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Controlling the Export of Dual-Use Technology in a Post-9/11 World

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Controlling the Export of Dual-Use Technology in a Post-9/11 World

Antonia Alice Badway *

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................... 431

II. U.S. EXPORT CONTROLS ON DUAL-USE TECHNOLOGY ..................... 434
   A. History ................................................................................................. 434
   B. Structure of the Export Administration Act ("EAA") ......................... 437

III. THE WORLD TRADE ORGANIZATION'S LIMITATIONS ON EXPORT CONTROLS ...................................................................................... 438
   A. From GATT to the World Trade Organization .................................... 438
   B. "Most-Favoured-Nation" Principle ...................................................... 440
   C. Article XXI Security Exception ............................................................ 441

IV. DOES THE EXPORT ADMINISTRATION ACT VIOLATE GATT? .......... 443
   A. Arguments Against the EAA's Legality Pre-9/11 ............................... 444
   B. Reconsidering These Arguments Post-9/11 ........................................ 444

V. THE EFFICACY AND IMPLICATIONS OF THE EAA ......................... 449
   A. Challenge of Foreign Availability ....................................................... 449
   B. Further Efficacy Challenges with Post-Shipment Verification .......... 451
   C. Effects of Licensing Processing Disparities on U.S. Businesses .......... 452

VI. CONCLUSION ............................................................................................ 453

"Every sweet has its sour; every evil its good."
—Ralph Waldo Emerson

I. INTRODUCTION

When Robert Louis Stevenson created the characters of Dr. Jekyll and Mr. Hyde, he wrote of two characters residing in one body.1 One was a good doctor,
the other an evil murderer. Stevenson used this duality to describe the nature of man; but this duality is also reflected in man's technology. Just as the nature of man is both evil and good, dual-use technology can serve both evil and good purposes. The evil lies in "military and other strategic uses (e.g. nuclear)," while the good lies in nonviolent "civil applications." Due to its possible evil applications, transferring dual-use technology to nations that threaten its peace and security has long troubled the United States.

The main U.S. export control over dual-use technology is the Export Administration Act of 1979 ("EAA"). The EAA sets out the Export Administration Regulations, which provide guidelines for whether American exporters of dual-use technologies receive a general or a far more complicated validated license to export the goods. The license an exporter receives is determined by the end user identity and use of the technology, which affects the difficulty of exporting the item. The EAA expired in 1990, but has since been extended indefinitely through executive orders to preclude foreign parties from posing a grave threat to U.S. economic and national safety.

In addition to the internal controls of the EAA, the United States is subject to external export controls as a result of its membership in the World Trade
Organization ("WTO"). The WTO replaced and incorporated the General Agreement on Tariffs and Trade ("GATT"), which requires that its members treat other member trading partners equally. If a member state grants another member a special favor, it has to do the same for all other WTO members. This non-discrimination principle is referred to as "most-favoured-nation" treatment because each member of the WTO must treat all other members equally.

In some situations, GATT allows for a member to derogate, or be excepted, from the "most-favoured-nation" principle. One such exception is a security exception. Under Article XXI of GATT, a contracting member of the WTO can legitimately restrict trade without violating GATT, to protect its "essential security interests" or to comply with the United Nations ("UN") Charter.

Prior to the terrorist attacks of September 11, 2001 ("9/11"), some legal experts objected to EAA restrictions on exports for reasons other than protecting the "essential security interests" of the United States, including efforts to avoid proliferating weaponry and to influencing domestic policies of foreign nations.

This comment argues that the terrorist attacks on the United States shifted the national conception of "essential security interests." While eliminating international terrorism was once solely a foreign policy interest, today it has evolved into an American national security interest. Many publicized targets of U.S. anti-terrorism actions are not members of the WTO, and, therefore, the U.S. anti-terrorism actions are not covered by the security exception.

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12. See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144 (1994) [hereinafter Final Act] (providing that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."). The United States is an original member of the WTO. Id. at 1130-1131.


14. See Understanding the WTO, supra note 13 (explaining the obligations accompanying GATT Article I).

15. See GATT, supra note 13, at Art. XX - XXI (listing the general exceptions and the security exception to the "most-favoured-nation" principle).

16. GATT, supra note 13, at Art. XXI.

17. Id. at Art. XXI (b)-(c). The security exception allows derogation from all WTO obligations, not just from Article I requirements. Id.

18. Referring to the terrorist attacks on the United States that occurred on September 11, 2001. See Kelly Pate, President Designates Today a Day of Prayer, Remembrance, DENVER POST, Sept. 14, 2001, at A1 (describing the attacks as comprised of two planes crashing into the World Trade Center in New York City, which then collapsed, a plane crashing in Pennsylvania and a plane crashing into the Pentagon in Washington, D.C.).

19. See Michael Gaugh, GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls, 8 N.Y. INT'L L. REV. 51, 73-74 (1995) (arguing that the EAA does not conform to GATT because: (1) there are no findings that export controls are necessary to protect essential security interests; (2) most proliferation controls are categorized as foreign policy controls, not national security controls; and (3) even the Department of Commerce knows how to note that a given technology is controlled for both reasons it has failed to so in a number of proliferation controls).
has no duty to afford them "most-favoured-nation" protections under GATT. However, there are a number of WTO member countries who are considered to harbor terrorists, from whom the United States restricts exports of harmful dual-use technologies. This paper addresses the legality and advisability of controls on exports of dual-use technologies to such countries.

Part II discusses the historical background of the U.S. export controls and sets out the structure of current controls on the export of dual-use technology. Part III traces the development of GATT, its foundation of non-discrimination in trade, and its Article XXI security exception. Part IV considers whether the EAA violates GATT in light of the United States' current "War on Terror." Part V identifies efficacy and economic implications of the EAA. Finally, Part VI concludes that in light of post-9/11 security concerns, the United States has not violated the WTO's "most-favoured-nation" principle because the EAA properly falls within GATT's Article XXI security exception, due to the increased threat of international terrorism aimed at the United States. However, unless the EAA is made more effective, it might not adequately serve a national security purpose, nor justify the competitive disadvantage at which it places U.S. businesses.

II. U.S. EXPORT CONTROLS ON DUAL-USE TECHNOLOGY

A. History

For almost 100 years, U.S. export controls have protected national security interests. The start of the Cold War between the United States and the Soviet Union created a security threat, requiring a new peacetime export control system. Congress responded to this new threat by enacting the Export Control Act of 1949 ("1949 Act"), allowing for three types of controls on exports. The first export control was the short-supply control, which was "to be used to prevent the export of scarce goods that would have a deleterious impact on U.S. industry and national economic performance." The second control, the foreign policy control, was "to be used by the President to promote the foreign policy of war, or the imminent threat of war," led to export controls where "the rationale for control was the necessity of not giving aid and comfort to the nation's enemies". The second control, the foreign policy control, was "to be used by the President to promote the foreign policy of

20. See Understanding the WTO, supra note 13 (stating that Afghanistan, Iraq, and North Korea are not members of the WTO, but Kenya and Pakistan are members).
22. See IAN F. FERGUSSON, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE CRS-2 (Congressional Research Service 2003) (noting that "during the first half of the 20th century, war, or the imminent threat of war," led to export controls where "the rationale for control was the necessity of not giving aid and comfort to the nation's enemies").
24. See FERGUSSON, supra note 22 (discussing the Export Control Act of 1949, which is no longer in print).
25. Id.
the United States." The third type of control, the national security control, was "to be used to restrict the export of goods and technology . . . that would make a significant contribution to the military capability of any country that posed a threat to the national security of the United States." As the Cold War continued, the 1949 Act was renewed seven times, each time largely without amendment, and remained in effect until 1969.

At the same time that Congress was enacting the 1949 Act, the United States and its North Atlantic Treaty Organization ("NATO") allies were establishing the Coordinating Committee for Multilateral Export Controls ("CoCom"). CoCom served as a multilateral export control regime aimed at controlling the export of "strategic goods and technology to the Soviet Union and its allies." It operated by informal agreements among its members according to the rule of unanimity. CoCom developed a list of items with potential military uses for which all members agreed to restrict export. Member states that wanted to export one of these items to non-CoCom members had to submit the export application to CoCom for review and approval. This provided a veto mechanism through which one CoCom member could absolutely prohibit another member from exporting technology to a non-member state.

In the late 1960s, the hostility between the United States and Soviet Union relaxed, resulting in reduced export control regulations. The near-embargo nature of the 1949 Act was replaced by less restrictive export controls of the Export Administration Act of 1969 ("EAA of 1969"). This shift to less

26. Id.
27. Id.
29. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 812 n. 5 (1987) [hereinafter RESTATEMENT] (listing the members of the Coordinating Committee for Multilateral Export Controls as including the member states of NATO, except Iceland, and Japan).
30. Id.
31. See Gist: U.S. Export Controls, U.S. DEPT. OF STATE DISPATCH, Aug. 1992 (on file with The Transnational Lawyer) (noting that CoCom was "not based on a treaty or an executive agreement" and was "implemented by each member country on a national basis" and explaining CoCom's mode of operations).
32. RESTATEMENT, supra note 29.
33. Id.
34. Jaffer, supra note 5, at 521.
35. See Christopher F. Corr, The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era, 25 Hous. J. INT'L L. 441, 451-452 (2003) (noting that "[i]f U.S. exporters were restricted from selling a particular technology to a designated region, it was quite unlikely that another country, particularly a non-COCOM country, was in a position to supply the technology").
36. See FERGUSSON, supra note 22 (Congressional Research Service 2003) (illustrating how the growing importance of trade to the U.S. economy and allies caused a reexamination of the export controls). This reexamination was due to the decreasing need to restrict trade with the Soviet Union. Id.
37. Id. at CRS-3.
restrictive controls was sustained by the renewal of the EAA in 1974 and 1977.38 The current EAA was finally passed by Congress in 1979, and it is this legislation that forms the basis of the entire U.S. export control system today.39

With the fall of the Berlin Wall, and the end of the Cold War, and the growth of technology worldwide, political demand for liberalized export controls resurfaced.40 U.S. businesses pressured policymakers to decrease restrictions on the export of dual-use goods, due to less need to protect the United States from Soviet attack and increased worldwide competition in the technology field.41 CoCom dissolved in 1994 as proposed by the Clinton administration, and was replaced in 1997 by the Wassenaar Arrangement on Export Control for Conventional Arms and Dual-Use Goods and Technologies ("Wassenaar Arrangement").42 Unlike CoCom, which required members to submit export licenses of restricted items for review and approval by CoCom, the Wassenaar Arrangement allowed member countries to independently determine whether to export restricted goods or technology.43 Critics have argued that allowing members to have complete discretion diminishes control over the export of dual-use technology to rogue or unreliable nations.44

Domestically, Congress has not been able to reach an agreement on how to reform the EAA even though such measures have been regularly introduced.45 The EAA was extended from 1989 to 1994 by temporary statutory extensions.46 In 1994, former President George Bush invoked the International Emergency Economic Powers Act ("IEEPA")47 and issued Executive Order No. 12924 to

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38. Id.
39. Id.
41. See id. (noting that the United States faced growing international competition, putting U.S. companies at a serious disadvantage because restricted goods were available from non-U.S. and non-CoCom sources).
42. See Mark D. Gursky, Comment, Liberalization of High Performance Computer Export Controls Under the Clinton Administration: Balancing National Security and Economic Interests, 49 CATH. U.L. REV. 975, 993 (2000) (explaining that in order to liberalize national export laws, the Clinton Administration wanted to replace CoCom with "a successor multilateral export control regime more oriented with the post Cold-War environment").
43. Id. at 994.
44. See Corr, supra note 35, at 455-456 (noting that members tend not to comply with "these watered down" requirements and that the U.S. can no longer prevent its allies or other countries from transferring technology to countries the U.S. views "as unreliable or as strategic threats"); see also Gursky, supra note 42, at 994 (noting that critics argue that the Wassenaar Arrangement "removes the ‘teeth’ that CoCom exemplified in controlling dual-use exports").
45. FERGUSSON, supra note 22, at CRS-3.
46. Id.
47. 50 U.S.C. § 1701 (1994); see also Themes Karalis, Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse as a Political Question, 12 CARDozo J. INT’L & COMP. L. 109, 125-126 (2004) (noting that "Congress expressly authorized the President to use Title II of the IEEPA to continue the effectiveness of the EAA’s Export Administration Regulations"). Further, the President can "exercise this authority only in the face of an ‘unusual and extraordinary threat, which has its source in whole or substantial part outside of the United States, to the
continue the EAA for another six years.\textsuperscript{48} When that time period expired, the EAA was extended from November 13, 2000 to August 20, 2001 through legislation passed by both the House and Senate, and signed by the President.\textsuperscript{49} Since August 20, 2001, the EAA has been operating due to Executive Order 13222, issued by former U.S. President Bill Clinton under International Emergency Economic Powers Act provisions.\textsuperscript{50} President Clinton justified extending the EAA on a determination that foreign parties having unrestricted access to certain U.S. technologies constituted "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States...".\textsuperscript{51}

B. Structure of the Export Administration Act ("EAA")

The EAA is implemented through the Export Administration Regulations ("EAR").\textsuperscript{52} The EAR control U.S. origin commodities, software, and technology for national security, foreign policy and short-supply reasons.\textsuperscript{53} The EAR is administered by the Bureau of Industry and Security, formerly known as the Bureau of Export Administration, which is part of the U.S. Department of Commerce.\textsuperscript{54} The Bureau of Industry and Security controls dual-use technology and administers a list of dual-use items that are subject to licensing under the EAR.\textsuperscript{55} This list is known as the Commerce Control List ("CCL").\textsuperscript{56}

Obtaining a license to export dual-use goods is a complicated process. U.S. exporters must first refer to the CCL\textsuperscript{57} to obtain an Export Control Classification Number for their proposed export. Next, they must reference the Commerce Country Chart\textsuperscript{58} to determine whether exports are generally permitted to the destination country.\textsuperscript{59} Numerous exceptions may apply which deny exportation,
2005 / Controlling the Export of Dual-Use Technology in a Post-9/11 World

and the exporter must refer to other sections of the EAR to determine whether the buyer is on a list of countries, organizations or individuals to which dual-use exports are denied.60

Even if an exporter successfully completes the initial portion of the process, there is still the possibility that the license will be denied if the Department of Commerce believes that the end-use of the product is one on a specific list of banned chemical, biological, or nuclear activities.61

If the exporter is able to meet all these requirements, the Department of Commerce will typically determine which type of license for export to a specific destination will be approved.62 A general license does not require further written authorization or documentation from the Department of Commerce. Further, it is available for any commodity listed on the CCL that is being exported to any destination that does not require a validated license.63 However, individual validated licenses are required for specific commodities and technical data listed on the CCL that are being exported to certain destinations, and must be accompanied by additional supporting documentation.64

Once the export license is issued, the Department of Commerce is responsible for conducting a post-shipment verification check to ensure the end-user and end-use match those stated in the application for the export license.65 This post-shipment verification is often minimal or absent.66

In addition to the EAA, which is an internal regulation on exports, the U.S. also faces external constraints on exports.

III. THE WORLD TRADE ORGANIZATION’S LIMITATIONS ON EXPORT CONTROLS

A. From GATT to the World Trade Organization

For decades, the United States has championed regulations to assure equal treatment among international trading partners. In 1945, the United States

60. See id. (referring to the Commerce Control List).
61. See EAR, supra note 7, § 744 (including nuclear explosive activities, unsafe guarded nuclear activities, restrictions on certain rocket systems, and restrictions on certain chemical and biological weapons end-uses, on the specific list of prohibited end-uses).
62. See RESTATEMENT, supra note 29, § 812 n. 2 (describing the difference between general and validated licenses); see also Gaugh, supra note 19, at 56.
63. See Gaugh, supra note 19, at 56 (explaining the U.S. export licensing system).
64. Id.
66. The negative effects of this minimal or absent post-shipment verification are discussed in Part V.B. of this comment.
proposed a code of conduct for international trade,\textsuperscript{67} which was to be administered by a new International Trade Organization ("ITO").\textsuperscript{68} This body was intended to resolve disputes between signatories to the code and attend to other administrative duties.\textsuperscript{69} The main principles proposed for the code were unconditional most-favoured-nation treatment and the prohibition of most quantitative trade restrictions among signatories.\textsuperscript{70}

To build support for an ITO, the United States brought together twenty-two other countries in Geneva for tariff-cutting negotiations that ran from April to October of 1947.\textsuperscript{71} These negotiations set the stage for future "Rounds," as they became known, which played a prominent role in creating international trade law.\textsuperscript{72} Similar to the most-favoured-nation principle, all negotiated concessions were applied equally to the participants.\textsuperscript{73} The concessions were recorded in the GATT, which also contained a code of conduct that protected these concessions and committed all signatories to a common set of international trade behaviors.\textsuperscript{74} The U.S. Congress later rejected a proposed charter for the ITO, that consequently never actually came into existence.\textsuperscript{75} Thus, the United States partially achieved its plan for an international trade law code of conduct, but without full ratification, there was no governing body to enforce the code.\textsuperscript{76}

GATT continued to evolve through additional negotiation rounds, patterned after the initial Geneva Round.\textsuperscript{77} In 1982, the United States urged a new round of negotiations to expand GATT's focus from trade in goods to include trade in services, intellectual property and investment.\textsuperscript{78} With much persistence on the part of the United States,\textsuperscript{79} the Uruguay Round convened in 1986 and ran until

\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} See id. at 24 (providing that the original countries to negotiate a multilateral trade agreement included the United Kingdom, France, China, Canada, Australia, New Zealand, South Africa, India, The Netherlands, Belgium, Luxembourg, Czechoslovakia, Brazil, and Cuba, followed by an additional eight countries who were engaged in a tariff-cutting negotiation).
\textsuperscript{72} Id. at 25.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{76} See LOWENFIELD, supra note 67, at 26 (noting that the ITO charter never entered into effect as most governments waited for the United States before initiating ratification procedures).
\textsuperscript{78} See LOWENFIELD, supra note 67, at 61 (noting that the global economy had also evolved since the original GATT, and these new areas of trade fit well within the principles and techniques of GATT).
\textsuperscript{79} See id. (describing how developing countries opposed the U.S. desire for a new round because the
1994.\textsuperscript{80} It was from the Uruguay Round that a new international trade organization emerged—the WTO.\textsuperscript{81} Even though GATT was never ratified, its signatories applied it provisionally for almost fifty years until the founding of the WTO.\textsuperscript{82} GATT now serves as the WTO's umbrella treaty for trade in goods.\textsuperscript{83} All 128 signatories of GATT were invited to ratify the Final Act of the Uruguay Round and 127 nations became members of the newly formed WTO.\textsuperscript{84}

B. "Most-Favoured-Nation" Principle

The "most-favoured-nation" principle is the foundation for WTO's prohibition against discrimination among trading partners, and one of the original principles upon which the United States based its initial proposal that evolved into GATT.\textsuperscript{85} The principle declares that WTO member states\textsuperscript{86} cannot discriminate between trading partners.\textsuperscript{87} The "most-favoured-nation" principle was so important that it became the first article of GATT.\textsuperscript{88} Paragraph 1 of Article I, covering the "most-favoured-nation" principle and export controls states that:

\[\text{[w]ith respect to all rules and formalities in connection with exportation, any advantage, favour, privilege or immunity granted by any contracting party to any product destined for any other country shall be accorded immediately and unconditionally to the like product destined for the territories of all other contracting parties.}\textsuperscript{89}

\[\]
In this way, the language of GATT Article I illustrates the significance of the “most-favoured-nation” principle.

While Article I forbids discrimination among WTO trading partners, it does contain exceptions. One such exception, the national security exception of Article XXI, allows contracting parties to discriminate against certain nations for national security purposes, without violating GATT. This exception is discussed in the following section of this comment.

C. Article XXI Security Exception

A prominent exception to the “most-favoured-nation” clause is the ability of member nations to protect their national security. Article XXI provides that an agreement shall not (1) require disclosure of any information contrary to national security interests, or (2) prevent necessary actions from being taken to protect essential security interests, or (3) prevent any contracting party from pursuing obligations under the United Nations Charter for the maintenance of international peace and security.

This exception to the Article I “most-favoured-nation” clause allows contracting parties to restrict trade for national security purposes without violating GATT. The national security exception is critical to WTO members attempting to balance the need to protect their national security with their obligations to the WTO. The Article XXI exception attempts to confine trade restrictions to situations that the contracting party “considers necessary for the protection of its essential security interests.”

There are no absolute standards for determining whether a WTO member’s invocation of Article XXI is truly for an essential security interest. One group of legal experts argues that the intent of Article XXI is clearly subjective, and it is left to the member state to determine the need for invocation. Other legal experts argue for an objective standard that is more limiting.

90. See id. at 66 (stating that “most exceptions to Article I are related to imports rather than exports” and are listed in Articles VI, XII, XIV, XX, and XXI).

91. GATT, supra note 13, at Art. XXI.

92. See discussion infra Part III.C.

93. GATT, supra note 13, at Art. XXI.

94. Id.

95. Gaugh, supra note 19, at 67.

96. See Wesley A. Cann, Jr., Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism, 26 YALE J. INT’L L. 413, 417 (2001) (discussing that nations do not want to participate in agreements without assurances that they retain “the right to protect their sovereignty from external threat”).

97. LOWENFIELD, supra note 67, at 34.

98. See id. (stating that Article XXI is a self-judging measure making it a “significant means for evading GATT obligations); see also Cone, supra note 75, at 745 (arguing that the Article XXI exception is quite broad and does not prevent contracting parties from self-judging their need for the exception, but also noting that the exception has not been abused).

99. See Raj Bhala, National Security and International Trade Law: What the GATT Says, and What the
The drafters of GATT limited the exception to essential security interests because they did not want the exception to completely obviate the purposes of GATT. The drafters did not want to make the exception too "tight" so as to prohibit "measures which are needed purely for security reasons," but at the same time, they did not want to make the exception so "broad" that countries could pursue commercial purposes disguised as an essential security interest. However, since the adoption of GATT, member nations have affirmed their right to invoke the Article XXI "essential security interest" exception without justification or the approval of other members. Further, there is even controversy surrounding the extent to which a country must notify other WTO members that it has chosen to invoke the exception.

Concerns that the national security exception could "reopen the door to arbitrary abuse" of economic power have been "checked informally" in several instances. In fact, in several instances member nations used persuasive methods, rather than turning to the WTO, to settle export disputes. In this way, the objective/subjective ambiguity of Article XXI promotes informal resolution of export disagreements, and supports liberal and most-favoured-nation trade policies, while still responding to members' legitimate security concerns. The

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United States Does, 19 U. PA. J. INT'L ECON. L. 263, 268-275 (1998) (contending that Article XXI should be an objective test based on whether "a reasonable government faced with the same circumstances would invoke Article XXI"); see also Rene E. Browne, Comment, Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton, 86 GEO. L. J. 405, 421 (1997) (arguing that "a history of insistence upon the 'self-defining' nature of Article XXI by biased parties to disputes, without a definitive statement or interpretation by the contracting parties as a whole, however, does not dictate that the provision must be understood as self-defining").

100. See Gaugh, supra note 19, at 67 (noting that the particular wording of the Article XXI exception "was chosen, after considerable discussion, because the drafters of Article XXI wanted to limit the exception to prevent it from swallowing the entire GATT").

101. See id. at 67-68 (quoting the drafters' reasoning in choosing the Article XXI language).

102. See id. at 68 (explaining that through the life of GATT, contracting parties have widely asserted that their use of the exception is by right and therefore requires no "notification, justification [or] approval").

103. See David T. Shapiro, Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT, 31 GEO. WASH. J. INT'L L. & ECON. 97, 102-103 (1997) (noting that, in the 1982 situation where "the European Community, Canada, and Australia suspended imports from Argentina in retaliation for Argentina's attack on the Falkland Islands, citing Article XXI," it was decided that members invoking the national security exception must inform other contracting parties of the invocation "to the fullest extent possible").

104. See id. at 101 (quoting Professor John H. Jackson, in his book WORLD TRADE AND THE LAW OF GATT at 752 (1969)).

105. See Peter Lindsay, The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?, 52 DUKE L.J. 1277, 1312 (2003) (providing examples of such informal checks on the national security exception). For example, the GATT community persuaded Sweden to withdraw its national security protection over shoes. Id. It also persuaded Taiwan not to invoke the exception in connection with the accession of the People's Republic of China to the WTO. Id. Additionally, Columbia and Nicaragua submitted their border dispute to the International Court of Justice instead of arguing the matter in the WTO and the United States and the European Community reached a settlement in their dispute over the Helms-Burton Act, rather than arguing the matter in the WTO. Id.

106. Id.
ambiguity in Article XXI allows "countries the ability to respond to legitimate security concerns without destroying advances in trade liberalization." 107

IV. DOES THE EXPORT ADMINISTRATION ACT VIOLATE GATT?

The alignment of the U.S. EAA and GATT becomes problematic because of the overlap in the list of countries to which U.S. businesses export dual-use technology and the list of countries that are members of the WTO. When U.S. businesses export to any country, WTO member or not, they are subject to U.S. export requirements. Contained within EAR section 740, Supp. 1, is a list entitled Country Group D, 108 containing all the countries to which the United States restricts export licenses under the EAR for national security reasons. 109 Of the forty-six countries on the Group D list, fourteen are WTO members and nine are WTO observer governments. 110 Since the United States, and not U.S. businesses, was the actual signatory to GATT, the businesses themselves are not subject to GATT Article I and can, therefore, discriminate between trading partners as they choose. 111 However, any discriminatory restrictions the United States places upon business exports are subject to GATT obligations. 112

In order for such restrictions to be acceptable under GATT, they must be necessary for the protection of the essential security interests of the United States. 113 While the EAA is clear about restrictions on the export of dual-use technology for national security reasons, other categories of restrictions in the EAA — "nuclear," "chemical & biological," and "missile technology" — do not specifically state they may be restricted for security reasons. 114 This ambiguity has resulted in controversy over whether or not "nuclear", "chemical & biological", and "missile technology" fit within the GATT Article XXI national security exception. 115

107. Id. at 1310.
108. See EAR, supra note 7, § 740, Supp. 1 (containing Country Groups A-D which are used in 15 C.F.R. § 740 to indicate which countries are restricted from receiving licenses for particular goods and technologies).
109. Id.
110. See id. (listing the countries restricted for national security reasons); see also WTO Members and Observers, supra note 86 (listing all WTO members and observer governments). The WTO members in Country Group D are: Albania, Armenia, Bulgaria, Cambodia, China (PRC), Estonia, Georgia, Kyrgyzstan, Latvia, Lithuania, Macau, Moldova, Mongolia, and Romania. The WTO observer governments in Country Group D are: Iraq, Kazakhstan, Laos, Russia, Tajikistan, Ukraine, Uzbekistan, and Vietnam. Id.
111. See GATT, supra note 13, at Preface (stating that the governments of the member nations agree to the provisions of GATT).
112. Id. (noting that the United States is a signatory to GATT and is therefore required to observe GATT procedures).
113. See GATT, supra note 13, art. XXI(a)-(b) (allowing for WTO member nations to avoid their obligations if necessary for an "essential security interest").
114. EAR, supra note 7, § 740, Supp. 1.
115. See supra Part IV.A-B.
The attacks on the United States on September 11th, 2001, created a new domestic awareness of the global threat of terrorism and the susceptibility of the United States. This new awareness also shifted the U.S. perception of what export controls were necessary for the protection of the "essential security interests" of the United States.\footnote{Id.}

A. Arguments Against the EAA's Legality Pre-9/11

Prior to September 11, 2001, three arguments that the EAA did not conform to GATT were advanced.\footnote{Gaugh, supra note 19, at 73-74 (concluding that the EAA violated GATT).} First, there were no findings that export controls were necessary for the protection of the essential security interests of the United States.\footnote{See id. at 73 (noting however that "the absence of the particular language found in GATT Article XXI is certainly not determinative. Thus, there is only a weak prima facie case that the EAA violates GATT, because it fails to comply fully with Article XXI. This lack is more likely indicative of American indifference towards compliance with GATT.").} Second, within the structure of the EAA, "most proliferation controls [were] categorized primarily as foreign policy controls, rather than national security controls."\footnote{See id. (noting that because national security and foreign policy controls are within different sections of the Statute, and not subsets of one another, "the inclusion of missile technology and biological and chemical weapons in the foreign policy provisions of the EAA strongly indicates that Congress did not feel that these controls were of a national security nature.").} Third, the Department of Commerce failed to note that certain technologies on the Commerce Control List were controlled for both national security and proliferation reasons, even though they had done so for other technologies.\footnote{See id. at 73-74 (arguing that such failure to note that a given technology is controlled for both national security and proliferation reasons "in a number of proliferation controls is strong evidence that they have been imposed for reasons other than protecting the essential security interests of the United States").} In essence, commentators worried that the United States might use national security as justification for political motives in regulating exports.\footnote{See id. (suggesting that the overarching national security rationale is actually based on foreign policy, not national security).} This would make the "most-favoured-nation" principle practically worthless by allowing WTO member nations to disguise politically motivated discrimination by claiming it was necessary to protect their "essential security interests."

B. Reconsidering These Arguments Post-9/11

While the words "necessary for the protection of the essential security interests of the United States" are not specifically stated in the EAA, Congress does offer two reasons why the EAA is necessary for the protection of essential

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116. Id.
117. Gaugh, supra note 19, at 73-74 (concluding that the EAA violated GATT).
118. See id. at 73 (noting however that "the absence of the particular language found in GATT Article XXI is certainly not determinative. Thus, there is only a weak prima facie case that the EAA violates GATT, because it fails to comply fully with Article XXI. This lack is more likely indicative of American indifference towards compliance with GATT.").
119. See id. (noting that because national security and foreign policy controls are within different sections of the Statute, and not subsets of one another, "the inclusion of missile technology and biological and chemical weapons in the foreign policy provisions of the EAA strongly indicates that Congress did not feel that these controls were of a national security nature.").
120. See id. at 73-74 (arguing that such failure to note that a given technology is controlled for both national security and proliferation reasons "in a number of proliferation controls is strong evidence that they have been imposed for reasons other than protecting the essential security interests of the United States").
121. See id. (suggesting that the overarching national security rationale is actually based on foreign policy, not national security).
security interests. 122 Outlined in the Introduction of the EAA of 1979, these findings are:

(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States. 123

(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States. 124

Although Congress chose to use the phrases “adversely affect the national security of the United States” and “detrimental to the national security of the United States” instead of “necessary for the protection of the essential security interests of the United States,” the language provides essentially the same meaning. Therefore, the EAA does not violate GATT based on the language used in the statute, because it is merely a question of semantics; any of these terms indicate a clear intention on the part of the United States to protect their national security interests. 125

The second argument, that “most proliferation controls are categorized primarily as foreign policy controls rather than national security controls,” falls short when one considers U.S. foreign policy. 126 A current U.S. foreign policy strategy uses export controls to persuade other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in any way in acts of international terrorism. 127 Before the President imposes export controls, he is required to exhaust reasonable and prompt efforts to secure the removal or reduction of assistance to international terrorists through international cooperation and agreement. 128 These EAA regulations preclude arbitrary restrictions on trade. In

122. EAA of 1979, supra note 6, § 2401.
123. Id. § 2401(5).
124. Id. § 2401(8).
125. See Gaugh, supra note 19, at 73 (noting that “the absence of the particular language found in GATT Article XXI is certainly not determinative”). Therefore, the argument that the EAA violates GATT because it fails to comply fully with Article XXI is weak. More likely, this compliance failure is due to American indifference towards compliance with GATT. Id.
126. Id. at 73-74.
127. EAA of 1979, supra note 6, § 2402(8).
128. Id.
light of the recent terrorist attacks on the United States, foreign policy and national security are arguably so intertwined that they cannot be separated in preventing international terrorism.

The confluence of foreign policy and national security also impacts export limitations of nuclear, chemical and biological, and missile technology, which fall under “foreign policy” restrictions under the EAA. But after 9/11, these technologies pose potential security risks to the nation. In 2003, the U.S. Department of State forewarned that while terrorists would likely still rely upon traditional terrorist tactics, several terrorist groups might look to nuclear, chemical and biological materials as a means to cause mass casualties rivaling or exceeding those of September 11th. In addition, the United Nations Security Council issued a resolution affirming that the proliferation of these materials “constitutes a threat to international peace and security.” Considering the international consensus that these materials pose a serious security risk, arguing that the United States cannot limit exports of nuclear, chemical, biological or missile technologies because they fall within the wrong section of the EAA ignores the safety of our people.

As part of U.S. foreign policy, the U.S. government restricts the exportation of nuclear, chemical, biologic and missile technologies to ten WTO members and five WTO observer governments. Some of the countries to which the United States restricts exports have volatile governments and have either associated with terrorists or they are terrorist sympathizers; included in this group of countries are Afghanistan, India, Libya, and Pakistan. In light of the countries’ tenuous relationships, the United States has restricted the export of technologies or materials that could be used to manufacture weapons of mass destruction,

129. See Pate, supra note 18 (describing the events of September 11, 2001).
130. See Fact Sheet, Office of the Press Secretary, The White House, Three Years of Progress in the War on Terror [hereinafter Fact Sheet] available at http://www.whitehouse.gov/news/releases/2004/09/20040911.html (Sept. 11, 2004) (quoting President George W. Bush as saying, “...[O]ur country is safer than it was on September the 11th, 2001, yet, we’re still not safe. ... We are a Nation in danger. We’re doing everything we can in our power to confront the danger. We’re making good progress in protecting our people and bringing our enemies to account. But one thing is for certain: We’ll keep our focus and we’ll keep our resolve and we will do our duty to best secure our country.”) The President talks of defeating “the terrorist enemy” as necessary to “protect the American people,” thus indicating it is a matter of national security. Id.
131. EAR, supra note 7, § 740, Supp. 1.
134. Id.; see also WTO Members and Observers, supra note 86 (listing the WTO member nations and observer governments). The WTO members restricted are: Bahrain, Egypt, India, Israel, Jordan, Kuwait, Oman, Pakistan, Qatar, and the United Arab Emirates. The WTO observer governments restricted are: Afghanistan, Lebanon, Libya, Saudi Arabia, and Yemen. Id.
135. Id.
appearing much less foreign policy oriented and much more national security oriented.

For example, Pakistan has not been a threat to the United States since 9/11. In fact, Pakistan has assisted the United States in its War on Terror, even going so far as to provide bases for the U.S. Air Force during the U.S. invasion of Afghanistan. However, it is predominantly Pakistan’s leadership that is friendly to the United States, with much of the Pakistani government personnel and general population opposed to an alliance with the United States. Moreover, the Taliban, taken out of power when the United States invaded Afghanistan, originated in Pakistan. Pakistan also sheltered Osama bin Laden, one terrorist believed to be responsible for planning the attacks of September 11th. The precarious nature of the relationship between the United States and Pakistan justifies export restrictions against Pakistan for essential security interests.

Furthermore, Pakistan and India are permanently pitted against each other in a nuclear arms race. Neither has signed the Comprehensive Nuclear Test Ban Treaty, and each links its own signing to the signing of the other. During the Clinton Administration, India emerged as a nuclear threat to the United States. In response to India’s 1998 nuclear testing, the United States imposed sanctions on India, including termination of dual-use technology sales. These sanctions were fully lifted by President George W. Bush following the September 11th attacks and as a result Indo-American relations improved such that India offered air bases for use by the United States in the U.S. invasion of Afghanistan. However, constructive Indo-American relations are still in the early stages, and

137. Id.
138. See Graham Allison, Tick, Tick, Tick, ATLANTIC MONTHLY, Oct. 2004, at 58 (noting that Pakistan’s President Musharraf has pledged support to the U.S. fight against terrorism, but not all of Pakistan’s military and intelligence agencies, or Pakistan’s general population support the alliance with the United States).
140. See id. (describing the Taliban’s involvement in the U.S. search for Osama bin Laden).
141. See Mark Thompson, Jay Branegan, Massimo Calabresi, James Carney, Michael Duffy, Matthew Forney, Paul Quinn-Judge, and Thomas Sanction, The Secretary of Missile Defense, TIME EUROPE, May 14, 2001, at 26 (noting that an Indian buildup in nuclear weapons would trigger a Pakistani buildup in nuclear weapons).
142. See Indurthy, supra note 139 (noting that Pakistan links its signing of the Comprehensive Test Ban Treaty to India signing the treaty, thus creating the current stalemate situation of neither country signing the treaty and neither country wanting to be the first to do so); see also The Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Status of Signature and Ratification, at http://www.ctbto.org/s_rtsignrat.dhtml?rat=NA&sig+NA&wstate=ALL&showsig=YES&showrat=YES&region=ALL (last visited on Feb. 13, 2005) (noting that India and Pakistan have neither signed nor ratified the treaty).
143. See Indurthy, supra note 139 (noting that President Clinton was joined by administration officials and U.S. Congressional leaders in denouncing India’s nuclear testing).
144. Id.
145. See id. (noting that the United States chose Pakistan for its frontline country of defense rather than using India).
until the United States and India have a longer history of mutual collaboration, export restrictions against India for nuclear reasons fall within essential security interests.

A third reason why U.S. foreign policy and national security are inseparable is Libya—a country with a long history of terrorist activities. A third example is illustrative. The Libyan government has officially accepted responsibility for the actions of its officials in connection with the Pan Am Flight 103 bombing, and the Qadhafi Foundation has pledged compensation to the victims wounded in the 1986 bombing of a Berlin nightclub that was orchestrated by the Libyan intelligence service. Although Libya has take steps to aid the United States in the War on Terror by sharing intelligence on terrorist organizations, and has officially renounced terrorism, Libya still remains on the U.S. State Department’s list of countries that sponsor terrorism. Because Libya remains a terrorism concern, export control restrictions aimed at Libya fall within the essential security interests of the United States.

Because both Pakistan and Libya pose terrorist threats, either from individuals within the country or from its national leaders, the threat provides a rationale for controlling export licenses for nuclear, chemical and biological, and missile technologies. The reasons for controlling these technologies are not listed specifically in the EAA as national security reasons, which is why critics frame them as foreign policy motivations. However, the security threat posed by this group of countries supports restrictions of such exports as being necessary to protect the “essential security interests” of the United States, as required by the GATT Article XXI national security exception.

The final pre-9/11 argument that the EAA violates GATT is that the Department of Commerce has failed to note that certain technologies on the Commerce Control List are controlled for both national security and proliferation reasons, even though they have done so for other technologies. Under this argument, omission of these technologies is construed to be intentional: the framers of the EAA did not intend that these potentially dangerous materials should be restricted on solely foreign policy grounds. On the other hand, as discussed above, the definitions of foreign policy and national security overlap more in the post-9/11 era than before, due to the threat of terrorism. In the event this overlap does not meet GATT requirements, the United States sought export controls to punish states that support terrorism. While these efforts have

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146. See U.S. Dept. of State, supra note 132, at 91 (detailing Libya’s terrorist history and discussing Libya’s recent renunciation of terrorism).
147. Id. (discussing Libya’s current attempt to resurrect itself in the eyes of the international community).
148. Id. at 85, 91 (recognizing the proactive and positive efforts of the Libyan government in signing international conventions and protocols relating to terrorism, but continuing to list Libya as a state sponsor of terrorist activities).
149. Gaugh, supra note 19, at 73-74.
150. Fact Sheet, supra note 130.
generally failed to reach accord, they have not been challenged as violating GATT. 151

As one commentator proposes, “the WTO should follow the original interpretation of Article XXI, which permitted trade sanctions only in the face of threats to national security in time of war or other emergency.” 152 In the days following 9/11, President George W. Bush declared a global War on Terror. Even if he has declared that the War in Iraq is over, there is little doubt that a time of emergency continues. 153 Thus, because they relate to essential U.S. security interests, any trade sanctions created by the EAA during this time of war or emergency are allowed under a strict reading of the Article XXI exception. However, even if the EAA is determined to be consistent with GATT, its effectiveness remains in question.

V. THE EFFICACY AND IMPLICATIONS OF THE EAA

A. Challenge of Foreign Availability

Although the EAA may not violate WTO obligations, curtailing U.S. exports still may not be rational if excluded nations can purchase dual-use technology from another foreign nation. 154 For example, Germany’s Siemens Corporation sold krypton electric switches to Iraq. 155 While commonly used by doctors to destroy kidney stones, these switches can also be used to set off the chain reaction in nuclear weapons. 156 After the War in Iraq ended, U.S. troops found an unexpected amount of dual-use items that had been exported from other foreign nations, including assortments of French military equipment and German-made chemical weapon protective gear. 157

The EAA acknowledges the issue of foreign availability, and therefore, lays out the following procedure: If the Secretary of Commerce determines that availability from non-U.S. sources makes restrictions on the export license of a

151.  RESTATEMENT, supra note 29, § 812 n. 5.
152.  See Shapiro, supra note 103, at 113 (indicating that “[u]nder this definition the United States could only sanction its wartime enemies, nations that support such enemies, and nations that use indirect means to undermine U.S. national security”).
153.  See Dana Bash et al., Bush Warns War on Terror Not Over (May 2, 2003), available at http://www.cnn.com/2003/ALLPOLITICS/05/02/spdj.irq.bush.ahead/index.html (reporting that the President warned his audience that the war against terror might not be over and that “[a]ny person involved in committing or planning terrorist attacks against the American people becomes an enemy of this country and a target of American justice”).
154.  See FERGUSSON, supra note 22, at CRS-5 (noting that “[f]oreign availability exists when a good is available to controlled countries from sources outside the United States in ‘sufficient quantity and comparable quality’ so that control of the item would be ineffective.”).
156.  Id.
2005 / Controlling the Export of Dual-Use Technology in a Post-9/11 World

certain good ineffective, then the Secretary will approve all licenses for that good that meet license requirements. The Secretary shall also remove the good or technology from the CCL if it is determined to be the appropriate action.

While the Secretary of Commerce is responsible for determining on a continuing basis whether foreign availability exists, either the Secretary of Commerce can initiate an investigation or the license applicant can request such an investigation. Therefore, if the Secretary of Commerce is not updating the CCL on a continuing basis, license applicants provide an additional check on the system to ensure efficacy. This further ensures that license restrictions are "necessary," since only materials that are unavailable from other countries would remain on the CCL. As per the Article XXI exception, those exports are legitimately restricted.

By ensuring that dual-use technology is not available from another country, the U.S. guarantees that its export controls are truly necessary to protect its "essential security interests" because it is the only source for such technology. In the event the President chooses to overturn a decision by the Secretary of Commerce and to control an item because to do otherwise "would be detrimental to the national security of the United States," the President must enter into negotiations with multilateral control partners to eliminate the availability at issue. Such multilateral negotiations would bring to light disagreements with other countries about the imperative for U.S. restrictions, providing yet another safeguard to ensure necessity of the essential security control.

The issue of foreign availability invites at least two additional perspectives. On one hand, there is a moral argument that the United States can protect national security by controlling the export of dangerous technologies, and should not surrender efforts to control dual-use items. On the other hand, this argument ignores the issue of illegal foreign availability. For instance, in 2003 it was discovered that Abdul Qadeer Khan, the founder of Pakistan's nuclear-weapons program, had been running a black market network of nuclear technologies and knowledge. For more than a decade, this nuclear smuggling network supplied the means to make enriched uranium to Iran, Libya and North

158. EAA of 1979, supra note 6.
159. Id.
160. FERGUSSON, supra note 22, at CRS-5,6.
161. GATT, supra note 13, at Art. XXI.
162. FERGUSSON, supra note 22, at CRS-6.
163. See Lloyd, supra note 157, at 309 (taking the side that U.S. businesses are not punished because if there truly was foreign availability, enemies of the United States would not attempt to gain dual-use items from the United States and that regardless of foreign availability, the United States should not just give up and hand the items over).
164. See Allison, supra note 138, at 58 (noting that while Khan asserted there was never any government authorization for his activities and Pakistan's President Musharruf has pledged support to the U.S. fight against terrorism, not all of Pakistan's military and intelligence agencies, or Pakistan's general population support the alliance with the United States).
Korea.\textsuperscript{165} All of these countries are on the U.S. Department of State's list of countries who sponsor terrorism.\textsuperscript{166} In addition, nuclear sites in Russia and other former Soviet states remain vulnerable to theft because their security systems have not been upgraded.\textsuperscript{167} These real examples illustrate that terrorists can obtain dual-use items regardless of export regulation and agreements between countries.

A second perspective comes from U.S. industries, who argue that foreign availability, coupled with “tight restrictions and long waits for licenses merely punish U.S. businesses without preventing enemies from gaining access to the items they seek.”\textsuperscript{168} Further, U.S. industry argues that the loss of income resulting from U.S. export controls hampers domestic businesses from researching and developing new technologies.\textsuperscript{169} Foreign firms are advantaged because they can use their increased capital to invest in research and development of new technologies that may allow them to surpass the United States in the technology race.\textsuperscript{170} This in turn will put the United States at a national security disadvantage when foreign nations become more technologically capable than the United States, rather than protecting security interests as intended.

\textbf{B. Further Efficacy Challenges with Post-Shipment Verification}

Even without the added complication of foreign availability, the actual application of the EAA decreases its desired policy outcome of keeping dual-use items out of the hands of those who harbor ill will toward the United States.\textsuperscript{171} The EAR prohibits exports of dual-use items based on the identity of the end-user or end-use, but the Department of Commerce fails to adequately monitor the actual end-use and end-users of the exported items.\textsuperscript{172} Once an export license is issued, the Department of Commerce is responsible for conducting a post-shipment verification check to ensure the end-user and end-use match those stated in the application for the export license.\textsuperscript{173} Even though twenty-eight

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\textsuperscript{166} See \textit{U.S. Dept. of State}, supra note 132 (providing an overview of state-sponsored terrorism).
\textsuperscript{167} See Jessica Stern, \textit{The Protean Enemy}, \textit{FOREIGN AFF.}, July-Aug. 2003, at 27, 40 (arguing that “Western governments must make it harder for radicals to get their hands on [new weapons]”).
\textsuperscript{168} Id.; see also \textit{FERGUSON}, supra note 22, at CRS-13 (noting that industry argues that “countries of concern” will simply turn to other nations to obtain the technology, thereby disadvantaging U.S. businesses while allowing foreign businesses to increase their market share and explore new markets).
\textsuperscript{169} \textit{FERGUSON}, supra note 22, at CRS-16 (noting that the loss of income from these exports reduces the amount of money U.S. businesses have to invest in future research and development which is necessary to remain competitive in the world market).
\textsuperscript{170} See id.
\textsuperscript{171} \textit{GAO Report}, supra note 65 (referring to the failure to properly implement post-shipment verification procedures).
\textsuperscript{172} Lloyd, supra note 157, at 313-314. The Department of Commerce monitors dual-use exports through the Bureau of Industry and Security. \textit{Id.}
\textsuperscript{173} \textit{GAO Report}, supra note 65.
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percent of all approved licenses for dual-use exports are to countries of concern, the Department of Commerce only completed post-shipment verification checks on six percent of these licenses. In addition, when post-shipment verification checks are actually completed, unfavorable results do not necessarily prevent companies from receiving export licenses in the future, nor do they play a major role in future enforcement actions. Therefore, a lack of real enforcement of the dual-use export license conditions regarding end-users and end-uses allows dual-use items to fall into the hands of parties who would otherwise be unable to obtain these items from the United States.

C. Effects of Licensing Processing Disparities on U.S. Businesses

The United States is placed in a negative competition environment when other WTO members process orders for dual-use technology more rapidly and predictably. One chief executive officer revealed, “our solution is to import a lot of equipment from Europe [rather than the U.S.] ...the export license usually takes from one week to two weeks for a European government. For the USA, [it is] case by case. Sometimes it is] three months, but the longest we have experienced is six months.” Daimler Chrysler Aerospace instructs its purchasing managers not to rely upon American parts because of the delays associated with American licensing. Even though the most frequently listed destination on export-license applications is China, post-9/11 U.S. security policies have slowed down the approval process for exports to China due to increased scrutiny of the applications. This increased scrutiny puts U.S. companies at a disadvantage to their international competitors who have not chosen to increase their control efforts.

Even among U.S. businesses, the EAA procedures create a disadvantage. Large companies can afford auxiliary staff to decipher the regulatory requirements. However, small companies cannot afford the added expense of

174. Id.
175. Id.
176. See id. (noting that these weaknesses in the post-shipment verification process reduce the process' efficacy because there is no actual punishment for misuse of an export license and therefore future violations are not properly deterred).
177. See Gaugh, supra note 19, at 76 (noting that the only damage caused by control of foreign-available goods is to U.S. industry because the United States cannot sell products to certain countries).
179. FERGUSSON, supra note 22, at CRS-16.
181. Id. (recognizing that international competitors have chosen not to increase their control efforts despite the influence of the United States).
182. Lloyd, supra note 157, at 310.
183. Id.
specialized staff. Small companies are therefore not able to compete at the same level in the exportation of dual-use technology.\textsuperscript{184}

The theory of regulatory accretion predicts this competitive disadvantage.\textsuperscript{185} The theory states that the more complex the system of rules, the more the system places burdens on compliance.\textsuperscript{186} The increased compliance effort results in a decrease in the desired policy outcome.\textsuperscript{187} The solution to this problem is regulatory reinvention.\textsuperscript{188} Under the theory of regulatory accretion and reinvention, the Department of Commerce must continue to remain flexible and simplify the EAA so that regulations can effectively keep dual-use items out of terrorist hands, while not destroying the very economic and social structure in the United States that they were designed to protect.\textsuperscript{189}

\textbf{VI. CONCLUSION}

Prior to September 11, 2001, a case could be made that the EAA violated GATT because necessity for national security was solely in the eyes of the United States, independent of the judgment of other GATT members, and because the Department of Commerce often controlled dual-use goods within the CCL differently across nations.\textsuperscript{190} In the wake of September 11th, and in the midst of the current War on Terror, the line between foreign policy interests and national security interests has blurred.\textsuperscript{191} While controlling international terrorism was once deemed a foreign policy interest,\textsuperscript{192} the U.S. has now felt the impact of terrorism on its own soil, making counterterrorism a national security interest. In addition, congressional findings in the EAA support the necessity to protect essential security interests.\textsuperscript{193} Taken together, protecting the United States against terrorist attacks is now both a foreign policy interest as well as a national security interest, satisfying the requirements of the Article XXI exception. Therefore, the EAA, which controls the export of dual-use technology from the United States, does not violate the WTO’s most-favoured-nation principle because it falls within the Article XXI exception—it is necessary to the essential security interests of the U.S. during the War on Terror.

\begin{thebibliography}{99}
\bibitem{184} Id.
\bibitem{185} See J.B. Ruhl & James Salzman, Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State, 91 Geo. L.J. 757, 761 (2003) (defining accretion as “an increase by natural growth or by gradual external addition; growth in size or extent”).
\bibitem{186} Id. at 824.
\bibitem{187} Id.
\bibitem{188} Id. at 831.
\bibitem{189} Id.
\bibitem{190} See supra Part IV.A.
\bibitem{191} See supra Part IV.B.
\bibitem{192} Id.
\bibitem{193} Id.
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However, while the EAA does not violate the WTO's most-favoured-nation principle, it is not effective in its application due to the problem of foreign availability of dual-use technology. There are procedural safeguards written into the EAA to ensure that foreign availability is taken into account when updating the CCL, but this procedure does not take into account black-market smuggling between foreign nations and terrorists. In addition, even when a license is approved under the EAA, the post-shipment verification checks on exports to countries of concern are rarely performed, allowing approved exports to fall into terrorist hands even when the item is exported from the United States.

Not only is the EAA lacking effectiveness, it also puts U.S. companies at a competitive disadvantage against foreign companies with less stringent government export regulations. Further, for U.S. businesses, the complicated procedures detailed in the EAA put small companies at a competitive disadvantage to large companies that can afford to hire the additional staff to untangle these complex requirements.

The EAA does not violate the WTO's most-favoured-nation principle in this post-9/11 War on Terror. However, to be both an effective national security measure and comply with the WTO obligations, legal and illegal foreign availability issues and post-shipment verification checks must be addressed. Without regulatory reinvention, U.S. businesses and jobs will be threatened in the name of a national security that is already vulnerable to competitive foreign exports of dual-use technology and the EAA may cease to be a useful regulation.

194. See supra Part V.
195. See supra Part V.A.
196. Id.
197. See supra Part V.B.
198. See supra Part V.C.
199. Id.