

Comment

The United States Arms Embargo Against South Africa: An Analysis of the Laws, Regulations, and Loopholes

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Introduction

With reports of violence and unrest in the Republic of South Africa a daily feature in American newspapers, public attention in the United States has increasingly focused on a variety of American efforts to bring an end to apartheid.¹ Little discussed in the ongoing debate over imposition of new measures is the sanction that the United States has maintained for the past twenty-three years: the South African arms embargo. How effective has this sanction been in denying South Africa access to items with military utility? Are there ways to strengthen the arms embargo so that it achieves greater success?

An evaluation of the embargo is complicated by the fact that there is no one place in which the laws implementing it can be found. Rather, the relevant regulations have been incorporated into the existing, complex scheme of U.S. trade law. This article offers a complete account of the laws and regulations implementing the embargo, analyzes the defects in the regulatory scheme, and recommends ways to strengthen the embargo. The first part outlines the background of the imposition of the embargo, while the next three parts examine the regulations that govern American exports to South Africa and explore the loopholes in these regulations that hinder their effectiveness. Part II discusses items on the

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1. Congress recently imposed various sanctions on South Africa. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986). The legislation was vetoed by President Reagan, but took effect after the House and Senate overrode the veto. *N.Y. Times*, Oct. 3, 1986, at A1, col. 4. Major features of the law include a ban on American imports of South African steel, iron, uranium, coal, textiles, and agricultural products, a prohibition on new corporate investment in South Africa and new loans to South African government agencies, a prohibition on U.S. banks' acceptance of deposits from South African government agencies, and a revocation of landing rights in the United States for South African Airways. *N.Y. Times*, Aug. 16, 1986, at 4, col. 1.

United States Munitions List, exports of which are controlled by the State Department. Part III deals with non-Munitions List items, exports of which are controlled by the Commerce Department. Part IV examines the export of nuclear equipment and materials, an activity regulated chiefly by the Nuclear Regulatory Commission. Finally, Part V recommends ways in which the arms embargo can be strengthened to bar more effectively the South African regime from access to American arms and related materials.

I. Background

On November 4, 1977, the United States joined in the unanimous vote of the United Nations Security Council adopting Security Council Resolution 418,² which established a mandatory arms embargo against the Republic of South Africa. This resolution succeeded Security Council Resolution 181,³ a non-binding call to all nations to adhere voluntarily to an arms embargo, which had been in effect from 1963 to 1977.

Security Council Resolution 418 declares that the acquisition of arms by South Africa "constitutes a threat to the maintenance of international peace and security" and directs all states to

cease forthwith any provision to South Africa of arms and related *matériel* of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and . . . cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned.

Furthermore, all states are directed to "refrain from any cooperation with South Africa in the manufacture and development of nuclear weapons."⁴

The United States has incorporated adherence to the United Nations arms embargo into its existing trade regulatory scheme. Thus, responsibility for supervising compliance with the embargo is divided among various executive departments. Broadly speaking, the State Department controls exports of defense articles and defense services, the Nuclear Regulatory Commission oversees exports of nuclear equipment and materials, and the Commerce Department administers regulations governing exports of other commodities and technical data.

2. S.C. Res. 418, 32 U.N. SCOR Res. & Decs. at 5, U.N. Doc. S/INF/33 (1977).

3. S.C. Res. 181, 18 U.N. SCOR Res. & Decs. at 7, U.N. Doc. S/INF/18/Rev. 1 (1963).

4. S.C. Res. 418, *supra* note 2. The Security Council stated that in adopting the resolution it was acting under Chapter VII of the United Nations Charter.

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II. Exports Under State Department Control

A. *The United States Munitions List*

The Arms Export Control Act⁵ gives the President statutory authority to control the import and export of all defense articles and defense services. The Act provides that items so designated shall be placed on the United States Munitions List.⁶ The export of Munitions List items is regulated exclusively by the Department of State.⁷ The regulations are known as the International Traffic in Arms Regulations (ITAR)⁸ and are administered by the Office of Munitions Control (OMC).⁹ Anyone who manufactures or exports "defense articles"¹⁰ or furnishes "defense services"¹¹ must register with the OMC.¹²

Unless certain exemptions apply,¹³ an OMC license is required for the export of defense articles¹⁴ or related technical data.¹⁵ Likewise, reexport of Munitions List items requires prior written approval from the State Department.¹⁶ American companies must also obtain the approval of the OMC before furnishing defense services abroad.¹⁷

The ITAR state that it is U.S. policy "to deny licenses and other approvals with respect to defense articles and defense services destined for or originating in certain countries or areas. . . . This policy also applies to countries or areas with respect to which the United States maintains an arms embargo."¹⁸ Furthermore, no significant exemptions from licensing¹⁹ apply to exports to proscribed countries.²⁰

5. 22 U.S.C. § 2778 (1982).

6. *Id.* The Munitions List is printed at 22 C.F.R. § 121.1 (1985). The authority to issue export regulations with respect to Munitions List items was delegated by the President to the Secretary of State. Exec. Order No. 11,958, 3 C.F.R. 79, 80-81 (1978).

7. 22 C.F.R. § 120.4 (1986).

8. 22 C.F.R. pts. 120-30 (1986).

9. 22 C.F.R. § 120.1 (1986). The OMC is an office within the Bureau of Politico-Military Affairs of the U.S. Department of State.

10. "Defense article" is defined as any item on the Munitions List. *See id.* § 120.7.

11. For the definition of "defense services," see *infra* note 41.

12. 22 C.F.R. § 122.1(a) (1986).

13. Exempt items include obsolete firearms, firearms for personal use, minor components, Canadian and Mexican border shipments, and nuclear materials under the export control of the Department of Energy or the Nuclear Regulatory Commission. *See id.* §§ 123.16-21.

14. 22 C.F.R. § 123.1(a) (1986).

15. *Id.* § 125.2(a).

16. *Id.* §§ 123.9(a), 124.9(e), 125.1(c). The State Department can also deny or revoke licenses and approvals without prior notice whenever it "deems such action to be in furtherance of world peace, the national security, or the foreign policy of the United States." *Id.* § 126.7.

17. *Id.* § 124.1(a).

18. *Id.* § 126.1(a).

19. The only exception, 22 C.F.R. § 123.17 (1986), refers to personal firearms and ammunition belonging to U.S. persons traveling abroad.

B. *Exports of Munitions List Items to South Africa*

In October 1986, Congress codified the South African arms embargo by passing the Comprehensive Anti-Apartheid Act, prohibiting the export to South Africa of items on the Munitions List.²¹ The only exception to the Act is that the President can authorize the export of specific items not covered by Security Council Resolution 418 if he determines that such items are to be exported solely for commercial purposes. Prior to such authorization, the President must notify Congress and allow it thirty days to disapprove the sale by joint resolution.²²

It is difficult to predict what the effects of the new law will be. Under current OMC regulations, the intended use of a defense article or service after its export is not supposed to be relevant to whether the export is subject to Munitions List controls.²³ The Director of the OMC is authorized to waive the denial policy pertaining to exports to arms-embargoed countries only in "a case of exceptional or undue hardship, or when it is otherwise in the interest of the United States Government."²⁴

In fact, the State Department has ignored its own regulations. OMC disclosures reveal that its officials authorized twenty-nine separate exports of Munitions List items to South Africa during fiscal years 1981-83, covering goods worth over \$28.3 million.²⁵ According to OMC Director William Robinson, commodities with "inherent commercial applications" were approved, including data encryption equipment, navigation gear, image intensifiers, and technical know-how.²⁶ Robinson acknowledged that the recipients of these exports included "two government-run installations, the National Physical Research Laboratory and the National Institute for Aeronautics and Systems Technology, both of which do classified military research."²⁷ Under the new law, exports such as

20. *Id.* § 126.1.

21. Pub. L. No. 99-440, § 317, 100 Stat. 1086, 1104-15 (1986).

22. *Id.* §§ 317-318.

23. 22 C.F.R. § 120.3. This section is entitled "Policy on designating defense articles and services," and discusses the criteria used to determine the composition of the Munitions List. The primary criterion is whether an item "is deemed to be inherently military in character." *Id.* With the narrow exception of certain spare parts and components, that "an article or service may be used for both military and civilian purposes does not in and of itself determine" whether it will be placed on the Munitions List, and "[t]he intended use of the article or service after its export (i.e., for a military or civilian purpose) is also not relevant in determining whether the export is subject to the controls of this subchapter." *Id.*

24. *Id.* § 126.3.

25. American Friends Service Committee/NARMIC, *Military Exports to South Africa—A Research Report on the Arms Embargo* 3 (Jan. 1984) [hereinafter *Military Exports*].

26. *Id.*

27. *Id.* at 4.

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these are likely to continue under the President's authority to allow exports for commercial purposes.

These waivers in the area of military electronics take on added significance when one considers that image intensifiers, for example, are used in military night vision equipment—crucial gear for military and police units waging guerrilla warfare at night or in bad weather.²⁸ Without importing such vital components, the South African company that manufactures night vision equipment²⁹ could not make a single pair of night-vision binoculars.³⁰ Indeed, one author calls military electronics “the most sensitive spot in South Africa's arms procurement” because the “immense range of components required by modern industry, especially in the military field, the high level of technology and the rapid development of components technology make it impossible for South Africa to become self-supplying in this field.”³¹

In addition to these licensed breaches of the arms embargo, there have been illegal arms sales to South Africa—that is, arms have been exported with no license at all. A few of these sales have been detected by the U.S. government, which has responded by prosecuting the violators. In 1978, for example, Olin Corporation was convicted and fined for falsification by its Winchester Division of export applications for shipment of firearms and ammunition.³² In 1980-81, Space Research Corporation of Vermont was prosecuted and two of its top officers were imprisoned for selling arms, ammunition, technology, and technical assistance to South Africa, leading to that nation's “acquisition and development of ad-

28. S. Faltas, Philips: Electronics and the Arms Trade 212 (1981) (unpublished paper for Peace Research Group, Free University, Amsterdam) (copy on file with the *Yale Journal of International Law*). The author adds that until 1979, the United States refused to provide related manufacturing technology even to fellow NATO nations. *Id.*

29. The company is one of the many subsidiaries of Armaments Development and Production Corporation (ARMSCOR), South Africa's “state-owned arms conglomerate.” Military Exports, *supra* note 25, at 4.

30. S. Faltas, *supra* note 28, at 212.

31. *Id.* at 211; see also Klare, *Evading the Embargo: Illicit U.S. Arms Transfers to South Africa*, 35 J. INT'L AFF. 15, 21 (1981). Klare asserts that South Africa must rely on imports of electronics and other high-technology gear to streamline its military operations, an important goal because of the small size of the pool from which the country draws its key military personnel.

32. See B. BRANAMAN, SOUTH AFRICA: ISSUES FOR U.S. POLICY 8 (Congressional Research Service Issue Brief IB80032, Nov. 19, 1985) (available from the Foreign Affairs and National Defense Division of the Congressional Research Service); see also Klare, *supra* note 31, at 22 (quoting allegations, arising from the court proceedings against Olin and from an earlier prosecution against an employee of Colt Industries for similar violations, that the State Department regularly “acquiesced” in illegal “sales by ‘looking the other way’ when presented with fraudulent export declarations”).

vanced 155 mm. artillery systems which have made major contributions to its regional military capabilities.”³³

The United States government is generally lax in enforcing the arms embargo, and it is often only by chance that reporters discover violations.³⁴ It thus seems unlikely that the few violations which have been detected and prosecuted are the only illegal arms sales that have taken place.

C. *Exports of Military Information and Technology*

The ITAR also cover licensing and technical agreements. These regulations involve the export of technical data or defense articles, the performance of defense services, and the use by a foreign party of technical data or defense articles previously exported by a U.S. party.³⁵ Such agreements must be approved by the OMC³⁶ and are therefore subject to the general policy of denial of licenses and other approvals with respect to defense services destined for arms embargoed countries.³⁷

It should be noted that, with respect to foreign companies producing products under license from American corporations, officials charged with enforcing U.S. export laws face “particularly acute” problems.³⁸ According to one article, “[i]t has been alleged that a number of such illegal third country reexports of items on the Munitions List have taken place.”³⁹

Another effect of the ITAR is to restrict scientific and technological cooperation between the United States and South Africa with respect to Munitions List items. This cooperation is regulated by the inclusion on the Munitions List of “technical data”⁴⁰ and “defense services”⁴¹ related

33. *Enforcement of the United States Arms Embargo Against South Africa: Hearing Before the Subcomm. on Africa of the House Comm. on Foreign Affairs* (appendix), 97th Cong., 2d Sess. 41 (1982) [hereinafter *Hearing*] (staff study of the Subcommittee on Africa of the House Committee on Foreign Affairs on The Space Research Case and the Breakdown of the U.S. Arms Embargo Against South Africa); see also Klare, *supra* note 31, at 22-24.

34. Klare, *supra* note 31, at 25.

35. 22 C.F.R. § 120.14 (1986).

36. *Id.* § 124.1.

37. *Id.* § 126.1(a).

38. Mehlman, Milch & Toumanoff, *United States Restrictions on Exports to South Africa*, 73 AM. J. INT'L L. 581, 594 (1979).

39. *Id.* (footnote omitted). One example cited is the reported shipment by the Italian firm Oto Melara of U.S.-designed armored personnel carriers and self-propelled guns to South Africa.

40. “Technical data” includes information

directly related to the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles. . . . This also includes information which advances the state of the art of

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to defense articles listed in the other categories of the list,⁴² and is subject to the same embargo policy as the listed defense articles.

Although the ITAR explicitly deal with exports of scientific and technical arms-related information, they do not restrict the export of information about American military and law enforcement techniques. However, Congress, in the general statute authorizing American training of foreign military and related civilian personnel, has declared that such education and training activities should be designed in part "to increase the awareness of nationals of foreign countries participating in such activities of basic issues involving internationally recognized human rights."⁴³ Accordingly, a U.S. representative at the United Nations has asserted that the United States "does not provide military training to the South African armed forces or police."⁴⁴

Despite the claim that the U. S. government does not assist in the military training of South Africans, various contacts between American officials and South African military and police personnel have taken place. In 1983, for example, the federal government trained a South African vice and drug officer in "drug law enforcement techniques,"⁴⁵ and between 1981 and 1984, the Coast Guard trained ten South African naval and air force officers in search and rescue techniques acknowledged by the State Department to be of potential military benefit.⁴⁶ At the local level, a South African police major participated in a police-media training program in Chicago in 1982,⁴⁷ and in 1983, two South Africans attended a Detroit convention of the International Association of Chiefs of Police, an organization which includes South African police and security officials among its members.⁴⁸ Referring to South Africa's 1982 admission to a similar body, Police General Mike Geldenhuys said that

articles on the U.S. Munitions List. This does not include information concerning general scientific, mathematical or engineering principles.

22 C.F.R. § 120.21 (1986).

41. "Defense services" means the furnishing to foreign persons, whether in the United States or abroad, of technical data or of assistance, including training, "in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles." *Id.* § 120.8.

42. *Id.* § 121.1.

43. 22 U.S.C. § 2347(b) (1982).

44. Statement by Jeffrey A. Bader, United States Representative to the Fourth Committee, Press Release USUN 94-(84) from the United States Mission to the United Nations (October 23, 1984).

45. Military Exports, *supra* note 25, at 6 (quoting interview with Drug Enforcement Administration, National Action/Research on the Military Industrial Complex, Nov. 7, 1983).

46. *Id.*; *Strategic Sales to South Africa Reach New High*, AFR. NEWS, Oct. 22, 1984, at 6 [hereinafter *Strategic Sales*].

47. Military Exports, *supra* note 25, at 6.

48. *Id.* at 7.

“[b]ecoming a member of [the International Police Association] is a highlight in these times of isolation experienced by South Africa.”⁴⁹ Thus, in addition to increasing South African police capabilities, contacts of this type “give the security forces a mantle of respectability and boost their morale.”⁵⁰

Even more ominous are revelations that South Africa has access to important NATO classified information. In 1983, the FBI detained a South African naval officer, Dieter Gerhart, and returned him to South Africa, where he was convicted of treason for spying for the Soviets.⁵¹ A *Washington Post* reporter wrote that Gerhart had access to “most of NATO’s electronic intelligence” and to “secrets of NATO military and computer codes.”⁵²

It is possible that contacts with the South African armed forces will cease to occur as a result of Congress’s recent decision to bar all agencies and entities of the United States from engaging in any form of cooperation with the South African armed forces.⁵³ However, because Congress excepted “activities which are reasonably designed to facilitate the collection of necessary intelligence,”⁵⁴ activities such as the sharing of NATO information with South Africa are likely to continue.

D. *Enforcement of Arms Export Restrictions*

The Arms Export Control Act provides penalties for any person who willfully violates the Munitions List laws or regulations.⁵⁵ U.S. government officials are authorized to investigate possible violations of these export laws both within and outside the United States. With cause, they can search, detain, and seize goods or technology at places within the United States and “at those places outside the United States where the Customs Service, pursuant to agreements or other arrangements with other countries, is authorized to perform enforcement activities.”⁵⁶

49. *Servamus*, July 1983, quoted in *Military Exports*, *supra* note 25, at 7.

50. *Military Exports*, *supra* note 25, at 7.

51. *Strategic Sales*, *supra* note 46, at 7.

52. *Id.* at 7, 15.

53. Anti-Apartheid Act of 1986, *supra* note 1, § 322.

54. *Id.*

55. Violators are subject to a fine for each violation of not more than \$1,000,000 or imprisonment of not more than ten years or both. 22 U.S.C. § 2778(c) (Supp. III 1985), as amended by Act of Aug. 8, 1985, Pub. L. No. 99-83, § 119(a), 99 Stat. 203, 204 (1985). Administrative sanctions can also be imposed. 22 U.S.C. § 2778(e), as amended by Pub. L. No. 99-83, § 119(b), incorporating 50 U.S.C. app. § 2410(c)-(e),(g) (1982), as amended by Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 112, 99 Stat. 120, 147 (1985).

56. 22 U.S.C. § 2778(e), as amended by Pub. L. No. 99-83, incorporating 50 U.S.C. app. § 2411(a) (1982), as amended by Pub. L. No. 99-64, § 113(a)(5), 99 Stat. 120, 148 (1985).

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Despite the stiff penalties and investigatory authority, enforcement of the arms embargo is generally lax.⁵⁷ A Congressional staff study has charged that the Space Research Corporation's extensive and long-term violations of the embargo were made possible by OMC and U.S. Army procedural failings, by the Central Intelligence Agency's negligence or purposeful evasion of U.S. policy, and by "the absence of a coordinated U.S. government enforcement system to detect and prevent such violations."⁵⁸ Even after the violations were discovered and an investigation had begun, no government official or agency took action to limit the *effects* of the violation, with the result that important arms shipments continued to reach South Africa.⁵⁹ The staff study attributes these failures of enforcement to the following:

[C]ollecting information on the embargo's operation was not high on the list of any agency's priorities, procedures for sharing and centrally assessing relevant information did not exist, and most fundamentally, there was no clear delineation of organizational responsibilities for obtaining relevant intelligence, evaluating [it] and acting upon it.⁶⁰

It is revealing to contrast the failure of the U.S. policy of limiting arms exports to South Africa with the success of Operation Exodus, a federal program designed to intercept illegal technology exports to the Soviet Union. As of January 1984, Operation Exodus had resulted in 2,330 seizures of Munitions List items and dual-use technology.⁶¹ Apparently, when the political will exists, the government can effectively control illegal exports. A few illegal exports to South Africa have been inadvertently detected under Operation Exodus,⁶² raising the question of how many more go undetected because of the lack of interest among enforcement officials and the absence of a program aimed specifically at South Africa. As a Customs representative stated, South Africa "is not on the priority list."⁶³

57. See, e.g., Mehlman, Milch & Toumanoff, *supra* note 38, at 594 ("it is unlikely that current enforcement efforts are successful"); Klare, *supra* note 31, *passim* and at 22 ("[M]ainstream Western sources ranging from the British Broadcasting Corporation to the *Washington Post* have confirmed that millions of dollars worth of U.S. arms have reached South African forces via illegal channels. . . . [I]t is reasonable to assume that there has been a systematic breakdown in Washington's export control operations.").

58. *Hearing, supra* note 33, at 54-78.

59. *Id.* at 78-85.

60. *Id.* at 80 (emphasis omitted).

61. Military Exports, *supra* note 25, at 9.

62. *Id.* ("In their zeal, Customs officials have also netted a few illegal shipments to South Africa but these are apparently regarded as an embarrassing, unintentional byproduct.") (citing U.S. Customs Service background material on Operation Exodus).

63. *Quoted in id.* The authors further point out that the Customs Department public affairs staff is not allowed to discuss illegal exports to South Africa. in contrast to the heavy publicity afforded seizures of equipment bound for Eastern Europe. *Id.* at 9-10.

III. Exports Under Commerce Department Control

A. *Commerce Department Export Regulation*

In the Export Administration Act of 1979,⁶⁴ Congress authorized the President to prohibit or curtail U.S. exports "to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations."⁶⁵ This authority was to be administered via export licenses issued by the Commerce Secretary.⁶⁶

The Export Administration Regulations (EAR) implement the Commerce Department restrictions.⁶⁷ They provide that, in general, no export⁶⁸ of any commodity or technical data is permitted unless an authorizing general license has been established or a validated license or other authorization has been granted by the Office of Export Administration (OEA).⁶⁹

Goods and technology subject to Commerce Department EAR licensing are listed on the "control list" (formerly the "commodity control list").⁷⁰ Because one category of the list consists of "[o]ther commodities [not elsewhere specified], and parts and accessories, n.e.s.,"⁷¹ all exports of any kind are covered by the Commerce regulations, except those specifically excluded, such as items on the Munitions List.⁷²

B. *Restrictions on Exports to South Africa*

The EAR prohibit exports or reexports to South Africa and Namibia of "arms, munitions, military equipment and materials, and materials and machinery for use in the manufacture and maintenance of such

64. The Act was reauthorized and amended by the Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985).

65. 50 U.S.C. app. § 2405(a)(1) (1982).

66. *Id.*

67. They appear as 15 C.F.R. pts. 368-99 (1986).

68. Exceptions are exports which are exclusively controlled by other departments, such as items on the Munitions List and commodities subject to the Atomic Energy Act. 15 C.F.R. § 370.10 (1986).

69. 15 C.F.R. § 370.3(a) (1986). The regulations also subject export and reexport authorizations to revision, suspension or revocation by the OEA without notice. *Id.* § 370.3(b).

No application is required for use of a general license, and no document is issued, *id.* § 371.1; however, either a written or an oral report describing the commodity or commodities to be exported must be provided to the customs office. *Id.* § 371.2(a). The primary general license, designated G-DEST, can be used to export any item under Commerce Department export regulation for which the regulations do not require a validated license. *Id.* § 371.3. A validated license issued by, or under the authority of, the OEA authorizes a specific export. *Id.* § 372.2(a).

70. 50 U.S.C. app. § 2403(b) (1982), *as amended* by the Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 104(b)(1), 99 Stat. 120, 122 (1985).

71. 15 C.F.R. § 399.1, Supp. 1 (1986).

72. *Id.* § 370.10.

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equipment.” They also prohibit the export of technical data relating to these commodities.⁷³ The list of items to which this embargo applies⁷⁴ is a sublist of the control list, so that all of the items on it are subject to exclusive Commerce Department control; there is no overlap with the Munitions List.

Other items on the control list—with the exception of computers, nuclear technology, crime control and detection devices, and aircraft and helicopters⁷⁵—are exportable or reexportable to South Africa or Namibia on a general license, provided that the exported commodities or technical data do not reach military or police entities in South Africa or Namibia.⁷⁶ In other words, there is an embargo on the export or reexport to South Africa and Namibia of *any* commodity or technical data “where the exporter or reexporter knows or has reason to know that the commodity will be sold to or used by or for military or police entities in these destinations or used to service equipment owned, controlled or used by or for such military or police entities.”⁷⁷ Exporters and purchasers cannot claim ignorance of the existence of the military/police embargo because all exports to South Africa or Namibia require a destination control statement on the shipping documents stating that any diversion of the exported commodity or data contrary to U.S. law, or to or for use by or for military or police entities, is prohibited.⁷⁸ Medical supplies and anti-hijacking commodities and their correlative data are exempted from the military/police embargo. Applications for validated licenses to export these items are generally to be “considered favorably on a case-by-case basis.”⁷⁹

Probably the most serious loophole in the military/police embargo is that once items exportable to other end users reach South Africa, it is

73. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(1), (3)).

74. 15 C.F.R. § 379, Supp. 2 (1986).

75. See *infra* text accompanying notes 84-107, 116-22 & 131-37.

76. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,364 (1985) (to be codified at 15 C.F.R. §§ 371.2(c)(11), 379.4(e)). Military and police entities to which the embargo applies are listed in the EAR. 15 C.F.R. § 385, Supp. 2 (1986) and 50 Fed. Reg. 47,363, 47,366 (1985).

77. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(2)). The total embargo on exports to military or police is a return to Carter Administration policy; it was mandated by Congress in 1985. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 108(n), 99 Stat. 120, 136 (1985). Under authority granted to him by the Act, President Reagan has ordered the Commerce Department to extend the military/police embargo until July 12, 1987. 51 Fed. Reg. 26,920 (1986).

78. 15 C.F.R. § 386.6(a)(2) (1986).

79. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(7), (10)).

extremely difficult for the United States to ensure that the items do not reach the South African military or police.⁸⁰

A related loophole lies in the provision that exporters bear no responsibility for end-use violations of which they do not know or have reason to know. Thus, "as long as the South African purchaser does not give the U.S. exporter reason to believe that the specific item being provided will be passed on to the South African military or police, there is no penalty to the exporter in the event of such a subsequent transfer."⁸¹

A third problem is the exception for anti-hijacking equipment, much of which "is virtually indistinguishable from other police gear," according to the NARMIC project of the American Friends Service Committee.⁸² This equipment, NARMIC points out, "could just as easily be used by the regime against its political opponents. It seems naive to assume otherwise."⁸³

C. Computers

In response to Congressional and public pressure,⁸⁴ President Reagan in September 1985 issued Executive Order 12,532,⁸⁵ banning all exports of computers, computer software, and goods and technology intended to service computers to, or for use by, the following entities of the South African government: the military, the police, the prison system, the national security agencies, ARMSCOR and its subsidiaries, the weapons research activities of the Council for Scientific and Industrial Research, the administering authorities for the black passbook and similar controls, any apartheid-enforcing agency, and any local or regional government or "homeland" entity which performs any function of any of the entities just described.⁸⁶ The Commerce Secretary was authorized both to issue implementing rules and to create "a system of end use verification" to

80. See *infra* text accompanying notes 91-92 & 101-07.

81. Mehlman, Milch & Toumanoff, *supra* note 38, at 593 (footnote omitted).

82. American Friends Service Committee/NARMIC, The Reagan South African "Computer Ban": An Analysis of Draft Export Regulations from the Commerce Department 5 (Nov. 11, 1985) [hereinafter Analysis of Draft Export Regulations].

83. *Id.* (emphasis omitted).

84. *Id.* at 1.

85. 50 Fed. Reg. 36,861 (1985).

86. 50 Fed. Reg. 36,861, 36,861-62 (1985). The executive order also banned most nuclear exports to South Africa and halted imports of arms, ammunition, and military vehicles produced in South Africa. *Id.* at 36,862. Other provisions of the order prohibited American financial institutions from making loans to the South African government or to entities owned or controlled by that government and stopped the importation of South African kruggerands. *Id.* at 36,861, 36,863.

Executive Order 12,532 was extended by President Reagan for one year on September 4, 1986. N.Y. Times, Sept. 5, 1986, at A5, col. 1. Moreover, a provision of the sanctions legislation adopted by Congress in October 1986 made permanent the measures contained in Execu-

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ensure that no computers exported to South Africa ended up in the service of any of the indicated government entities.⁸⁷ Accordingly, the Commerce Department regulations require a validated license for the export or reexport to government consignees of computers and computer goods and technical data; applications are to be denied if the export "is likely to be used by or for" prohibited government entities, with case-by-case exceptions possible for "humanitarian purposes."⁸⁸

A problem with the list of restricted government entities is that certain agencies are specifically excluded, including the Ministry of Communication and Public Works,⁸⁹ which is responsible for building prisons and overseeing South Africa's telecommunications system.⁹⁰ Moreover, any of the approved agencies "could easily front" for one of the embargoed branches of the South African government in order to obtain for the latter prohibited computer exports.⁹¹ In general, end-use restrictions on exports to the South African government are simply unenforceable: "[i]ntragovernmental transfers can obviously shift goods to the military or police without the consent or knowledge of the exporter."⁹²

The damage that could result if the embargo were to be breached in this manner is illustrated by an event which occurred in November 1983. The U.S. Customs Service intercepted a computer being rerouted to the Soviet Union that had been shipped—with the approval of the U.S. government—to a private company in South Africa. Secretary of Defense Caspar Weinberger acknowledged that the computer was " 'identical to a number of highly classified American systems' that could be used to produce 'faster, more accurate and more destructive weapons.' "⁹³ Despite Executive Order 12,532 and the new, more stringent Commerce Department regulations, the same computer would still be approved to-

tive Order 12,532. Comprehensive Anti-Apartheid Exports Act of 1986, Pub. L. No. 99-440, § 304, 100 Stat. 1086, 1099-1100.

87. 50 Fed. Reg. 36,861, 36,862 (1985). The sanctions law enacted in 1986 permits exports of computer items to end-users other than the proscribed government entities only if an end-use verification system is in effect. Comprehensive Anti-Apartheid Exports Act of 1986, Pub. L. No. 99-440, § 304, 100 Stat. 1086, 1099-1100.

88. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(3), (9)).

89. *Id.* at 47,366.

90. *See* Analysis of Draft Export Regulations, *supra* note 82, at 3.

91. *Id.* Another possible problem with computer exports is that South African corporations that manufacture weapons and weapons components and that supply ARMSCOR are not specifically covered by the regulations. *Id.* at 4. However, the Commerce Department could deny applications for export to these end-users on the ground that the exported items are "likely to be used" for ARMSCOR.

92. Mehlman, Milch & Toumanoff, *supra* note 38, at 593.

93. The Sun (N.Y. Times News Serv.), Nov. 21, 1983; MacNeil/Lehrer News Hour (PBS television broadcast, Dec. 1983), *quoted in* Military Exports, *supra* note 25, at 1.

day for export to private companies or to non-embargoed agencies in South Africa unless the Department found that the computer was "likely to be used" by or for an embargoed government entity.

Yet another loophole in the regulations is that "insubstantial"—generally, content that is 20% or less by value—U.S.-origin parts or peripherals in foreign-origin computer systems are to be approved on a case-by-case basis.⁹⁴ With computers, "the most critical and sensitive elements frequently make up less than 20 per cent of the final product."⁹⁵

Applications to export computers, goods and technical data to service computers, and software to any end-user in South Africa or Namibia must be accompanied by a signed assurance from the ultimate consignee that the export will not be diverted to a prohibited agency.⁹⁶ A loophole in the EAR is that each license application that involves contracts entered into prior to Executive Order 12,532 is to be considered on a case-by-case basis in accordance with the regulations and policies that were then in effect.⁹⁷

The summary that precedes the new regulations contains an announcement that the Office of Export Administration will "institute and vigorously administer an enhanced system of end use verification, which will involve periodic verification by U.S. Government or exporter personnel of location and use of certain computers."⁹⁸ It remains to be seen how vigorous—and how successful—this verification system will be.

D. *Aircraft*

Category VIII of the Munitions List covers those aircraft "which are specifically designed, modified, or equipped for military purposes."⁹⁹

94. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(9)).

95. G. McDougall, Recent Changes in the United States Arms Embargo against South Africa 4 (June 14, 1982) (statement before the United Nations Special Committee against Apartheid) (copy on file with the *Yale Journal of International Law*).

96. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,364-65 (1985) (to be codified at 15 C.F.R. §§ 379.4(e)(2), 385.4(a)(9)(iii)).

97. *Id.* at 47,365-66 (to be codified at 15 C.F.R. § 385.4(a)(12)). This regulation is a result of Congress's determination that the President may not interfere with exports or reexports mandated by existing contracts unless he certifies that "a serious and direct threat to the strategic interests of the United States" can be answered only by overriding existing contracts with the new export policy. Export Administration Amendments Act of 1985, Pub. L. No. 99-64, § 108, 99 Stat. 120, 136 (1985).

98. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363 (1985).

99. 22 C.F.R. § 121.1 (1986). This category is subject to a proviso included in the Export Administration Act which explicitly bars from Munitions List controls, and subjects exclusively to Commerce Department controls, "any product (1) which is standard equipment . . . in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country." 50 U.S.C. app. § 2416(c) (1982). The "controlled" countries are generally those of the Soviet bloc. 22 U.S.C. § 2370(f) (1982).

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Such aircraft are thus subject to the ITAR. The Commerce regulations require a validated license for export to all consignees of non-Munitions List aircraft and helicopters; applications for such exports are generally to be considered favorably on a case-by-case basis if "adequate written assurances" against military, paramilitary, or police use are provided.¹⁰⁰ There is a weakness here that pervades the regulations: it is virtually impossible to control how an export is used once it reaches South Africa. According to one report, "Pretoria's military is already using civilian versions of the Cessna U-17 Skywagon [supplied by United States companies] . . . in counter guerrilla operations."¹⁰¹ Another authority states that Lockheed C-130's and L-100's, sold by the U.S. as "civilian" planes, are used to move South African Army troops, equipment, and supplies.¹⁰² In addition, it has been reported that two U.S.-made Helio Courier airplanes were provided in March 1982 to a puppet army in the homeland Bophuthatswana by a South African civilian source, and that security forces in Ciskei use U.S. aircraft.¹⁰³

Another problem is that, because of South Africa's extensive civilian defense forces and reserves, even civilian aircraft are at the service of the military. Citizens in the various branches of these forces are subject to mobilization at the call of the South African President "in Time of War or in Connection with the Combating of Terrorism or in Connection with an Armed Conflict outside the Republic or in Connection with Internal Disorder or Other Emergency."¹⁰⁴ Aircraft in the hands of these citizens can be of immense use to the South African Air Force. The Air Commandos, for example, "consist of at least 12 volunteer squadrons of civilian owner-pilots who are trained to provide light support. Most of the aircraft flown in these units are believed to be of American origin."¹⁰⁵

Finally, the South African government retains broad powers that allow it, "in defence of the Republic or for the prevention or suppression of

100. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(8)).

101. Conrad, *U.S. Data Processing Corporations Are Supplying South Africa with the Brains of its Military and Police Services*, MULTINATIONAL MONITOR, April 1982, at 14.

102. International Defence & Aid Fund, Fact Paper on South Africa No. 8, *The Apartheid War Machine: The Strength and Deployment of the South African Armed Forces* (April 1980), reprinted in G. Butcher, Prepared Statement, Testimony before the House Foreign Affairs Subcommittees on Africa and International Economic Policy and Trade, app. C at 9-10 (Feb. 9, 1982) (copy on file with the *Yale Journal of International Law*); see also Klare, *supra* note 31, at 20-21.

103. Analysis of Draft Export Regulations, *supra* note 82, at 6; see also Military Exports, *supra* note 25, at 5.

104. Statutes of the Republic of South Africa, Defence Act No. 44 of 1957, ch. X, reprinted in G. Butcher, *supra* note 102, app. C at 5 (italics omitted).

105. International Defence & Aid Fund, *supra* note 102, reprinted in G. Butcher, *supra* note 102, app. C at 10.

terrorism or for the prevention or suppression of internal disorder in the Republic," to assume control over, or requisition use of, any civilian transport system or air service.¹⁰⁶ More generally, South African law permits the government to "expropriate privately owned goods and services at any time it deems necessary for the security of the state."¹⁰⁷

E. *Dual-Use Equipment*

Commerce regulations take a permissive stance towards the export to civilians, and to government agencies other than the military or police, of dual-use equipment—i.e., goods with both military and civilian application. Apart from computers and aircraft, these goods are principally electronics equipment.¹⁰⁸ Dual-use electronics equipment and related technical data are easily exportable; they are subject only to the same restriction that applies, for example, to the export of toothpaste: the exporter must not know or have reason to know that the commodity or technical data will come into the possession of the military or police.¹⁰⁹ As with computers and aircraft,¹¹⁰ it is very difficult to enforce the military/police embargo once dual-use items have been exported to civilians or government agencies in South Africa.

F. *Components and Spare Parts*

The export of components and spare parts of items listed on the Munitions List is restricted by the ITAR.¹¹¹ The EAR provide that non-Munitions List components and parts exported from the United States and used to manufacture or produce a foreign-made end product are subject to U.S. export control laws.¹¹² Generally, that end product cannot be sent to a new destination without prior written OEA approval whenever either the U.S.-origin part or component or the end product could

106. Statutes of the Republic of South Africa, Defence Act No. 44 of 1957, § 102, reprinted in G. Butcher, *supra* note 102, app. F at 12; see also discussion of the unenforceability of end-use restrictions, *supra* text accompanying notes 91-92.

107. Mehlman, Milch & Toumanoff, *supra* note 38, at 593.

108. See *supra* text accompanying notes 28-31 for discussion of the importance to South Africa of electronics imports. See also *Controls on Exports to South Africa: Hearings before the Subcomms. on International Economic Policy and Trade and on Africa of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 64 (1982) (testimony of Thomas Conrad, American Friends Service Committee/NARMIC) ("In the long run, exports of [high-tech equipment] are probably more significant and pernicious than trafficking in actual arms, because they contribute to South Africa's entire infrastructure of repression.").

109. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(2), (3)(ii)).

110. See *supra* text accompanying notes 91-92 & 101-07.

111. See 22 C.F.R. § 121.1 (1986).

112. 15 C.F.R. § 376.12 (1986).

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not have been exported directly from the United States under a general license.¹¹³ Also, parts and components exported from the United States cannot be used in foreign-made end products “where it is known or there is reason to know” that the end product will be sold to or used by military or police entities in South Africa or Namibia.¹¹⁴

Export restrictions on components and spare parts are particularly difficult to enforce. One report charges that “[r]ather than outright sales of large weapons systems, exports by U.S. corporations consist to a great extent of the building blocks of modern weaponry—components, unfinished subassemblies and other technology that can easily be submerged in large wholesale transactions.”¹¹⁵

G. *Crime Control and Detection Commodities*

Congress requires a validated export license approved by the Secretaries of Commerce and State for the export of crime control and detection instruments and equipment.¹¹⁶ Commerce’s regulations provide that such applications

generally will be considered favorably on a case-by-case basis unless there is evidence that the government of the importing country may have violated internationally recognized human rights and that the judicious use of export controls would be helpful in deterring the development of a consistent pattern of such violations or in distancing the United States from such violations.¹¹⁷

In relation to South Africa and Namibia, the regulations state only that a validated license is required for the export of crime control and detection commodities.¹¹⁸ The Commerce Department thus can permit sales of these commodities to South Africa’s growing private police industry.¹¹⁹ One such sale occurred in 1982 when through an “administrative error” the Commerce Department licensed the sale of 2500 U.S.-made shock batons to a South African holding company.¹²⁰ The exporters claimed that the South African company was planning to resell the devices to private security firms.¹²¹ In a letter to then-Commerce Secretary Mal-

113. *See id.*

114. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(4)).

115. Military Exports, *supra* note 25, at 2.

116. 50 U.S.C. app. § 2405(j) (1982), *as amended by* Pub. L. No. 99-64, § 108(k), 99 Stat. 120, 135-36 (1985).

117. 15 C.F.R. § 376.14 (1986).

118. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(5)).

119. Analysis of Draft Export Regulations, *supra* note 82, at 5.

120. *Congress to Probe Shock Baton Sale*, AFR. NEWS, Oct. 18, 1982, at 5-7.

121. *Id.* at 6.

colm Baldrige, six members of the Senate Foreign Relations Committee asserted that the licensing error "calls into questions [sic] the efficiency of current processing arrangements for export license applications."¹²²

H. *Foreign Subsidiaries of U.S. Corporations*

Both State and Commerce Department regulations deal exclusively with U.S.-origin exports and reexports. Commodities manufactured by foreign subsidiaries (whether in South Africa or in other countries) of U.S. companies, but not under a U.S. license or containing components or technology of U.S. origin, are not subject to the controls of either department.¹²³ However, the Administration has the power to place trade restrictions on foreign subsidiaries of U.S. corporations. The Export Administration Act authorizes the President to control any export "by any person subject to the jurisdiction of the United States,"¹²⁴ a phrase that can include foreign subsidiaries of U.S. corporations.¹²⁵ Moreover, the Act applies to any "United States person," which is defined to include "any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President."¹²⁶ Thus, implementation of arms trade restrictions on subsidiaries depends upon an explicit action of the Executive.

I. *Enforcement of Commerce Department Export Restrictions*

The Export Administration Act provides stiff penalties for violation of its provisions.¹²⁷ U.S. government officials are authorized to investigate,

122. *Id.* at 7.

123. "Subsidiaries of American firms located in South Africa and other countries may provide the most substantial amount of U.S. support for the policy of apartheid." Mehlman, Milch & Toumanoff, *supra* note 38, at 600. The authors refer to this issue as the "potentially most important failure of existing export restrictions." *Id.* at 596.

124. 50 U.S.C. app. § 2405(a)(1) (1982).

125. *See* War or National Emergency—Presidential Powers, Pub. L. No. 95-223, Title I, 91 Stat. 1625 (1977); H.R. REP. NO. 459, 95th Cong., 1st Sess. 17 (1977) (indicating that Congress used the quoted phrase in the Export Administration Act as amended in order to "provide authority for control over exports of non-U.S.-origin goods and technology by foreign subsidiaries of U.S. concerns"); *see also* M. Mehlman & T. Milch, United States Restrictions on Exports to South Africa—A Reevaluation 50-55 (Apr. 3, 1979) (unpublished memorandum on file with the *Yale Journal of International Law*).

126. 50 U.S.C. app. § 2415 (1982); *see also* Mehlman, Milch & Toumanoff, *supra* note 38, at 597 (arguing that the U.N. Participation Act of 1945, as amended, 22 U.S.C. § 287c(a) (1982), which confers on the President broad authority to implement Security Council mandates, affords another statutory basis for the executive branch to impose trade restrictions on foreign subsidiaries of U.S. companies).

127. The Act provides that anyone who knowingly violates, or conspires or attempts to violate, any provision of the Act or any regulation, order, or license issued under it is punishable for each violation by a fine of not more than five times the value of the exports involved or

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both within and outside the United States, possible violations of the EAR, and, with cause, to search, detain, and seize goods or technology at places within this country and “at those places outside the United States where the Customs Service, pursuant to agreements or other arrangements with other countries, is authorized to perform enforcement activities.”¹²⁸

As with defense exports, enforcement of Commerce Department export restrictions is not sufficiently vigilant. The Congressional Research Service affirmed in November 1985 that “clandestine arms deliveries reportedly continue. The primary vehicle is the production of U.S.-designed aircraft, aircraft engines, weapons, and computer systems by corporations based in third countries.”¹²⁹ A Commerce Department official stated in 1977 Congressional testimony that the government relies on the U.S. Embassy in South Africa to monitor compliance with the embargo, but that “enforcement is a difficult matter in this area.”¹³⁰ It remains to be seen whether the new, more stringent export regulations prompted by Executive Order 12,532 will be matched by more effective enforcement.

IV. Exports of Nuclear Equipment and Materials

A. Nuclear Export Controls

Congress has directed the Nuclear Regulatory Commission (NRC) to prepare a list of components, items, and substances that “are especially relevant from the standpoint of export control because of their signifi-

\$50,000, whichever is greater, or by imprisonment for not more than five years, or both. Anyone who willfully violates, or conspires or attempts to violate, any provision of the Act or any regulation, order, or license issued under it, with knowledge that the exports involved will be used for the benefit of any controlled country or any country to which exports are restricted for national security or foreign policy purposes, is subject to a fine of not more than five times the value of the exports involved or \$1,000,000, whichever is greater. In the case of an individual, the penalty is a fine of not more than \$250,000 or imprisonment for not more than ten years or both. 50 U.S.C. app. § 2410 (1982), *as amended by* Pub. L. No. 99-64, § 112, 99 Stat. 120, 146 (1985). The Commerce Department can also impose administrative penalties, including fines and denials of export privileges. *Id.*; 15 C.F.R. § 387.1(b) (1986).

128. 50 U.S.C. app. § 2411(a) (1982), *as amended by* Pub. L. No. 99-64, 99 Stat. 120, 148-49 (1985).

129. B. BRANAMAN, *supra* note 32, at 8; *see also* Mehlman, Milch & Toumanoff, *supra* note 38, at 593-96, 600-01 (noting that “unlawful diversions of U.S. commodities and technology through third countries and end-use diversions after exports reach South Africa appear to constitute a major means by which the current embargo may be circumvented”).

130. *United States-South Africa Relations: Arms Embargo Implementation: Hearings before the Subcomm. on Africa of the House Comm. on International Relations*, 95th Cong., 1st Sess. 58-59 (1977) (testimony of Stanley J. Marcuss, Deputy Assistant Secretary of Commerce for Domestic Commerce); *see also supra* text accompanying notes 91-92 & 101-07 for discussion of the unenforceability of end-use restrictions once exports reach South Africa.

cance for nuclear explosive purposes" and to regulate exports of these commodities through licensing.¹³¹ The President is directed to publish procedures regarding Commerce Department controls over all other export items which could, if used for purposes other than those for which the export is intended, be of significance for nuclear explosive purposes.¹³²

The NRC regulations list nuclear equipment and material subject to export and import licensing.¹³³ South Africa is a "restricted destination,"¹³⁴ meaning that some regulated commodities can be shipped to it on a general license while others require a specific license. Review of license applications is designed to ensure that exports will not be used for nuclear explosive devices, that International Atomic Energy Agency (IAEA) safeguards will be applied, that adequate physical security measures will be maintained, and that a proposed export "is not inimical to the common defense and security" as determined by the State Department.¹³⁵

The Commerce Department has compiled the Nuclear Referral List, a sublist of the control list consisting of those commodities that are of potential significance for nuclear explosive purposes. Validated licenses and special procedures are required for the export of these items.¹³⁶ Furthermore, the regulations require a validated license for the export of any commodity that the exporter knows or has reason to know will be used for a nuclear weapons purpose.¹³⁷ In addition, nuclear weapons design and test equipment constitute category XVI of the Munitions List¹³⁸ and thus are subject to the Department of State regulations.

B. *Controls on Nuclear Exports to South Africa*

The Comprehensive Anti-Apartheid Act of 1986 includes provisions dealing specifically with nuclear exports to South Africa.¹³⁹ Exports of production or utilization facilities, source or special nuclear material, sensitive nuclear technology, and nuclear materials potentially useful for

131. 42 U.S.C. § 2139 (1982).

132. *Id.*

133. 10 C.F.R. § 110.8-9 (1986).

134. *Id.* § 110.29.

135. *Id.* § 110.42. The President must terminate nuclear exports to a non-nuclear weapon state (defined as a state which had not exploded a nuclear device as of Jan. 1, 1967) under certain circumstances, such as if he finds that it has detonated a nuclear explosive device after March 10, 1978. *Id.* §§ 110.2, 110.45.

136. 15 C.F.R. §§ 378.2(a), § 378 Supp. 1 (1986).

137. *Id.* § 399.1(f)(4)(i).

138. 22 C.F.R. § 121.1 (1986).

139. Comprehensive Anti-Apartheid Act of 1986. Pub. L. No. 99-440, 100 Stat. 1086 (1986).

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explosive purposes are prohibited unless the U.S. government determines that South Africa has become a party to the Treaty on the Non-Proliferation of Nuclear Weapons or otherwise maintains IAEA safeguards.¹⁴⁰ The President can waive the export prohibitions if he determines that invoking them would seriously hinder U.S. non-proliferation objectives or jeopardize U.S. defense and security, and if he reports this to Congress.¹⁴¹ In addition to these statutory provisions, current Commerce regulations require exporters of computers to South Africa or Namibia to certify that the goods will not be sold to or used by entities involved in nuclear activities.¹⁴²

V. Recommendations

This article has demonstrated that the piecemeal approach of the executive branch toward implementing the arms embargo against South Africa contains serious omissions and loopholes. This section discusses a number of steps that could be taken by the government to strengthen its embargo policy. A total trade embargo would be the most effective step. It would eliminate U.S. support for the South African economy, unequivocally voice American condemnation of apartheid, and be easier to enforce than the present system (because there would be no exceptions or exercises of discretion). A total trade embargo would require Congressional action. Although the House of Representatives recently passed such an expansive measure,¹⁴³ House leaders subsequently accepted in its stead Senate legislation imposing more limited sanctions.¹⁴⁴

Even if a total trade embargo is not imposed, the United States should increase the effectiveness of the current arms embargo. First, the embargo should be broadened so that no Munitions List items or anti-hijacking commodities are exported to South Africa, dual-use items are more closely restricted, foreign subsidiaries of U.S. corporations are regulated, and training of South African military and police is ceased. Second, enforcement of the embargo should be improved, both in the United States and abroad. Finally, the cooperation of our allies should be

140. *Id.* § 307(a). The Act contains an exception to the export prohibitions for assistance designed to help South Africa reduce proliferation risks. *Id.* § 307(b).

141. *Id.* § 307(c).

142. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(9)(iii)).

143. The text of the bill, proposed as an amendment in the nature of a substitute to H.R. 4868 by Rep. Dellums, is found at H.R. 4868, 99th Cong., 2d Sess., 132 CONG. REC. 3908-09 (1986).

144. *See supra* note 1; N. Y. Times, Sept. 13, 1986, at 1, col. 5. Denmark is alone among the major Western nations in having proclaimed a total trade boycott of South Africa. N.Y. Times, Sept. 14, 1986, § 1, at 1, col. 1.

sought toward the goal of preventing arms and related goods from reaching South Africa from any part of the world. Each of these suggestions is addressed below.

A. *Broadening the Existing Arms Embargo*

1. Export of Munitions List and Anti-Hijacking Commodities

The Administration should adhere to its own stated policy and cease licensing ostensibly "civilian" Munitions List items.¹⁴⁵ Commodities such as image intensifiers are on the Munitions List because of their potential for military application,¹⁴⁶ and should not be exported to South Africa under any circumstances. In addition, commodities "to be used in efforts to prevent acts of unlawful interference with international civil aviation"¹⁴⁷ should not be exportable to South Africa because many anti-hijacking commodities can also be used by police against political opponents.¹⁴⁸ The current regulations provide for a presumption of exportability for such items, even when the acknowledged end-user is a military or police entity.¹⁴⁹

2. Export of Dual-Use Equipment

Because their transfer to apartheid-enforcing entities cannot effectively be prevented by U.S. authorities,¹⁵⁰ exports of dual-use items such as computers, electronics, aircraft, and crime control equipment should be barred to any South African end-user. Halting the sale of aircraft to South Africa, for example, would be an extremely effective means of strengthening the embargo, particularly in light of a 1985 report that "in the view of many independent analysts, . . . [South Africa's manufacturing capability] has lagged behind in such key fields as aircraft, tanks and other armored vehicles."¹⁵¹ Alternatively, such exports should be prohibited to any government or state organization so that intragovernmental transfers would be impossible; here, though, the problem of potential military expropriation of dual-use items from civilian users would remain.

145. See *supra* text accompanying notes 23-27.

146. See *supra* text accompanying notes 28-31.

147. Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(10)).

148. See *supra* text accompanying notes 82-83.

149. See Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363, 47,365 (1985) (to be codified at 15 C.F.R. § 385.4(a)(2), (3)(ii), (4), (10)).

150. See *supra* text accompanying notes 91-92 & 101-07.

151. Frankel, *U.N. Arms Ban Proves Costly to South Africans*, Wash. Post, Feb. 24, 1985, at A26, col. 1.

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Another way to restrict dual-use exports would be for the Commerce Department to establish a presumption against licensing any export to South Africa, rebuttable only if an exporter could show that a particular item lacked military or police utility.¹⁵² Alternatively, Commerce could publish both its internal licensing standards and non-confidential information about pending license applications; before license applications are approved, public comment could be solicited, at least in contexts not involving national security considerations. Such a system would remove the shroud of secrecy currently surrounding export license applications and would permit exports inconsistent with the spirit of the embargo to be publicly challenged.¹⁵³

Even if these broad solutions to the dual-use problem are rejected, other narrower improvements should be adopted. For example, export of dual-use electronics commodities should at least be barred to the same “apartheid-enforcing entities” to which computer sales are prohibited.¹⁵⁴ Also, “insubstantial” U.S.-origin parts or peripherals in foreign-origin computer systems should be denied export licenses in order to prevent critical U.S.-made components from reaching South Africa.¹⁵⁵

3. Foreign Subsidiaries of U.S. Corporations

According to a recent report, “[m]ultinational corporations have globalized their production to such an extent that it is easy to manipulate supply sources to avoid the scrutiny and control of any one national government.”¹⁵⁶ Presently, U.S. multinationals can legally evade the embargo export restrictions by producing abroad items for export to South Africa that could not legally be exported from the United States. Therefore, all restrictions that apply to exports of U.S.-origin commodities and technical data should also apply to exports by foreign subsidiaries of U.S. corporations outside of South Africa and to sales by subsidiaries located in South Africa.¹⁵⁷

152. See Mehlman, Milch & Toumanoff, *supra* note 38, at 598.

153. *Id.* at 598-600.

154. See *supra* text accompanying notes 25-31 & 108-10.

155. See *supra* text accompanying notes 94-95.

156. NARMIC/AMERICAN FRIENDS SERVICE COMMITTEE, AUTOMATING APARTHEID—U.S. COMPUTER EXPORTS TO SOUTH AFRICA AND THE ARMS EMBARGO 63 (1982).

157. See *supra* notes 124-26 and accompanying text (arguing that the Export Administration Act as amended authorizes the President to exercise regulatory authority over exports by foreign subsidiaries of U.S. corporations); see also Mehlman, Milch & Toumanoff, *supra* note 38, at 600 & n.86 (citing *Fontaine v. SEC*, 259 F. Supp. 880 (D.P.R. 1966) to support the proposition that foreign subsidiaries which violate U.S. export restrictions “could arguably be barred from further U.S. business transactions”).

4. Contacts with South African Military and Police

The South African military and police should be ostracized from the world community. To this end, NATO intelligence should not be shared with South Africa, training of South Africans by federal drug enforcement and Coast Guard personnel should cease, and interpolice contacts at all levels should be discouraged.¹⁵⁸

B. *Improving Enforcement of the Embargo*

The arms embargo against South Africa must become a priority of the U.S. government. If the Administration monitored embargo compliance with the same vigor and vigilance with which its Operation Exodus has policed export restrictions applicable to the Soviet Union,¹⁵⁹ no doubt more violations would be uncovered and still others deterred.

An effective way to improve enforcement of the arms embargo would be to replace the current ad hoc enforcement situation with an organized system supervised by one lead office.¹⁶⁰ This office would have the specific responsibility of enforcing the arms embargo and would coordinate the activity of relevant government officials so that errors such as those which were made in the Space Research case¹⁶¹ would not be repeated. Regardless of who is responsible for policing the embargo, whether a new office or existing institutions, there should be increased intelligence gathering on illegal arms exports, better intragovernmental communications procedures, and more trained staff to monitor embargo compliance.¹⁶² If the exportation of dual-use equipment to civilian and some government end-users continues, end-use monitoring must be vastly improved. The Customs Department and U.S. embassies in key countries should be provided with increased resources, personnel, and training, in order more effectively to halt smuggling and monitor end-use compliance.

Another way to improve enforcement of the embargo is to impose affirmative reporting requirements on U.S. companies exporting to South Africa. These companies would be required to monitor the end-use of their exports once the items reach South Africa and would face U.S.-imposed sanctions for end-use violations.¹⁶³

158. See *supra* text accompanying notes 43-54.

159. See *supra* text accompanying notes 61-63.

160. See *Hearing, supra* note 33, at 45.

161. See *supra* text accompanying notes 33-34 & 57-60.

162. See *Hearing, supra* note 33, at 46.

163. See Mehlman, Milch & Toumanoff, *supra* note 38, at 601.

Arms Embargo Against South Africa

C. *International Cooperation*

The United States must convince its allies that the arms embargo should be vigorously implemented and enforced. South Africa will be neither morally ostracized nor militarily hampered if other governments allow it to receive arms and related material in violation of the United Nations embargo.

The current international climate seems conducive to achieving the goal of isolating South Africa through an effective arms embargo. The European Community and several members of the Commonwealth of Nations adopted sanctions against South Africa in 1986.¹⁶⁴ In the United States, the Reagan Administration has been harshly criticized for not abandoning its policy of constructive engagement.¹⁶⁵ A display of initiative by the United States in coordinating an international effort to establish an effective arms embargo would signal our commitment to justice and enhance the opportunity for peaceful change in South Africa.

164. The European Community banned imports of iron, steel, and gold coins from South Africa and prohibited new investment there. *N.Y. Times*, Sept. 21, 1986, § 4, at 1, col. 4. The likely effect of the European sanctions, however, was "severely limited" by West Germany's block of a ban on coal imports. *Id.* Japan has joined the Community in prohibiting imports of iron and steel from South Africa. *Id.*

Six leaders of the Commonwealth of Nations have agreed to adopt certain measures "and commend them to the rest of the Commonwealth and the wider international community for urgent adoption and implementation." *Excerpts From the London Communique*, *N.Y. Times*, Aug. 6, 1986, at A10, col. 2. Major features of the sanctions include: a ban on the import of iron, steel, uranium, coal, and agricultural products from South Africa; a ban on new investment in, promotion of tourism to, and air links with South Africa; the termination of all government assistance to, investment in, and trade with South Africa, and the withdrawal of most consular facilities there; and a ban on all new bank loans to South Africa. *Id.* The British government did not subscribe to these measures, agreeing only to voluntary bans on new investment in, and the promotion of tourism to, South Africa, and to the European Community sanctions described above. *Id.*

165. Congress's official response was the sanctions bill enacted in October 1986. *See supra* note 1.