UNITED STATES HUMAN RIGHTS POLICY: EFFECT ON EXPORTS

I. INTRODUCTION

Beginning with his first statements on foreign affairs, and continuing with his public addresses during the first years of his administration, President Jimmy Carter has sought to identify United States foreign policy with his campaign for human rights. Secretary of State Cyrus Vance, in a speech on human rights and United States foreign policy, said that it is the resolve of the Carter Administration to make the advancement of human rights "a central part of our foreign policy." At the Commemoration of the 30th Anniversary of the Universal Declaration of Human Rights, Carter made what is perhaps his strongest statement on the subject:

As long as I am President, the Government of the United States will continue throughout the world to enhance human rights. No force on earth can separate us from that commitment.

I have sought to rekindle the beacon of human rights in American foreign policy. Over the last two years we have tried to express these human concerns as our diplomats practice their craft and as our Nation fulfills its international obligations.

Human rights are not peripheral to the foreign policy of the United States. Our human rights policy is not a decoration. It is not something we have adopted to polish up our image abroad or

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1 For a list of President Carter's human rights statements, see Weissbrodt, Human Rights Legislation and United States Foreign Policy, 7 GA. J. INT'L & COMP. L. 231 n. 2 (1977).
2 Id. at 232 n. 3.
3 There are two strands to the theme of human rights, corresponding generally to the principles of the International Covenant of Civil and Political Rights, opened for signature Dec. 16, 1966, G.A. Res. 2200, U.S. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967), entered into force Mar. 23, 1976, on the one hand, and the International Convention on Economic, Social and Cultural Rights, id., on the other hand. Most of the discussion of human rights by the government and the media has focussed on the former set of human rights. This reflects perhaps our Western democratic bias that while some nations cannot yet afford food, clothing, shelter, health care, education, jobs and the like for all its citizens, no country is so poor that it cannot provide for political and civil rights. For an area of U.S. human rights policy where economic human rights are considered see II, B., 3 and III, A., 2 of this Note, infra.
to put a fresh coat of moral paint on the discredited policies of
the past.

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Our pursuit of human rights is part of a broad effort to use our
great power and our tremendous influence in the service of
creating a better world. . . .

Attention to the human rights issue extends beyond executive
branch policy statements. Since 1974, there has been an increase
in congressional interest and legislation as well as the develop-
ment within the State Department of a government agency to
carry out human rights policy.

Despite the sincere intentions of those committed to the ad-
vancement of human rights, controversy has arisen over the
implementation of policy. Private industry has opposed the en-
facement of human rights policy when such policy has acted as an
impediment to U.S. trade and exports. This conflict has been
reflected in inter-governmental debates over the sometimes con-
flicting objectives of human rights policy and national export
policy. Viewed in a broad sense, this conflict is obvious. When
President Carter unveiled his national export policy (to which the
acronyms "NEXPO" and "NEP" have been attached), he em-
phasized the importance to the nation's economic strength that
"both the private sector and the Federal government place a
higher priority on exports." He voiced the need to reduce
government-imposed barriers which unnecessarily inhibit
American firms from selling abroad. Speaking specifically of ex-
port controls used for foreign policy purposes, Carter urged cau-
tion:

I am directing the Department of Commerce, State, Defense,
and Agriculture to take export consequences fully into account
when considering the use of export controls for foreign policy

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1 J. Carter, The White House Commemoration of the 30th Anniversary of the Universal
Declaration of Human Rights, Dec. 6, 1978. Carter also announced the goals and ac-
ccomplishments of his human rights policy in both his 1978 and 1979 State of the Union Ad-
dress.

2 See, e.g., Export Policy: Hearings Before the Subcomm. on International Finance of
the Senate Comm. on Banking Housing and Urban Affairs, Part 4 - Export-Import Bank
Authorization and Related Issues, 96th Cong., 2d Sess. 297, 303 (1978) (statement of the
Machinery and Allied Products Institute).

3 President Carter, Statement on National Export Policy, (September 26, 1978) reprinted
in 225 INT'L TRADE REP. (BNA) (U.S. Export Weekly) AA-1 (Sept. 26, 1978) [hereinafter
cited as Export Policy Statement].

4 Id. at AA-3.
purposes. Weight will be given to whether the goods in question are also available from countries other than the United States.9

In the first major section of this Note, human rights policy and statutory provisions will be examined. Next, the implementation of these policies and laws, as they affect United States exports, will be discussed. The final section contains information on the effect of these provisions on trade, and recommendations for methods of advancing both policies—human rights and export promotion—while minimizing conflicts.

II. POLICY GOALS AND LEGISLATION

In 1973, the House Foreign Affairs Subcommittee on International Organizations opened hearings on human rights conditions in 18 countries.10 As one American human rights expert has pointed out, "these hearings chaired by Representative Donald Fraser of Minnesota and the resulting Subcommittee reports have heralded a new era in United States foreign policy in regard to human rights."11 The hearings were inspired by what Congress believed was an unwillingness on the part of the State Department to seriously consider human rights issues in its dealings with foreign countries.12 The Subcommittee concluded that the United States had not been giving adequate consideration to human rights violations in formulating its foreign policy, and made 29 recommendations to improve the situation.13 These recommendations led to the initial adoption of human rights provisions in foreign policy legislation in 1973. Subsequently, the early legislation has been amended and, with the encouragement of the Carter Administration, generally expanded in scope and force.

9 Id.


11 Weissbrodt, supra note 1, at 239.

12 For a concise discussion of the historical basis for the current United States concern for global human rights and the erosion of its concern prior to 1973, see Weissbrodt, supra note 1, at 232-40. The author suggests that traditionally the United States has supported the right of self government and the right to freedom of religion. During the Cold War years, government protests against human rights violations became more selective, being directed generally against communist powers which overthrew non-communist governments. When Cold War policy was abandoned by the Nixon Administration in favor of a policy of detente, Secretary of State Kissinger reduced the level of criticism for human rights violations even in communist countries.

13 FRASER SUBCOMMITTEE REPORT, supra note 10.
Present human rights sanctions which relate to foreign policy can be categorized as those which relate to appropriations, those which affect trade financing, those concerned with the licensing of export transactions, and those directed specifically towards certain notorious human rights violators. Human rights provisions tied to appropriations bills have affected the implementation of foreign security assistance acts and foreign economic aid acts. Financing is affected by human rights provisions added to the Export-Import Bank Act of 1945, the Jackson-Vanik Amendment to the Trade Acts of 1974, statutes regulating the activity of United States representatives at International Financial Institutions (IFIs), and laws regulating the Overseas Private Investment Corporation (OPIC). Human rights considerations enter the realm of export licensing through general foreign policy provisions in the Export Administration Act of 1969, as amended (EAA) licensing provisions in security assistance acts and amendments to and regulations under the EAA which prohibit the licensing of specific goods to specific nations. Other restrictions imposed on nations whose governments flagrantly disregard human rights norms are a hodgepodge. In order to evaluate the

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22 See note 20, supra.
impact that enforcement of this complicated body of legislation has had on United States exports, it is necessary to begin with a review of the human rights provisions.

A. Appropriations

The most detailed and perhaps most far-reaching human rights provision is found in § 502(B) of the Foreign Assistance Act of 1961, as amended (FAA of 1961).\textsuperscript{24} § 502(B)(a)(1) places the human rights issue squarely in the realm of foreign policy making:

The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

It is important to note that this is a broad mandate which is not limited to the "security" assistance mentioned in other subsections of 502(B).


Initially Congress passed § 32 of the Foreign Assistance Act of 1973, a broad provision which stated that "it is the sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes," 89 Stat. 714 (1973). Weissbrodt suggests that Congress could find no evidence that § 32 changed the State Department's policies in regard to a single country, or that information provided by diplomats in countries receiving aid was ever used by the Department of State in its policy deliberations. See generally Weissbrodt, supra note 1, at 241.


(a)(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

(3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States through such programs with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.
1. **Security Assistance**

Section 502(B)(a)(2) declares that it is the policy of the United States that:

except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

Section 502(B)(d)(1) defines "gross violations" as including "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denial of the right to life, liberty, or the security of person." A working definition of "consistent pattern" of "gross violations" which can be mechanically enforced, has not yet been formulated. (See discussion in Section III, infra.) Section 502(B)(a)(2) is specifically limited to "security assistance" which includes military assistance, sales of defense articles, extensions of credits, military education and training, and licensing for the export of defense-related goods and services.

In section 502(B)(3):

the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States through such programs with governments which deny to their people internationally recognized human rights . . . .

The human rights standard in subsection (3) is less specific than in subsection (2). In addition, the extent of the denial of "internationally recognized human rights" which will force the President to effect an assistance program change is left unclear. Nevertheless the first three subsections of 502(B) provide a strong mandate to include human rights considerations in the formulation of foreign policy.

Two important reporting requirements are included in 502(B). An annual report on the human rights records of recipient countries (which takes into account the findings of appropriate international organizations such as the International Committee of the Red Cross) must be organized by the Coordinator for Human

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* 22 U.S.C. § 2304 (d) (2) (A) (1979 Supp.).
* 22 U.S.C. § 2304 (a) (3) (1979 Supp.).
Rights and Humanitarian Affairs and submitted by the Secretary of State to Congress. A separate report must be submitted on any country within 30 days of request by either the House or Senate. If the Secretary of State fails to comply within this period of time, Congress may cut off aid to the country until the report is delivered. The report must include:

(A) All the available information about observance of and respect for human rights and fundamental freedom in the country, and a detailed description of practices by the recipient government with respect thereto;
(B) the steps the United States has taken to-
(i) promote respect for an observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and
(ii) publicly or privately call attention to and disassociate the United States and any security assistance provided for such country from, such practices.

The final subsection requires the Secretary of State to state whether in his opinion extraordinary circumstances exist which necessitate a continuation of security assistance, despite human rights violations.

The last human rights provision relating to security assistance is found in Section 113 of the Foreign Assistance and Related Programs Appropriations Act of 1979, a bill which provided funds for the FAA of 1961 for the fiscal year ending September 30, 1979. Section 113 reads as follows:

Funds appropriated by this Act may not be obligated or expended to private assistance to any country for the purpose of aiding the efforts of the government of such country to repress

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* 22 U.S.C. § 2304(b) (1979 Supp.).
* 22 U.S.C. § 2304(c) (1) (1979 Supp.).
* Id. § 2304(c) (1) (A), (B).
the legitimate rights of the population of such country contrary to the Universal Declaration of Human Rights.

2. Economic Assistance

Corresponding to the section 502(B) prohibitions on security assistance are the human rights sanctions incorporated into United States foreign economic assistance programs under § 116 of the FAA of 1961 as amended and § 112 of the Agricultural Trade Development and Assistance Act of 1954 as amended (ATDA). Section 116(a) provides that:

No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges or other flagrant denial of the right to life liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

The final clause was added to this provision because, as the Senate Foreign Relations Committee reported, it was important to link United States assistance to human rights, but it was equally important not to rule out aid to needy people because they lived in countries where they were politically oppressed. This attitude is reflected in the general policy goals of the foreign assistance programs. Section 101(3) states as a principal objective "the encouragement of development processes in which civil and economic rights are respected and enhanced."

Section 116 provides further that on request by either the Senate Foreign Relations Committee or the Committee on International Relations of the House of Representatives, the Agency for International Development (AID) must submit a written report demonstrating how such assistance will directly benefit the needy people in the recipient country. If either committee or either House of Congress disagrees with the justifications provided by

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22 U.S.C. § 2151n (a) (1979 Supp.).
22 U.S.C. § 2151n (a) (1979 Supp.).
S. Rep. No. 94-406, 94th Cong., 1st Sess. (1975). In addition to adopting the human rights policy provision, the Congress intended to continue the policies of Pub. L. 93-189, known as the "New Directions," which are aimed at directly assisting the poor in the developing nations rather than promoting large projects and capital transfers.
22 U.S.C. § 2151(a) (3) (1979 Supp.).
AID, it may initiate action to terminate assistance to any country by a concurrent resolution. Section 116(d) requires the President to submit to Congress a written report explaining how the assistance would directly benefit the people of a recipient country. Finally, section 116(e) authorizes the President to use $1,500,000 for activities to promote increased adherence to civil and political rights as set forth in the Universal Declaration of Human Rights. Contemplated programs include those which help countries to strengthen legal guarantees of human rights or to improve legal assistance programs through such activities as workshops and conferences on human rights and economic development.

In addition to adding section 116 to the FAA of 1961, the International Development and Food Assistance Act of 1977 added section 112 to the ATDA, which revised features of the Food-for-Peace program. The purpose of the new section was to include human rights considerations in decision making under Title I of the ATDA. Section 112(a) states:

No agreement may be entered into under this title to finance the sale of agricultural commodities to the government of any country which engages in a consistent pattern of gross viola-

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22 U.S.C. § 2151n (b) (1979 Supp.).
22 U.S.C. § 2151n (d) (1979 Supp.).
22 U.S.C. § 2151n (e) (1979 Supp.).

The Universal Declaration of Human Rights has gained broad acceptance as a statement identifying basic human rights. It is neither a treaty nor an international agreement, but rather a common standard of achievement for all of mankind. The Declaration was adopted on December 10, 1948 by a resolution of the U.N. General Assembly. G.A. Res. 217, U.N. Doc. A/810 at 71 (1948), reprinted in U.N. RESOLUTIONS, 135-4, (1948-9).


The 1954 Act is commonly referred to as the Food for Peace Program and is usually cited by its public law citation, P.L. 480. The statute is essentially a two point assistance law that (1) authorizes loans and grants to foreign countries so they can buy U.S. farm products, and (2) provides free food to foreign governments and international relief organizations. Title I of the statute requires that 75 percent of the concessional sales must go to "poor nations." The amendments passed in 1977 maintained this formula but allowed for the greater flexibility requested by the administration. The congressional committee took into consideration the testimony of Secretary of Agriculture Bergland and others about the increasing difficulty of administering Title I concessional sales within the limitations of the previous law. Prior to the 1977 legislation, poor countries were defined as those with an annual per capita gross national product of $300 or less based on World Bank data. Under the present law the eligibility standard for countries in the 75 percent category is changed to the poverty criterion of the International Development Association (IDA) which makes adjustments upward to account for inflation. In addition, the 75/25 percent requirement can be waived by the President in order to effectively achieve the "humanitarian purposes" of Title I. H.R. REP. No. 5-40, 95th Cong., 1st Sess. 7 (1977).
tions of internationally recognized human rights, including torture or cruel, inhuman or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such agreement will directly benefit the needy people in such country.44

The statute provides further that either the commodities or the proceeds from their sale will be used for specific projects which the President determines would directly benefit the needy people of the country receiving financing. The agreement must specify how the projects will benefit the needy. A report by the recipient country must be submitted to the President within six months after delivery of the commodities.

The statute speaks only generally of "projects or programs which would directly benefit the needy people." The legislative history provides a more specific explanation:

It is the committee's intention that the "specific projects or programs"... should be mainly in the areas of agricultural development, rural development, nutrition, health services, population planning, food distribution, education and training, housing, public works, conservation and storage, and credit and marketing facilities.45

B. Financing

1. The Export-Import Bank (Eximbank)

Statutes which authorize the financing of international trade transactions have been amended in recent years to reflect the concern of members of Congress and the Carter Administration that human rights policy considerations become a factor in the decisions made concerning the authorization of credit. The most significant legislation has dealt with the Export-Import Bank Act of 1945.46 Perhaps this act illustrates the conflict between export policy and human rights policy in the most striking terms. In reporting the bill to Congress, the House Committee on Banking, Finance and Urban Affairs stressed that the purposes of the amendments were:

44 7 U.S.C. 1712(a) (1979 Supp.).
46 Supra, note 14. Title XIX of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 is usually cited as the Export-Import Bank Act Amendments of 1978 (P.L. 95-630). The Eximbank legislation was attached as a rider to the multipurpose financial institutions regulation bill.
to encourage the sale of more American goods and services overseas by extending the U.S. Export-Import Bank for 5 years . . . and increasing its financial commitment authority . . . .

. . . to reduce this chronic foreign trade deficit . . . [by] vigorous support for increased exports . . .

. . . [to] make U.S. companies more competitive in the world market place and increase export significantly."

The Congressional intent is clearly to facilitate the successful exporting of U.S. goods and services. To this end, Congress has amended the human rights restrictions in this Act twice in the past three years.48 The current amendments under section 2(b)(1)(B) stress the goal of strengthening the competitive position of U.S. exports:

Only in cases where the President determines that such action would be in the national interest where such action would clearly and importantly advance United States policy in such areas as international terrorism, nuclear proliferation, environmental protection and human rights, should the Export-Import Bank deny applications for credit for nonfinancial or noncommercial considerations.49

Previously, the human rights language called for the Eximbank Board to take into account, in consultation with the Secretary of State, the human rights practices of the country to receive the exports supported by a loan or financial guarantee, and the effect the exports might have on human rights in the recipient country.50 The new law51 differs in two respects. First, it strengthens the human rights language by mandating a denial of any Eximbank activity under certain circumstances. Second, this provision is balanced by a requirement that the President determine that a denial will "clearly and importantly" advance United States human rights policy.52

49 12 U.S.C. § 635(b) (1) (B) (1979 Supp.) (emphasis added).
51 Supra note 14. This amendment is known as the Chaffee Amendment after its principal sponsor, Senator Chaffee of Rhode Island.
52 While many policy concerns are reflected in legislation of this kind, it is interesting to note two factors which seemed to have influenced the shift in language in the human rights provisions. First, in the period between the passage of the two amendments, United States leaders became increasingly fearful of the economic consequences of the ever-increasing
2. The Jackson-Vanik Amendment to the Trade Act of 1974

The Jackson-Vanik Amendment to the Trade Act of 1974\(^8\) prohibits the extension of credit by the United States government to any non-market country which denies or limits its citizens the right or opportunity to emigrate. The amendment also prohibits the President from granting most-favored-nation treatment to, or from making any commercial agreement with, any country which makes such denials or imposes more than a nominal tax on immigration. An amendment to section 402 gives the President the authority to waive these restrictions for 18 months if he has received assurances that the emigration practices in the future will achieve the objectives of the Amendment, and the waiver will further promote them, as well. Subsequent extensions can be con-

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\(^5\) Supra note 15. § 2403(a) states:

To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of law, on or after the date of the enactment of this Act products from any non-market economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation-treatment), such country shall not participate in any program of the government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly, and the President of the United States shall not conclude any commercial agreement with any such country, during the period beginning with the date on which the President determines that such country—

1. denies its citizens the right or opportunity to emigrate;
2. imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatever; or
3. imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen to emigrate to the country of his choice, and ending on the date on which the President determines that such country is no longer in violation of paragraph (1), (2) or (3).
continued by executive order at one-year intervals unless either house of Congress passes a resolution of disapproval.54

3. International Financial Institutions (IFIs)

Amendments to the International Bank for Reconstruction and Development Act55 establish human rights criteria for action taken by U.S. representatives at meetings of IFIs.56 Title VII of the Act provides in Section 701(a) that:

The United States Government in connection with its voice and vote in [the IFIs], shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in—

(1) a consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of life, liberty, and the security of person; or

(2) provide refuge to individuals committing acts of international terrorism by hijacking aircraft.57

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54 19 U.S.C. § 2432(d)(1) (1979 Supp.). This amendment was a result of the urging of Secretary of State Henry Kissinger, who by letter to Senator Jackson pointed out that without such a waiver provision, § 402 was unacceptable to the administration and further, he had been assured by the Soviets that emigration practices would improve in the future. S. REP. NO. 93-1298, 93rd Cong., 2d Sess. (1974). In a December 3, 1974 appearance before the Senate Finance Committee Kissinger pointed out that the compromise did not reflect "formal government agreements" between the two countries but was based on "clarifications of Soviet domestic practices from Soviet leaders." 32 CONG. Q. 66 (Dec. 7, 1974).

55 Supra note 16.

56 There are four multilateral development banks including the World Bank, the Inter-American Development Bank (IDB), the Asian Development Bank (ADB) and the African Development Bank (AFDB). According to the overview of IFI's produced by the Senate Committee on Foreign Relations, the United States joined the first part of the World Bank, the International Bank for Reconstruction and Development, in 1945. Thereafter, two other organizations were created as part of the World Bank, the International Finance Corporation and the International Development Association. The United States joined these in 1955 and 1960 respectively. In 1959 the United States joined the IDB and in 1966, the ADB. The AFDB membership is restricted to countries of the region it serves, but the United States did join the African Development Fund in 1976.

The committee defined the purpose of the development banks to be the amassing of capital to be lent to governments of less developed countries for the purpose of economic development. Loans to the 'wealthier' less developed countries are made at rates equal to the cost of the money to the IFI plus technical and administrative costs (hard loans). Those to the very poor less developed countries are made on concessionary terms (soft loans). S. REP. NO. 95-159, 95th Cong., 1st Sess. 25 (1977).

57 22 U.S.C. 262d (1979 Supp.). § 262d(e) elaborates on the definition of 'gross violations':

In determining whether a country is in gross violation of internationally recognized human rights standards as defined by the provisions of subsection (a), the United States government shall give consideration to the extent of cooperation of such country in permitting an unimpeded investigation of alleged viola-
Section 701(c) requires that the Secretaries of State and Treasury submit an annual report to the Speaker of the House of Representatives and the President of the Senate on the progress made toward achieving the goals of Title VII. Section 701(f) authorizes and instructs the United States Directors of the IFIs to "oppose" any loan, any extension of financial assistance, or any technical assistance to any country described in 701(a), unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of the country.

The passage of Title VII was accompanied by an unusual coalition of interests, described by one observer as an "unholy alliance: pro-aid liberals waving high the early Carter banner of muscular public virtue, and anti-aid conservatives figuring to sink development aid under an unbearable load of human rights." An earlier proposal would have required an automatic "no" vote against any loan to a country where human rights are violated.

The language finally adopted was contained in an amendment sponsored by the late Senator Humphrey and Representative Reuss and supported by the Carter Administration. The language requires the government to consider human rights issues but does not legislate a specific course of action. This gives the United States the flexibility in bargaining needed to improve human rights conditions in recipient countries.

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The term oppose can mean voting "no," voting "present," abstaining, or taking any action other than voting "yes." H. CONF. REP. No. 95th Cong., 1st Sess. 10 (1977).


The amendment, proposed by Representative Badillo, was approved by voice in the House in April 1977. It was based on a bill signed by President Ford in 1976 (PUB. L. No. 94-302, commonly known as the Harkin Amendment) that required United States officials to vote against aid proposals by the Inter-American Development Bank and the African Development Fund if the country involved violated its citizen's human rights. The Senate amendment containing the Harkin language, proposed by Senators Abourezk and Hatfield, was defeated by a seven-vote margin (43-50).

President Carter voiced his concern over the House language in a news conference on April 15, 1977:

I think the Harkin amendment is a mistake. The Reuss amendment and the Senator Humphrey amendment, which are the same, provide me with an adequate authority to deal with the question of human rights as it relates to international and regional lending institutions. To have a frozen mandatory prohibition against our nation voting for any loan simply removes my ability to bargain with a foreign leader whom we think might be willing to ease off on the deprivation of human rights.
Two other amendments dealing with human rights concerns and relating to financing institutions were passed in 1978. Section 611 of the Foreign Assistance and Related Programs Appropriations Act of 1979 contains a directive to the United States Government to propose and seek adoption of an amendment to the charters of the IFIs to establish human rights standards to be considered in connection with each application for assistance. 62

Human rights amendments were also attached to recent legislation authorizing United States participation in the Supplementary Financing Facility (popularly known as the Witteveen Facility) 63 of the International Monetary Fund (IMF). 64 Under section 30(a) of the Bretton Woods Agreement Act, the director of the IMF is directed "to initiate a wide consultation" with the managing director of the Fund and other member country directors to formulate stabilization programs which "foster a broader base of productive investment and employment especially in the productive activities which are designed to meet basic human needs." Section 30(b) requires an annual report evaluating the effect of policies of those countries which result from the Witteveen Facility Agreements. An additional report is required under section 31, as defined in section 116(a) of the FAA of 1961. 65

The Overseas Private Investment Corporation Amendments Act of 1978 66 extended the authority of OPIC and modified the statutory guidelines for its programs. 67 Among the modifications

The President elaborated in a letter to Senator Humphrey:

... there may well be times when we can bargain with prospective borrowers to release prisoners or stop other offensive practices if we have our vote as leverage .... Moreover, if we want other bank members to vote with us, we must be able to work with them and vote with them - not just automatically vote "no" at the outset.


64 The purpose of the Witteveen Facility is to provide supplementary IMF financing needs. Such needs have arisen out of the large payments imbalance caused by the astronomical rise in international oil prices decreed by the Organization of Petroleum Exporting Countries (OPEC). S. REP. No. 95-603, 95th Cong., 2d Sess. 3 (1978).


66 22 U.S.C. §§ 2199, 2200(a) (1979 Supp.).

67 The Committee on International Relations outlined the basic OPIC programs including:

- Investment insurance

The heart of the OPIC programs is political risk insurance authorized by section 234(a) of the Foreign Assistance Act of 1961, under which OPIC provides insurance against the risks of (1) expropriation, (2) inconvertibility, and (3) war, revolution, and insurrection.

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was a human rights provision which makes section 116 of the FAA of 1961 applicable to any insurance, reinsurance, guaranty, or loan issued by OPIC. Two exceptions are cited: the section 116 exception for programs benefitting needy people and an exception based on national security interests. The Act also calls for an annual report that must include a description of any project for which OPIC refused financial support on human rights grounds as well as a description of any project receiving OPIC insurance or support by reason of one of the above exceptions.

C. Licensing of Exports

1. Military Export Licensing

Human rights concerns are reflected in legislation regulating military export licensing. These exports require government approved licenses before they may be shipped. Section 502B(a)(2) discussed in II, A., 1 of this Note prohibits security assistance from being provided to governments engaged in a consistent pattern of gross violations of human rights. Security assistance, in this context, includes licensing for the export of defense-related

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Investment Guaranties

Section 234(b) of the Foreign Assistance Act of 1961 authorizes OPIC to provide guarantees of loans and other investments against loss due to such risks as OPIC may determine. The guarantees are against both political and commercial risks.

Under the investment insurance program, most of the investment projects which OPIC insures are developed independently by the private sector and a formal application is made for OPIC coverage after the project is already conceived or under construction. In contrast, under the investment guaranty program, OPIC frequently plays the role of investment broker, by actively seeking financing to capitalize a partially developed investment project.

Direct investment

[This] program is intended to provide financing for projects which are commercially feasible but for which sufficient commercial capital is not available on satisfactory terms.

Investment encouragement

Section 234(d) of the Foreign Assistance Act of 1961 authorized OPIC to initiate and support through financial participation, incentive grant, or otherwise the identification, assessment, surveying, and promotion of private investment opportunities. OPIC [will] underwrite 50 percent of the cost of project feasibility surveys.


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22 U.S.C. § 2200(a) (2) (A), (B) (1979 Supp.).

22 U.S.C. § 2304(a) (2) (1979 Supp.).
goods and services. The sanction applies to all munitions sales including Foreign Military Sales (FMS) and commercial munitions sales. Foreign Military Sales are transacted on a government to government basis while commercial munitions sales are negotiated directly between the manufacturer and the purchaser.

Another human rights provision relating to licensing of military exports empowers the President to disqualify a developing country from purchasing United States munitions through the FMS program if he finds that a country is diverting economic development assistance for military purchases. Such a ban may be imposed only if the diversion materially interferes with the country's development.11

2. Commercial Export Licensing

The EAA72 is the statute which empowers various actors in the Executive Branch to review commercial export licensing. These actors include the President, the Departments of State, Commerce, Defense, Treasury and Energy, the National Security Council, the Central Intelligence Agency and the National Aeronautics and Space Administration. The administration of exports under the EAA is centralized to some extent in the Export Administration Office of the Department of Commerce, but at higher levels of decision-making the bureaucracy is essentially an interagency creature.

Under the EAA, exports can be controlled:

(A) to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand, (B) to the extent necessary to further significantly the foreign policy of the United States and to fulfill its international responsibilities and (C) to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States.78

Human rights factors come into play as an element of foreign policy under (B).

All items exported under this act require either a general or a validated license before export. The two licenses have the same legal effect. However, in contrast to the general licensing pro-

cEDURE which is very simple, the process of obtaining a validated license is time consuming and requires prior approval by the Export Administration Office or one of the higher levels of review. Under the authority of the Act the Secretary of Commerce is responsible for issuing regulations that determine which items to which destinations will require a validated license. The items which require validated licenses are usually high-technology products destined for non-market countries. While the reason given for delay in, or denial of, the granting of a validated license is generally national security, human rights considerations are at times significant.

A more specific basis for commercial export controls for crime control and detection instruments is found in Section 4 of the EAA. New subsection (m)(1) requires that such items be approved for export by the Secretary of Commerce pursuant to a validated export license. The Senate Foreign Relations Committee listed under the category such items as leg irons, shackles, thumb-screws, stock batons, straitjackets, psychological stress analysis equipment, dart guns, bulletproof vests, ultraviolet detection equipment and other equipment of similar usefulness.

D. Special Treatment for Specific Nations

In addition to the general human rights provisions outlined above, there are some statutory restrictions which apply to specific human rights violators. The more important of these provisions are discussed briefly below.

1. The Soviet Union

Section 8(b) of the Export-Import Bank Amendments of 1974 prohibits the approval of any loans or financial guarantees in connection with exports to the Soviet Union in an aggregate amount in excess of $300,000,000. The President may establish a limit in excess of this amount if he determines that a higher limit is in the national interest and the Congress adopts a concurrent resolution approving such a determination.

74 15 C.F.R. § 399.1 et seq. (published separately).
78 12 U.S.C. § 635e(b) (1978). This provision is known as the "Stephenson Amendment" after its sponsor, Senator Adlai Stevenson. It is important to note that this limitation has no practical effect unless the Jackson-Vanik Amendment sanction prohibiting the extension
2. **Uruguay**

In October 1976, Congress passed Section 505 of the Foreign Assistance and Related Programs Appropriations Act of 1977. It stipulated that no funds appropriated under the Act could be used to provide military assistance, international military education and training, or foreign military credit sales to Uruguay.

3. **Chile**

Strict bans against military assistance under the FAA of 1961 as well as sales, credits, or loan guarantees under the Arms Export Control Act have been enforced against Chile since 1976. This law followed previous less stringent limits on military and economic assistance.

4. **Uganda**

Section 4(m) of the EAA prohibits exports to Uganda until a Presidential determination is made that the government of Uganda is no longer engaged in a consistent pattern of gross violations of human rights. Section 5 of the 1978 Amendments to the Bretton Woods Agreements Act prohibits the importing of goods produced or manufactured in Uganda until a similar Presidential determination is made. A less forceful provision, Section 610(d) of the

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of credit to non-market countries including the Soviet Union is waived, as provided by the Amendment. To date, the prohibition against the Soviet Union has not been waived. For a discussion of proposed legislation concerning both Amendments see text at notes 183-85, infra.

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Footnotes:


80 The International Security Assistance and Arms Export Control Act of 1976, Pub. L. 94-329, § 406, 90 Stat. 729 (1976). The Committee on International Relations defined the limits of this prohibition as follows:

The prohibition does not extend to cash sales under the Foreign Military Sales Act or to commercial sales of military equipment to Chile. This section thus terminates all U.S. financial support for the Chilean military, but does not jeopardize regional stability by depriving Chile of access to defense articles and defense services needed for its defense and paid for with its own resources. Any cash sales to Chile will, of course, be subject to congressional review under Section 36(b) of the Foreign Military Sales Act and under the new 502(B) of the Foreign Assistance Act.


Foreign Relations Authorization Act,\textsuperscript{84} expresses the sense of Congress that the President should prohibit the export of military and police equipment to Uganda and submit a resolution to the U.N. Security Council calling for an arms embargo against Uganda.

5. Argentina

The Kennedy Amendment\textsuperscript{85} prohibits grants of military assistance, military training, or security-supporting assistance to Argentina under the FAA of 1961. Credits, loan guarantees, and sales of defense articles under the Arms Export Control Act are also disallowed. No export licenses may be issued under Section 38 of the Arms Export Control Act to or for the Government of Argentina. This prohibition came into effect after September 30, 1978.

6. South Africa

Section 2(b)(8) of the Export Import Bank Act, as amended, prohibits Eximbank credits to the government of South Africa or its agencies until significant progress toward the elimination of apartheid, as determined by the President, has been made.\textsuperscript{86} Another prohibition applies to all transactions in South Africa, whether with the Government or a national or an agency, which would contribute to enabling the government of South Africa to maintain or enforce apartheid.\textsuperscript{87} A third clause prohibits the extension of credit in support of any export to other purchasers in South Africa unless the purchasers implement fair employment principles.\textsuperscript{88}


\textsuperscript{87} In a letter to then Representative Paul Tsongas who sponsored this amendment, John Moore, President of the Bank, clarified the understanding of the Bank on the matter:

Based on the legislative history established during the subcommittee’s discussions of this amendment, it is our understanding that the amendment includes guarantees, insurance, and credits in connection with a sale to any national or agency of the Republic of South Africa.

This language is to be codified in 12 U.S.C. 635(b) (8).

\textsuperscript{88} Specifically, the statute states that credit will be denied to such purchasers unless:

The United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the implementation of the following principles: nonsegregation of the races in all work facilities; equal and fair employment for all employees; equal pay for equal work for all employees; initiation and development of training programs to prepare nonwhite South Africans for supervisory, administrative, clerical, and technical jobs; increasing the number of nonwhites in
7. Miscellaneous Human Rights Violators

The International Development and Food Assistance Act of 1978 includes, in Section 602, prohibitions against the use of funds authorized to be appropriated under the Act to aid Vietnam, Cambodia, Uganda, or Cuba. The Act appropriates funds for the FAA of 1961 for fiscal year 1979. The ban against aid includes both monetary payments and the sale or transfer of any goods of any nature.

Section 108 of the Foreign Assistance and Related Programs Appropriations Act of 1979 provides that:

none of the funds appropriated or otherwise made available to this Act shall be obligated or expended to finance directly any assistance or reparations to Uganda, Cambodia, Laos, or Vietnam.

This Act funded the FAA of 1961 through September 30, 1979. Section 114 imposes a similar ban against Mozambique and Angola.

III. IMPLEMENTATION

Since the initial days of the Carter Administration, the frequency and intensity of government human rights statements have declined somewhat. In attempting in this section of the Note to explain how human rights policy is effected, the question of the extent to which the Carter Administration's original emphasis on human rights issues has continuing significance shall also be addressed.

Although it is possible to understand generally how human rights policy is effected, the specifics of the review procedure remain unclear except, perhaps, to the participants. Analysis is hampered by the secretive atmosphere in which the deliberations proceed, by the paucity of published material on the procedures and by the inadequacy of information on the roles of the various human rights actors. Further, the programs affected by human

management and supervisory positions; a willingness to engage in collective bargaining with labor unions; and improving the quality of life for employees in such areas as housing, transportation, schooling, recreation, and health facilities.


Much of the information presented in this section was collected in interviews and conversations with persons involved with the procedures described. Two documents relied on extensively are COUNCIL OF THE AMERICAS, HUMAN RIGHTS PROCEDURES AND ORGANIZATION IN
rights considerations have different decisional processes, and vary in degrees of formality. Thus, while the explanation of statutes relevant to human rights is fairly clear, discrete and straight-forward, this explanation of human rights policy implementation is perforce somewhat vague.

A. Agency Actors

The primary forums for decisions on export-related foreign policy action are the Interagency Group for Human Rights and Foreign Assistance (referred to by some as the “Christopher Committee” but identified here as the IG) and its Human Rights Working Group, the Arms Export Control Board (AECB) and its Arms Transfer Policy Planning Working Group, and the Office of Munitions Control in the State Department’s Bureau of Politico-Military Affairs (PM/MC). The Bureau of Human Rights and Humanitarian Affairs (HA) in the State Department plays an important advisory role before these groups. It should be understood from the outset that the functions of these groups are not clearly defined and vary somewhat depending on the subject matter brought before each group.

1. Interagency Group for Human Rights and Foreign Assistance (IG)

IG, created by a 1977 National Security Council directive, passes on decisions regarding bilateral and multilateral foreign

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* The Interagency Group is chaired by the Deputy Secretary of State and is comprised of representatives from the Departments of Treasury, Defense and Agriculture, the Bureau for Human Rights and Humanitarian Affairs (HA) and other bureaus within the State Department, the Agency for International Development (AID), the National Security Council (NSC), Eximbank, the Overseas Private Investment Corporation (OPIC) and other departments and agencies when necessary.

* This working group is co-chaired by the Deputy Assistant Secretary for Human Rights and the Director of the Office of Development Finance of the Bureau of Economic and Business Affairs, with representatives from the Regional Affairs Offices in HA, the Policy Planning Staff, Treasury, OPIC and other concerned agencies.

* This board is chaired by the Under Secretary of State for Security Assistance, Science and Technology, with representatives from the Department of Treasury, Defense and other areas of State, Joint Chiefs of Staff, Arms Control and Disarmament Agency, NSC, Central Intelligence Agency, AID and Office of Management and Budget.

* This group is chaired by the Director of the Bureau of Politico-Military Affairs with similar representatives to the Arms Export Control Board.

* HUMAN RIGHTS PROCEDURES, supra note 91, at 6.
assistance. Bilateral foreign assistance includes Eximbank and OPIC transactions, Title I Food-for-Peace projects, and FMS credits. Multilateral foreign assistance is exemplified by IFI and International Monetary Fund (IMF) loans.

IG decides to approve, delay limit or deny a project based on a number of factors including not only a recipient country's human rights conditions and trends but also U.S. concerns in the areas of national security, antiterrorism, nuclear non-proliferation and labor practices, as well as the recipient's expropriation history. HA, the lead advocate of human rights concerns among IG's participants, has only the power to make recommendations before this group.

After determining a course of action to be taken, IG will contact the agency, bureau or department responsible for administering the project and inform it of the IG's decision. It is not clear whether the administering organization is bound by IG's decision, though there has been no indication of non-compliance thus far. It is also unclear whether the Deputy Secretary of State is bound by IG action or may treat it as merely advisory. There is uncertainty as to whether the agency's procedures are formal or informal.

The Human Rights Working Group, which is comprised of representatives similar to those on IG, has decision-making power for routine projects. If an agreement within the group is achieved, the decision is sent to the responsible agency for implementation. If the group members are in disagreement, the issue is brought before the IG for resolution.

2. **Arms Export Control Board (AECB)**

The AECB is an advisory group to the Departments of State and Defense and the Arms Control and Disarmament Agency. It was designed to streamline the licensing review procedure of FMS program sales (government to government arms sales) and to coordinate the involvement of the review participants. Its five working groups consider a broad range of topics, including human rights, and relate their recommendations to the Board. The working group considering human rights is the Arms Transfer Policy Planning Working Group. Like the AECB itself, it does not have any determinative power.

3. **Bureau of Politico-Military Affairs (PM/MC)**

PM/MC is the bureau responsible for coordinating regional

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"Arms Transfer, supra note 91, at 76-7."
defense and foreign policy matters communicated from various Defense Department and State Department bureaus. It also makes decisions on the licensing of munitions exports sold directly by U.S. manufacturers to foreign purchasers. These sales, known as commercial munitions sales, do not require the government to act as an intermediary.

When disagreement over appropriate action occurs within the groups discussed above, an attempt is made to reconcile the divergent views. If this effort fails, the dispute escalates, in unpredictable fashion, to higher levels in each department represented in the group. Should the discord persist at these levels, the President must determine whether to approve or disapprove an export transaction.

4. The Bureau of Human Rights and Humanitarian Affairs (HA)

HA is responsible for voicing, in an advisory capacity, United States human rights concerns before IG, AECB and PM/MC. Significantly, HA does not have a final say on the relative importance that a particular interest entrusted to it will play in general foreign policy. Hence, the enforcement of human rights is not dictated by the strongest human rights bureaucratic advocate but is determined by an administrative process in which HA is but one participant. Competing interests in the State Department act as a check upon the free exercise of human rights policy.

Aside from its power to make recommendations to decision-making bodies, HA can take U.S. diplomats abroad to convey to their foreign hosts U.S. concern for the foreign nation's human rights situation. This keeps a continuous flow of information about U.S. policy available to foreign nations. Indeed, this may be the only channel of expression open to HA when other foreign policy interests make action undesirable.

In order to clarify its general course of action in dealing with a violating nation, HA has developed a sequential list of initiatives which it will recommend, beginning with those which have little impact on U.S. trade and aid programs in a foreign country and ending with those which will have a significant effect on such pro-

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*Its recommendations are based upon information on human rights practices gleaned from a number of sources, such as other State Department bureaus, the Central Intelligence Agency and non-governmental organizations (NGOs). For an informative explication of the data collection methods of NGOs, see Note, *The Role of Nongovernmental Organizations in Implementing Human Rights in Latin America*, 7 GA. J. INT'L & COMP. L. 477, 488 (1977).*
grams. Naturally any determination made by HA will depend on the degree of influence the U.S. wields in the country in question. As a first step, HA will recommend that concern over an offending nation's policy be communicated through diplomatic channels. Should the country fail to make any attempt to ameliorate the situation, HA will make recommendations to the decisional groups, to reduce or cut off, in the following order: a) military grants and government-financed Foreign Military Sales, b) privately financed Foreign Military Sales and commercial munitions sales, c) military training for that nation's troops, d) bilateral economic assistance, and e) multilateral economic assistance. As a last resort, HA will recommend limiting, delaying or denying commercial export transactions. When this last stage is reached, HA will distinguish between those importers in the violating nation which are governmental agencies and those which are private businesses.99

B. Appropriations

The broad reach of § 502(B) of the FAA of 1961100 extends to economic and security assistance programs in both the legislative and executive branches of the U.S. government. Congress appropriates funds to various bilateral and multilateral aid programs,101 weighing its human rights commitment against other political factors.102 The executive branch administrators of these


100 Supra note 24.

101 The number of foreign aid programs for which funds are appropriated is quite large. Under the category of security assistance is the Military Assistance Program (MAP), Redistributed MAP, International Military Education and Training (IMET), Excess Defense Articles (EDA), Foreign Military Sales (FMS) credits, Ship transfers, Facilities Transfers, AID Public Safety Assistance, P.L. 480 Common Defense Funds, International Narcotics Control, Military Assistance Advisory Groups and Military Groups, and Military Assistance Service-Funded (MASF). Commercial munitions sales do not require any government appropriations.

Economic assistance requiring appropriations or authorized funds include the numerous AID-administered projects in the areas of agricultural development in rural areas, agricultural research, education and human resources, population planning health, technical assistance, housing guarantees and security support assistance, P.L. 480 - Food-for-Peace, Eximbank transactions, OPIC transactions, Commodity Credit Corporation transactions, loans from the IFIs and the IMF. See Latin American Center for International Policy, Human Rights and the U.S. Foreign Assistance Program, Fiscal Year 1978, Part 1 (1978).

102 For a recent example of this process, see the House floor debate over H.R. 12514 and
programs are legally bound to allocate these program funds consistently with the empowering legislation. Consistent deviation from legislative aims may result in either greater Congressional oversight of the program, or major reduction in its over-all appropriations. Congress has been expanding its role in enforcing human rights policy\textsuperscript{103} by use of bans and appropriations legislation, indicating a dissatisfaction with the amount of attention paid to human rights in the implementation of these foreign aid programs.

A discussion of the implementation of economic assistance programs which benefit U.S. exports inevitably involves an analysis of financing programs since such aid programs are based to a large extent on providing financing to foreign countries. Financing programs are discussed below in Section III C. of this Note. The implementation of human rights sanctions against appropriations of security assistance is taken up in Section III D. on Licensing.

C. Financing

Several programs and institutions have been set up to provide financing to foreign businesses and governments. Title I of Food-for-Peace and Eximbank transactions have as their main purpose the development and expansion of foreign markets for U.S. goods.\textsuperscript{104} Although increasing U.S. exports is not a primary purpose of OPIC or the IFIs, these programs provide financing which could have a beneficial effect on our export posture.\textsuperscript{105}

All of these programs are conducted under the aegis of foreign policy and are thus subject to the declaration of Section 502(B) that a principal goal of U.S. foreign policy shall be to promote in-

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\textsuperscript{103} See, e.g., 22 U.S.C. § 2372 (the Kennedy Amendment).


\textsuperscript{105} But see 22 U.S.C. § 2191(2) (b) (1979 Supp.), which directs OPIC to further balance of payments and employment objectives of the U.S. and (2) (i) which compels OPIC to conduct its activities in consonance with the international trade, investment and financial policies of the U.S. government. These purposes are not the primary ones, however. The economic and social development of the recipient countries is the central aim. See 22 U.S.C. § 2191(1) (1979 Supp.)

In the sections describing the U.S. goals in the IFIs, See 22 U.S.C. §§ 282(c), 262(d), 262(d-1), 262(f), 262(g) and 262(h) (1979 Supp.), there is no mention of expanding U.S. exports. Indeed, the only element of the goals relevant to U.S. exports is 22 U.S.C. § 262(f) which declares that the U.S. shall use its voice in the IFIs to promote the utilization of light capital technologies.
creased observance of human rights of all countries. Section 116 covers OPIC activity generally. Additionally, each of these programs has human rights language specifically placed in its empowering legislation.

1. Title I of P.L. 480 (Food-for-Peace)

Sales of available U.S. agricultural commodities may be made to friendly countries under Title I of P.L. 480.\textsuperscript{107} Credits for Title I sales\textsuperscript{108} (and private commercial commodity sales\textsuperscript{109}) may be extended by the Commodity Credit Corporation (CCC), a governmentally created and administered commodities financing facility.

Title I sales begin with an agreement between the U.S. government and a foreign government. Then the U.S. Department of Agriculture buys the required commodities on the open market, using CCC financing. The State Department and AID are responsible for the distribution of the food. The foreign government then purchases the commodities on credit and sells them to local merchants. The proceeds may be invested in development projects and repayment may be made over long periods of time.\textsuperscript{110} Although the CCC may supply concessionary financing, the prices at which Title I sales are transacted are usually close to U.S. market price.\textsuperscript{111}

The Department of Agriculture is responsible for determining how much food to make available for Title I sales. IG, although rarely reviewing private commercial commodity sales financed by the CCC, routinely examines Title I sales. The Department of Agriculture's criteria for deciding on the amount of food to purchase for P.L. 480 projects do not include human rights.\textsuperscript{112} It is only the distribution decided on by IG that will bear the mark of human rights policy.

\textsuperscript{107} 7 U.S.C. § 1703(d) (1979 Supp.).
\textsuperscript{108} 7 U.S.C. § 1702 (1979 Supp.).
\textsuperscript{109} 7 U.S.C. § 1707(a) (1979 Supp.).
\textsuperscript{109} 7 U.S.C. § 1706(b) (1979 Supp.).
\textsuperscript{110} 7 U.S.C. § 1704 (1979 Supp.).
\textsuperscript{111} 7 U.S.C. § 1706 (1976 Supp.) states that repayment for such sales shall be on terms as favorable to the U.S. as the foreign nation's economy will permit but in no event less than the minimum rate established by 22 U.S.C. § 2151(t) (three percent per year commencing at not less than ten years following the time the funds are committed and two percent for the interim).
\textsuperscript{112} The criteria are: productive capacity, domestic requirements, farm and consumer price levels, anticipated commercial exports and adequate carryover. Agricultural, Rural Development and Related Agencies Appropriations Fiscal Year 1980, Hearings before the Senate Comm. on Appropriations, Part I Justifications 96th Cong., 1st Sess. 1153 (1979).
One of the mandates of the P.L. 480 program is that reasonable precautions be taken to safeguard usual marketing of U.S. agricultural goods against undue disruption of normal patterns of commercial trade with friendly countries.\textsuperscript{118} When the implementation of the human rights provisions\textsuperscript{114} results in the blockage of CCC loans, (as in 1977 when a $10,000,000 CCC surplus wheat loan to a Latin American nation was blocked),\textsuperscript{115} some disruption of usual marketing must occur. In enforcing the human rights sanctions in this area, IG must attempt to keep such disruptions to a minimum.

2. \textit{Eximbank}

Eximbank is a critical valve in the flow of U.S. goods to foreign nations. Implementation of human rights provisions contained in the Eximbank legislation thus has a significant effect on U.S. trade.\textsuperscript{116} Eximbank financing for exports exists in the following forms: (1) direct loans to the foreign importer, (2) guarantees to U.S. commercial banks holding export debt, (3) export credit insurance for the exporter and commercial banks for both political and commercial risks, (4) lines of credit to foreign banks financing U.S. exports and (5) discount loans to commercial banks.\textsuperscript{117} It offers these services under varying terms, the most significant of these being the long term direct loans carrying fixed interest rates, where commercial bank participation is limited.\textsuperscript{118}

Eximbank itself is presently aggressively seeking to promote U.S. exports by providing an array of services most responsive to the needs of U.S. exporters.\textsuperscript{119} However, Eximbank's efforts are hindered by a perception by exporters that it imposes "'political,' protectionist and other restraints on its operations . . . ."\textsuperscript{120} From

\begin{itemize}
\item \textsuperscript{118}7 U.S.C. 1703(c).
\item \textsuperscript{114}7 U.S.C. § 1722 (1979 Supp.).
\item \textsuperscript{118}A commercial export may be financed through non-Eximbank sources, but there is no substitute for a required export license.
\item \textsuperscript{117}12 U.S.C. § 635(b) (1) (B) (1979 Supp.).
\item \textsuperscript{116}MACHINERY AND ALLIED PRODUCTS INSTITUTE, \textit{A HANDBOOK ON FINANCING U.S. EXPORTS} 8-13 (2d ed. 1976).
\item \textsuperscript{120}Id. at 25 (1978). The suggestion of avoiding such restraints, which presumably include human rights, occurred eighth on a list of ten suggestions frequently made by exporters surveyed.
\end{itemize}
October 1977 to March 1978 Eximbank, as a matter of policy, withheld direct loans to Chile and Uruguay for human rights reasons. However, on a discretionary basis IG instructed Eximbank to delay its issuance of a letter of interest for the long term financing of a $270 million sale of turbine equipment manufactured by Allis-Chalmers Corporation to an Argentinian governmental entity in July of 1978. At that time, all credits to Argentina were being delayed. Three months later, all the credits were approved and Allis-Chalmer's letter of interest was issued when Argentina consented to an inspection by the Inter-American Human Rights Commission.

Since the enactment of the new amendment, IG has not denied, delayed or limited any transaction application for human rights reasons to Argentina or Chile. There have been no applications for transactions involving Uruguay so it is unclear whether an application by this country would be authorized. Legislated restrictions remain in place on Eximbank's ability to finance exports to South Africa. It is agreed within the human rights bureaucracy that under the new amendment, any negative action on an Eximbank matter must be taken by the President personally. Thus IG does not possess the authority it once wielded, but now has just an advisory role.

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The Jackson-Vanik Amendment represents a second important restriction on Eximbank activity. It is essentially a fixed ban against credits and most favored nation (MFN) status to non-market countries which deny their citizens the rights to emigrate. However, it does permit the President to waive the restriction. President Ford waived it for Romania in 1975, and President Carter waived it for Hungary in 1978. Poland and Yugoslavia are also eligible for most favored nation treatment and Eximbank transactions under an exception relating to Tariff Schedules.

3. *International Financial Institutions (IFIs)*

IFIs, also known as Multilateral Development Banks, are lending institutions which grant credits and loans to developing nations for a variety of development projects. Some of these credits and loans create U.S. export opportunities. As a member of these institutions, the United States may abstain or vote to oppose loans made to human rights-denying nations. IG is responsible for deciding which way the U.S. representatives to these institutions should cast their votes on particular loans.

The United States has limited power in the IFIs and has not caused project loans to be denied on human rights grounds, although it has abstained from voting and has voted against many loans. However, the lack of a veto does not mean that the United States is without influence in the IFIs. For example, after the United States informed some nations that it intended to oppose their loans in upcoming votes, the nations requested delays in consideration of the loans for an indefinite period of time.

The primary aims of the United States in the IFIs are to satisfy basic human needs and to channel funds away from human rights violating nations when the project will not directly benefit the needy. When deciding whether to attempt to channel funds away from an applicant with a poor human rights record, IG will

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128 Supra note 53.
131 19 U.S.C. 2432(e) (1979 Supp.).
127 According to the Secretary of the Treasury, testifying before Congress in late 1978, the U.S. had opposed eighteen loans to nine countries in the IFIs, although all passed. *Foreign Assistance and Related Programs Appropriations, Fiscal year 1979, Senate Hearings Before the Comm. on Appropriations, 95th Cong., 2d Sess.* 146 (1978) (statement of Secretary Blumenthal).
128 Id.
consider: (1) the nature of the human rights situation in the applicant nation (and trends), (2) prior U.S. human rights initiatives to that country, (3) the effectiveness of an available strategy, (4) other U.S. interests, and (5) the integrity of the IFI as an effective vehicle for international development. In addition to these considerations, IG may take into account a violating nation's failure to respond to U.S. appeals and as a result direct votes against that nation's projects even if they address basic human needs. The purpose of this action is to disassociate the United States from the repressive regime.

4. The Witteveen Facility

The Witteveen Facility provides an additional source of funds for the International Monetary Fund (IMF). The IMF is an international monetary institution that helps qualified members stabilize their economies during times of imbalance. This keeps member nations from resorting to restrictive trade policies and other protectionist measures that would be disruptive of international economic relations. Financial participation in the Witteveen Facility is shared equally by OPEC countries and developed countries. Unlike the IFIs, which furnish long-term development loans, the IMF and the Witteveen Facility provide medium-term financial assistance for monetary and currency stabilization purposes. Eighty percent of the assistance is at close to market rates of interest. Furthermore, members of IMF who meet certain criteria may draw on IMF credits as of right, whereas no such rights exist for applicants to the IFIs.

The language of the Bretton Woods Amendment compels the Secretary of the Treasury to instruct the United States executive director on the Executive Board of the IMF to initiate a wide consultation with other nation's directors to formulate stabilization programs which are designed to meet basic human needs. How this amendment has or will change the policies of the IMF remains to be seen. The sharply-criticized secrecy of the IMF loan review-

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135 Id. at 4.
136 For instance, the U.S. opposed a loan to Chile in May 1978 in the InterAmerican Development Bank when the project was for Rural Public Health. Id. at 7.
137 Id. at 5.
139 Supra note 63.
ing process makes evaluation of the effect of this amendment, from an export or from a human rights standpoint, impossible.

5. Overseas Private Investment Corporation (OPIC)

OPIC facilitates investment abroad by United States citizens by offering investment insurance, investment guarantees, direct investment help and other miscellaneous services. Like the IFIs, the purpose of OPIC is to foster economic and social development in the recipient country and act as an arm of U.S. foreign policy.

In creating and expanding new business projects, OPIC funding helps expand U.S. export opportunities. This of course is not OPIC's primary purpose. Under the application of the "new directions" language, OPIC is required to give preference to projects in less developed nations having per capita incomes of $520 or less, as well as to restrict its activities in nations with per capita income of $1,000 or more. The "new directions" language will probably prevent OPIC from playing a vital role in any new effort to increase U.S. exports.

Although OPIC projects are subject to human rights examination by the IG, there have been only two instances of discretionary action taken since the enactment of the human rights provision in mid-1978. One case involved the denial of insurance for the expansion of a business in EL Salvador which was partially owned by the El Salvadorian government. The other case was a delay for in-

141 22 U.S.C. § 2194(a) (1979 Supp.).
142 22 U.S.C. § 2194(b) (1979 Supp.).
143 22 U.S.C. § 2194(c) (1979 Supp.).
144 22 U.S.C. §§ 2194(d)-(f) (1979 Supp.).
147 Regarding the fulfillment of its primary purposes, OPIC has come under some attack. See, e.g., criticism that OPIC had concentrated many of its projects in countries guilty of human rights violations and that the projects frequently helped increase the gap between rich and poor. Center for International Policy, OPIC: Insuring the Status Quo (September 1977).

surance for a privately owned business in the same country. As a matter of course, OPIC does not presently operate in Uruguay, Uganda and South Africa.149

D. Licensing

Licensing of exports involves two main types of exports goods: munitions exports and general commercial sales exports. Different criteria for granting licenses are employed by various agency groups in both the Department of State and Commerce. The process of licensing of munitions will be discussed here first, followed by a review of the commercial sales licensing procedures.

1. Munitions Exports

Munitions exports are processed through one of two programs: the Foreign Military Sales (FMS) program or the commercial munitions sales program. Section 502(B)(a)(2) of the Foreign Assistance Act prohibits security assistance from being furnished to human rights violators. Security assistance is defined to cover all aspects of munitions sales—credits, licensing and the sales themselves.150 Thus both FMS and commercial munitions sales would theoretically be unavailable to a government which violates the human rights of its citizens.

a. FMS. If the munitions sale is for "major defense equipment"151 and the amount of the transaction is $25,000,000152 or more, the sale must undergo FMS licensing review. This is most frequently the method by which foreign purchasers buy American-made arms. Under this program, the Department of Defense purchases the munitions from the manufacturer or takes them from its own stock and sells them to the buyer on a government-to-government basis, frequently assisting the sale with government financing.153

149 South Africa is ineligible for OPIC projects because it has per capita income exceeding $1000. Were the per capita income not a barrier, it is likely that human rights reasons would still prohibit OPIC involvement.

150 Supra note 26.

151 22 U.S.C. § 2794(6) (1979 Supp.). Major defense equipment is defined as any item on the U.S. Munitions List which is significant combat equipment into which $50 million of non-recurring research and development costs have been invested or has a production cost of $200 million. For enumerations of significant combat equipment, see 22 C.F.R. § 121.03.

152 22 U.S.C. § 2778. This ceiling does not apply to NATO members, Austria, New Zealand, Japan and nations with which the U.S. has entered into a congressionally approved co-production agreement.

153 22 U.S.C. §§ 2763, 2764 (1979 Supp.) allow for the extension of credits and guarantees by the President. Guarantees need only have ten percent of the principal amount committed from the appropriated funds. Hence in Fiscal Year 1978, $675.85 million in appropriated
In addition to the hurdle posed by Section 502(B)(a)(2), FMS credits and guarantees may not be approved if they would aid dictators who are denying their people fundamental rights except when the President determines that approval would be important to the security of the United States.\textsuperscript{184} Furthermore, FMS must be compatible with foreign policy and foreign aid goals, with due consideration given to the impact of the sale on the purchaser's social and economic development.\textsuperscript{185}

The proposed sales under this program are examined by the AECB and its working groups.\textsuperscript{186} The Arms Transfer Policy Planning Group, which as a permanent member from HA, considers human rights factors, along with many others, and recommends a course of action to the AECB. Disagreements within the AECB are settled by higher level officials within the executive branch. Sales posing major policy questions might even require a presidential decision. Historically, however, the State Department makes most of the final decisions on individual sales.\textsuperscript{187}

The President is required to submit a report to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate detailing transactions for the sales of $7,000,000 or more of "major defense equipment" or $25,000,000 of defense items or services at least 30 days prior to the issuance of a license.\textsuperscript{188} By requiring this advance notice, Congress is able to confer with the Administration over specific sales whenever it feels more emphasis should be accorded a particular foreign policy interest in the decision to license the sale.

b. Commercial Munitions Sales. The other program through which military exports may pass is the commercial munitions sales program.\textsuperscript{189} This is for sales that are transacted directly be-
tween the foreign purchaser and the U.S. seller. Although commercial sales are not controlled by some of the particular human rights language that relates to the FMS, the commandment of Section 502(B)(a)(2) still applies.

PM/MC oversees licensing for commercial munitions sales. The reviews procedure seems to be as broadly based as that of the AECB but not as compartmentalized. PM/MC judges the sales on a number of criteria, and calls upon HA to deliver its views on the advisability of the sales from the human rights perspective. As with all decisional groups, disagreements between PM/MC and the conferring groups escalate within each participating department's hierarchy.

PM/MC compiles the U.S. Munitions List, otherwise known as the International Traffic in Arms Regulations (ITAR) which designate which goods are considered munitions requiring licensing, whether exported through either the FMS program or the commercial munitions sales program. This list contains not only items of fundamentally military character but also items that have both military and civilian uses. A prominent example of these dual use items is the air-ambulance, a helicopter designed for transport of wounded or injured persons. Despite its capacity for non-military use, this article is considered "equipped" for military use, and falls under the jurisdiction of the ITAR. It is capability, not end-use, that determines an item's presence in the ITAR, although end-use may be considered in the licensing review procedure. PM/MC heads the "Grey Area Committee" in the Department of State which considers matters relating to commercial goods with dual uses. It also renders opinions to manufacturers on whether a given export will fall under the jurisdiction of the ITAR.

Both commercial munitions sales and FMS are subject to approval at the time export licenses are applied for, but sales pro-

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U.S.C. § 2794(7) as commercial [munitions] exports on the U.S. Munitions List (International Traffic in Arms Regulations, or ITAR). These are basically munitions which are not expensive and sophisticated enough to qualify as "major defense items," but which still possess inherently military characteristics.

160 See DEPARTMENT OF STATE, THE OFFICE OF MUNITIONS CONTROL - ITS PRINCIPAL FUNCTIONS (1972). Unlike the AECB, this consultation seems to be informal, without structured working groups with specific areas of concern.

161 22 C.F.R. § 121 et seq.

162 Category VIII - Aircraft, Spacecraft and Associated Equipment in 22 C.F.R. § 121.01 includes aircraft, including helicopters, which are designed, modified or equipped for military purposes.

163 DEPARTMENT OF STATE, supra note 160, at 3.
posals submitted by manufacturers to prospective purchasers are similarly subject to approval by PM/MC, as required by the ITAR. The Secretary of State may revoke a license at any time prior to shipment.

2. Commercial Licensing

Goods exported under the authority of the Export Administration Act sometimes require validated licenses which are issued by the Commerce Department in conjunction with other departments. The Commodity Control List (CCL), compiled by the Commerce Department, designates those goods which require validated licenses. Aside from high technology goods which typically require validated licenses to allow review for national security reasons, items on the crime control and detection list and the aviation and avionics list (such as non-military aircraft and parts including inertial guidance systems) require human rights review.

The Commerce Department's Export Administration Office (EAO) receives license applications and, after processing them, contacts pertinent departments for their approval. If sent to the State Department, a license application is directed to the Bureau of Economic and Business Affairs. If necessary, this bureau will route the application to the regional and functional bureaus concerned with issues raised by the applications such as human rights, anti-terrorism, or nuclear proliferation. If human rights is an issue, the application is sent to HA, which confers with the regional bureau representing the destination country. Should they agree upon denial or approval, the decision is made at that level. If disagreement persists beyond fifteen days, an officer at HA prepares an "action memo" for the Deputy Secretary of State, who then decides upon the State Department's position. In the

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164 22 C.F.R. § 123.16.
165 22 C.R.F. § 123.05 states that licenses may be denied, revoked, suspended or amended for national security or foreign policy reasons.
166 15 C.F.R. §§ 399 et seq.
167 15 C.F.R. § 376.14. Examination of these items is mandated by 50 U.S.C. app. § 2403(n)(1) (1979 Supp.).
168 15 C.F.R. 399.1 CCL—13-16.
169 Although the Commerce Department technically has no discretionary human rights review jurisdiction, it would obviously have the power to deny applications for unlawful exports, such as crime control equipment to the South African or Namibian military forces. Apparently it has exercised some discretionary power on its own accord. One government official told of the denial of a export license for a computer which was bound for a Latin American country, because the $5 million computer was to be used for storing finger prints.
event that there is continuing disagreement between departments on the application, the difference might theoretically escalate as high as the President.\footnote{170}

Highly publicized instances of trade blockages with the U.S.S.R., which were at least partly for human rights reasons,\footnote{171} were brought about by the Carter Administration through commercial license denials, delays and new regulations.\footnote{172} It seems unlikely at this point that the commercial licensing mechanism will be used again to advance United States human rights interests, although other foreign policy interests, such as national security, do result in denials and considerable delay in export licensing.\footnote{173} Human rights considerations, however, are not chief among the reasons for licensing denials other than policy equipment and munitions.

\footnote{170 In practice it is doubtful that many commercial licensing decisions rise even to the Assistant Secretary level in the Administration. In 1977 only five referrals were decided at the Deputy Assistant level; one went higher. Comptroller General, Report to Congress of the United States: Administration of U.S. Export Licensing Should be Consolidated to be More Responsive to Industry 5 (1978).}

\footnote{171 N.Y. Times, July 13, 1978, A1 at col. 6. President Carter denied that he was planning any retaliation for the convictions, id. at col. 4, but this statement hardly seems credible in view of the timing of the blockage which ensued.}

\footnote{172 During July of 1978 relations between the U.S. and the U.S.S.R. had become tense due to a large extent to the arrest and trial of a number of Soviet dissidents, notably Anatoly Shcharansky. Id. at col. 6. In an attempt to penalize the U.S.S.R. for the actions taken against the dissidents, the White House reviewed all the major technical and scientific exchanges between the U.S. and the U.S.S.R. in order to ferret out and end those most beneficial to the Soviets. Id. The National Security Council had been contacting congressional figures to gain support for the cancellation, by export license denial, of a Sperry-Univac computer sale to the Soviet news agency TASS. Id. at A4, col. 4. Despite opposition from the Departments of State, Treasury and Commerce that the blockage would not improve human rights accorded to Soviet dissidents, but would injure U.S. economic interests, id. the license was denied. The President asserted that the computer would have greatly added to TASS's computer capability. [1978] 216 INT'L TRADE REP. (BNA) AA-1. This claim was denied by Sperry's chairman who noted that similar computers had perviously been okayed for sales to the Russians. [1978] 217 INT'L TRADE REP. (BNA) A-9.}

This incident followed in the wake of another highly publicized use of commercial export licensing for U.S. foreign policy purposes involving the Oshkosh Truck Company. This company signed a contract for 400 heavy duty trucks with Libya, apparently against the advice of a State Department official, [1978] 207 INT'L TRADE REP. (BNA) A-1, but the advice of a Commerce Department official who stated that the Commerce Department's opinion concerning issuance of a license is usually determinative. Id. The State Department urged strongly that the license be denied because of Libya's alleged harboring of terrorists and because of allegations that the trucks would be used to transport Soviet-made tanks. After receiving assurances that Libya had signed an anti-terrorism pact, and that the trucks would not be used for military purposes the license for modified versions of the original trucks was approved. [1978] 235 INT'L TRADE REP. (BNA) A-1.

\footnote{173 For a lengthier discussion of the commercial licensing process, see Note, Export Licensing: Uncoordinated Trade Repression, 9 GA. J. INT'L & COMP. L. 345 (1979).}
IV. EVALUATION AND RECOMMENDATIONS

A. Agency Discretion Versus Mandatory Actions

Most of the human rights statutes vest discretionary powers in various executive agencies. A statute typically contemplates the imposition of human rights sanctions under specific circumstances, for example when the nation receiving aid engages in a consistent pattern of gross violations of human rights, or when United States interests in the area of human rights will be clearly and importantly advanced. In contrast to discretionary enforcement provisions are those which call for a direct ban or limitation on licensing or financing of certain exports to particular countries. Some examples are: Eximbank transactions for South Africa; appropriations to Vietnam, Cambodia, Uganda, Cuba; exports to Uganda; and military sales to Argentina. Generally, the sanctions are to be enforced until an oppressive policy, such as apartheid in South Africa, or repressive practices, such as torture or political detention, are ameliorated.

There are both advantages and disadvantages to each statutory approach. Rigid bans provide for a predictability. Exporters presumably will make use of this predictability by funneling their market-developing resources, such as executive time spent developing sales contacts, setting up sales offices, arranging for local financing, and orchestrating co-production and licensing agreements, away from the designated countries. There are two problems with this approach however. First, where the imposition of the ban or restriction is an attempt to coerce respect for human rights in the target nation by restricting needed goods, the importing nation may pursue non-American suppliers. In addition, United States exporters will seek ways to circumvent the ban when possible, thereby diminishing its coercive effect. Second, a ban restricts United States diplomatic flexibility by eliminating the possibility of providing incentives for a nation to improve its human

175 Supra note 86.
176 Supra note 89.
177 Supra note 82 and 83.
178 6Supra note 85.
179 It is not suggested that the purpose of all of these bans is coercive. For example, it is unlikely that South Africa would be coerced into discarding its policy of apartheid merely because all U.S. goods are withheld from it. Nevertheless, the United States imposes a total ban to register strong disapproval of the policy.
rights situation. Under a discretionary clause, which allows United States human rights officials to review individual cases, specific steps taken by a foreign government to ameliorate its human rights conditions can be recognized and applauded. Thus, for example, if a country frees some political prisoners or allows an international human rights organization to investigate its practices, the United States could show approval by facilitating Eximbank credits for exports to the country, by approving previously denied or delayed munitions sales, or by increasing development aid to that country. If a strict ban is imposed, incremental improvements in a country's human rights situation might not be significant enough to overcome legislative and bureaucratic inertia and cause a lifting of the ban.\(^{180}\)

There are also limits to the *discretionary* use of denials, delays and limitations in Eximbank, OPIC and licensing, when the purpose is to gain leverage by depriving target nations of United States exports and credit. These methods, when used to give teeth to diplomatic dialogue, can only produce meaningful deprivation in the target country (and hence coercive effect) when that country has placed heavy reliance on the availability of goods from United States sources. If used too frequently, these policy tools become less effective by casting great doubt on the reliability of the United States as a supplier. Further, this doubt could spread to other countries which view themselves as prospective targets. The result could well be that potential target nations would simply develop other ready sources of supply to plan against such future contingencies.

The discretionary use of denial, delay and limitation for coercion is also marred by lack of communication between HA and other human right agencies, and the exporting community. An examination of human rights enforcement in the commercial export sphere reveals a sense of circumspection on the part of human rights officials, but it is difficult to determine whether this is due merely to intradepartmental pressures or instead to careful weighing of export and credit availability elsewhere and the long-term adverse trade impact on normal United States trade relations. When practical, recommendations for the limitation, delay or denial of an Eximbank transaction should be imposed only on United States exports which command competitive superiority in foreign export markets (unless the human rights situation in the recipient nation is so horrendous that policy requires a more complete break in eco-

\(^{180}\) See note 6, *supra*. If there is no change of human rights improvement by means of such incentives, bans may still be used to disassociate the U.S. government from that nation's practices.
onomic relations). It is only these exports which can bear the added cost of unreliability for future exports caused by the limitation, delay or denial. In addition, the availability to a foreign government or business of alternative financing should be examined before the U.S. orders a delay or denial of Eximbank credit. Generally, when it is uncertain whether Eximbank financing is available, an exporter and importer must rely on private financing usually obtained through commercial banks. Human rights policy makers must take into account that denial of Eximbank financing will have the greatest adverse effect on United States export markets when imposed (1) upon human rights problem nations which are also perceived as high credit risks for private financing and (2) upon "big ticket items" such as costly Allis-Chalmers turbines, for which commercial banks might be unwilling to extend the long-term financing that would make the United States export competitive.

Discretionary clauses present additional problems for export trade. The Chaffee Amendment to the Export-Import Bank Act of 1945 is a good example. An exporter may expend a substantial amount of time and money developing a market or setting up a particular transaction. Although the provision permits the President to deny an application for Eximbank's services only where it would clearly and importantly advance United States interests in the areas of human rights, the exporter might lose the sale and have his market jeopardized if, with little advance notice, his transaction were singled out as one that could be used to clearly and importantly advance human rights concerns. One can only speculate about this presently since there has been no discretionary enforcement of the Chaffee Amendment. The jeopardy that the exporter's market may be subjected to could range from nonexistent to grave. Perhaps a separate government insurance program should be created to indemnify such an exporter for the fixed investment losses he experiences due to human rights action. Such a program would reduce or eliminate loss to the exporter without compromising human rights policy, by imposing the cost of human rights policy onto the government, and ultimately the taxpayers, who in theory are the ones who wish to see human rights policy advanced.

As explained in section III A. 4 of this Note, officials at HA have publicly outlined a series of actions which they may recommend against an offending country. However, several questions critical to export planning remain unanswered. How flagrant must a particular nation's human rights violations be before HA will
recommend a particular step? When will a decisional group's concern for this situation offset a conflicting foreign policy interest causing the group to accept HA's recommendation? How will a decisional group's decisions affect the market for any given export?

Uncertainty as to government policy increased by the reluctance of the State Department to issue a public blacklist of nations against which sanctions are consistently applied. Such a list, HA contends, would lead to diplomatic resentment and intractibility. Once a country is publicly branded by HA as a human rights transgressor, the reasoning goes, it would have little incentive to improve its human rights practices. What little leverage the State Department could exert would be jeopardized if not completely lost. It should be mentioned that HA is willing to advise exporters with regard to possible human rights sanctions, but exporters do not make frequent use of this service.

Denial of IFI funds to nations because of human rights violations has an indirect impact on United States exports, since some of the loan proceeds will often be used to purchase United States goods. Congress thoroughly debated the different effect of agency discretion and strict bans in amending the IFI appropriation bill. Since the purposes of United States involvement in the IFIs do not include expanding United States exports, the facilitation of United States export planning should be a minor consideration. In the IFIs, flexibility rather than predictability is the critical factor.

The Jackson-Vanik Amendment has been criticized as a strict ban which is narrow both in terms of its intended targets (nations politically at odds with the United States) and in terms of its human rights base (i.e., it is directed only towards the single right of emigration). Recent critics have stressed the negative impact of this strict ban on trade, especially East-West trade. Senator Stevenson (D., Illinois) has proposed an amendment

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181 Supra note 99.
182 See note 62, supra.
183 See Weissbrodt, supra note 1, at 275-77. The author suggests that socialist nations might well conclude that this legislation is not part of a concern for human rights, but constitutes a new phase of the Cold War propaganda competition. To allow this perception to go uncorrected would be a mistake. Weissbrodt concludes that "if the United States human rights efforts are to be credible and effective, they must be perceived by every nation as motivated by a genuine desire to improve the observance of human rights and not motivated by political dominance of the Third World or by Cold War competition with the Soviet Union." Id. at 277.
184 C. Gershman, Selling Them the Rope—Business and the Soviets, COMMENTARY, April 1, 1979, at 35.
which will give the President more discretion in determining whether to waive the sanctions tied to emigration policy in non-market nations. The new amendment would allow the President to grant a waiver for a five year period instead of the present one year. Also, the waiver might be based on a Presidential determination that emigration policies were improving in a country. The President would no longer have to receive assurances from the nation. This discretion would improve the application of this policy because, as Senator Stevenson argues, “countries may do quietly that which they were reluctant to announce formally in response to threats or demands. And trade could proceed satisfactorily as it cannot on a spasmodic, interruptible basis.”

Given the assurance of a five year waiver, exporters could pursue new markets and seek long-term credit arrangements.

In the final analysis, a policy based predominantly on discretionary power is desirable. It is more manageable in bringing about improvements in human rights observance, and a flexible approach is more aptly suited to the nature of the evil addressed by human rights legislation. To an extent, some loss of United States export volume is an inevitable consequence of the exercise of discretionary power over exports. But as human rights policy, procedures and agencies mature, uncertainty in enforcement should diminish. Since export losses are inversely proportional to predictability in enforcement, temptations to interrupt standard human rights implementation procedures (such as the National Security Council intrusion into the licensing process in the Sperry Univac computer case) should be resisted by the Executive Branch. Strict bans ought to be used only in those instances where the United States intends to disassociate itself from a historically repressive and recalcitrant regime.

B. Licensing

Congress should pass legislation to improve the munitions licen-

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185 [1979] 243 INT'L TRADE REP. (BNA) M-1. In the statement and analysis accompanying his proposed amendment, Stevenson pointed out further that the legislation does not go so far as to grant MFN status and credits without qualification or condition but rather replaces an explicit linkage to emigration policy with a procedural formulation which implies that the continued availability of credits and MFN status will be subject to periodic review. The proposed legislation would also revise the 1974 Stevenson Amendment by placing a $2 billion limit on outstanding Eximbank credits for exports to any Communist State. The previous law set a $300 million limit on credit for the Soviet Union only.

186 See note 172, supra.

187 See Note, Export Licensing: Uncoordinated Trade Repression, 9 GA. J. INT'L & COMP. L. 345 (1979), for a lengthier discussion and criticism of Licensing in the context of the EAA.
singing process. Under current law, some "dual use" items (i.e., having both commercial and military use) may not be exported to countries on which munitions sales bans have been imposed even though no commercial export bans have been imposed. Such a situation should not occur without a showing that diversion of the dual use item to military use has been made.

Unavoidably, sales of weapon and other military goods and services will remain sensitive to human rights and other foreign policy interests. It is not surprising that expanded munitions export sales is not a key element of the Carter Administration's National Export Policy.

C. Overlapping and Complex Statutes

Human rights legislation represents a broadly supported mandate to infuse human rights considerations into United States foreign policy decisions. This mandate is assuming the texture of bedrock. But efficient governance is not inconsistent with this human rights concern, and there are aspects of what some exporters regard as an overly confusing network of legislation that cry out for correction and improvement.

Congress could act to simplify the legislation in two ways. First, as HA assumes the responsibilities assigned to it under recent human rights statutes, Congress should refrain from passing short and long term credit and appropriations bans directed against specific countries. Second, now that United States human rights concerns have been publicized world-wide and a permanent bureau has been established in the State Department, Section 112 prohibitions which relate to the Food-for-Peace program should be re-evaluated and perhaps eliminated.

In recent years, Congress has passed many human rights statutes which relate to specific countries. As previously mentioned a number of these take the form of a ban which will not be lifted until the human rights situation in a given country improves. Often however an appropriations bill, which funds other major assistance programs for a period of a year or less will provide that funds appropriated or credit authorized by it shall not be granted to a particular country for human rights reasons. Under the authority of the provisions outlined in Part II of this Note, the State Department, in conjunction with HA, has been

188 See note 1, supra
189 Supra note 28.
190 Supra note 21.
given the authority to review the condition of human rights in foreign countries and when necessary impose bans on credits, guarantees and appropriations. Congress should respect the expertise and authority of this agency and defer to its judgment. Companies which want to export goods to a foreign country should be able to turn to HA for advice on the status of our policy toward that foreign country without fear of the possibility of a further congressional ban, except in the most extra-ordinary circumstances.

The application of the section 112 human rights sanction to the P.L. 480 Food-for-Peace program should be reviewed and perhaps eliminated. Under section 112, P.L. 480 financing of sales of agricultural commodities is prohibited to a country which engages in consistent pattern of gross violations of human rights unless such sales will directly benefit the needy in that country.\textsuperscript{9} The general food program, however, has as a principal goal the alleviation of hunger and malnutrition in the recipient countries.\textsuperscript{10} It can be argued that while general economic and security assistance programs symbolize political support for a recipient country, the Food-for-Peace program represents a purely humanitarian effort to directly aid the poor and needy. By creating and funding this program, the United States government has raised its level of concern for the poor to new heights. It is inconsistent with the goal of Food-for-Peace to deny benefits to a nation if the needy there actually benefit, simply because the government fails to respect the human rights of its citizens. In fact, to terminate effective Food-for-Peace aid for the sole reason that the foreign government is a human rights violator is to add insult to injury. On the other hand, if the program does not effectively aid the poor, it should be revised or abandoned in that country.

D. Government Evaluation and Report

A broad-based and thorough enforcement of human rights discretionary sanction would have an enormous adverse impact on exports. On the other hand, if human rights policy is to be taken seriously, discretionary delays and denials of credits and appropriations must be imposed at times, with a resulting negative impact on United States foreign trade. In trying to balance a strong export policy against a sound human rights policy, the government is faced with the major task of determining the im-

\textsuperscript{9} Supra note 34.

\textsuperscript{10} H.R. REP. No. 95-1087, 95th Cong., 2d Sess. 35 (1978).
pact of human rights actions on the level of exports, both by country and by product. It is recommended that the General Accounting Office or an Executive Branch Task Force undertake a study in this area. Such a study should contain foreign market share analysis establishing (1) the percentage of United States trade represented by each type of export product in each country receiving United States goods; (2) the availability of similar exports elsewhere; (3) the fixed investment involved in marketing a given export in a given market; and (4) the effect of trade losses and gains on employment in the United States. A record of the history of human rights observance in each nation should also be included. Additionally, an attempt should be made to separate extraneous factors not directly related to the effects of human rights policy on trade from those which are related (e.g., inflation, fiscal and monetary policies, political changes which effect a nation's import policies, etc.). Instances of circumvention by United States exporters of human rights sanctions, primarily by non-governmental financing and movement of manufacturing bases outside the United States should be traced and analyzed.

With this information in hand, policy makers will be able to establish accurately the human rights policy impact on trade and can intelligently weigh the probable business effect of the action against human rights and other United States foreign policy concerns. Also, in developing a strategy to increase exports, the government could seek to promote the kinds of businesses and products which are least likely to be affected by enforcement of the human rights statutes. Certainly some of his information may already be available to HA and IG. However, the information does not seem to be organized or accessible in terms of export interests. To make a lasting contribution to efficient government, the report should stress the need to intelligently balance, where they conflict, export policy and human rights policy.

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