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EXPORT CONTROLS

International commerce has never been completely free from governmental regulation. Despite the theoretical advantages of free trade, nations have always erected barriers designed to protect the internal markets of local economic interests. These import restrictions reduce international specialization and raise the cost of living without a corresponding increase in national income. And since this limitation on foreign competition usually...

1. The classic exposition of the advantages of free trade is contained in Adam Smith, The Wealth of Nations 424 (Modern Library ed. 1937): "If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage. The...industry of the country is not employed to the greatest advantage when it is...directed toward an object which it can buy cheaper than it can make...." See also Ricardo, Principles of Political Economy 77-93 (Everyman's ed. 1943). The contemporary case for free trade along substantially similar but more sophisticated lines is ably presented in Haezler, The Theory of International Trade 221-6 (1936) and Viner, Studies in The Theory of International Trade 437-526 (1937). Some economists have even suggested that an individual country may secure the benefits of free trade by a unilateral elimination of trade barriers. See, e.g., Beveridge, Tariffs: The Case Examined 109-10 (1931): "The gain through removing obstacles depends in no way upon the removal of all...obstacles or any of them.... For other countries to tax our exports is an injury to us and an obstacle to trade. For us to tax their exports is not a correction of that injury; it is just a separate additional obstacle to trade."

2. "[T]here are a series of interferences with free trade because of sectional interests which stand to gain by the tariffs and quotas and other impediments to free trade which are constantly deaf to the irrelevant argument that the economy as a whole must lose by the restrictions." Lerner, The Economics of Control 363 (1946). Additional arguments have been advanced to justify a protective tariff: (1) maintaining a high domestic standard of living by preventing competition from cheap labor areas and equalizing costs of production; (2) increasing national output by stimulating the growth of new industries; (3) protecting "infant" industries; (4) immunizing the domestic economy from fluctuations in economic activity in other countries; (5) fostering the development of industries essential to military defense; (6) checking the excessive production for export of irreplaceable natural resources; (7) preventing domestic unemployment. For a statement of some of these arguments, see Heckscher, Protection, in 12 Encyc. Soc. Sci. 559 (1934); Alexander Hamilton, Report on the Subject of Manufactures in Papers on Public Credit, Commerce and Finance (1934); List, The National System of Political Economy (Trans. ed. 1904); Killoough, International Trade 102-11 (1938). These arguments are discussed and refuted in Elsworth, International Economics 301-45 (1938). See also Dietrich, World Trade 79-102 (1939); Coen, Picking America's Pockets (1936); Taussig, Free Trade, The Tariff and Reciprocity (1920).

3. See the statement in Bouling, Economic Analysis 345 (1941): "The result of the tariff...is to transfer the production of the commodity from a place which is more suited to a place which is less suited to its production, much as if a tax were laid on the opera to encourage singing in the bathtub." Keynes, however, points out that when a country has unemployed resources, a mercantilist policy of encouraging favorable trade balances through import restrictions may, in fact, raise the domestic income level.
ally benefits interests more powerful and more vocal than those which it harms; governmental interference with imports comes to be regarded as a state duty, rather than a usurpation of rights by the state.

Export controls, on the contrary, have traditionally been employed only in rare instances: during war and emergencies, to preserve essential mate-

See KEYNES, General Theory of Employment, Interest and Money 335 et seq. (1936). Nevertheless, though an individual country can gain by limiting trade with other countries under some conditions, trade restrictions may impose a loss on other countries greater than the gain to the country imposing them. See Samuelson, Welfare Economics and International Trade, 28 Am. Econ. Rev. 261 (1938); Schott, A Reconsideration of the Theory of Tariffs, 9 Rev. Econ. Studies 89 (1942); Metzler, The Theory of International Trade in A Survey of Contemporary Economics 210, 242 (Ellis ed. 1948).

But “there are strong presumptions of a general character against trade restrictions unless they can be justified on special grounds. The advantages of the international division of labor are real and substantial, even though the classical school greatly overstressed them. The fact that the advantages which our own country gains from a favorable balance is liable to involve an equal disadvantage to some other country . . . means that great moderation is necessary . . . [because] an immoderate policy may lead to a senseless international competition for a favorable balance which injures all alike. And finally, a policy of trade restrictions is a treacherous instrument even for the attainment of its ostensible object, since private interest, administrative incompetence and the intrinsic difficulty of the task may divert it into producing results directly opposite to those intended.” KEYNES, op. cit. supra at 338-9.

4. “Those individuals in the community who are actively engaged in or connected with foreign trade—importers, exporters, shippers, international bankers—will of course tend to favor freer trade. In most communities, however, and particularly in the United States, they are numerically much weaker than the business interests which favor protection. If and when they become powerful, we may expect to witness a low tariff movement of some vigor.” ELLSWORTH, op. cit. supra note 2, at 344 n.1 (1938); See HEUSER, Control of International Trade ix (1939).

5. HEUSER, op. cit. supra note 4, at ix. “If protection is granted to one industry, it is always difficult and often impossible to find reasons for refusing protection to any other industry . . . [I]ndeed, it tends to make protection seem not merely equitable but necessary for others. . . . The tariff grows like a snowball.” BEVERIDGE, op. cit. supra note 1, at 115. Moreover, vested interests growing up behind walls established to protect particular markets resist any endeavor to reduce these barriers sheltering them. See Commercial Policy in the Post-War World (League of Nations Publications II A: Econ. & Financial No. 7) 23 (1945).

6. Export duties on raw materials have sometimes been imposed by non-industrial countries for revenue purposes. As long as the world price of the taxed articles was considerably higher than the internal cost of production, these countries could retain some of the exporters’ profit without injuring domestic producers. See EXPORT DUTIES (League of Nations Publications II: Econ. & Financial No. 14) 3-11 (1927); Gordon, Barriers to World Trade 349-51 (1941). These duties were occasionally levied to benefit domestic processing or fabricating industries or to grant a preferential status to exports of raw materials from colonies to the mother country. EXPORT DUTIES, supra, at 4; STALEY, Raw Materials in Peace and War 67 (1937). Usually, where nations have interfered with exports the emphasis has been on stimulating the volume of exports rather than limiting them. Interdependence between this type of effort and import barriers maintained to secure a favorable balance of trade “cannot be overemphasized. The difficulty of disposing of export surpluses was greatly intensified by the multiplication of
rials at home and to channel commodities in approved directions; as part of a commodity control scheme, either to secure an equitable world allocation of goods, or to restrict foreign sales in order to maintain an artificially high world price; or as part of a bilateral agreement to control the terms of trade at home and to channel commodities in approved directions; as part of a commodity control scheme, either to secure an equitable world allocation of goods, or to restrict foreign sales in order to maintain an artificially high world price; or as part of a bilateral agreement to control the terms of trade.

trade barriers elsewhere; . . . protectionist policies at home tended to have the effect of maintaining or increasing costs of production for export industries, thereby giving rise to an argument for assistance to exports. . . .” Gordon, op. cit. supra, at 318. See Carlson, Import and Export Controls, 11 Law & Contemp. Probs. 795 (1946).

7. Gordon, op. cit. supra note 6, at 352-3. Export controls were used as a club to keep the peace under Covenant of the League of Nations Art. 16, which authorized member nations to sever all trade or financial relations with League members resorting to war. For an analysis of how this interesting experiment in collective export embargo of aggressors failed to work in practice, see Bonn, How Sanctions Failed, 15 Foreign Affairs 350 (1937). And see Atwater, Administration of Export and Import Embargoes, 1935-6 in Geneva Research Center, Geneva Studies, IX, No. 6 (1938); Highley, The First Sanctions Experiment in Id., No. 4; Royal Institute of International Affairs, International Sanctions (1939); Steiner, Principles and Problems of International Relations 545-66 (1940). The United Nations Charter contains a similar proviso granting the Security Council the right to call on member states to take specifically named economic and diplomatic sanctions. U.N. Charter Art. 41; see Kirk, The Enforcement of Security, 55 Yale L. J. 1081, 1089 (1946); Goodrich & Hambro, Charter of the United Nations: Commentary and Documents 276-8 (2d ed. 1949).


For a discussion of particular commodities controlled under these plans see:

Wheat: Rowe, Markets and Men 51-73 (1936); Greaves, Raw Materials and International Control 73-84 (1936).

Sugar: Staley, op. cit. supra note 6, at 300-3; Commodity Control in the Pacific Area 224-65 (Holland ed. 1935); Rowe, op. cit. supra, at 74-92; Greaves, op. cit. supra, at 99-105.

Tea: Wickizer, Tea Under International Regulation (1944); Staley, op. cit. supra, at 304-6.

Timber: Staley, op. cit. supra, at 315-16; Greaves, op. cit. supra, at 93-8.

Coffee: Rowe, op. cit. supra, at 22-50; Staley, op. cit. supra, at 253-65.

Non-ferrous metals: Elliott et al., International Control in the Non-ferrous Metals (1937); Knorr, Tin Under Control (1945).

Rubber: Knorr, World Rubber and Its Regulation (1945); Whittlesey, Government Control of Crude Rubber—The Stevenson Plan (1931); Rowe, op. cit. supra, at 122-51; Staley, op. cit. supra, at 290-3; Greaves, op. cit. supra, at 124-9.

For a criticism of American willingness to participate in these schemes, see Whittlesey, National Interest and International Cartels 112-17 (1946); for a defense, Haley, United States Policy Regarding Commodity Agreements, 12 Dep’t State Bull. 638 (1945).
and balance of payments between two countries, or to retaliate for the im-
port curbs of other nations.9

American export controls do not fit neatly into any of these usual cate-
gories. They were first imposed as a war-time expedient in 1940, immediately
prior to the fall of France.10 Although many other wartime controls imposed
at the same time have since withered away,11 presidential power to regulate

9. For a general discussion of these controls in operation see HUSEN, op. cit. 
supra note 4, at 111–21; GORDON, op. cit. supra note 6, at 354–61; HAIGHT, FRENCH IM-
PORT QUOTAS (1935).

Clearing agreements and exchange controls often accomplished the same results as
export restrictions. For a general discussion of exchange control and clearing agree-
ments see REPORT ON EXCHANGE CONTROL (League of Nations Publications II A: Econ. 
& Financial No. 10) (1938); ENQUIRY INTO CLEARING AGREEMENTS (League of Nations 
Publication II B: Econ. & Financial No. 6) (1935); ELLIS, EXCHANGE CONTROL IN 
CENTRAL EUROPE (1941); EINZIG, EXCHANGE CONTROL (1934); EINZIG, THE EXCHANGE 
CLEARING SYSTEM (1935); Ohlin, Mechanism and Objectives of Exchange Control, 27 

10. 54 STAT. 712, 714 (1940) authorized the President to prohibit or curtail the
export of military equipment or munitions and related items "in the interest of national
defense." 56 STAT. 463 (1942) broadened the power to include "any articles, technical
data, materials or supplies," and eliminated the requirement that the prohibition or
curtailment be in the interest of national defense. Legal challenges to this legislation
as an unconstitutional delegation of power were summarily repulsed: United States v.
Rosenberg, 150 F.2d 788 (2d Cir. 1945), aff'd 47 F.Supp. 406 (E.D.N.Y. 1942), cert.
Courts recognized the intimate relationship between foreign trade and foreign policy and
relied primarily on United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936),
which acknowledged the President's virtually plenary powers in the conduct of foreign
relations.

11. The First Decontrol Act, 61 STAT. 34 (1947) and the Second Decontrol Act,
61 STAT. 321 (1947), eliminated many wartime controls over domestic distribution,
production, prices, transportation, and shipping. The First War Powers Act, 54 STAT.
676 (1940), had empowered the President to confer priority on delivery of materials
under army and navy contracts over deliveries for private accounts or for export "in
the best interests of national defense during the national emergency." 55 STAT. 236 (1941)
broadened the President's power to include assignment of priorities to lend lease orders.
Title III of the Second War Powers Act, 56 STAT. 176, 178 (1942), not only continued
powers to assign priorities but also provided that "whenever . . . the fulfillment of re-
quirements for the defense of the United States will result in a shortage in the supply
of any material or any facilities for defense or for private account, the President may
allocate such materials or facilities in such manner, upon such conditions and to such
extent as he shall deem necessary in the public interest and to promote the national
defense." These priority and allocation powers were the basis for controls exercised by
the War Production Board and for the rationing scheme administered by the Office
of Price Administration.

While the Second Decontrol Act, 61 STAT. 321 (1947), abolished this regulatory
authority, priority and allocation powers were retained over (1) tin and tin products, ex-
cept for the purpose of exercising import controls over tin ores and tin concentrates; (2)
antimony; (3) chinchona bark, quinine and quinidine when held by any government agency
or acquired from a government agency; (4) materials for export required to expand or
maintain the production in foreign countries of materials critically needed in the United
exports has been repeatedly extended, despite avowed lack of Congressional sympathy for the perpetuation of emergency controls. At present the planned duration of export control authority coincides with most of the projected life span of the European Recovery Program.

Only America's position of economic dominance in the world makes the retention of export controls necessary. With productive capacity diminished as a result of the war, most nations are unable to supply even normal needs through home output. Filling the extraordinary requirements necessary to permit speedy reconstruction requires even more outside assistance.
Because American industrial and agricultural output increased vastly during the war and post-war years, America has become the source of supply for most of the world. Foreign countries rely on the United States for a substantial share of the food, fuel and materials on which economic recovery and development abroad depend.15

By pledging itself to hasten European recovery, the United States has assumed responsibilities commensurate with its economic power.16 But despite steady gains in production, supplies of many commodities remain inadequate to meet combined foreign and domestic demands.17 Unrestricted


Since the end of the war, Europe has made substantial recovery. European output of petroleum products, steel, pig iron, lead, zinc, and bread grains increased 40% in 1948 over 1947 production, while aluminum and tin increased between 35% and 40%. ORGANIZATION FOR EUROPEAN ECONOMIC CO-OPERATION, REPORT TO THE ECONOMIC CO-OPERATION ADMINISTRATION ON THE FIRST ANNUAL PROGRAMME 10 (1949); see also H. R. REP. No. 323, 81st Cong., 1st Sesss. 4-10 (1949); SEN. Doc. No. 111, 80th Cong., 1st Sess. 19-25 (1947). For even more recent statistics on the extent of European recovery, see PROGRESS IN EUROPEAN RECOVERY AND THE ROAD AHEAD (Dep't State Pub. No. 3466, Econ. Coop. Ser. No. 16) 2 (1949).

15. Not only are war-devasted countries dependent on the United States, but other countries normally supplied by these countries to a significant extent have become abnormally dependent on the United States for their material needs. As a result, American exports to meet these demands in the first quarter of 1948, for example, were twice the dollar value of the 1936-38 average. SEC'TY COMM., 4TH QUARTERLY REPORT, EXPORT CONTROL AND ALLOCATION POWERS 7-9 (1948) (hereinafter cited as 4 EXPORT CONTROL REPORT). (These reports were originally required under § 6(b) of the Second Decontrol Act, 61 STAT. 321, 324 (1947). Similar reports are required under Export Control Act § 8.) On American capacity to satisfy these European needs, see REP. SEC'TY INT., NATIONAL RESOURCES AND FOREIGN AID (1947); PRESIDENT'S COMMITTEE ON FOREIGN AID, EUROPEAN RECOVERY AND FOREIGN AID (1947); HERTER COMMITTEE PRELIMINARY REPORT No. 9 (1947).


17. In February, 1948, HERTER COMMITTEE PRELIMINARY REPORT No. 16 described "the probable plight of individual commodities in a free market world... Lumber: in the absence of controls, exports might be double the present rate. Petroleum: Free exports might take several times the present availabilities... Cereals: Urgent foreign requirements are larger and supplies smaller." See REP. SEC'TY INT., supra note 15, at 56;
exports, therefore, may have inflationary repercussions on domestic prices. Export controls serve to filter the drain of still scarce commodities. In the domestic market they vitiate the inflationary impact of abnormal foreign demands. By influencing the international distribution of goods, they facilitate fulfillment of American international commitments. Moreover, they enable the United States to exercise the necessary vigilance over exports significant to the national security.

The Choice of Weapons

Non-quantitative Restrictions

Since a private enterprise economy relies primarily on competitive price to influence individual choice, governmental regulation may consciously make use of the market mechanism to secure a desired character, volume and direction of international trade. At least four non-quantitative restrictions that influence trade by influencing the terms of trade may be distinguished: duties or tariffs, proportioned to the volume or value of goods sought to be traded; governmental grants disguised as premiums or subsidies; deliberate currency appreciation or depreciation that re-

"... [D]emand for iron and steel has been running ahead of the supply"; See Hearings before Committee on Banking and Currency on H. R. 1661, 81st Cong., 1st Sess. 6 (1949); Sen. Rep. No. 31, 81st Cong., 1st Sess. 2 (1949); Hearings Before H.R. Committee on Interstate and Foreign Commerce on Fuel Investigation (hereinafter cited as Fuel Hearings), 80th Cong., 2d Sess. 1547 (1948).

18. Voluntary allocation agreements are an alternative method of solving this problem. 61 Stat. 945 (1947) authorized the President to consult with representatives of business and agriculture with a view to making voluntary agreements providing for priority allocation and inventory control of scarce commodities which basically affect the cost of living or industrial production. Authority to conclude such agreements, immune from prosecution under the anti-trust laws, has been extended until Sept. 30, 1949, by Pub. L. 6, 81st Cong., 1st Sess. (Feb. 9, 1949). See Sen. Rep. No. 23, 81st Cong., 1st Sess. (1949); H.R. Rep. No. 8, 81st Cong., 1st Sess. (1949); Hearings before Committee on Banking and Currency on S. 547, 81st Cong., 1st Sess. (1949). Many such agreements have already been made for domestic industries but proposals for voluntary allocation of scarce goods to foreign aid programs are still under consideration. Report of the Office of Industry Cooperation on the Voluntary Allocation Program 5, 50 (1948) (mimeo.).

19. For a discussion of the possible effect on price of export restrictions in the export market see p. 1335 and note 36 infra. Price controls, of course, may avoid this danger. See pp. 1344-6 infra.


21. Heuser, op. cit. supra note 4, at 75.


23. The League of Nations defines export subsidies as "various kinds of payments or
results in a wholesale readjustment of comparative price structures; and license fees and charges, coupled with veterinary and packing regulations, that hamper commercial intercourse.

In the past, America has freely employed all of these non-quantitative restrictions on imports for protectionist purposes. None of these devices, however, is an appropriate instrument for export control. The constitutional ban against taxes on exportation precludes the use of duties as an export control device. And the other non-quantitative restrictions, while not

other benefits granted by the state or by private organizations upon the production or exportation of specified articles, thus placing the subsidized industry or branch in a more favorable position as compared with other similar national or foreign industries or export branches." DOCUMENTATION, DIRECT AND INDIRECT SUBSIDIES (League of Nations Publications II: Econ. & Financial No. 35) 8 (1927). Compare the definition in DIETRICH, op. cit. supra note 2, at 94. It has been estimated that some countries subsidized exports as much as 35% in the period 1935-38. ELLIS, op. cit. supra note 9, at 240. For a discussion of the extent to which export subsidies have been employed and their consequences on the domestic economy, see GORDON, op. cit. supra note 6, 11 LAW & CONTEMP. PROB. 795, 805-7 (1946). 49 STAT. 774 (1935), as amended, 7 U.S.C.A. § 612(c) (Supp. 1948), authorizes export subsidies in case of domestic surpluses.

24. See Ellis, Exchange Control and Discrimination, 37 AM. ECON. REV. 877 (1947). On the dangers involved in an unexpected depreciation in currency values, see HABERLE, op. cit. supra note 1, at 45; HARRIS, EXCHANGE DEPRECIATION (1936). Whatever trade advantages may be secured by currency devaluation are likely to be offset by retaliatory measures instituted by foreign countries placed at a disadvantage by artificially created unfavorable exchange ratios. See Silverstein, Effects of the American Devaluation on Prices and Export Trade, 27 AM. ECON. REV. 279 (1937), discussing American experience with currency devaluation pursuant to the Thomas Inflation Law, Title III of the Agricultural Adjustment Act of 1933, 48 STAT. 51 (1933). A constitutional conflict was precipitated over Congressional power, exercised in a joint resolution, 48 STAT. 112-13 (1933) that abrogated contract clauses calling for payment in gold. The Supreme Court, however, sustained the constitutionality of this resolution as applied to both privately issued bonds, Norman v. Baltimore & O. Ry., 294 U.S. 240 (1935); and obligations of the United States, Perry v. United States, 294 U.S. 330 (1935).

25. Other devices generically labelled "administrative protection" include marks of origin requirements, arbitrary and discriminatory tariff nomenclature, oppressive customs formalities, arbitrary valuations and preferential railway rates. Frequently this kind of protection is a consequence of the way the customs laws are enforced by administrative officials. ELLSWORTH, op. cit. supra note 2, at 356. See, in general, Winslow, Administrative Protectionism: A Problem in Commercial Policy in EXPLORATIONS IN ECONOMICS 179 (1936). For proposals to liberalize and simplify American customs procedures advanced by the United States Associates of the International Chamber of Commerce, see N. Y. TIMES, Jan. 30, 1949, § 3, p. 1, col. 1. Another form of indirect protection is the popular boycott of foreign products, under private or governmental auspices. Sometimes these boycotts are incorporated into statute. See the Buy American Act of 1933, 47 STAT. 1520 (1933), 41 U.S.C. § 10 (1946), which provides that only domestically produced articles shall be acquired for public use, except where the articles are acquired for foreign use, where the domestic price is unreasonable, where the supply is inadequate or where it is in the public interest to permit foreign procurement.

26. See notes 22-5 supra.

27. U.S. CONST. Art. I, § 9 (5): "No tax or duty shall be laid on articles exported
similarly prohibited by constitutional limitations, clearly are neither economically feasible nor completely effective. 25

Quantitative Restrictions

More effectively, the government may supervise the distribution of exports by controls which operate in the first instance not on price but directly on the quantity or value of goods entering the stream of international commerce. 29 While these quantitative restrictions are free from any constitutional infirmity, not all the variant forms such restrictions may take are equally fitted for the task of controlling exports. Monopolies and cartels to limit output and sales, for example, whether governmental or private, are repugnant to the American competitive tradition and the spirit of the anti-trust laws, whatever their merits as a control device. 23 And exchange controls that regulate the flow of money and international

from any State." A similar provision bars states from laying duties on exports without the consent of Congress. U.S. Const. Art. I, §10 (2). 28. In general, non-quantitative restrictions suffer from a lack of the flexibility and precision that characterize quotas as a trade control device. See p. 1334 and notes 32-34 infra. More specifically, administrative protectionism merely hampers rather than regulates trade, and can function only as a supplement or make-weight to other forms of trade control; governmental premiums and/or subsidies involve outlays too large in proportion to the goals sought to be achieved, particularly when other equally or more effective and less expensive means are available; and currency devaluation, by affecting all prices, provides no assurance that only trade in particular commodities will be affected by the altered price ratio. See also note 24 supra.

29. The clearest exposition of the differences between quantitative and non-quantitative restrictions can be found in QUANTITATIVE TRADE CONTROLS (League of Nations Publications II: Econ. & Financial No. 5) (1943). Since export restrictions have been so rarely employed, most analyses of the effects of quantitative restrictions have been in terms of import restrictions, e.g., HEUSER, op. cit. supra note 4; HIGHT, op. cit. supra note 9.

30. "In the United States, government policy, widely supported by public opinion, is hostile to the participation of American firms in international cartels. The maintenance of the American system of private enterprise is grounded on the assumption that it is a competitive system and that active competition among our business firms is essential to promote technical progress and to insure an equitable division of the national income." BIDWELL, A COMMERCIAL POLICY FOR THE UNITED NATIONS 49 (1945).

European efforts to regulate cartels have been uniformly unsuccessful. See Kronstein & Leighton, Cartel Control: A Record of Failure, 55 YALE L. J. 297 (1946). For a discussion of the nature of the cartel problem and how to deal with it, see STOCKING & WATKINS, CARTELS OR COMPETITION? (1948); STOCKING & WATKINS, CARTELS IN ACTION (1946); INTERNATIONAL CARTELS (United Nations Publications II D: Dept. of Econ. Affairs No. 2) (1948); EDWARDS, A CARTEL POLICY FOR THE UNITED NATIONS (1945); HEUSER, INTERNATIONAL CARTELS (1945); BERGE, CARTELS: CHALLENGE TO A FREE WORLD (1944); TERRILL, THE AMERICAN TRADE PROPOSALS: RESTRICTIVE BUSINESS PRACTICES, 14 DEPT' STATE BULL. 455 (1946); CLAYTON, PRIVATE BARRIERS TO INTERNATIONAL TRADE, 12 DEPT' STATE BULL. 933 (1945); KNORR, PROBLEMS OF INTERNATIONAL CARTELS, 55 YALE L. J. 1097 (1946); LOCKWOOD & SCHMIESSER, RESTRICTIVE BUSINESS PRACTICES IN INTERNATIONAL TRADE, 11 LAW & CONTEMP. PROB. 663 (1946); BERGE, CARTELS AS BARRIERS TO INTERNATIONAL TRADE, 11 LAW & CONTEMP. PROB. 684 (1946).
payment can be effective only where a shortage of foreign funds exists in the exporting country.\textsuperscript{31}

A quota system, on the other hand, possesses unique advantages. When coupled with a mechanism for licensing overseas shipments, quotas clearly permit greater precision and certainty in controlling the size, nature and destination of proposed exports than all non-quantitative devices.\textsuperscript{32} It is always possible theoretically to find a non-quantitative restriction that is equivalent to a given quota, \textit{i.e.}, one that would restrict exports to the same level. But unforeseen changes in a cost structure or improvements in production technique, for example, may make it possible to export quantities in excess of a desired amount despite the burden of non-quantitative export controls. Non-quantitative barriers, therefore, are only "conformable" types of state interference with foreign commerce. Quotas, on the other hand, are "non-conformable" interferences: by no legal means can predetermined export ceilings be exceeded.\textsuperscript{33} Moreover, a quota system delegated to administrative discretion is more responsive to changes in domestic supply and foreign needs than the cumbersome legislative procedures and bilateral negotiations currently required for tariff changes.\textsuperscript{34}

At the same time, a quota system for export control carries with it the germs of possible abuse. By directly restricting the scope of individual economic activity and threatening with punishment anyone who attempts to

\textsuperscript{31} Exchange controls usually grow primarily out of disturbances in the balance of payments and are designed to protect the value of the currency. Import restrictions are maintained primarily to protect particular industries, see note 2 \textit{supra}. Though exchange controls can arise independently and be administered separately, in practice these controls have been integrated with import controls for achievement of both ends, protection of the currency and of particular industries. \textit{Quantitative Trade Controls} (League of Nations Publications \textit{II}: Econ. & Financial No. 5) 8 (1943). See \textit{Ellis, op. cit. supra} note 9, at 289.

\textsuperscript{32} If "flexibility, precision and quickness of adjustment of ... [an] import quota system [make] it an admirable instrument" for achieving particular objectives, Carlston, \textit{Import and Export Controls}, 11 \textit{Law \& Contemp. Prob.} 795, 798 (1946), export quotas should be equally effective and for the same reasons.

\textsuperscript{33} \textit{Quantitative Trade Controls} (League of Nations Publications \textit{II}: Econ. & Financial No. 5) 20 (1943). While it is highly unlikely, the quota might be sufficiently large to permit exportation of a quantity equal to that which would be sold abroad under free trade conditions. See \textit{Gordon, op. cit. supra} note 6, at 232 n.4.

\textsuperscript{34} "Parliamentary procedures are much too slow to permit of the rapid changes which are required under a system of quantitative restriction. ... [U]nder such a system, much latitude must be left to the executive branch of government ... while in most democratic governments the adoption of the tariff has traditionally been a jealously guarded prerogative of the legislative branch. ..." \textit{Quantitative Trade Controls} (League of Nations Publications \textit{II}: Econ. & Financial No. 5) 27 (1943). "The fixing of quotas ... must be left, obviously, to the executive branches of the government. If the drawing up of a modern tariff schedule seems too complex and technical a problem for the rather cumbersome process of parliamentary action, it is obvious that the determination of appropriate quotas for a large number of commodities must be handled by administrative bodies." \textit{Gordon, op. cit. supra} note 6, at 255.
substitute his own decisions for those of the state, quota limitations represent
a serious interference with the functioning of a private enterprise economy. In addition, export quotas usually produce price differences between the exporting and importing country not covered by cost, insurance and freight: when the quota is smaller than the amount that would be exported in the absence of quotas, the price will tend to rise for foreign purchasers and decline in the domestic market. This price differential could place exporters fortunate enough to secure export permission in a dominant position in which monopolistic profits may be reaped. Simultaneously, already slender dollar resources in receiving countries would be further depleted.

Though a quota system is subject to these inherent dangers, statutory authorization for export controls envisages a regulatory scheme grounded on quantitative restrictions. The Export Control Act empowers the President to "prohibit, or curtail the exportation from the United States . . . of any articles, materials and supplies, including technical data, except under such rules and regulations as he shall prescribe." Power to "prohibit or curtail" the export of most commodities, vested by executive order in the Office of International Trade (OIT), is exercised through an elaborate licensing
machinery. OIT decides when commodities are to be controlled, fixes quotas, determines geographic distribution, grants export licenses to appropriate exporters, and enforces compliance with license awards. But since OIT lacked peacetime experience in operating this machinery, satisfactory techniques developed slowly, through trial and error. And since OIT is a branch of the Department of Commerce, its delegated duty to restrict exports has collided with the principal function of all Department of Commerce agencies: to foster and promote international trade.40

THE QUOTA SYSTEM IN OPERATION

Quota Determination and Allocation

Minute and detailed supervision over all American exports would present an impossible administrative burden. In practice, therefore, export controls are merely selective. Some three hundred "Positive List" commodities, which the OIT considers to be in domestic short supply, require export licenses regardless of destination.41 Unrestricted exports would force the domestic prices of these commodities to inflationary levels and cause severe shortages and dislocations. Even where domestic supplies are con-


Some commodities are licensed by other agencies: The State Department licenses arms, ammunition and implements of war, tinplate scrap and helium; the Treasury Department licenses export of gold commodities, with the exception of fabricated gold, and narcotic drugs; the Atomic Energy Commission licenses material and facilities for the production of fissionable materials. See Comprehensive Export Schedule No. 26, Oct. 1, 1948, pp. 78-9; CURRENT EXPORT BULLETIN No. 449, April 15, 1948; CURRENT EXPORT BULLETIN No. 459, June 16, 1948, p. 3. 40. OIT is part of the Commerce Department's Bureau of Foreign and Domestic Commerce for which funds were first appropriated by 37 Stat. 408 (1912) to "foster, promote and develop the foreign and domestic commerce of the United States." For a recent report on how OIT has discharged its responsibilities under this mandate see 36 Sec'y Comm. Ann. Rep. xxiii, 167-79 (1948).

sidered to be adequate for domestic needs at tolerable prices, a few commodities are similarly controlled to secure their geographic distribution in accordance with the recommendations of international allocating bodies in which the United States participates. But the bulk of commodities, other than those on the "Positive List", are controlled only when intended for European destinations.

Setting an appropriate total export quota for controlled commodities requires the resolution of two objectives that frequently cannot be simultaneously achieved—restricting certain exports to cushion the domestic economy against inflationary pressures while encouraging certain exports in order to assure the success of American foreign policy.

Collection of Data. Reconciling foreign and domestic needs is primarily OIT's responsibility. But several executive departments and independent agencies concerned with "policies and operations having an important bearing on exports" combine with OIT in determining which commodities are to be controlled and in setting the quota amount. Normally, quotas are

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42. Export Control Report 32. Chief of these agencies is the International Emergency Food Committee, now a part of the Food and Agriculture Organization, which makes recommendations concerning the allocation of beans and peas, cereals, cocoa, fats and oils including soaps, nitrogenous fertilizers, meat and meat products, rice, seeds and protein foods. The Combined Tin Committee, consisting of representatives from Belgium, France, The Netherlands, United Kingdom, United States, India and Canada, makes recommendations dividing estimated total supplies as stated by producing countries among importing countries. Other committees function on an inter-agency level. The Coal Operating Committee established the quantity of different grades to be exported and the distribution among claimant countries. The Interior Department set up an Interdepartmental Petroleum Committee, and committees ad hoc have been established for steel, tin and rubber. 

43. Current Export Bulletin No. 434, Jan. 28, 1948, divided countries into two groups for purposes of licensing: Group R countries include Europe and adjacent areas; Group O includes all other countries except possessions of the United States and Canada, not subject to export licensing at all. Export Control Report 6, 27. See Comprehensive Schedule No. 26, Oct. 1, 1948, p. 18. Only "Positive List" commodities require licenses for shipment to Group O countries. Many commodities have recently been freed of licensing restrictions even to European destinations. See, e.g., OIT Press Release No. 358, April 27, 1949, freeing 500 separate items from all export controls.


44. Export Control Act § 4(a). These agencies include the Departments of State, Agriculture, Interior, Treasury and Labor, the National Military Establishment, the Ec-
based on an estimate of total American production less estimated demand. American foreign service personnel and foreign governments supply information for each importing country regarding total needs, domestic production and quantity available from other sources. From this statistical data, compared with the historical record of American exports and prior licensing experience, a quota emerges that fixes the quantity of each controlled commodity available for foreign shipment. Within these totals judgments have to be made as to the relative importance of each country's requirements. Similar comparisons must be made among proposed competing uses.

Destination and end use controls enable supplies to be distributed in a

onomic Cooperation Administration, the Housing and Home Financing Agency, the National Security Resources Board and the Council of Economic Advisers. In addition OIT has established Commodity Advisory Panels and Commodity Advisory Committees representing a cross-section of the export trade "from the standpoints of (1) large, medium and small companies, (2) geographical distribution, (3) trade association membership, and (4) segments of the export trade involved—e.g., by levels of the export trade (such as manufacturers, suppliers of exporters, and various types of distributors, including independent or merchant exporters), by degree of integration (such as manufacturing-exporters), by types of commodities, etc." These groups are frequently consulted and advise OIT on export licensing policies and procedures. See Current Export Bulletin No. 446, April 1, 1948; Third General Revision of Export Regulations, 15 Code Fed. Reg., Ch. III, § 373.1, 13 Fed. Reg. 4077 (1948); Export Control Report 13. For a list of these panels see Fuel Hearings 2046–59.

45. Three different types of quotas are used: (1) quantitative quotas, fixing the quantities which may be licensed for shipment to a particular country; (2) closed quotas, doling out small parcels when OIT considers that special circumstances outweigh critical domestic needs, after review by OIT's inter-agency committee; (3) open-end quotas, where licenses are approved as received in order to provide a gauge for the volume of exports to be expected in the absence of restrictions. Open-end quotas are sometimes used for newly controlled items to obtain background information for the establishment of a quantitative quota. Export Control Report 10–11; Herter Committee Preliminary Report No. 16 at 16–17; Hearings before Committee on Banking and Currency on H. R. 1661, 81st Cong., 1st Sess. 5–6 (1949).

46. Export Control Report 32–5. See Fuel Hearings 1588, 1596–1610, 1625, 1961–5. For a criticism of proposed tests of a "proper" export allowance, see Herter Committee Preliminary Report No. 16 at 28–36. "Neither the Department of Commerce nor its interdepartmental advisory committee have made such decisions based on policy, nor were they in a position to make them. The Congress had given no mandate to make them. There are few present governmental functions in which so large a concept as the rebuilding of a foreign continent at the risk of domestic inflation can be properly planned and the custody of what was regarded as a dying power was not one of them." Id. at 31.

47. Appropriate end uses fall into two general categories: special projects and commercial. Special project quotas are established to enable the export of commodities which will (1) contribute to the attainment of the policy objectives of the United States; (2) further the production abroad of commodities needed for United States domestic consumption or reconversion or essential consumption in foreign countries; (3) permit construction or operation of facilities necessary to the minimum essential civilian economy of the country of destination; (4) lead to increased international trade with the United States in the
manner most conducive to world recovery, rather than according to purchasing power. But the effectiveness of these controls depends, in part, upon the cooperation of importing countries in supplying OIT with detailed statements of requirements, indigenous production, anticipated imports and proposed end uses. Where, as in the case of Eastern European countries, such information has not been forthcoming, OIT has sometimes established a zero quota pending the receipt of requirements information similar to that supplied by other countries.

Participation by Economic Cooperation Administration. ECA officials exercise no independent control over American exports, except insofar as the Administrator participates in the quota determining process. Instead, ECA merely makes funds available to the participating countries, and these jointly and severally decide how and where such funds are to be spent. Nor does ECA alter the manner in which international transac-

future. See Third General Revision of Export Regulations, 15 CODE FED. REGS. § 375, 13 FED. REG. 4088 (1948); COMPREHENSIVE EXPORT SCHEDULE No. 26, Oct. 1, 1948, pp. 47-8. The remaining quota is reserved for commercial exporters. For example, of a total quota of 1,120,000 tons of iron and steel products established in the third quarter of 1943, 235,000 tons were for special projects and the remainder available for commercial licensing. OIT Press Release No. 215, Aug. 4, 1948.

48. In the first 6 months of 1948, uncontrolled exports amounted to $4,850,238,600 of which 25%, or $1,211,056,000 went to European Recovery Program countries. In the same period, controlled exports amounted to $1,643,210,000 of which over 597 or 974,000 went to European Recovery Program countries. H. R. REP. No. 18, 81st Cong., 1st Sess. 2 (1949).

49. Sec'y Comm., 3d Quarterly Rep., Export Control and Allocation Powers 26-7 (1948) (hereinafter cited as 3 Export Control Report). Thomas C. Blaisdell, Acting Assistant Secretary of Commerce, assured the House Committee on Interstate and Foreign Commerce that if the information were supplied, and if the information were adequate and the justification regarded as sufficient, the OIT would issue licenses on the assumption that the United States was receiving from the Soviet Union an adequate return for goods sent to Russia. Fuel Hearings 1565-6.

50. See note 44 infra. Several bills were introduced in the House of Representatives in 1948 calling for the establishment of a European Recovery Program. The Herter Committee bill, H. R. 4579, 80th Cong., 2d Sess. (1948), drawn along the lines suggested by HERTER COMMITTEE PRELIMINARY REPORT No. 8 (1947), located export control authority in the ECA Administrator, along with attendant power to make domestic allocations of critically short items. See HERTER COMMITTEE PRELIMINARY REPORT No. 16 at 38-41 (1948). The government's proposals, H. R. 4540, 80th Cong., 2d Sess. (1948) retained then-existing export control authority in OIT. In Committee, the government's view prevailed and the bill as approved gave the ECA Administrator only limited export control powers. H. R. REP. No. 1885, 80th Cong., 2d Sess. 46-7 (1948).

OIT's preeminent power in fixing export allotments is acknowledged by Paul Hoffman, ECA Administrator. Hearings before H. R. Select Committee on Small Business on the Impact of the European Recovery Program on American Small Business, 80th Cong., 2d Sess. 9 (1948).

51. See ORGANIZATION FOR EUROPEAN ECONOMIC COOPERATION, REPORT TO THE ECONOMIC COOPERATION ADMINISTRATION ON THE SECOND ANNUAL PROGRAMME (1949); ECA Release No. 160, Sept. 10, 1948; ECA, FIRST REPORT TO CONGRESS 2-3 (1943).
tions are normally effected. Though individuals abroad who seek to buy in the United States must first secure a payment authorization from the government of their importing country, goods continue to be supplied through regular trade channels.\textsuperscript{52}

Within the framework of controls administered by OIT, the Foreign Assistance Act of 1948 does provide a limited priority position for ECA. The Act forbids OIT to permit the export from the United States to non-participating countries of commodities whose supply is insufficient to meet the requirements of participating countries.\textsuperscript{53} Moreover, ECA may refuse delivery to participating countries of goods going into the manufacture of commodities intended for shipment to non-participating countries, when OIT would not license direct shipments of those commodities to non-participating countries "in the interest of national security."\textsuperscript{64} The Act, however, does not foreclose exports of scarce goods to non-participating countries if OIT determines such export is in the national interest.\textsuperscript{65} In practice, the priority position of participating over non-participating countries has not been denied, and OIT's administration of export controls has complemented ECA by checking on the relative essentiality of goods for which ECA dollars are spent.\textsuperscript{66} But since there is the possibility of conflict, the Act requires prior and continuous consultation between OIT and ECA on all matters, with appeal to the President for adjudication of differences.\textsuperscript{67}

\textbf{Protecting National Security.} OIT also consciously employs export controls to influence the geographic distribution of goods in the interests of national security. Commodities with direct military significance or basic manufacturing importance are channelled away from Eastern Europe by rigorous licensing practices.\textsuperscript{68} Close scrutiny of industrial equipment with

\begin{itemize}
  
  \item Shipments made under ECA payment authorizations nevertheless require an export license. OIT has rejected the suggestion that all ECA shipments be automatically licensed because of the difficulty of identifying these shipments as such and because ECA, making broad category allotments, has no mechanism for testing the national security questions involved in particular exports. See N. Y. Times, March 5, 1949, p. 21, col. 1.
  
  \item The Economic Cooperation Act of 1948 § 112 (g), 62 Stat. 137, 148; 22 U.S.C.A. § 1510(g) (Supp. 1948).
  
  \item Proviso added to Economic Cooperation Act of 1948 § 112(g), 62 Stat. 137, 148; 22 U.S.C.A. § 1510 (g) (Supp. 1948).
  
  \item 4 Export Control Report 13.
  
  \item Economic Cooperation Act of 1948 § 105(c), 62 Stat. 137, 140; 22 U.S.C.A. § 1504(c) (Supp. 1948). See Joint Memorandum of Understanding Between the Economic Cooperation Administrator and the Department of Commerce Concerning the Programming of Exports (July 16, 1948).
  
\end{itemize}
war potential supplements State Department controls over shipment of actual arms, munitions and implements of war.23

Export Priorities. Without additional governmental assistance, export controls provide no assurance that any goods will be available to foreign purchasers in the domestic market. Priority assistance, in the form of preferential licensing or financial aid, provides the positive corollary of export control, insuring that desired exports are available in sufficient quantities.23 Regular programs for priority assistance have been established for two commodities—nitrogen fertilizer and tinplate—that contribute to the production and preservation of food in foreign countries.61 Occasional priority assistance has been employed when the material exported would expand foreign production of commodities still scarce in the United States.62 And once priority assistance was invoked when the State Department certified that such assistance was necessary to the success of American foreign policy.63

License Distribution

Requests for export permission frequently result in an oversubscription of assigned quotas.64 Some exporters are lured by the prospect of greater profits from foreign sales. Others desire to maintain established trade connections. When supplies and competition increase in the domestic market, as may occur if controls are maintained more for security reasons than because goods are in short supply, the pressure for licenses increases correla-

60. 6 EXPORT CONTROL REPORT 78. The Second Decontrol Act authorizes OIT to grant export priorities assistance until June 30, 1949. See note 11 supra.
61. 4 EXPORT CONTROL REPORT 76-83. In the third quarter of 1947, the total value of exports receiving export assistance was $27,707,000. Of this total, all but $107,000 was used to assure exports of tinplate and fertilizer. SEC'y. COMM., 1ST QUARTERLY REP., EXPORT CONTROL & ALLOCATION POWERS 29 (1948) (hereinafter cited as 1 EXPORT CONTROL REPORT); see COMPREHENSIVE EXPORT SCHEDULE No. 26, Oct. 1, 1948, pp. 49-50; HESTER COMMITTEE PRELIMINARY REPORT No. 16 at 5-8. In 1948, 453,000 tons or seven-eighths of the export quota of tinplate, 12.8% of the total output in the United States, received priority assistance. Delivery of 31,000 tons of nitrogen fertilizer was guaranteed by use of these powers. 4 EXPORT CONTROL REPORT 78, 82.
62. Two cases involved the export of material to be used for increasing foreign output of tin and lead, both in short supply in the United States. In some cases, OIT has arranged for applicants to receive needed supplies without involving formal priorities assistance. 4 EXPORT CONTROL REPORT 76.
63. OIT employed its priority power to expedite the shipment of 4,000 tons of steel to Greece. 4 EXPORT CONTROL REPORT 76. See also HESTER COMMITTEE PRELIMINARY REPORT No. 16 at 7. All priorities assistance has been undertaken within regular export quotas. Total value of exports receiving priorities in these cases has been $700,000. 4 EXPORT CONTROL REPORT 76.
64. In March, 1948, for example, a total quota of 240,000 bags of flour for Brazil was announced. Requests for export permission totalled between 40 and 50 million bags, re-
Foreign consignees sometimes swell the volume of applications by collusion with American exporters. Expecting to receive only part of the goods applied for, importers place excessive orders without intending to accept deliveries greater than actual requirements.

Distributing these quotas in the form of licenses among a large number of applicants involves a quest for appropriate licensing standards. The Export Control Act itself provides no adequate guide. It requires that "full utilization of private trade channels" be encouraged—but only "insofar as practicable." While commanded to give "consideration to the interests of small business, merchant exporters as well as producers, and established and new exporters," OIT is simultaneously authorized to apply "such standards as may be deemed necessary." Consequently, OIT has invoked administrative discretion to furnish suitable criteria. In the final allocation formula, no single test predominates. Specific weights cannot be assigned factors influencing the ultimate pattern of license distribution.

**Proration.** One possible solution would be simple division of the available quota among all applicants according to the amount sought to be exported. Major advantages of this technique are administrative simplicity and speed in making license awards. But resort to this rule would often allocate to each exporter a quantity too small for profitable shipment. And proration invites circumvention by encouraging applicants to request export permission for quantities larger than those intended to be shipped. Together these dangers create a problem of unused licenses that waste already limited excluding denial of 99½% of all applications. *Fuel Hearings 1850–1, 1858.* See OIT Press Release No. 206, July 21, 1948 and OIT Press Release No. 232, Aug. 27, 1948.

License applications were received in 1947 as follows:

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<tr>
<th>Month</th>
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<tr>
<td>January</td>
<td>60,000</td>
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<td>February</td>
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<td>December</td>
<td>33,000</td>
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**Herter Committee Preliminary Report No. 16** at 35. As of July 1, 1948, OIT was receiving applications at the rate of 15,000 a week and had a backlog of 37,263 applications. By the beginning of 1949, however, license applications declined from 20,000 per week to 10,000 per week. *Hearings before Committee on Banking and Currency on S. 548, 81st Cong., 1st Sess. 10* (1949).

65. Francis McIntyre, Assistant Director of OIT, estimated in March, 1949 that about two-thirds of export licensing had a security significance as against a division six months previously of about 50-50 between security factors and shortages of supply. N. Y. Times, March 5, 1949, p. 21, col. 1.


68. Ibid.

69. 3 *Export Control Report* 13.

70. BNA Report 6.
port quotas. Similar wastage occurs when a license is granted for a shipment subsequently denied a foreign import permit, or when an exporter is unable to fulfill a sales agreement because of domestic procurement difficulties.\(^7\)

Though proration has never been employed as a method of license distribution, OIT has adopted two measures aimed at eliminating quota waste. Exporters are required to submit with each license application clear evidence of an accepted order covering the transaction between the applicant and the foreign buyer.\(^2\) In addition, license applicants must submit proof that the material covered by the application is in fact available to the applicant.\(^3\)

**Historical Participation.** Established exporters urge license distribution according to pre-war participation in export trade. During the early years of export control, OIT was easily persuaded to adopt this criterion.\(^4\) It seemed only fair that exporters who had worked to establish American trade in a period of competition and no controls should not have their shares of the market subjected to a hostile licensing procedure. These traders had invested effort and resources in the cultivation of foreign markets. Frequently, they were best able to supply its needs. Producer-exporters, whose plants had converted to war production, were deemed entitled to periods of re-conversion during which their market shares were preserved until they could effectively compete again for foreign sales.\(^5\)

Experience acquired in administering controls, however, demonstrated the disadvantages of historical participation as a licensing standard. More

\(^{71.}\) Ibid.


\(^{74.}\) 1 EXPORT CONTROL REPORT 45-7. The base period most frequently used was that between 1939 and 1941. Exporters who shipped a commodity during this period were classified as historical exporters while others, regardless of earlier participation, were classified as non-historical exporters. Normally, the share reserved for historical exporters was 85%, with the remainder available to newcomers. Of these newcomers, war veterans were allotted quantities generally 50% greater than those approved for non-veteran newcomers. Variations in this arbitrary ratio were permitted when American participation in a foreign market increased because of failure of other sources of supply. See Hearings before Subcommittee No. 2 of [H. R.] Select Committee on Small Business, 80th Cong., 2nd Sess. 28-9 (1948); and Report on Export Controls Pursuant to H. R. 18, p. 2 (1948).

and more, pre-war years became too remote to provide an accurate gauge of those who should be permitted to export. Administrative protection of historical shares established and perpetuated monopolistic market division and price determination. Denied the possibility of seeking lower competitive prices, foreign countries were forced to drain their dollar resources more rapidly. And claims of merchant exporters to larger license allotments only emphasized the difficulties inherent in determining how pre-war trade was actually divided among competing trade groups. Consequently, OIT has reduced the historical test to a status merely coordinate with other criteria.

Price. Price is potentially the most useful criterion for assigning license priority. It not only insures competitive determination of the terms of trade, but by making American goods available at a lower cost conserves foreign dollar balances. But whatever its merits, OIT does not rely pri-

76. "The historical pattern of shipment has outlived its usefulness as the basic guide to licensing distribution. In the interests of fostering the best competitive conditions in international commerce, it is desirable to permit newcomers, small businessmen, and merchant exporters to share in controlled export trade to the full extent of their competitive ability." 2 Export Control Report 9. See McIntyre, New Export-Control Policies Safeguarding U.S. Interests, Foreign Commerce Weekly, Feb. 28, 1948, pp. 3, 34; BNA Report 9; Current Export Bulletin No. 431, Dec. 31, 1947.

77. "[Producer-exporters] generally contend that, since they control most of the material at its source, they should receive all or substantially all of the export licenses issued. On the other hand, the merchant exporters assert that, in the interests of small business, of which they are an integral part, the bulk of licenses should be issued to them. Studies of the statistics submitted by exporters showing their value of exports during the period 1937-46, indicated a typical breakdown between the producers and the merchant exporters to be 60 per cent to the mills and 40 per cent to the merchant exporter." 4 Export Control Report 36. OIT insists that quotas have actually been distributed in the ratio of 53.3 to 46.7. See, e.g., OIT Press Release No. 207, July 21, 1948; OIT Press Release No. 211, July 23, 1948; OIT Press Release No. 314, Jan. 18, 1949. Merchant exporters, however, remain unconvinced and maintain that in fact they receive 12 less than the norm of 40% recognized by OIT as the appropriate share of merchant exporters. See N. Y. Times, Jan. 3, 1949, p. 57, col. 3.

78. See Current Export Bulletin No. 457, May 18, 1948: "While the historical method will not be the predominating factor in licensing commodities . . . it may be taken into consideration, along with other criteria when quotas are oversubscribed in order to insure, insofar as possible, a fair and equitable distribution of available quotas."

79. Prior to Jan. 1, 1948, OIT did not possess specific legislative authority to employ price as a criterion for selecting exporters. Section 3 (b) of the Anti-Inflation Act of 1947, 61 Stat. 946 (1947), authorized OIT to use price criteria in the licensing of exports, "either by giving preference among otherwise comparable applications to those which provide for the lowest prices, or, in exceptional circumstances, by fixing reasonable mark-ups in export prices over domestic prices." On Feb. 19, 1948, Rep. Ploeger introduced a bill, H. R. 5470, 80th Cong., 2d Sess. (1948), to repeal this grant of authority because of the storm of criticism aroused by OIT's proposal, in Current Export Bulletin No. 431, Dec. 31, 1947, to employ the price criterion exclusively. The Committee on Banking and Currency reported the bill out favorably, H. R. Rep. No. 1543, 80th Cong., 2d Sess. (1948), but the House failed to take any action. Export Control Act § 4 includes price as one of the criteria OIT may employ.
marily on this criterion, except to screen out applications when they provide for an "obviously excessive" price.\textsuperscript{13}

Failure to adopt price as the exclusive criterion stems both from administrative difficulty and trade criticism. Price can perform the function of fixing license priority only if the necessary comparisons are made between prices that are in fact comparable. And prices are comparable only when determined under "comparable conditions of supply," a concept not easily susceptible to administrative definition.\textsuperscript{5} Producer-exporters, paying no commission to middlemen, possess a price advantage over merchant exporters; merchant exporters, therefore, charge that use of the price criterion denies them their traditional share of the export market.\textsuperscript{2} In addition, a free-along-side price, as contrasted with a free-on-board price,\textsuperscript{6} confers an advantage on shippers located closer to ports of exit.\textsuperscript{81} And where the price criterion has been used, exporters assert that, because of quota restrictions, countries receiving aid from the United States pay higher prices elsewhere for similar goods.\textsuperscript{55}

To the extent that ECA supervises prices paid by importers in participat-

\textsuperscript{50. \textit{Current Export Bulletin} No. 457, May 18, 1948, provides that "provisions of § 3(b) of Pub. L. 395 regarding price will be applied as one of the licensing criteria only when the export price for the specific commodity is obviously excessive." Though what constitutes an obviously excessive price is nowhere defined, see, for an illustration of how this test may be used, \textit{Hearings before Committee on Banking and Currency on H. R. 5470}, 89th Cong., 2d Sess. 82 (1948).

\textsuperscript{51. "The simple appeal of the formula 'lowest price for comparable merchandise under similar conditions of supply' will not make it easy to administer. Evaluations will frequently have to be made of the cost and value of different methods of selling and of different services. A price must sometimes be put on sheer versatility, on the availability of an assortment of techniques and terms for the service of differently situated foreign customers. . . . Distinctions in method will not always lend themselves to close measurement. . . ." \textit{Hearings Committee Preliminary Report} No. 16 at 14. See 4 \textit{Export Control Report} 35.

\textsuperscript{52. \textit{H. R. Rep.} No. 1543, 89th Cong., 2d Sess. 2 (1943). See note 77 \textit{supra}. Trade associations of merchant exporters have urged Congress to require OIT to make available to merchant exporters at least 50% of all allocations. See \textit{N. Y. Times}, Nov. 23, 1948, § 3, p. F1; \textit{Hearings before Committee on Banking and Currency on S. 548}, 81st Cong., 1st Sess. 175 (1949).

\textsuperscript{53. A free-on-board price is the price quoted at inland shipping points. Buyers are responsible for all movement of goods from inland points of loading, and for any loss or damage incurred after loading. The buyer is required to pay all transportation costs, fees or charges, if any, levied because of exportation, and the cost and charges incurred in obtaining the necessary documents. Under free-along-side price, the seller quotes a price that includes delivery of the goods along side the overseas vessel, absorbing the inland freight himself. For a definition of these and other terms used in foreign trade adopted jointly by the United States Chamber of Commerce, the National Council of American Importers, and the National Foreign Trade Council, see \textit{Guaranty Trust Company of New York, A Review of Export and Import Procedure} 45-55 (1943).

\textsuperscript{54. \textit{Hearings before Committee on Banking and Currency on H. R. 5470}, 89th Cong., 2d Sess. 3, 11 (1948).

\textsuperscript{55. See \textit{Hearings before Subcommittee of the Committee on Banking and Currency on H. R. 5470}, 89th Cong., 2d Sess. 3, 11 (1948).}
ing countries, OIT price control might be unnecessary. But ECA places no price limitations on goods purchased with ECA funds, above which payment authorizations will not be honored, lest a price ceiling become a price floor. It does, however, seek to prevent dollar wastage and to reduce prices by insisting on customary discounts and sales at prevailing market prices.\textsuperscript{86} Where American exporters have charged excessive prices, ECA may try to obtain a refund by moral suasion, but if such suasion fails, ECA can only threaten to bar the offender from making future exports under its aegis.\textsuperscript{87}

**Competitive Trade.** OIT seeks to encourage the use of private trade channels whenever possible. Though reluctant to forbid foreign purchasing missions from transacting any business whatsoever,\textsuperscript{88} OIT has required these missions to demonstrate the competitive nature of their procurement procedures.\textsuperscript{89} Even where the United States is the exporter, licenses are

\textsuperscript{86} The Economic Cooperation Act of 1948, 62 STAT. 137, 22 U.S.C.A. § 1501 et seq. (Supp. 1948) contained no provision for the policing of commodities procured under ECA payment authorization. The Foreign Aid Appropriation Act of 1949, Pub. L. 793, 80th Cong., 2d Sess. §202 (June 28, 1948), remedied this deficiency by insisting that no commodities be purchased in bulk with ECA funds at prices higher than those prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality and terms of payment. Determination of adjusted market price was left to the ECA Administrator, guided by accepted trade practices. This provision of the Foreign Aid Appropriation Act of 1949 was incorporated into the Economic Cooperation Act of 1948 under both Senate and House proposed amendments. See H. R. REP. No. 323, 81st Cong., 1st Sess. 28-9 (1949); SEN. REP. No. 100, 81st Cong., 1st Sess. 10 (1949); ECA, \textit{First Report to Congress} 17 (1948); Crawford, \textit{United States Foreign Assistance Legislation, 1947-1948}, 58 \textit{Yale L. J.} 871, 889-92 (1949).


\textsuperscript{88} See statement of Wallace S. Thomas, OIT Director of Export Operations, N. Y. Times, Jan. 22, 1949, p. 21, col. 1: "The United States Government has endeavored to discourage the activities of foreign government purchasing missions in the United States. The Government cannot go to the length of forbidding these missions to do any business whatever. It must be kept in mind that the United States Government during the war did purchasing for its own account through the United States Commercial Corporation and other agencies. The fact that the United States Government no longer finds it necessary to purchase extensively in this way does not necessarily imply that foreign governments no longer have need to purchase for their own account." For a list of foreign government purchasing missions operating in the United States in June, 1948, see \textit{Hearings before Investigation Subcommittee of the Committee on Expenditures in the Executive Departments Pursuant to S. Res. 189, 80th Cong., 2d Sess.} 768-73 (1948).

\textsuperscript{89} Third General Revision of Export Regulations, 15 Code Fed. Regs. CH. III §373.2(f) (2), 13 Fed. Reg. 4078 (1948): "Procurement by foreign governments will be subject to continuous review in line with the announced policy of the United States to
granted only on a showing that the use of ordinary commercial channels is impracticable. Similarly, OIT has abandoned its former practice of giving consideration to foreign embassy recommendations before selecting licensees.

Enforcement

Equally as important as selecting an appropriate criterion for allocating licenses is enforcing compliance with license awards. Without adequate policing, export controls cannot successfully dampen inflationary pressures or assure a desired geographic distribution of goods.

Securing effective enforcement is at once simple and difficult. The necessity for all shipments to pass through ports of exit which provide a convenient checkpoint where all controlled items must ultimately be scrutinized for violations of licensing regulations makes enforcement relatively easy. But the task of enforcement is not complete until the exported goods arrive at their destinations and are put to their intended use. Once beyond the frontier, however, exported goods are outside American jurisdiction. In this area, compliance activities face unique obstacles. OIT's enforcement problem is therefore a twofold one: (1) checking that only licensed commodities actually leave the United States; and (2) assuring that license provisions calling for performance outside the United States are in reality observed.

The first post-war years of export control produced wide-spread violations involving license misuse and exporter malpractice. Licenses were secured through the submission of false information, advertised for sale and freely transferred. Export documents were altered or forged, while secret payments defeated efforts to control price. Goods were transshipped from a

maximize the restoration of private trade, and in every instance the foreign government will be requested . . . to establish the competitive nature of its procurement." Competitive procurement by foreign purchasing missions requires a public request for sealed bids from American suppliers, giving complete specifications for the commodity to be purchased, furnishing OIT with a copy of the specifications, a list of suppliers submitting bids, the bids submitted by each and a statement of the amounts purchased from each firm. Successful bidders are then licensed, though the exportation of some purchases in the name of the purchasing mission may be authorized. See CURRENT EXPORT BULLETIN No. 431, Dec. 31, 1947; 2 EXPORT CONTROL REPORT 10; HEARINGS BEFORE SUBCOMMITTEE NO. 2 OF THE HOUSE COMMITTEE ON SMALL BUSINESS, 80th CONG., 2d Sess. 111 (1948).

91. Id. § 373.2(e). In CURRENT EXPORT BULLETIN No. 431, Dec. 31, 1947, OIT undertook to review recommendations of foreign embassies for approval of particular license applications, though insisting such recommendations were customary and merely advisory. See 3 EXPORT CONTROL REPORT 13.
92. HEARINGS BEFORE INVESTIGATIONS SUBCOMMITTEE OF THE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS PURSUANT TO S. RES. 189, 89th CONG., 2d Sess. 612 (1945); SEN. REP. NO. 1775, pt. 2, 80th CONG., 2d Sess. 16 (1948).
controlled to an uncontrolled destination, or diverted from a licensed to an unlicensed use. Not all the blame for these violations was properly attributable to OIT. Some irregularities were a product of Congressional failure to provide OIT with adequate powers of investigation, while staff and appropriations were microscopic compared with the number of transactions to be policed. Post-war disappearance of "back-stop" controls such as rationing, priorities and allocation powers, and foreign fund controls made enforcement more difficult. Exporters who expected rapid elimination of all export curbs tended to ignore enforcement regulations.

OIT's internal policies, however, made possible many violations of its own regulations. There was a natural tendency to make things administratively easier for both licensing officers and applicants. Many officials were trained to encourage rather than restrict trade. Consequently, licensing procedures were developed that made violation easy and prosecution difficult. Adequate sanctions were available—criminal penalties of fine and imprisonment, civil seizure and forfeiture of goods illicitly exported, and admin-


94. 3 Export Control Report 16. See Secretary of Commerce Sawyer's bitter complaint that OIT "was hamstrung by a lack of funds" and "existed on a beggar's rations and occupied a death cell." Hearings before Investigations Subcommittee of the Committee on Expenditures in the Executive Departments Pursuant to S. Res. 189, 80th Cong., 2d Sess. 756 (1948). OIT's staff now totals 670. Hearings before Subcommittee of the Committee on Banking and Currency on S. 548, 81st Cong., 1st Sess. 13 (1949). But only 47 persons were on duty in the enforcement division in October, 1948. See October Monthly Administrative Report, OIT Enforcement Branch, October, 1948 (copy in Yale Law Library).


96. See Hearings before Investigations Subcommittee of the Committee on Expenditures in the Executive Departments Pursuant to S. Res. 189, 80th Cong., 2d Sess. 753 (1948).


98. The First Export Control Act, 54 Stat. 714 (1940), carried its own penalties. Violators could be punished by a fine of $10,000 or by imprisonment for not more than two years, or both. During 1946 and 1947 a total of seven cases were referred to the Department of Justice for action. See Hearings before Committee on Banking and Currency on H. R. 5470, 80th Cong., 2d Sess. 61 (1948). And of 12 cases referred to the Justice Department during the past fiscal year, only two have resulted in actual prosecution, both involving bribery of OIT officials. The rest are still under investigation. Communication to the Yale Law Journal from Nathan Ostroff, OIT General Counsel, Nov. 24, 1948 (copy in Yale Law Library). See OIT Press Release No. 230, Aug. 20, 1948. Export Control Act §5 reduces the criminal penalty for violation to $10,000 or one year in jail or both.

istrative suspension or termination of the privilege of securing or using a license. But OIT's enforcement regulations did not adequately define the legal basis for proceeding against suspected lawbreakers.

The new powers conferred by the Export Control Act, coupled with revised licensing procedures, permit a vigorous enforcement crusade. For the first time, OIT has been given powers analogous to those possessed by other federal regulatory agencies—to make investigations, require the keeping of records, subpoena witnesses and compel testimony under oath. Reflecting been seized under this power. See, e.g., United States v. 21 Pounds, 8 Ounces of Platinum, 147 F.2d 78 (4th Cir. 1945); United States v. 200 Watches, 69 F.Supp. 223 (S.D.N.Y. 1946); United States v. 251 Ladies Dresses, 53 F.Supp. 772 (S.D.Texas 1943); The Cachalot III, 60 F.Supp. 527 (S.D.Fla. 1945). See OIT Press Release No. 346, Apr. 7, 1949 (seizure of 1,300,000 lb. of carbon black valued at $150,000 and actually intended for Europe instead of Mexico as stated in the shipping declaration); OIT Press Release No. 214, Aug. 4, 1948 (seizure of $10,500 of vitreous china water closets requiring a license to all destinations, declared cast iron water closets not subject to export controls). Twelve seizures of illegal exports were made in the last half of 1948.

100. Administrative actions instituted by the OIT in the last half of 1943 included:

<table>
<thead>
<tr>
<th>Action</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personnel suspensions</td>
<td>3</td>
</tr>
<tr>
<td>License privileges cancelled for a specific period</td>
<td>8</td>
</tr>
<tr>
<td>License privileges suspended indefinitely</td>
<td>8</td>
</tr>
<tr>
<td>Veterans preference cancelled</td>
<td>0</td>
</tr>
<tr>
<td>Referred to other government agency</td>
<td>6</td>
</tr>
<tr>
<td>Referred for personnel action</td>
<td>2</td>
</tr>
<tr>
<td>Charging letter submitted</td>
<td>21</td>
</tr>
<tr>
<td>Warning letter submitted</td>
<td>95</td>
</tr>
<tr>
<td>Placed under surveillance</td>
<td>74</td>
</tr>
<tr>
<td>Revocation of license</td>
<td>26</td>
</tr>
<tr>
<td>Application rejected</td>
<td>12</td>
</tr>
<tr>
<td>Shipment ordered returned to the United States</td>
<td>2</td>
</tr>
</tbody>
</table>

Total: 257


101. 3 Export Control Report 16; 4 Id. at 35-6. For a similar complaint voiced by OPA enforcement officials against OPA price regulations see Problems in Price Control: NATIONAL Office ORGANIZATION AND MANAGEMENT 122 (Gen. Pub. No. 12, OPA Historical Reports on War Administration, 1947).

102. Export Control Act §6(a). Section 6(b) incorporates the standard provision for immunity from subsequent prosecution because of compulsory testimony. Section 6(c) specifically prohibits OIT from disclosing any information received from license applicants unless withholding it would be contrary to national interest. Advance notice of any intention to restrict dealings in any commodity would result in a rush by speculators to secure licenses before the effective date of the proposed control. See Hearings before Committee on Banking and Currency on H. R. 5470, 80th Cong., 2d Sess. 79 (1948). Consequently Export Control Act §7 grants OIT immunity from all provisions of the Administrative Procedure Act, 60 STAT. 237 (1946), 5 U.S.C. §1001 (1946), except the requirement for publication of regulations in the Federal Register (Administrative Procedure Act §3) and notice and hearing on all proceedings instituted by OIT
earlier licensing experience, current regulations describe conduct likely to incur criminal, civil or administrative sanctions. Licensing procedures are designed to retain greater control over the license by OIT before and after issuance.103

**Domestic Compliance.** A major feature of OIT's enforcement program is a restatement of the responsibilities of all parties to a license transaction.104 Exporters are warned against misrepresenting the country of ultimate destination, the proposed end use or the true consignee in license applications. Submitting an order or purchase commitment with intent not to abide by its terms will subject the exporter to both criminal and administrative sanctions.105 Barred also is the receipt, use or alteration of any export control document for the purpose of making a shipment other than that authorized.106 The once prevalent practice of advertising or soliciting licenses for sale or purchase, transferring licenses to other parties without OIT approval, or changing named parties is now prohibited.107 A code of ethics has been promulgated to govern the activities of expediters appearing before OIT in behalf of license applicants. These expediters are forbidden to influence OIT, Post Office or customs officials to take any license action. They are precluded from soliciting the handling of business before OIT or charging a fee contingent upon the grant of a license.108 The status of freight forwarders, persons professionally engaged in facilitating overseas shipment, has been clarified to establish their authority to act and their responsibility in handling and clearing shipments in order to eliminate any illicit advantage that


104. Id. at 4. See 4 EXPORT CONTROL REPORT 37-8; 3 id. at 16-17.

105. OIT licenses exports, not exporters. But "[f]or the purpose of eliminating disreputable and dishonest exporters," a Senate investigating committee has recommended that OIT give "consideration ... to establishing an approved list of exporters, ... Individuals and firms desiring to be considered for the approved list should be required to file a registration statement setting forth detailed information concerning themselves or the firms they represent." SEN. REP. No. 1775, pt. 2, 80th Cong., 2d Sess. 23 (1948).


107. Ibid.

might accrue to any exporter who employed them.\textsuperscript{103}

Other regulations are designed to prevent tampering with the license itself. Special security paper, typewriters and perforating machines have reduced the possibility of forgery, and "clean copy" is required of all export control documents.\textsuperscript{110} The Shippers Export Declaration, once a mere statistical document, has been transformed into an export control document. OIT regulations require such declarations to be authenticated by the collector of customs at the port of exit prior to exportation. Customs officials may authenticate the document only when it is presented by an authorized agent of the licensee and after comparison with the OIT validated license.\textsuperscript{111} OIT receives from the Census Bureau a monthly report listing every shipment leaving the United States on an export license for comparison with OIT's own record of validated licenses.\textsuperscript{112}

\textit{Foreign Compliance}. While primarily responsible for effective foreign compliance, OIT necessarily delegates part of the task to other Federal agencies. Both Customs Service and the Post Office Department share in actually policing exportation as it takes place to prevent unauthorized shipments to unauthorized destinations.\textsuperscript{113} Political and security objectives of export controls emphasize the importance of close cooperation with intelligence services of the government such as the Central Intelligence Agency and the Federal Bureau of Investigation.\textsuperscript{114} Foreign Service personnel, ECA officials and friendly foreign governments may be enlisted to trace transactions in countries of licensed destination.\textsuperscript{115}

Destination and end use controls may likewise be made effective by controlling the ordinary instruments of foreign commerce. Banks, insurance companies and carriers, in their normal operations, frequently become aware of attempted violations. But since these interests cooperate voluntarily, OIT has never exploited its power to extend any enforcement regulations to the "financing, transporting and other servicing of exports. . . ."\textsuperscript{116}


\textsuperscript{112.} See \textit{HERTER COMMITTEE PRELIMINARY REPORT} No. 16 at 19.


\textsuperscript{114.} \textit{Hearings before Investigations Subcommittee of the Committee on Expenditures in the Executive Departments Pursuant to S. Res. 189}, 80th Cong., 2d Sess. 765 (1943).

\textsuperscript{115.} \textit{Id.} at 617.

\textsuperscript{116.} Export Control Act §3(a). Regulations to impose a legal liability on the in-
At first glance, the very idea of export controls appears to conflict with the avowed goals of American commercial policy. Controls are obviously barriers to the free flow of goods. Moreover, no system of quantitative restrictions exists or could be devised by which quotas could be allocated without discriminating among countries seeking to buy from the United States. An equal quota for each country would be absurd. And allocation in proportion to imports in a base year would fail to reflect changes both in supply and in requirements.

The anomaly of such controls is underlined by the fact that since the passage of the Reciprocal Trade Agreements Act of 1934, the United States instrumentalities of foreign commerce have been proposed, see Hearings before Investigations Subcommittee of the Committee on Expenditures in the Executive Departments Pursuant to S. Res. 189, 80th Cong., 2d Sess. 762 (1948), and approved by the Senate Committee on Expenditures in the Executive Department, see Sen. Rep. No. 1775, pt. 2, 80th Cong., 2d Sess. 23 (1948). OIT, however, has failed to enact them on the ground that "the proposed regulations as drafted posed a number of serious legal and practical problems which must be resolved if they are to do an effective policing job without being burdened by what are claimed to be unjustifiable legal liabilities and business costs." Letter from Nathan Ostroff, General Counsel, OIT, to William P. Rogers, Chief Counsel, Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments, Sept. 29, 1948 (copy in Yale Law Library).

A double standard of international trade morality is not unknown in commercial history. American commercial policy prior to the Reciprocal Trade Agreements Act, 48 Stat. 943 (1934), as amended, 19 U.S.C.A. § 1351 (Supp. 1948), is illustrative, and see Commercial Policy in the Post War World (League of Nations Publications II A: Econ. & Financial No. 7) 62 (1945): "In the past, governments have too often approved recommendations in favor of liberal policies in principle, and in practice raised higher and higher barriers to trade. . . . They have only too frequently exemplified the Latin saying: 'Meliora probo; deteriora sequor' (I approve the better, but follow the worst). . . ."

The proportional method, i.e., allocation among importing countries in proportion to imports shipped in a "representative period" is "the only [scheme] which can ensure as equitable an allocation as the existence of quotas allows. . . ." Commercial Policy in the Post-War World (League of Nations Publications II A: Econ. & Financial No. 7) 62 (1945). For a criticism of this formula and suggestions for minimizing the discriminatory character of quotas, see Trade Relations Between Free-Market and Controlled Economies (League of Nations Publications II A: Econ. and Financial No. 4) 62-70 (1943). See also, Quantitative Trade Controls (League of Nations Publications II: Econ. & Financial No. 5) 24 (1943); Young, The International Economy 524-6 (1942); Condliffe, The Reconstruction of World Trade 218-20 (1940).

The Reciprocal Trade Agreements Act made possible an active tariff bargaining policy by authorizing a reduction in American import duties contingent upon the grant of similar concessions by other countries. Through incorporation of the unconditional most-favored-nation principle, concessions made to one country were automatically extended to all. Only countries discriminating against American trade or pursuing policies contrary to the purposes of the Act were denied similar privileges. See Tasca, The Reciprocal Trade Policy of the United States (1938).

Originally, the President was empowered to reduce tariffs by as much as 50%
has led a campaign to reduce trade barriers and eliminate all forms of trade discrimination. During the war, pledges to remove trade barriers were incorporated in the Lend-Lease Agreements, Atlantic Charter, and Bretton Woods Agreement. And in 1947, 23 nations urged by the United

of duties in force in 1934. By 1945, rates had been reduced by the full 50% on 42% of dutiable imports and something less than the permissible 50% on 20% of the remaining imports. 59 Stat. 410 (1945), as amended, 19 U.S.C.A. §1351(a)(2) (Supp. 1948) authorized a further reduction of 50% below rates in force on Jan. 1, 1945, or a total of 75% below 1934 duties, in order to maintain American bargaining power. The United States Reciprocal Trade Agreements Program and the Proposed Trade Organization (Dep't State Pub. No. 3112, Comm. Policy Ser. No. 112) 2 (1943); Smith, Protocol of Policy Under the Trade Agreements Program, 59 Q. J. Econ. 297 (1944); Berglund, Reciprocal Trade Agreements Act of 1934, 25 Am. Econ. Rev. 411 (1935).

120. Some sort of action was necessary in the unstable thirties, because of the shrinking volume of international trade. Following World War I, relatively free world markets had disintegrated into tightly isolated segments. State interference with ordinary economic processes in the name of military preparedness, economic stability or speedy industrialization always turned out to be restrictive of international trade. See Knorr, The Functions of an International Trade Organization: Possibilities and Limitations, 37 Am. Econ. Rev. 542 (1947) (Papers and Proceedings of the 59th Annual Meeting of the American Economic Association). For a statistical demonstration of the deterioration of international commerce and the need for multilateral world trade, see The Network of World Trade (League of Nations Publications II A: Econ. & Financial No. 3) (1942). Reasons influencing states to adopt restrictions on trade are examined in Quantitative Trade Controls (League of Nations Publications II: Econ. & Financial No. 5) 23-33 (1943); Hueser, op. cit. supra note 4, at 3-47.

121. “In the final determination of the benefits to be provided to the United States in return for aid furnished, the terms and conditions thereof shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of worldwide economic relations. To that end, they shall include provision for agreed action, open to participation by all other countries of like mind, directed to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers.” Master Lend-Lease Agreement with Great Britain Art. VII. See Report to Congress on Lend-Lease Operations for the Year Ended March 11, 1942, p. 50. Similar articles were included in agreements with other countries, e.g., China, see 5th Report to Congress for the Period Ending June 11, 1942, pp. 31-2; and Russia, see 9th Quarterly Report to Congress on Lend-Lease Operations for the Period Ended March 11, 1943, p. 52.

122. Atlantic Charter Art. IV provides that the United States and Great Britain agree to “endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great and small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.”


124. Australia, the Benelux countries (Belgium, Luxemburg and The Netherlands),
States, met in Geneva to discuss tariff reductions. The ensuing Geneva General Agreement on Tariffs and Trade primarily emphasized schedules enumerating articles for which specified concessions were granted after bilateral negotiations; its general provisions, however, were designed to prevent impairment of concessions either by prohibiting restrictive and discriminatory measures altogether or by defining the limits within which they might be employed. Similarly, the Havana Charter for an International Trade Organization, adopted by the United Nations Conference on Trade and Employment in 1948, was fathered by the United States. Its key provisions call for equal treatment of all nations and the abolition of special privileges in commercial treaties and decree that "no prohibitions or restrictions, other than duties, taxes or other charges, whether made effective through quotas, licenses or other measures, shall be instituted by any member." While, as in the Geneva Agreement, certain exceptions

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126. Exceptions, however, far outnumber the absolute prohibitions. E.g., Geneva Agreement Art. XI prohibits the use of quantitative restrictions, but is hedged in by permanent exceptions, and must be read in the light of Arts. XII, XIV, and XVIII-XXI, which permit deviations from the prescribed norm for reasons ranging from the protection of public morals to safeguarding the national security. But see Analysis of General Agreement on Tariffs and Trade (Dep't State Pub. No. 2983, Comm. Policy Ser. No. 109) 198 (1947): "In substance, . . . [the Geneva Agreement] may be described as constituting a general prohibition against the use of quotas, this prohibition then being made subject to carefully defined and closely controlled exceptions permitting their use in justifiable or necessary circumstances. . . ."


128. The Havana Charter had its genesis in the American Proposals for Expansion of World Trade and Employment (Dep't State Pub. No. 2411, Comm. Policy Ser. No. 79) (1945) first published in December, 1945, and later elaborated in the form of a Suggested Charter for an International Trade Organization of the United Nations (Dep't State Pub. No. 2598, Comm. Policy Ser. No. 93) (1946). These proposals persuaded UNESCO to call the International Conference on Trade and Employment that ultimately approved the Havana charter in 1948. The planned ITO, now awaiting ratification, still strongly resembles the original State Department proposals, although many concessions were necessarily made to win support of other countries. For the text of the President's message submitting the Havana Charter to the Senate, urging swift ratification, and the State Department's memorandum in support of the Charter, see 20 Dep't State Bull. 601-6. (1949.)

129. Havana Charter Art. 16. An exception is made for tariff rates on certain products based on historic agreements.

130. Id. Art. 20.
cut into this flat prohibition, the Charter condemns quantitative restrictions in principle and limits them to exceptional cases.

Whether the exceptions contained in either agreement justify the use of American export controls is debatable. In general, these exceptions do not envisage the imposition of export restrictions by a dominant creditor and trading nation like the United States. Many were incorporated to enable non-industrialized, underdeveloped and debtor nations to safeguard their balance of payments and protect their internal economic interests. And while Article 45(b)(1) of the Havana Charter authorizes retention of quantitative restrictions when essential to the acquisition or distribution of products in general or local short supply, it adds the proviso that these measures be consonant with the principle that all countries are entitled to an equitable share of the international supply of such products. Consequently, OIT's restrictive licensing policies have already been attacked as violating the principles laid down in the Geneva and Havana agreements.

131. Exceptions permitted in the Havana Charter are reminiscent of those contained in the Geneva Agreement. Like Geneva Agreement Art. XI, see note 125 supra, Havana Charter Art. 20, see text accompanying note 130, calls for the general elimination of quantitative restrictions, then proceeds to list exceptions where discrimination may be imposed without violating the Charter. Other parallelisms are apparent. Compare general exceptions to the rule prohibiting discriminatory trade policies listed in Havana Charter Art. 45 with Geneva Agreement Art. XX; compare Havana Charter Art. 21 with Geneva Agreement Art. XII, etc. It is worthy of note that only the 23 signatories to the Geneva Agreement are bound by its provisions, while 57 nations are considering adoption of the Havana Charter.


The National Association of Manufacturers, however, opposes the Havana Charter on six major grounds, the first of which is that: "It gives legal sanction to principles and methods of international trade which stand in complete opposition to the principles of freer non-discriminatory, multilateral trade. Indeed, it legalizes the economic jungle in which the world has lived since the early Nineteen Thirties." N. Y. Times, Mar. 31, 1949, p. 39, col. 1. The National Foreign Trade Council has also announced opposition to American adherence to the ITO charter, presumably for similar reasons. N. Y. Times, Jan. 26, 1949, p. 35, col. 2.

133. See, e.g., Havana Charter Art. 21, permitting trade restrictions to safeguard a country's balance of payments, and note 131 supra.

134. Czechoslovakia, Hungary and Poland, as well as Russia, joined in making these charges against American export control policy before the Committee on Development of Trade of the United Nations Economic Commission for Europe, meeting in Geneva, on Feb. 15, 1949. Paul R. Porter, American delegate, responded to these attacks on a note of altruism by insisting that "So long as the Soviet Union pursues a policy which hundreds of millions of people throughout the world regard as aggressive, the United
slovakia has accused the United States of repeatedly violating the Geneva agreement and the Havana Charter by adhering to a discriminatory trade policy in refusing to issue licenses for the export of many products to Czecho-
slovakia. The Committee on Development of Trade of the United Nations Economic Commission for Europe has rejected a Czech resolution calling for an investigation of United States trade practices.

In defense, OIT insists that American use of export controls has been carefully confined to the limited exceptions contemplated by the ITO Charter. Security export controls, for example, channelling goods away from Eastern Europe, despite the bans against discrimination posted in both the Havana and Geneva Agreements, find support in the general exception enumerated in ITO Charter Article 99 permitting quota controls over traffic in goods or materials directly or indirectly supplying the military establishment of another country. In any event, OIT has never interpreted security licensing to require complete embargo of shipments to Soviet bloc countries, recognizing that a broad definition of goods possessing military value might be as unwise as one too narrow. Even a quantitatively small volume of scarce goods exported from the United States might enable their

States will not aggravate the risks to peace loving countries by shipping goods of signifi-
cant military value to the Soviet Union. . . .” N. Y. Times, Feb. 16, 1949, p. 11, col. 2. For the anonymous views of a “very high economic official of one of the principal satellite countries” that American discrimination on exports is “irritating but unsuccess-

135. Czechoslovakia alone of all the Russian satellite countries is a signatory to the Geneva Agreement and thus able to press charges under it. Czech participation in the agreement came before Czechoslovakia fell under Russian domination.

136. The Czech resolution was defeated by a vote of 11-6. N. Y. Times, Feb. 20,
1949, p. 1, col. 4. The next day, Czechoslovakia announced its intent to charge the United States formally with violation of the Geneva agreement, first by filing a note with the United States requesting bilateral negotiations with a view to settling the issue, and then by filing a complaint with the contracting states administering the Geneva Agreement, if these discussions prove fruitless. N. Y. Times, Feb. 21, 1949, p. 5, col. 5. In part, the Czech claim is based on denial of export license for a rolling mill costing $23 million on which $16 million had been paid, and refusal of export permission for ball bearings, penicillin and streptomycin. Formal charges that the United States export licensing system constitutes a violation of the Geneva Agreement were filed March 25, 1949, see N. Y. Times, March 26, 1949, p. 1, col. 5, and placed on the agenda of the contracting nations responsible for administering the multilateral tariff accord, see N. Y. Times, April 9, 1949, p. 5, col. 4.

137. Communication to the YALE LAW JOURNAL from Nathan Ostroff, General Counsel, OIT, July 21, 1949. Mr. Ostroff adds that the declaration of policy contained in Export Control Act § 2 was “consciously related and limited to ITO precepts.” And after studying the areas in which the proposed ITO Charter would be incompatible with existing United States law and/or practice, the United States Tariff Commission has concluded “that various exceptions in the Charter (particularly Articles 45 and 99) would permit continuance of the program on a temporary basis.” U. S. Tariff Commission, Report on THE HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 34 (1949).

138. 4 Export Control Report 15. Strict controls over shipments to Eastern Europe reduced exports to that area from an annual rate of $400,000,000 in the second quarter of 1947 to an annual rate of $125,000,000 in the third quarter of 1948. H. R. Rep. No. 18,
purchasers to produce essential materials for the United States or for countries that would otherwise require assistance from the United States.\(^{123}\) American industry depends on Eastern Europe for many raw materials, some not available elsewhere.\(^{123}\) A policy that provokes retaliation might dry up this source of supply.\(^{124}\) Moreover, ECA countries generally follow America's lead in curtailing shipments of commodities denied licenses by OIT for security reasons,\(^{125}\) so that American export control policy might adversely affect the volume of trade between Eastern and Western Europe. Yet a greater volume of East-West trade would benefit both halves of a

81st Cong., 1st Sess. 2 (1949). In the first quarter of 1948 before controls to Eastern Europe were introduced, total exports to that area amounted to $78.8 million; in the second quarter they fell to $25.1 million. The sharpest decrease was in exports to Russia which fell from $20.3 million in the first quarter of 1948 to $4.2 million in the second and $1.7 million in the third. The largest decrease took place in exports of machinery and vehicles which declined from $44.4 million in the first quarter of 1948 to $6 million in the second quarter of 1948. 6 Export Control Report 12.

American policy was recently modified to strike Yugoslavia from the list of eastern bloc countries. N. Y. Herald Tribune, March 29, 1949, p. 1, col. 2. As a result of a more "sympathetic" export licensing policy toward the Tito regime, Yugoslav trade with the West is expected to double in 1949. N. Y. Times, April 10, 1949, §3, p. F1, col. 1. See N. Y. Times, April 8, 1949, p. 7, col. 1.

139. 4 Export Control Report 33: "An embargo on shipments from the United States would be completely untenable. . . . Much of the steel and other scarce materials exported from the United States is being used abroad to expand production of petroleum, nonferrous metals, and other short supply materials for shipment back to this country. . . ."

140. In 1947, e.g., the United States obtained from the U.S.S.R. 28% of total chrome imports, 58% of total platinum imports and 65% of total cadmium imports. In addition, the United States obtained a substantial share of its furs from Russia and its wood pulp from Finland. 4 Export Control Report 15.

141. Russian exports to the United States dropped 75% in January, 1949, to their lowest point since restrictive licensing of Eastern European shipments was introduced on March 1, 1948. The value of American imports of two strategic materials, manganese and chrome, dropped from $2,700,000 in December, 1948, to $1,200,000 in January, 1949. N. Y. Times, March 22, 1949, p. 43, col. 5. For a report that Russia will reduce manganese exports to the United States to one tenth and chrome to 40% of the amount the United States expected to purchase as reprisal for American export licensing policy, see N. Y. Times, March 3, 1949, p. 4, col. 1. In March, 1949, Russian exports to the United States of steel hardening chrome and manganese declined another 50%. N. Y. Times, May 14, 1949, p. 20, col. 2-3.

142. Economic Cooperation Act §117(d), 62 Stat. 137, 153, 22 U.S.C.A. § 1515(d) (Supp. 1948) provides that: "The Administrator is directed to refuse delivery insofar as practicable to participating countries of commodities which go into the production of any commodity for delivery to nonparticipating European countries which commodity would be refused export licenses to those countries by the United States in the interests of national security. . . ." See 4 Export Control Report 15.

For an announcement by the British Government of a list of products of potential military value to be added to those for which export licenses are required, see N. Y. Times, April 1, 1949, p. 3, col. 6; N. Y. Times, March 26, 1949, p. 1, col. 5. Although British exports are also controlled by a licensing system, the government has tried to avoid using licenses to direct exports to specific destinations. Instead Britain tries to direct the production of certain goods for export to particular destinations by controlling
continent that is economically interdependent, and would reduce the drain on the United States for economic assistance.

In a sense, export controls are consistent with the long run objectives set forth in the Geneva Agreement and the Havana Charter—the elimination of trade barriers and the expansion of world trade. Present barriers to trade are, after all, only symptomatic of a more basic disease. Post-war economic disturbances and political insecurity only reinforced an instinctive desire to insulate national economies from external forces. Popular pressures compelled national action to provide immediate employment, without regard for international consequences. Faced with a desperate lack of all types of consumer goods and many raw materials, most countries imposed trade restrictions that permit exchange of available exports for only most urgently needed and essential import requirements. Both the European recovery program and American export control policy seek to eliminate the causes of the growth and maintenance of these trade restrictions. By channelling goods to countries most in need, and most important in world trade, the issuance or withdrawal of building, equipment or raw material licenses and by cooperation with industries concerned. See 5 Labor and Industry in Britain 220–21 (1947); 6 Id. 40–41 (1948) (a summary of British controls still in operation).

143. For statistical proof of the commercial and general economic interdependence of the European continent before the war see Europe's Trade (League of Nations Publications II A: Econ. & Financial No. 1) (1941); The Network of World Trade (League of Nations Pub. II A: Econ. and Financial No. 3) (1942).

144. “Even those ... countries most eager to see their countries' foreign trade move back toward normal were handicapped by the disorganized conditions left in the wake of the war—the destruction of productive facilities, the exhaustion of supplies, the disruption of transport and distribution channels, the scrambled ownership in industry, the inadequacy of foreign exchange assets, the internal financial confusion, and often also the unsettled status of the government regime itself. ... [A] large measure of governmental control and even direct official intervention in foreign-trade arrangements seemed unavoidable, at least for a time.” Chalmers, Current Trends in Foreign Trade Policies, Foreign Commerce Weekly, Feb. 23, 1946, p. 9. See Thorp, The Necessity for Foreign Investment, 13 Dept State Bull. 829 (1945). And see Carlston, Import and Export Controls, 11 Law & Contemp. Probs. 795 (1946): “The restoration of foreign trade will be brought about by no such simple stroke as the elimination of trade barriers alone. ... [V]arious restrictive measures adopted by states ... are not the primary cause of the breakdown in ... trade but are rather induced by other and more deep-seated forces and are a part of many causative forces.”


146. Intra-European trade alone accounted for a significant share of total international trade before the war, while Europe's trade with the rest of the world constituted a major portion of all other trade. See The Network of World Trade (League of Nations Publications II A: Econ. & Financial No. 3) 39, 41 (1942); Europe's Trade (League
they make possible the restoration of productive facilities so that these nations can remove barriers and resume normal trade. Moreover, restoring world trade hinges on speedy world recovery, and both goals depend on continued American prosperity. Export controls help curb the dangers that threaten continued domestic prosperity and permit most efficient utilization of scarce foreign dollar balances.

CONCLUSION

American export controls have not escaped criticism, both from traders denied export permission and countries cut off from access to American goods. These criticisms are in part unavoidable, for in formulating an appropriate commercial policy the United States faces two problems that are separate but by no means independent. While safeguarding its own immediate interests, the United States seeks as rapidly as possible to restore the world to a political and economic stability that will replace the uneasy equilibrium of pre-war years. But in the long run, the United States seeks to create international institutions and common agreements that will enable this new stability to be maintained in an orderly world. Unless political and economic stability is achieved, permanent institutions and agreements cannot be expected to succeed. To the extent that export controls help achieve this immediate objective of American commercial policy, their retention and continuance are justified.

of Nations Publications II A: Econ. & Financial No. 1) 15-23 (1941); note 143 supra. In addition, Europe was America's best customer. In the years 1939-41, 34.1% of all American exports by value went to continental Europe, almost twice as much as American exports to Canada, which ranked next in importance. For the dependence of Europe on American exports, see notes 14 and 15 supra. For a graphic demonstration of American dependence on international trade, see World Trade and the United States (Dep't State Pub. No. 3492, Comm. Policy Ser. No. 119) (1949).

147. For a discussion of the extent to which the restoration of world trade depends on the United States, see Dept' Commc, The United States in the World Economy (1943); Hansen, America's Role in the World Economy (1940). See also Hoover, International Trade and Domestic Employment (1945).

148. See, e.g., the lament of merchant exporters, notes 77 and 82 supra.

149. See notes 134-7 supra.

150. "Our problems are of two kinds. There are immediate problems, relating principally to the tasks of making good the material ravages of war. There are longer run problems, involving the organization of the world economy to achieve the maximum output of goods and services and the elevation of living standards. The two are by no means independent of each other. . . ." Clayton, The Importance of International Economic Relations to World Peace, 14 Dep't State Bull. 677, 679 (1946). See Lockwood & Schmeisser, Restrictive Business Practices in International Trade, 11 Law & Contemp. Probs. 653, 664 (1946).