

# EXTRATERRITORIAL APPLICATION OF UNITED STATES LAW: THE CASE OF EXPORT CONTROLS

## INTRODUCTION

Recently the United States has attempted to achieve certain foreign policy goals through the extraterritorial application of its export control laws.<sup>1</sup> Such application is an example of a growing trend among nations to further national policy through the extraterritorial application of domestic law.<sup>2</sup> The United States has taken an expansive view of its power to control activities in other states, provoking challenges and retaliation from European states which charge that such a view may be contrary to basic principles of international law.<sup>3</sup> As global economic interdependence increases, such unilateral attempts to impose law beyond territorial borders increases international tensions<sup>4</sup> and puts serious strains upon multinational corporations and individuals, who must struggle to abide by conflicting directives of two sovereign nations. Yet interdependence may necessitate that nations accept, to some degree, extraterritorial application of national law if the alternative is economic isolationism.<sup>5</sup> The problem, therefore, is to find an internationally acceptable basis for extraterritorial jurisdiction; that is, a means for determining when a nation's application of its laws to foreign persons is consistent with international law. This Comment uses the extraterritorial aspects of the Export Administration Act of 1979<sup>6</sup> (EAA) as a framework within which to analyze the bases for the extraterritorial application of United States law.

The EAA establishes a comprehensive system of American export

<sup>1</sup> See *infra* text accompanying notes 49-64.

<sup>2</sup> See *infra* text accompanying notes 10-26.

<sup>3</sup> See Legal Service of the Commission of the European Communities, *U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 INT'L LEGAL MATERIALS 891, 897 (1982) [hereinafter cited as *EC Comments*] ("it is clear that the U.S. measures . . . by their extra-territorial character simultaneously infringe the territoriality and nationality principles of jurisdiction and are therefore unlawful under international law").

<sup>4</sup> See, e.g., Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980) (analysis of the deleterious effect on Anglo-American relations of United States efforts to enforce its antitrust laws abroad).

<sup>5</sup> Thus, for example, should other nations decide that United States reexport controls on its nuclear technology were impermissible infringements of their national sovereignty, the United States might well forgo exporting such technology, on the ground that nuclear nonproliferation was an overriding national policy concern.

<sup>6</sup> 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979).

controls based on foreign policy, national security, and economic considerations. The law as applied contains three major extraterritorial elements: (1) a requirement of prior United States consent for reexport of American goods or technology;<sup>7</sup> (2) control of the export of items produced in foreign states incorporating technology previously exported from the United States;<sup>8</sup> and (3) authority to prohibit exports, of whatever origin, by persons subject to the jurisdiction of the United States.<sup>9</sup>

This Comment will first review American efforts to export its values and influence the policies of other nations through the extraterritorial application of its laws. Part II will examine the United States export control structure as a specific instance of such extraterritorial application. It will then describe United States attempts to use that structure to further its foreign policy interests during the Soviet pipeline dispute, and the serious international tensions that resulted from making such an effort without giving adequate consideration to principles of international law.

The next part will demonstrate the need for an internationally acceptable basis for the extraterritorial application of law. When the United States proceeds without such a basis, it invites retaliatory or protective measures by other nations, adversely affects diplomatic relations, and significantly reduces the effectiveness of United States law abroad. Part IV will show that the commonly accepted bases for international jurisdiction are not a sufficient means for accommodating international interdependence to legitimate national sovereignty concerns. Part V will explain an "abstention analysis" which should be used to decide when nations should abstain from extraterritorial applications of law. It then examines the bases for jurisdiction advanced for United States laws and concludes that while reexport controls on United States origin goods and technology might well be justified, export controls based upon corporate ownership would not be. The Comment concludes that it is in the United States own interest, as well as in accordance with principles of international comity, for the United States to undertake an "abstention analysis" before attempting to implement its laws beyond its borders. The Comment suggests various means by which Congress can ensure that American policymakers adequately consider international law principles before attempting to apply export control laws extraterritorially.

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<sup>7</sup> Commerce and Foreign Trade Regulations, 15 C.F.R. § 374.1 (1983).

<sup>8</sup> *Id.* § 379.8.

<sup>9</sup> Export Administration Act of 1979, 50 U.S.C. app. § 2405(a)(1) (Supp. III 1979).

## I. UNITED STATES VALUES APPLIED ABROAD

The United States has used many methods in recent years to expand its sphere of influence and to instill its values in other nations. By granting military and financial aid "with strings attached" the United States has attempted to influence other states' policies on the East-West struggle,<sup>10</sup> on human rights,<sup>11</sup> and on nuclear weapons development.<sup>12</sup> By granting or withholding trade concessions, such as most-favored-nation status, the United States has attempted to influence Soviet emigration policies.<sup>13</sup> By stationing troops abroad and promising nuclear weapons protection, the United States has influenced the military structure in Europe, Korea, and Japan.<sup>14</sup> Moreover, the United States has used its financial support of international organizations to further its policies, including recognition of Israel<sup>15</sup> and denial of aid to Vietnam and Kampuchea.<sup>16</sup>

Those actions comport with the basic principle of international law that all states are equal sovereigns and may not be coerced or con-

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<sup>10</sup> The Mutual Defense Assistance Control Act of 1951, 22 U.S.C. § 1611 (1976) (superseded 1979), declared that "no military, economic or financial assistance shall be supplied to any nation unless it applies an embargo on such shipments to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination."

<sup>11</sup> The Foreign Assistance Act, 22 U.S.C. § 2151n (1982) requires that no assistance be given to states that consistently engage in gross violations of human rights. *See also id.* § 262d.

<sup>12</sup> *Id.* § 2429a (cutting off assistance to states engaging in certain specified nuclear activities).

<sup>13</sup> Trade Act of 1974, 19 U.S.C. § 2432 (1982).

<sup>14</sup> United States military involvement in Europe is founded upon the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (effective Aug. 24, 1949). In addition to participation in the North Atlantic Treaty Organization (NATO), the United States maintains Mutual Defense Assistance Agreements with numerous European states. *See, e.g.,* Mutual Defense Assistance Agreement, Jan. 27, 1950, United States-United Kingdom, 1 U.S.T. 126, T.I.A.S. No. 2017. Cooperation with Korea occurs pursuant to the Mutual Defense Assistance Agreement, Jan. 26, 1950, United States-Korea, 1 U.S.T. 137, T.I.A.S. No. 2019. With Japan, the United States has concluded a Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1632, T.I.A.S. No. 4509.

<sup>15</sup> On September 24, 1982, the United States delegation to the 26th General Conference of the International Atomic Energy Agency withdrew following a vote which rejected Israel's credentials. *See* DEP'T ST. BULL. 69 (Nov. 1982). Thereafter, the Secretary of State announced that the United States would withdraw from any U.N. organization, including the General Assembly, that excluded Israel. United States funding for the I.A.E.A. was delayed. N.Y. Times, Oct. 17, 1982, § 1, at 1, col. 6. Actions to exclude Israel were taken in the wake of the invasion of Lebanon.

<sup>16</sup> The Foreign Assistance Act, 22 U.S.C. § 262d(b)(4) (1982) directs United States representatives to the international financial institutions, such as the International Bank for Reconstruction and Development, to consider various policy factors in allocating aid. One such factor is the responsiveness of Vietnam, Laos, and Kampuchea in accounting for Americans missing in action.

trolled by foreign states.<sup>17</sup> Those actions remain wholly within that principle because they involve neither coercion nor control of other nations, but rather present those nations with a choice. If a state chooses to accept American aid, it must also, to a greater or lesser extent, accept American political values. If it chooses to reject those values, it may not enjoy the benefits of United States economic or military assistance.

Increasingly, however, the United States has used another method of extending its values abroad: the extraterritorial application of United States law. By traditional standards of international law, state sovereignty is coextensive with state territory, and within that territory is exclusive.<sup>18</sup> More and more frequently, however, the United States has attempted to apply its laws to activities occurring in foreign states, and United States courts have exercised jurisdiction over questions of liability for activities undertaken by foreigners outside the United States.

For example, United States courts have accepted jurisdiction over foreign defendants in antitrust cases, where the intended or actual effect of the alleged antitrust violation is felt within the United States.<sup>19</sup> Courts have similarly held Title VII of the Civil Rights Act of 1964<sup>20</sup> to apply extraterritorially to the conduct of an American corporation's overseas activities<sup>21</sup> as well as to the activities of a foreign subsidiary in the United States.<sup>22</sup> Provisions of the securities acts have been given extraterritorial effect in numerous cases, generally using the effects rationale which, as noted, developed in antitrust litigation.<sup>23</sup> United States courts have also taken jurisdiction over claims between two foreign nationals arising out of human rights violations that occurred in Paraguay.<sup>24</sup> Environmental protection, drug enforcement, foreign cor-

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<sup>17</sup> U.N. CHARTER art. 2, para. 1, 4. For an evaluation of the meaning of article 2, paragraph 4, see Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983 (1974).

<sup>18</sup> I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 109 (3d ed. 1979); 1 C. HYDE, *INTERNATIONAL LAW* § 199 (2d ed. 1945); L. OPPENHEIM, *INTERNATIONAL LAW* § 144 (8th ed. 1955). See generally *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7) (discussing the extent of state sovereignty under international law).

<sup>19</sup> For courts using this so-called "effects test" in antitrust litigation, see, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-93 (3d Cir. 1979); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945).

<sup>20</sup> 42 U.S.C. §§ 2000e to 2000e-15 (1976).

<sup>21</sup> *Bryant v. International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980).

<sup>22</sup> *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981).

<sup>23</sup> See, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968); see also Gordon, *supra* note 4. On the effects doctrine, see *infra* note 88 and accompanying text.

<sup>24</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), held that deliberate torture perpetrated under color of official authority violates "established norms of the

rupt practices, and foreign asset controls are all areas in which United States laws have had extraterritorial application.<sup>25</sup>

The most recent and controversial application of United States law abroad has come in the form of extraterritorial application of export control laws. The controversies arise when the federal government claims jurisdiction to enforce the control laws against foreign companies or when United States courts claim jurisdiction to hear disputes concerning foreign companies' failure to abide by those laws.<sup>26</sup> A look at one of those controversies is illustrative of the general problem of defining the limits of a state's jurisdictional reach.

## II. THE UNITED STATES EXPORT CONTROL STRUCTURE

### A. Description

The United States maintains a comprehensive system of export controls under the Export Administration Act of 1979.<sup>27</sup> The EAA authorizes the President to "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of

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international law of human rights," and when the alleged torturer is found within the United States, the Alien Tort Statute, 28 U.S.C. § 1350 (1976), provides federal jurisdiction.

<sup>25</sup> See, e.g., *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (imperfect environmental impact statement gives standing to enjoin section of the Pan-American Highway wholly within Columbia and Panama); *United States v. King*, 552 F.2d 833, 850 (9th Cir. 1976) (distribution of heroin in Japan bound for United States), *cert. denied*, 430 U.S. 966 (1977); *Rivard v. United States*, 375 F.2d 882 (5th Cir.) (conspiracy to smuggle heroin into the United States), *cert. denied*, 389 U.S. 844 (1967); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(d)(1) (1982); Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (1983) (reaching any United States citizen, or entity organized under United States laws). On the extraterritorial reach of United States law to foreign branches of United States banks, see Heininger, *Liability of U.S. Banks for Deposits Placed in their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903 (1979).

<sup>26</sup> In at least one instance a company has sought, in federal court, to enjoin the United States from imposing sanctions for failure to comply with the controls. See *Dresser Indus., Inc. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982).

<sup>27</sup> 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979). The Act contains the general export control authority for the United States and regulates most exports. Separate legal authority governs the export of defense articles, narcotics and dangerous drugs, nuclear equipment and materials, watercraft, natural gas and electric power, tobacco seeds, endangered species, and patent applications. See Commerce and Foreign Trade Regulations, 15 C.F.R. § 370.10 (1983). For general discussions of the mechanics of the Act, see Bertsch, *U.S. Export Controls: The 1970's and Beyond*, 15 J. WORLD TRADE L. 67 (1981); Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of "The Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255 (1981); Note, *Reconciliation of Conflicting Goals in the Export Administration Act of 1979—A Delicate Balance*, 12 LAW & POL'Y INT'L BUS. 415 (1980).

the United States, to the extent necessary to further significantly the foreign policy of the United States."<sup>28</sup> In addition to controls for foreign policy purposes, the EAA authorizes similar controls for reasons of national security<sup>29</sup> and short supply.<sup>30</sup>

The statute authorizes the President to impose export controls abroad on three different kinds of activity. First, the authority to prohibit exports of goods and technology "subject to the jurisdiction of the United States" has been interpreted to include a prohibition on the reexport of United States goods or technology without prior United States consent.<sup>31</sup> Second, the United States has interpreted that phrase as also allowing it to prohibit the export of items produced by foreign companies if the items were produced using technology previously exported from the United States.<sup>32</sup> Third, the EAA authorizes the United States to prohibit exports by persons subject to the jurisdiction of the United States. That phrase has been used to claim jurisdiction not only over the export activities of American citizens and corporations, but also over the export activities of foreign corporations which are owned or controlled by United States shareholders, including foreign subsidiaries of American corporations.<sup>33</sup> These three applications have somewhat different rationales. The rationale for the reexport control is the clearest and is based on the view that goods and technology originating in the United States should remain subject to the jurisdiction of the United States through their entire production and distribution cycle. Thus reexport control is a condition of the original export authorization<sup>34</sup> and is the method used to prevent diversions and transshipments of United States goods and technology to unauthorized destinations.<sup>35</sup>

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<sup>28</sup> 50 U.S.C. app. § 2405(a)(1) (Supp. III 1979).

<sup>29</sup> *Id.* § 2404(a)(1); 2402(2)(A).

<sup>30</sup> *Id.* § 2406(a)(1); 2402(2)(C).

<sup>31</sup> See Commerce and Foreign Trade Regulations, 15 C.F.R. § 374 (1983).

<sup>32</sup> *Id.* § 379.8.

<sup>33</sup> The term "person subject to the jurisdiction of the United States" is not defined in the EAA or in the definitions section of the Export Administration Regulations. See 50 U.S.C. app. § 2415; Commerce and Foreign Trade Regulations, 15 C.F.R. § 370.2 (1983). As generally implemented, however, the United States applies controls to goods or technology originating in the United States and to any person dealing in them. When the United States wishes to control non-United States origin goods and technology exported by persons subject to United States jurisdiction, the regulations are specifically amended to define the scope of that control. See, e.g., Export Administration Regulations, 15 C.F.R. § 385.2(d)(3) (1983) (relating to the definition used with respect to export controls for the 1980 Moscow Olympics); Amendment of Oil and Gas Controls to the U.S.S.R., 15 C.F.R. § 385.2(c)(ii), (iii), 47 Fed. Reg. 27,250-52 (1982) (interim rule, repealed, 47 Fed. Reg. 51,858-61 (1982)).

<sup>34</sup> See *supra* note 31.

<sup>35</sup> For an example of transshipment problems under earlier export control laws see *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982). See

The control of goods produced abroad using United States technology is more complicated and is based on a theory of "contamination."<sup>36</sup> When the United States exports technology it seeks to ensure that any items produced abroad using that technology are subject to the same restrictions that would apply to the item if it had been produced in the United States. For example, if a United States firm develops the technology to produce an item deemed to be of strategic importance under the export control laws, export control regulations would require that the export of that item be licensed; applications for direct exports to the Soviet Union would probably be denied. If the firm decides to set up a factory in France to produce the item, it must receive a license authorizing the export of production technology to France. That license would require that goods produced in France using the technology could not be exported to the Soviet Union without express United States authorization.<sup>37</sup> By using controlled United States technology, therefore, France produces goods which are contaminated by American export controls.<sup>38</sup>

The application of the technology control could become quite complicated if the foreign manufacturer changes or develops the technology further, thus making it unclear how much of the item derives from United States technology. In addition, the technology could originally be exported during a period of relatively loose controls, followed by a period in which the United States decided to restrict the export of that technology. In such a case, the surprised foreign manufacturer would still be subject to the stricter controls, even though as a foreign corporation, it could neither have foreseen nor influenced the subsequent imposition of stricter controls.

The third kind of export control differs conceptually from the first two in that it focuses on the person who exports rather than on the item exported. The EAA authorizes the control of items exported by "any person subject to the jurisdiction of the United States."<sup>39</sup> This

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generally A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW, TRADE CONTROLS FOR POLITICAL ENDS* (1977); Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U. PA. L. REV. 331 (1959).

<sup>36</sup> The term "contamination" will be used in this Comment to refer to the continuing effect of United States export control laws on goods produced with American technology. Thus, not only is the primary good produced abroad using such technology "contaminated," or subject to United States export control, but so are all products produced from the primary product.

<sup>37</sup> See *supra* note 32.

<sup>38</sup> One notes, however, that the French would have received the benefit of using American technology thereby saving considerable research and development costs.

<sup>39</sup> See *supra* note 33.

language was originally used in the Trading with the Enemy Act,<sup>40</sup> the original United States export control statute. It continues to be the standard language used to define the entities that are subject to such controls in those statutes and regulations which, like the EAA, developed from that original act. Thus the Foreign Assets Control Regulations, originally implementing the Trading with the Enemy Act, broadly interprets the word "person" to include:

- (1) Any person, wheresoever located, who is a citizen or resident of the United States;
- (2) Any person actually within the United States;
- (3) Any corporation organized under the laws of the United States or of any State, territory, possession or district of the United States; and
- (4) Any partnership, association, corporation, or other organization, wheresoever organized or doing business, which is owned or controlled by persons specified in paragraphs (a)(1), (2), or (3).<sup>41</sup>

The EAA incorporates that broad conception of "persons." When Congress passed the EAA in 1979, it did not define the term "persons subject to the jurisdiction of the United States." There is no indication in the legislative history, however, that it intended to restrict the expansive definition of the term as developed under the original Trading with the Enemy Act.<sup>42</sup>

Similarly, Congress appears to have delegated equally broad power to the President to determine when extraterritorial controls may be imposed. In 1977, Congress extended the President's power to control extraterritorial exports in nonemergency situations.<sup>43</sup> Although the Senate considered an amendment during the 1979 debates which would have limited the President's authority in nonemergency situations,<sup>44</sup> the EAA, as passed, incorporated the 1977 grant of broad discretionary au-

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<sup>40</sup> 50 U.S.C. app. §§ 1-44 (1976 & Supp. III 1979). Section 5(b) allowed the President during times of war or national emergency to control a variety of economic transactions by persons under United States jurisdiction.

<sup>41</sup> Foreign Assets Control Regulations, 31 C.F.R. § 500.329(a) (1983).

<sup>42</sup> SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, EXPORT ADMINISTRATION ACT OF 1979, S. REP. NO. 169, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1147 [hereinafter cited as SENATE REPORT].

<sup>43</sup> International Emergency Economic Power Act, Pub. L. No. 95-223, 91 Stat. 1626, 1628-29 (1977) (codified in scattered sections of 50 U.S.C.). In this legislation, the President's authority under the Trading with the Enemy Act was limited to times of war, and the Export Administration Act of 1969 was amended to grant nonemergency authority to impose export controls extraterritorially.

<sup>44</sup> SENATE REPORT, *supra* note 42, at 1150.

thority, pending further study.<sup>45</sup> The Senate Report indicates that Congress did not give sufficient consideration to the possible misuses of these controls in nonemergency situations.<sup>46</sup> In approving the continuation of the President's nonemergency authority to impose controls, the Senate gave no serious consideration to the international law ramifications of extraterritorial controls and gave no clear guidelines as to when those controls could properly be used.<sup>47</sup>

By incorporating a broad definition of "persons subject to United States jurisdiction," therefore, the EAA has authorized the President to apply the statute to a broad range of individuals and corporations, foreign and domestic. Moreover, in the absence of clear guidelines regarding nonemergency imposition of such controls, Congress seems to have further delegated to the President the discretionary authority to decide just when such controls are called for.<sup>48</sup> The recent attempts by the United States to constrain Soviet policy in Poland by imposing export controls on West European states illustrates the far-reaching international implications of those delegations.

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<sup>45</sup> *Id.* at 1150-51.

<sup>46</sup> The Report noted a State Department letter urging retention of nonemergency controls in case "the United States would wish to distance itself from especially abhorrent acts of other governments which would not, however, constitute emergencies for the United States." *Id.* at 1151.

<sup>47</sup> *Id.*

<sup>48</sup> To ensure the constitutionality of a congressional delegation of power, Congress must enunciate a policy or objective, or establish an "intelligible standard" by which the agency concerned may discern the limits of the power delegated to it. *See Kent v. Dulles*, 357 U.S. 116 (1958); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940); *Amalgamated Meat Cutters v. Connolly*, 337 F. Supp. 737 (D.D.C. 1971). "When the President acts [as here] pursuant to an express . . . authorization of Congress his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

The Foreign Policy Export Control section of the Export Administration Act (§ 2405) has been held to be entitled to the highest presumption of validity because it is a federal statute regulating foreign commerce in the area of foreign affairs and national security. *United States v. Brumage*, 377 F. Supp. 144, 150 (E.D.N.Y. 1974). Considering these factors, it would be extremely unlikely that courts would find the statute, or the President's actions pursuant to the statute, unconstitutional. With respect to international law objections, the RESTATEMENT suggests that it would not be unreasonable for United States courts to enforce United States laws which are inconsistent with international law, if Congress has made clear its intent that the law is to be enforced. *See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 403(4)(b) (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT (Tent. Draft)].

B. *The Soviet Pipeline Controversy: Application of United States Export Controls*

In December 1981, the Polish government imposed martial law and banned the trade union Solidarity.<sup>49</sup> The Reagan Administration, viewing that as a Soviet-inspired move,<sup>50</sup> imposed economic sanctions on Poland and tightened those already imposed against the Soviet Union.<sup>51</sup> Seeking tougher measures, the United States urged West European countries to take action against the Soviets; in particular to join the United States in controlling oil and gas production equipment going to the Soviet pipeline project.<sup>52</sup>

The United States failed to reach agreement with its European allies on sanctions against the Soviets. The purpose of such sanctions was to place economic pressure on the Soviet Union so as to advance reconciliation in Poland.<sup>53</sup> The European states agreed with that goal but disagreed with the United States policy of using economic sanctions against the Soviet Union.<sup>54</sup> Their dislike of economic sanctions may have been influenced by their strong interest in the completion of the Soviet pipeline. Thus, most European states deliberately chose to continue cooperation with the Soviets in that area.

In view of that European position, the United States had several options. It could have: (1) targeted other areas of trade with the Soviets where the United States had almost total control of the trade, and the Europeans had almost none, for example, grain sales; (2) targeted areas of trade where the European interest in trade was less significant than it was in the gas pipeline and where agreement on sanctions was a real possibility; (3) maintained a unilateral embargo of oil and gas equipment to the Soviets without attempting to control European exports; (4) extended United States export controls on oil and gas equipment to the

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<sup>49</sup> President's News Conference, 17 WEEKLY COMP. PRES. DOC. 1379 (Dec. 17, 1981).

<sup>50</sup> President's Statement on United States Measures Taken Against the Soviet Union, 17 WEEKLY COMP. PRES. DOC. 1429 (Dec. 29, 1981).

<sup>51</sup> President's Christmas Address, 17 WEEKLY COMP. PRES. DOC. 1404, 1406 (Dec. 23, 1981).

<sup>52</sup> President's News Conference, 18 WEEKLY COMP. PRES. DOC. 1465 (Nov. 1, 1982); Question & Answer Session, 18 WEEKLY COMP. PRES. DOC. 1476 (Nov. 13, 1982).

<sup>53</sup> President's Message to Congress Transmitting Report on East-West Trade, 18 WEEKLY COMP. PRES. DOC. 1059 (Aug. 24, 1982).

<sup>54</sup> Statement of James L. Buckley, before the Subcommittee on International Economic Policy of the Senate Foreign Relations Committee, July 30, 1982, *reprinted in* DEP'T ST. BULL., Sept. 1982, at 37-38 [hereinafter cited as Buckley Statement]; *see also* 1982-1983 EUR. PARL. DOC. (No. 1) (1982) (report on significance of economic sanctions).

fullest extent possible under the law so as to restrict exports from the United States and from Europe.

American policymakers chose the last and most controversial option,<sup>55</sup> the one which embodied the most expansive interpretation of United States power to apply its laws extraterritorially. President Reagan announced an extension of United States export controls to require that prior written authorization be obtained from the Department of Commerce for "the export to the U.S.S.R. of non-U.S. origin goods and technical data by any person subject to the jurisdiction of the United States."<sup>56</sup>

Regulations were promulgated, pursuant to the EAA, which stated that for the purpose of those controls, persons subject to the jurisdiction of the United States included: (1) citizens or residents of the United States; (2) persons within the United States; (3) corporations organized under United States law; and (4) any partnership, association, corporation or other organization wherever organized or doing business, that is owned or controlled by persons specified in (1), (2), or (3).<sup>57</sup>

In addition, controls were extended to cover non-United States origin goods produced through the use of American technology or subject to United States license.<sup>58</sup> Technology which had been exported to Europe years ago might have triggered a requirement of United States export approval.

The Commerce Department began enforcement proceedings in the United States and denied export privileges to firms in France, the United Kingdom, Italy, and West Germany.<sup>59</sup> There was immediate

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<sup>55</sup> There was considerable debate in the administration on the wisdom of implementing the controls extraterritorially and speculation that the State Department objected, resulting in Secretary of State Haig's resignation. See President's News Conference, 18 WEEKLY COMP. PRES. DOC. 849, 856 (June 30, 1982).

<sup>56</sup> Amendment of Oil & Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (1982) (interim rule). See President's Statement, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982).

<sup>57</sup> Amendment of Oil & Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (1982) (interim rule). These regulations are thus applied to foreign subsidiaries of United States corporations.

<sup>58</sup> *Id.*

<sup>59</sup> Orders temporarily denying export privileges were issued for the following firms: Creusot-Loire (France), 47 Fed. Reg. 38,169, *as modified*, 47 Fed. Reg. 42,392 (1982); Dresser (France), 47 Fed. Reg. 38,170, *as modified*, 47 Fed. Reg. 39,708 (1982); Nuovo Pignone (Italy), 47 Fed. Reg. 39,709 (1982); John Brown Engineering (UK), 47 Fed. Reg. 40,205 (1982); AEG-Kanis (West Germany) and Mannesmann Anlagenbau (West Germany), 47 Fed. Reg. 44,603 (1982). According to officials of the administration, sanctions for noncompliance would include denying export privileges to United States firms, freezing assets of foreign firms and arresting officials of firms who do not comply if they enter the United States. 413 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 425 (June 22, 1982). Those orders were vacated on Nov. 16, 1982, 47 Fed. Reg. 52,490 (1982). A suit challenging the extension of controls to European

and vitriolic response from Europe.<sup>60</sup> The ministers of the European Communities complained,<sup>61</sup> and the British and French governments took steps to prevent their firms from complying with United States law.<sup>62</sup> On November 13, 1982, approximately five months after extension of the controls to Europe, the President announced that the United States had reached agreement with several European states on regulating relations with the Soviets and the controls on European exports were lifted.<sup>63</sup> As a result, the issue became moot and no United States court has ruled on the legitimacy of the expansive jurisdiction contemplated in the EAA.

European objections to the United States controls had been expressed in terms of international law principles.<sup>64</sup> They had claimed that that exercise of jurisdiction was contrary to international law and that the United States actions had been an infringement on European sovereignty. American policy-makers justified the extension of export controls and argued this was legitimate under international law. Both sides justified their positions in terms of the traditional bases for extra-territorial application of law and the more recently articulated *Restatement* reasonableness analysis.

The next section emphasizes the need for nations to structure their policies within the confines of international law and, consequently, the need for clearer standards of "legality" against which a nation's actions can be judged.

### III. THE NEED TO COMPLY WITH PRINCIPLES OF INTERNATIONAL LAW

In this age of increased global interdependence, the ability of any one nation to act unilaterally is limited. Furthermore, in order to re-

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subsidiaries and the temporary denial order was filed by Dresser. *See* Dresser Indus., Inc. v. Baldrige, 549 F. Supp. 108 (D.D.C. 1982).

<sup>60</sup> *See, e.g., Statement and Order Concerning the American Embargo with Regard to the Soviet Gas Pipeline*, 21 INT'L LEGAL MATERIALS 851 (1982) [hereinafter cited as *Statement and Order*]; *EC Comments*, *supra* note 3.

<sup>61</sup> *See* Buckley Statement, *supra* note 54, at 37-38.

<sup>62</sup> The British Secretary of State for Trade made an order under Section 1(1) of the Protection of Trading Interests Act of 1980 which would enable the government at any time to prohibit British companies from complying with the American regulations. The French invoked a 1959 law which allows the government to requisition the services of companies for the needs of the country. Under that authority, French subsidiaries were ordered to meet their contractual obligations. *See* Schmitthoff, 45 EXPORT J. 3 (1982).

<sup>63</sup> President's Speech, 18 WEEKLY COMP. PRES. DOC. 1475 (Nov. 22, 1982); Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (1982).

<sup>64</sup> *See* *Statement and Order*, *supra* note 60; *EC Comments*, *supra* note 3.

ceive effective support from allies and other countries, a nation must act within the consensual framework of international law.

In the Soviet pipeline dispute,<sup>65</sup> for example,<sup>66</sup> the United States advanced a number of reasons for implementing the controls. Those included the wish to advance reconciliation in Poland, the concern that Europe would become dependent upon Soviet energy supplies, and an interest in depriving the Soviets of a source of hard currency.<sup>67</sup> Europeans, on the other hand, asserted interests in fulfilling their contractual obligations, maintaining national sovereignty, stimulating exports, expanding sources of energy, and increasing trade contacts with the Soviet Union.<sup>68</sup> Given the variety of national interests at stake, and the differing weights assigned to each, it is not surprising that both sides claimed their actions conformed to principles of international law. Neither side attempted to weigh systematically the interests of the other. The Europeans refused to consider the possible legitimacy of United States technology controls;<sup>69</sup> the United States failed to give adequate weight to European sovereignty concerns. The result of that lack of balancing was predictable. The executive branch of the United States government found American interests compelling and imposed the controls. Europeans found those controls unreasonable and took steps to ensure that they would not be complied with.<sup>70</sup>

That followed a typical pattern. Instead of achieving widespread

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<sup>65</sup> See *supra* text accompanying notes 49-64.

<sup>66</sup> The pipeline affair is not the only situation in which the extraterritorial application of United States law has caused considerable international controversy. Diplomatic notes have protested United States attempts to claim extraterritorial jurisdiction and foreign legislation has nullified its effect. In response to extraterritorial application of American antitrust laws, the British passed the Protection of Trading Interests Act which prevents disclosure of certain documents and contains a "clawback" provision whereby unsuccessful antitrust defendants can recover from the successful plaintiffs two-thirds of the damages awarded by a United States court. See Protection of Trading Interests Act of 1980, reprinted in 21 INT'L LEGAL MATERIALS 834 (1982). Numerous states have laws prohibiting disclosure of certain business records, some passed in direct response to American attempts to enforce antitrust laws. See *F.T.C. v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1325-26 nn.143-47 (D.C. Cir. 1980); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979). After the extension of United States export controls to cover foreign subsidiaries, both the French and British governments took steps to require their corporations to disobey United States law. See *supra* note 62 and accompanying text. Finally, Canadian concern over the expansive nature of United States export controls may have contributed to the passage of legislation restricting foreign ownership of Canadian enterprises. See NATIONALISM AND MULTINATIONAL ENTERPRISE 39-87 (H. Hahlo, J. Smith & R. Wright eds. 1973).

<sup>67</sup> See *supra* notes 51-52 and accompanying text.

<sup>68</sup> See *supra* note 60 and accompanying text.

<sup>69</sup> See *EC Comments*, *supra* note 3.

<sup>70</sup> See *supra* text accompanying notes 52-62.

support for United States goals, extraterritorial application of United States laws has often produced retaliatory legislation and solidified foreign opposition to United States policy. The debate turns from the merits of the particular policy, be it antitrust or export controls, to the method of implementation and its concomitant infringement of sovereignty. Extraterritorial application of United States laws can thus be self-defeating, resulting in serious international tensions with ultimately little advancement towards any substantive policy goal. Aside from the international tension caused by this jurisdictional battle, individuals and corporations are often caught in the crossfire and are placed in the untenable situation where obedience to one sovereign will result in liability to the other. That increases the costs of international trade and investment, and creates stress in the international system.

Ultimately, while unreasonable attempts to apply law extraterritorially results in no "winners," the foreign state is most likely to prevail in a clash of regulations. Once the host state determines that it wants the particular export to be made, it can order the corporation to export<sup>71</sup> or can alter the corporate structure so as to avoid compliance with United States law.<sup>72</sup> In extremes, it could nationalize the industry. Any of those results damages international relations.

Thus, despite the problems inherent in the application of vague principles of international law, careful good-faith consideration of those principles is necessary both in the interest of the regulating state and of the international order. Furthermore, it is possible to reduce that vagueness and establish viable guidelines for policymakers to use when deciding on the legitimacy of an extraterritorial application of law. The remainder of this Comment develops various theories justifying the extraterritorial application of export controls and proposes that a somewhat more objective analysis be undertaken by states considering extraterritorial applications of law.

#### IV. JURISDICTION UNDER INTERNATIONAL LAW: TRADITIONAL APPROACHES

It is a basic principle of international law that a state is sovereign in its own territory and, as sovereignty is exclusive, no state may unilaterally act in another state's territory.<sup>73</sup> Attempts to exercise jurisdic-

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<sup>71</sup> See, e.g., the actions of the British and French governments described *supra* note 62 and accompanying text.

<sup>72</sup> *Freuhauf v. Massardy*, [1968] D.S. Jur. 147 [1965] J.C.P. II 14, 274 bis (Cour d'appel, Paris).

<sup>73</sup> C. HYDE, *supra* note 18, § 199; L. OPPENHEIM, *supra* note 18, § 144a.

tion within the territory of another state can constitute violations of international law<sup>74</sup> and may give rise to a claim before the International Court of Justice or other appropriate forum.<sup>75</sup>

The control over imports and exports is clearly an exercise of sovereignty.<sup>76</sup> In the United States, the power to regulate commerce with foreign nations is granted to Congress.<sup>77</sup> Control over foreign trade is frequently used as an instrument of foreign policy.<sup>78</sup> Trade treaties,<sup>79</sup> customs zones,<sup>80</sup> and embargoes<sup>81</sup> are political, as well as economic, actions by sovereign nations and the ability to implement those measures is an important aspect of any state's sovereignty.

Under a strict interpretation of sovereignty, a state may regulate exports as an act of sovereignty but no state's controls may extend beyond its territorial boundaries. Such a limited interpretation of state

<sup>74</sup> C. HYDE, *supra* note 18, § 200; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 (1962).

<sup>75</sup> The International Court of Justice is the judicial organ of the United Nations as established in Article 92 of the Charter of the United Nations. A Statute annexed to the Charter governs the operations of the Court. See U.N. CHARTER art. 92; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 (1962) and commentary.

<sup>76</sup> Traditionally, sovereignty includes the right to exercise undivided authority over all persons and property within state borders. See J. BRIERLY, LAW OF NATIONS 142 (4th ed. 1949); C. FENWICK, INTERNATIONAL LAW 125 (4th ed. 1965). That would include the authority to prohibit the movement of property out of the state and to establish barriers to the entrance of other persons or property.

In the context of the long-standing Arab boycott of Israel, former Secretary of State Vance, during the House debates on the extension of the Export Administration Act of 1969, affirmed the United States understanding of sovereignty, observing that the United States "[u]nderstands that states do exercise their sovereign rights to regulate their commerce, and to decide, if they wish, to refuse to deal with other nations. They have the right to control the source of their imports as well as the destination of their exports." *Extension of the Export Administration Act of 1969: Hearings and Markup Before the House Committee on International Relations*, 95th Cong., 1st Sess. 381 (1977).

<sup>77</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>78</sup> See A. LOWENFELD, *supra* note 35 (examining various trade controls imposed by the United States and other nations, their history, justifications, and effects).

<sup>79</sup> The General Agreement on Tariffs and Trade (GATT) sets forth multinational agreement to various terms of trade and tariff reductions. See THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1958). The United States negotiates treaties on friendship, commerce, and navigation to encourage trade and investment with other states. See, e.g., *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 554 (2d Cir. 1981) (treaty with Japan).

<sup>80</sup> The Treaty of Rome laid the groundwork for the establishment of the European Communities and set forth the establishment of a customs union as a major goal. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 3, 298 U.N.T.S. 11, 15-16.

<sup>81</sup> In response to human rights violations in Uganda, for example, the United States established an embargo. 50 U.S.C. app. § 2403(m)<sup>1</sup> (Supp. II 1978) (expired Sept. 30, 1979).

authority has been rejected in most areas and international law authorities recognize occasions when states can exercise jurisdiction extraterritorially.<sup>82</sup> Advances in communications and travel, increases in international trade and investment, and the growth of multinational enterprises have significantly altered the international system and created a greater degree of interdependence between states. Those changes have been reflected in international law as new bases for the exercise of jurisdiction have developed and gained recognition.<sup>83</sup>

The jurisdiction of a state<sup>84</sup> can be founded on a number of bases, including: location of the person or object within state territory, nationality of the person, protection of vital state interests, or even protection of certain universal interests.<sup>85</sup>

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<sup>82</sup> See *infra* notes 88, 102-07 and accompanying text; see also RESTATEMENT (Tent. Draft), *supra* note 48, at 92-93. For the continuing attraction of the restrictive view, however, see *EC Comments*, *supra* note 3, at 893-96.

<sup>83</sup> See *infra* notes 88, 102-07 and accompanying text.

<sup>84</sup> Traditional international law principles distinguish between different types of jurisdiction, depending on the nature of the act which the governmental body is applying. Thus, "jurisdiction to prescribe" is defined as "the authority of a state to apply its substantive laws to particular persons and circumstances in a transnational context," and is essentially a legislative concept. "Jurisdiction to enforce," however, has traditionally referred to a nation's exercise of extraterritorial jurisdiction "to enforce its laws against particular persons or in particular circumstances." RESTATEMENT (Tent. Draft), *supra* note 48, at 87. To those traditional categories, the *Restatement* has added a third, "jurisdiction to adjudicate," which covers much the same activity as the traditional "jurisdiction to enforce." It encompasses those processes which relate to "a state's authority to make particular persons or things . . . amenable to its judicial process, whether on governmental or private initiative." The *Restatement* then redefines "jurisdiction to enforce" to cover executive action, "whether by . . . police action, administrative order, or by cooperation with the authorities of another state. . . ." *Id.* at 88.

While the *Restatement* thus distinguishes between the various types of jurisdiction, the commentary notes that "the traditional kinds of jurisdiction are related and often interdependent, and are governed by the same underlying principles and shaped by similar considerations." *Id.* This is particularly the case in the export control area at issue in this Comment which encompasses the extraterritorial reach of the legislative authorization for export controls, the executive implementation of this authority, and the judiciary's complementary interpretation of the authority in particular cases. Because the question of a basis for jurisdiction is common to all three types of jurisdiction, and the issue examined in this Comment substantially involves all three, the term "jurisdiction," as used here, refers to jurisdiction to prescribe, enforce, and adjudicate.

<sup>85</sup> Five principles govern the exercise of jurisdiction by a nation: the territorial principle, by which jurisdiction is based on the place where the offense was committed; the nationality principle, based on the nationality of the offender; the protective principle, which covers conduct which threatens the national security or operation of governmental functions, such as counterfeiting and falsification of official documents; the universality principle, under which the custody of a perpetrator of a crime of universal interest, such as piracy, provides jurisdiction; and the passive personality principle, based on the nationality of the victim.

The last two doctrines are not universally accepted and are not relevant here.<sup>86</sup> Traditionally, territorial jurisdiction referred to the power of all states to exercise jurisdiction over persons on the basis of their activities within the state's territorial borders.<sup>87</sup> The concept of territorial jurisdiction has been greatly expanded in recent years by the adoption of the "effects doctrine" which enables a state to regulate conduct occurring abroad if it has an appreciable effect within the territory of the state.<sup>88</sup> The notion of territorial jurisdiction is fairly well ac-

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The most recent draft of the *Restatement* largely agrees with the formulation in *Zenith*. See *RESTATEMENT* (Tent. Draft), *supra* note 48, § 402. Links of territoriality or nationality are generally the necessary bases for exercise of jurisdiction. *Id.* § 402 comment a. The protective principle is cited as a narrow basis for jurisdiction, limited to the types of cases named in the *Zenith* opinion. *Id.* § 402 comment d; *accord*, *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978). The *Restatement* also cites a "passive personality" principle, but that principle is much narrower than the one named in *Zenith*. "Under that principle a state may in certain circumstances apply its law—particularly its criminal law—to an act committed outside its territory by a person not its national, on the basis that the victim of the act was its national." *RESTATEMENT* (Tent. Draft), *supra* note 48, § 402 comment e. The comment explains that the principle has been the subject of "considerable controversy" *id.*, and that the principle has "not been generally accepted for ordinary torts or crimes, [but] has been increasingly accepted when applied to terrorist or other organized attacks on a state's nationals," *id.*, those controversies which the *Zenith* decision described as falling under a "universality principle."

<sup>86</sup> See I. BROWNIE, *supra* note 18, at 295-99.

<sup>87</sup> *Id.* at 300-02.

<sup>88</sup> See *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 n.31 (D.C. Cir. 1968) (dictum), *cert. denied*, 393 U.S. 1093 (1969); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945). The revised *Restatement* also recognizes as a basis for jurisdiction conduct outside a country "which has or is intended to have substantial effect within its territory." *RESTATEMENT* (Tent. Draft), *supra* note 48, § 402(1)(c). The Permanent Court of International Justice has recognized the general acceptance of an effects analysis in "the courts of many countries" when applied to criminal law. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., ser. A, No. 10, at 23 (Judgment of Sept. 7).

"Effects" analysis in civil cases, however, is less well accepted. When it is applied to cases involving physical acts taking place within one state which have a *physical* effect in the state seeking to exercise jurisdiction, it is not a particularly controversial rationale for establishing jurisdiction. See *RESTATEMENT* (Tent. Draft), *supra* note 48, § 403 note 3. The United States, however, has engendered major international criticism by extending that basis for jurisdiction into the area of *economic* "effects." It has done so particularly in the context of antitrust litigation. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 549 F.2d 597 (9th Cir. 1976). Europeans have resisted the extraterritorial application of United States antitrust law on the basis of economic "effects" in the United States. See Gordon, *supra* note 4, at 153-54. They characterize the effects doctrine as a basis for jurisdiction which has "found less than general acceptance under international law." *EC Comments*, *supra* note 3, at 896.

The rationale of the effects doctrine depends upon the directness, identifiability, and magnitude of the adverse effect; only by making a direct causal link can a nation justify extending its jurisdiction extraterritorially to reach the source of the adverse effect. The rationale is particularly inappropriate for export controls, where the adverse

cepted. It is the concept of nationality as a basis for jurisdiction, particularly in reference to corporations, that has been the subject of most dispute.

### A. *The Problem of Corporate Nationality*

The traditional nationality principle of jurisdiction allows a state to exercise jurisdiction over its citizens at home or abroad.<sup>89</sup> That does not necessarily mean that the state's regulations will be enforced by another state, but upon return to the home state the citizen can be prosecuted for acts committed abroad.

The issue of extraterritorial application of law is most intractable in the context of corporations. There are particular conceptual difficulties in applying the nationality principle as a basis for jurisdiction over corporations. Courts and regulators have attempted to minimize the problems by simply analogizing corporations to natural persons.<sup>90</sup> Courts may obtain jurisdiction over corporations, therefore, as over natural persons, either through the corporation's presence in the state or because the corporation has the "nationality" of the state claiming the right to exercise jurisdiction. Under a theory of corporate nationality, a state can exercise jurisdiction over acts performed abroad by its corporations similar to the jurisdiction exercised over natural persons.<sup>91</sup> That theory of jurisdiction can sometimes cause difficulties for natural persons, especially those with dual nationality or subject to foreign compulsion.<sup>92</sup> When it is applied by imperfect analogy to "juristic" persons such as corporations, it has serious drawbacks and often results in international disagreement.<sup>93</sup> No test for determining a corporation's na-

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"effect" is likely to be a foreign policy setback, or a loss of technological advantage, because the causes of such "effects" are varied and the causal links attenuated.

<sup>89</sup> See *Blackmer v. United States*, 284 U.S. 421 (1932).

<sup>90</sup> For natural persons there are two primary methods of determining nationality, one based on blood relationship, the other birth in the territory (*jus sanguinis* and *jus soli*). C. FENWICK, *supra* note 76, at 302.

<sup>91</sup> There are a number of tests for determining the "nationality" of a corporation. See, e.g., I. BROWNLIE, *supra* note 18, at 487 (summarizing "legal experience" as adopting "doctrine of substantial connexion"); Kronstein, *The Nationality of Enterprises*, 52 COLUM. L. REV. 983, 986 (1952) (stating a place of incorporation test as the general rule in common law states and a place of control test as the general rule in civil law countries); Tedeschi, *The Determination of Corporate Nationality*, 50 AUSTRALIAN L.J. 521, 521 (1976) (citing five "tests," the use of which "change[s]" according to the purpose of categorizing the corporation); Note, *The "Nationality" of International Corporations under Civil Law and Treaty*, 74 HARV. L. REV. 1429 (1961) (citing two general approaches, one looking to characteristics of those who own the corporation, the second looking to the locus of certain corporate activities).

<sup>92</sup> See L. OPPENHEIM, *supra* note 18, at §§ 308-313 (regarding double nationality and statelessness).

<sup>93</sup> See *supra* text accompanying notes 49-64. The United States used an owner-

tionality has yet been universally accepted,<sup>94</sup> yet vital national interests may rest upon how the problem of determining corporate nationality is resolved. States need to determine the nationality of a corporation for purposes of taxation, choice of law issues, and questions of diplomatic protection. In times of war or national emergency, corporate nationality may be a factor in determining the loyalty of the corporation, whether it should be given certain defense work, or whether it should be nationalized.<sup>95</sup>

Various states have used five different criteria to determine the nationality of a corporation. Those are: place of incorporation; place of central management and control; nationality of shareholders; nationality of managers; and principle place of business.<sup>96</sup>

The first two factors, place of incorporation and place of central management and control are internationally recognized criteria for determining the nationality of a corporation. Place of incorporation is the criterion most often used in common law countries,<sup>97</sup> while the location of management and control (*siège social*) is used in civil law countries.<sup>98</sup> The last two are relatively unimportant because they are asserted only infrequently as a basis for jurisdiction.<sup>99</sup>

Use of the third factor, nationality of the corporation's shareholders, is most controversial. The International Court of Justice, in the case of *Barcelona Traction, Light and Power Company, Ltd.*,<sup>100</sup> refused to look to the nationality of the shareholders, holding that "[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."<sup>101</sup> The Court recognized only two situations in which a court would be justified in looking to the

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ship test rejected by the Europeans.

<sup>94</sup> See *supra* note 91.

<sup>95</sup> A different test of nationality is often applied in times of war or national emergency than that used in other situations. See *infra* note 104.

<sup>96</sup> See Tedeschi, *supra* note 91.

<sup>97</sup> RESTATEMENT (Tent. Draft), *supra* note 48, § 216 (a corporation has the nationality of the state that creates it if there is also a "genuine link between the state and the corporation"). The U.K., Australia, and the Netherlands also use place of incorporation as the primary test for nationality. See generally L. GOWER, J. CRONIN, A. EASSON & L. WEDDERBURN, *PRINCIPLES OF MODERN COMPANY LAW* 135 (4th ed. 1979) and H. HAHLO, *A CASEBOOK ON COMPANY LAW* 15-21 (1970) (both on U.K.); R. YORSTON & E. FORTESCUE, *AUSTRALIAN MERCANTILE LAW* 660 (14th ed. 1971); S. SCHIUT, J. VAN DER BECK & B. RAAP, *DUTCH BUSINESS LAW* 137 (1979).

<sup>98</sup> See generally Note, *supra* note 91 (emphasizing French law).

<sup>99</sup> See Tedeschi, *supra* note 91, at 524-25.

<sup>100</sup> (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5) (Belgium claimed right of diplomatic protection of its nationals who were majority shareholders in a corporation incorporated in Canada that had been damaged by Spanish government action).

<sup>101</sup> *Id.* at 70.

nationality of the shareholders to determine corporate nationality: the treatment of enemy and allied property during times of war and the treatment of nationalized property.<sup>102</sup> Justice Jessup's separate opinion also considered other leading tests for determining the national character of a corporation.<sup>103</sup> With respect to the criterion of ownership and control he stated: "The control test was widely used to determine the enemy character of property during war, but it is not established in international law as a general test of the nationality of a corporation."<sup>104</sup>

The United States has taken the position that ownership or control of a foreign corporation by United States citizens is a sufficient link to enable the United States to prescribe rules of law governing the corporation's conduct. The *Restatement* sets forth this view as follows:

When the nationality of a corporation is different from the nationality of the persons . . . who own or control it, the state of the nationality of such persons has jurisdiction to prescribe, and to enforce in its territory, rules of law governing their conduct. It is thus in a position to control the conduct of the corporation even though it does not have jurisdiction to prescribe rules directly applicable to the corporation.<sup>105</sup>

The United States used this basis of jurisdiction to enforce extra-

<sup>102</sup> *Id.* at 39.

<sup>103</sup> *Id.* at 182 (Jessup, J., concurring).

<sup>104</sup> *Id.* at 183. Britain has applied a control test to determine nationality when the question is whether a corporation has enemy character, but not in other situations. *See Daimler Co. v. Continental Tyre and Rubber Co.*, 2 A.C. 307, 4 BRIT. INT'L L. CASES 711 (1916). That the British courts regard the enemy character question unique is indicated by the fact that a British court has held that the control test may be used to determine the enemy character of a corporation but may not be used to determine the same corporation's nationality for other purposes. *See Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 7 BRIT. INT'L L. CASES 1014.

In the United States, the control test was used during times of war under the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 5b (1976 & Supp. I 1977). In 1933, this section was amended to include times of national emergency. Act of March 9, 1933, sec. 2, 48 Stat. 1.

Commentators have also treated the corporate nationality issue in war situations separately from in other situations. *See* I. BROWNLIE, *supra* note 18, at 405-06, 485-90. *Compare* 1 L. OPPENHEIM, *supra* note 18, § 293, at 642 n.3 with 2 L. OPPENHEIM, *supra* note 18, § 88a.

Of course, parties to an agreement may choose to define corporate nationality in terms of ownership or control. *See, e.g.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Aug. 27, 1965, art. 25, para. 2, 17 U.S.T. 1270, 1280, T.I.A.S. No. 6090, 515 U.N.T.S. 159, 174.

<sup>105</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 comment d (1965).

territorial trade embargoes against China, Cuba, and Vietnam under the Trading with the Enemy Act.<sup>106</sup> Legitimacy of United States jurisdiction on the basis of corporate nationality has been hotly contested by other nations which reject the position that jurisdiction over a foreign corporation can be based solely on the nationality of the shareholders.<sup>107</sup>

### B. *Territorial and Nationality Bases for Extraterritorial Jurisdiction Applied to Export Controls*

Territorial and nationality bases for jurisdiction can be used to "justify" all three types of export controls, yet such analysis does not have the support of the world community.<sup>108</sup> Reexport controls and technology controls both rely upon less controversial justifications for the exercise of jurisdiction. In each case, jurisdiction is exercised over goods and technology present in the territory of the United States. Before the items leave the territorial jurisdiction of the United States,

<sup>106</sup> See generally Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968).

<sup>107</sup> See, e.g., *Freuhauf v. Massardy*, [1968] D.S. Jur. 147, [1965] J.C.P. II 14,274 bis (Cour d'appel, Paris) (French position); Text of Embassy of Canada note, M. NASH, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1292 (1978) (protesting United States jurisdiction based on ownership test). See generally A. LOWENFELD, *supra* note 35, at 148-83; Corcoran, *supra* note 106; Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Freuhauf v. Massardy*, 83 HARV. L. REV. 579 (1970).

In certain cases other countries have applied a control test. In 1967, the Court of Appeals in Paris looked to the nationality of the stockholders and directors as one of the factors to determine corporate nationality. That justified granting a corporation French nationality, even though its *siège social* had been in Algeria. This case can probably be explained by the French concern that the newly independent Algeria would make unacceptable claims on these corporations. See *Centrale de Réassurance des Mutuelles Agricoles v. Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France*, 41 I.L.R. 369 (Cour d'appel Paris 1967). The French court's decision was sharply criticized by the Algerian court. That court referred to *Caisse Centrale* and stated:

The aim of this ruling is to deprive Algeria of its jurisdiction over Algerian companies, on the false pretext that certain of the shareholders of these companies are French. The conclusion to be drawn from this ruling would lead to the absurd result that the law governing a company may be changed by means of changes which might take place in the composition of the members of that company.

*Sonarem v. Genebrier and Others*, 41 I.L.R. 384, 393 (Algeria, Court of Annaba, Comm. Div., 1968). Note that generally the French courts have not used a control test, but rather have held that the place of incorporation or the *siège social* determines the nationality of corporations. See, e.g., *Engregistrement v. Société M.* 20 I.L.R. 263 (Cour de Cassation, 1953); *Re Société Mayol, Arbona et cie.*, 39 I.L.R. 430 (Conseil d'État, 1960).

<sup>108</sup> See *EC Comments*, *supra* note 3, at 894-98.

the parties consent in their licensing agreement to certain conditions on their future use. Those conditions include agreement by the recipient not to retransfer items without prior United States consent and to seek export authorization for goods produced through the use of American technology. Both types of controls are imposed and made explicit before the goods leave the United States, at a time when the United States clearly has jurisdiction under the well-established territorial principle. The imposition of those types of controls, therefore, is legitimate under international law.

The foundation for export controls based solely on the nationality of some control group of shareholders is not so firm. As in the two other types of export controls, in this situation a state imposes its rules on a corporation outside its territory. But unlike the other two cases, in this situation there is no preexisting agreement in which those who originally took the goods or technology from the United States agreed to abide by future United States rulings on subsequent reexports. Such controls are imposed, in a sense retroactively, on a corporation that has never had any connection with the United States other than that a group of that state's citizens have accumulated some percentage<sup>109</sup> of the company's shares. Thus, under that theory, a state may gain control over technology and goods created wholly in another state by means of its citizens' investment.

The application of traditional jurisdictional categories to export controls demonstrates that those categories cannot provide a consistent guide for deciding when extraterritorial applications of law are within international law. There is no consensus as to what the categories entail, especially the nationality category, nor is there agreement as to application. A state should establish such a traditional basis for jurisdiction before applying its laws extraterritorially; on the other hand, finding such a basis does not, in and of itself, ensure that other states will respect its decisions.<sup>110</sup>

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<sup>109</sup> There are no promulgated definitions for when a corporation is owned or controlled by United States citizens, such as what percentage constitutes ownership. Thus, when that criterion is used, enforcement officials have great discretion to select the firms which will be subject to the control.

<sup>110</sup> See *infra* note 112 and accompanying text.

## V. EXTRATERRITORIAL APPLICATION OF UNITED STATES LAW: ABSTENTION ANALYSIS

### A. *Unreasonable Exercise of Jurisdiction*

Even when one of the traditional bases of jurisdiction is present,<sup>111</sup> the goals served by international law as well as national interest dictate that extraterritorial applications of national law should be further restricted. Increasing economic interdependence has led nations to rely on expansive concepts of nationality or territoriality to extend their jurisdiction beyond national borders. Such attempts to stretch the traditional bases for jurisdiction to their furthest logical limits, however, not only exacerbate international tension, but may also prove counterproductive to the regulating state's interest by provoking the territorial state to retaliate with a correspondingly expansive interpretation of its jurisdiction.<sup>112</sup>

Perhaps in response to such objections, American legal opinion, as reflected in the 1981 revisions to the *Restatement*, is moving toward a less categorical approach to extraterritorial applications of law, including the nationality-based jurisdiction over foreign corporations owned by United States citizens.<sup>113</sup> While the *Restatement* still legitimizes United States extraterritorial jurisdiction over foreign subsidiaries of the United States corporations, it substantially limits the scope of permissible controls. They would be applied only to programs of economic regulation applicable to nationals of the United States which further national interests and which cannot effectively be carried out by territorial controls.<sup>114</sup>

The *Restatement* would additionally limit extraterritorial jurisdiction and the use of the nationality-control test as a basis for jurisdiction over foreign subsidiaries of United States corporations by subjecting

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<sup>111</sup> See *supra* note 85 and accompanying text.

<sup>112</sup> Thus, for example, United States efforts to apply its securities and antitrust laws extraterritorially have produced serious international strains and resulted in the enactment of "blocking statutes" by which foreign states attempt to protect their nationals against such extraterritorial application of United States law. By 1980, Australia, Canada, West Germany, France, the Netherlands, South Africa, and the United Kingdom all had enacted such statutes. See *RESTATEMENT* (Tent. Draft), *supra* note 48, at 91 n.8; see also *supra* text accompanying notes 71-72.

<sup>113</sup> See *RESTATEMENT* (Tent. Draft), *supra* note 48, §§ 403, 418. See generally Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983) (arguing for a reasonableness test).

<sup>114</sup> *Id.* § 418(3). Moreover, the *Restatement* recognizes foreign compulsion as a limitation on United States jurisdiction: a person is exempted from obeying United States law if that person is compelled by another sovereign to violate that law. *Id.* § 418(4).

any such application of jurisdiction to a "reasonableness" test.<sup>115</sup>

Recently, several United States courts have imposed a "reasonable-ness" test upon attempted extraterritorial applications of United States law.<sup>116</sup> That approach requires a court, once it has established a traditional nationality or territorial basis for jurisdiction, to decide whether the proposed extraterritorial application is "reasonable." That is the requirement codified in the *Restatement*.<sup>117</sup>

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<sup>115</sup> *Id.* § 403.

There is still considerable cause to doubt whether the control or ownership tests for determining corporate nationality are acceptable under international law as bases for the exercise of jurisdiction. One could argue that in claiming extraterritorial jurisdiction based on a control theory of nationality, the United States is attempting "to impose idiosyncratic legal rules upon others, in the name of applying international law." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). If the United States cannot justify the exercise of that jurisdiction, its actions to prescribe or enforce rules on that basis violate international law and can give rise to claims by other states. See *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 8 (1965). See *supra* text accompanying notes 73-75.

<sup>116</sup> See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) (extraterritorial application of antitrust laws to patent fraud abroad limited by "a weighing of competing interests"); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 549 F.2d 597, 613 (9th Cir. 1976) (extraterritorial application of antitrust laws limited by inquiry into whether American interests are "sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority"); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (when a court is confronted with securities transaction that is "predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States court and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries"), *cert. denied*, 423 U.S. 1018 (1975); *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975) (courts must not apply United States securities laws to every foreign transaction in fraudulent securities "however negligible the effect in the United States or on its citizens").

<sup>117</sup> The *Restatement* advocates that the reasonableness of any extraterritorial exercise of jurisdiction be judged by weighing:

a. the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct and foreseeable effect upon or in the regulating state;

b. the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

c. the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

d. the existence of justified expectations that might be protected or hurt by the regulation in question;

e. the importance of regulation to the international political, legal or economic system;

f. the extent to which such regulation is consistent with the traditions of the international system;

g. the extent to which another state may have an interest in regulating the activity; and

The reasonableness test, however, is too amorphous and capable of being manipulated to be of use to courts and policymakers.<sup>118</sup> The *Restatement* lists eight factors that should be examined to determine if an extraterritorial application of law is legitimate.<sup>119</sup> While there is nothing inherently wrong with that, it is of limited use to a policymaker or judge faced with a real situation. For example, applying the *Restatement* factors to the three types of export controls would require twenty-four separate analyses. Such an approach is obviously unwieldy. In addition, many of the factors listed are subjective measures which will be given dramatically different weight by the various states engaged in the analysis. Thus, where two states each believe their vital interests are engaged in the dispute, each could undertake the reasonableness analysis in good faith and vindicate diametrically opposite conclusions. To a certain extent, this occurred in the pipeline dispute.

Furthermore, reasonableness analysis implies that if an extraterritorial application of law is "reasonable," it should be undertaken, much the same as with the domestic application of law. For several reasons that is not the case. First, the extraterritorial application of law implies a breakdown of the diplomatic process; otherwise the regulating state could convince other states to enact their own, sympathetic, legislation, or to enter into treaty agreements to resolve the issue.<sup>120</sup> Second, extraterritorial applications lead to confusion on the part of the persons regulated, who must follow two sovereigns. Uncertainty tends to reduce

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h. the likelihood of conflict with regulation by other states.

RESTATEMENT (Tent. Draft), *supra* note 48, § 403(2).

The Reporter's introductory note to the *Restatement's* chapter on jurisdiction explains the reasonableness analysis as follows:

Territoriality and nationality have remained the principal points of departure for evaluating the exercise of jurisdiction, but in determining their meaning rigid concepts have been displaced by broader criteria embracing principles of reasonableness and fairness in accommodating overlapping or conflicting interests of states, and meeting concerns for affected individuals and other private interests. This means that courts (and other decision makers), learning from the approach to comparable problems in private international law, are increasingly inclined to analyze various interests, examine contacts and links, give effect to justified expectations, search for the "center of gravity" of a given situation, and develop priorities. This *Restatement* articulates this approach as the principle of reasonableness.

*Id.* at 92-93.

<sup>118</sup> See Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 386 n.230 (1982).

<sup>119</sup> See *supra* note 117.

<sup>120</sup> See, e.g., *Swiss Propose Law Prohibiting Insider Trading*, Wall. St. J., Nov. 17, 1983, at 36, col. 1 (effort by Switzerland to ease dispute with United States over insider trading and bank secrecy laws).

the incentives entrepreneurs and corporate managers have to invest and participate in international trade. Finally, extraterritorial applications of law may lead to retaliation that significantly restricts the beneficial movement of goods, capital, and technology.<sup>121</sup> Thus the eight reasonableness factors listed in the *Restatement* do not imply the proper presumption against extraterritorial applications of law. Instead, a decisionmaker should focus on three basic concerns. Those concerns incorporate, to some extent, the eight *Restatement* factors. Focusing on those concerns will tell decisionmakers when to abstain from extending the reach of their nation's laws. For that reason this Comment will call that analysis, "abstention analysis."

Using abstention analysis, the decisionmaker first must examine the interest of the regulating state in implementing the regulation. The next question is whether imposing such a regulation would be fair to the regulated person. That inquiry would ascertain whether the regulated person had sufficient links to the regulating state to justify the exercise of jurisdiction. It would also determine whether such regulation would interfere with the person's justified expectations. Finally, the decisionmaker must look to the effect of the regulation beyond the regulating state's borders, and the interests of other nations.

To sum up, abstention analysis involves: (1) the interests of the regulating state, (2) the interests of the regulated person, and (3) the interests of the other state. The analysis is applied with a presumption against the extraterritorial application of law and focuses, to the extent possible, on objective factors.

These three categories of inquiry will be applied to export controls. Under abstention analysis, reexport controls are consistent with international law, and other states should acquiesce in their imposition. Export controls based upon corporate ownership, on the other hand, would rarely, if ever, be consistent with international law. Finally, upon an abstention analysis, extraterritorial controls based upon exported technology fall in the middle and require a case-by-case balancing of the factors involved to determine the legitimacy of the proposed control.

## B. *Abstention Analysis Applied to Three Types of Export Controls*

### 1. Interests of the Regulating State

The first criterion of abstention analysis considers the interests of the regulating state including both the extent to which some activity

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<sup>121</sup> See *supra* note 66 and accompanying text.

occurs within the regulating state and how necessary extraterritorial controls on that activity are to the state's definition of its national interests.<sup>122</sup> In the case of export controls, the term "activity" should be interpreted more broadly than merely the attempt to export. Export controls are governmental attempts to control access to goods and technology. In determining the legitimacy of a state's effort to control such access, the location of research, production, and development processes are relevant.

When the activity takes place within the regulating state, its interests are most actively involved. Thus, United States attempts to control reexports and exports of goods produced abroad using United States technology rely upon an underlying territorial link in that the development of the good or technology occurred within the United States. In the case of reexports, development and production occurs entirely within the territory of the United States and there is no real activity in the territory of the other state. Thus, the location of the main activity is within the territory of the United States.

The territorial link is more attenuated, however, in the case of goods produced through the export of United States technology because those goods are produced in another state's territory, using its productive forces. When export controls are viewed broadly as attempts to control the use of technology, then the fact that the technology was developed originally within the United States could represent sufficient activity within the territory of the United States to justify its interest in regulation. That is particularly the case if the American technology comprises a substantial part of the value of the foreign produced good.

Export controls based upon the nationality of those who own or control the corporation cannot be similarly justified; no activity occurs within the territory of the regulating state. The corporation owes its existence to its incorporation in the territorial state and the goods and technology at issue are produced using the workers and resources of the other state. In fact, the only link to the United States is the use of American capital.

The actual level of activity which occurs within the regulating state can thus be used to determine the significance of the relationship between the activity to be regulated and the state seeking the regula-

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<sup>122</sup> Cf. RESTATEMENT (Tent. Draft), *supra* note 48, § 403(2)(a), (c) (analogous parts of reasonableness test), *quoted supra* note 117.

Abstention analysis requires significant *actual* activity within the regulating state and then considers whether the state interest can be achieved through less intrusive, non-extraterritorial regulations. The significance of the state interest itself is not weighed as that would result in an extremely subjective analysis.

tion. Once that is established, the necessity of the regulation in terms of the national interests of the regulating state can be more clearly assessed.

This aspect of the analysis concentrates on whether the regulating state must rely upon an extraterritorial application of law to achieve its stated national goal. The emphasis is not upon how significant or necessary that goal is, but upon how important the extraterritorial control is to the achievement of the stated goal. That removes the subjective weighing of national interests from the analysis and concentrates on the more objective question of how necessary the extraterritorial aspects of the controls are.

The United States seeks to effectuate a variety of national security and foreign policy goals by limiting foreign access to certain goods and technology through a comprehensive export control system. Unrestricted reexport of American goods would significantly undermine the effectiveness of the United States export control system. In order to achieve its national interests without reexport controls, the United States would have to either cease exporting strategic goods or permit exports only to those states that maintain stringent controls on their own exports. That would eliminate the problem of extraterritorial controls but would result in a significant decrease in world trade, a worsening of the United States balance of trade, and restricted access of less developed states to American goods and technology. Those unpalatable alternatives to reexport controls would tend to support the continuation of extraterritorial controls as a legitimate means of achieving United States national interests.<sup>123</sup>

The unrestricted export of items produced abroad using American technology has a similar effect upon the United States by encouraging trade to shift from United States producers to overseas producers whose goods are identical but free from export restrictions. That tends to nullify the direct control imposed upon United States exports. Thus, if the United States did not use extraterritorial controls on foreign produced items, it could only control the flow of American technology by relying on direct controls over American produced goods and refusing to license technology to states without similar export control systems. The resulting control system would significantly increase research and development costs worldwide by cutting down on the international movement of technological information and requiring each nation to pursue developments independently. Thus, extraterritorial controls seem to be the most effective, least damaging method of achieving the national goal.

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<sup>123</sup> See *supra* note 35 and accompanying text.

On the other hand, controlling the export of goods and technology of foreign corporations owned by Americans is a more indirect, less justifiable means of achieving that national goal. The goods exported are not identifiably "American" and their export does not significantly damage the United States attempt to deny unfriendly states access to American goods and technology. The effect of exports by a foreign subsidiary of an American corporation cannot be distinguished from the effect of exports by a foreign corporation owned by foreigners. No American goods or technology are transferred. While the extraterritorial application of United States law to foreign subsidiaries would make American policy more effective (as would application of United States law to foreign corporations owned by foreigners) the extraterritorial aspect is not a necessary component to the achievement of an effective export control system.

The first part of abstention analysis requires courts and policy-makers to consider not only the need for the proposed regulations to implement the goals of the regulating state, but also the level of international acceptance of such methods of implementing national goals. Decisionmakers should examine those methods objectively, by reference to the practices of similarly situated nations.

The United States places great importance on the maintenance of export controls and uses them as tools of American foreign policy.<sup>124</sup> Using an objective standard, the decisionmaker would note that most other industrialized nations also maintain export control systems and that such regulations are a generally accepted part of the international trade system.<sup>125</sup> Export controls would almost certainly be upheld under this criterion.

Reexport prohibitions, moreover, are relatively common, although few states have developed technology controls.<sup>126</sup> Exercising export controls over items produced using exported technology is therefore still somewhat unusual. Technology controls may be upheld, however, if one looks to the field of nuclear technology, where such controls are widely accepted. In the nuclear area most suppliers of technology re-

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<sup>124</sup> See *supra* text accompanying notes 27-41.

<sup>125</sup> Most Western European states and Japan maintain export controls as part of CoCom membership. CoCom is the Coordinating Committee established to coordinate an embargo of the Communist bloc. See Buckley, *Control of Technology Transfer to the Soviet Union*, DEP'T ST. BULL., Aug. 1982, at 71.

<sup>126</sup> Reexport controls are required by CoCom. *Id.* Such controls are also required on nuclear exports pursuant to supplier agreements. See International Atomic Energy Agency, Communications Received from Members Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material, INFCIRC/209 (1974), reprinted in 14 INT'L LEGAL MATERIALS 543 (1975).

quire both reexport controls and technology controls, although they are often implemented by means of agreements between governments rather than through private contractual arrangements based on export licenses.<sup>127</sup> International acceptance of nuclear export controls can probably be traced to the international consensus on the dangers of uncontrolled nuclear exports<sup>128</sup> and the fact that the controls are implemented by intergovernmental agreement rather than extraterritorial fiat. Nevertheless, if policymakers can demonstrate that the national interests served by technology controls are similar to those in the nuclear area, they should similarly be in accordance with international law. The use of the third basis of jurisdiction, corporate ownership, on the other hand, has not gained wide international acceptance.<sup>129</sup> Using an objective standard, therefore, export controls based upon corporate ownership should not be favored.

## 2. Fairness to the Regulated Party

The second part of abstention analysis looks to the fairness of the proposed regulation to the regulated party. It first considers the links between the regulating state and the persons subject to regulation. A sufficiently strong link would imply that such persons had notice of the regulating state's interests and perhaps some ability to influence that state's deliberations. The analysis then determines, given the sufficient person-state link to render the exercise of jurisdiction fair, whether the regulations would unfairly interfere with the regulated party's justified expectations.

In the case of reexports and exports produced from United States technology, it is vital to find a sufficient person-state link because, by definition, the regulated party is not a United States national. The link to the United States is found in the origin of items being controlled and in the explicit contractual agreement made in the export authorization by which the foreign purchaser agreed to the exercise of United States jurisdiction. For the purpose of specific transactions this voluntary contractual relationship may constitute a sufficient link to the United States to permit the exercise of jurisdiction.

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<sup>127</sup> International Atomic Energy Agency, Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment or Technology, INFCIRC/254 (1978), *reprinted in* 17 INT'L LEGAL MATERIALS 220 (1978).

<sup>128</sup> This is evidenced by support for the Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161, which has over 112 signatories.

<sup>129</sup> See *supra* notes 104-15 and accompanying text.

Foreign corporations, owned or controlled by United States citizens, are tied by nationality, residence, and economic activity to the foreign state, rather than the United States. The United States has claimed that the fact that a corporation has a nationality link to the United States constitutes a sufficient person-state link for the exercise of jurisdiction.<sup>130</sup> That claim has been made not only for wholly owned subsidiaries with American managerial control but also for foreign corporations where the American parent owns only fifty-one percent or in which Americans owned a majority of the shares without any individual or small group of shareholders having control.<sup>131</sup>

Such claims of jurisdiction fail to recognize the legitimacy and indeed, the primacy of the other state's right to exercise jurisdiction. Thus, reliance on a tenuous and little accepted ground for the exercise of jurisdiction creates a situation where other states will invariably have stronger links to the corporation and the corporation will be subject to the demands of two sovereigns.

The exercise of jurisdiction may still be unfair to the regulated party even with sufficient person-state links, if the party's justified expectations would be unmet by the proposed regulations. What are an individual or corporation's "justified expectations" will be difficult for courts and policymakers to evaluate in the case of export controls because of the implicit value judgment in the term. The United States would probably argue that by publishing and enforcing extraterritorial export controls for decades, it has prevented anyone from having a legitimate expectation that he was free from such controls. Thus, a policymaker might reasonably conclude that the continued imposition of the controls is eminently fair to any regulated party. It is, moreover, difficult to imagine that individuals could have a justified expectation that they could freely export United States origin goods when they agreed as a condition of receipt of those goods that no reexport would occur.<sup>132</sup>

The same is true for the export of goods produced abroad using United States controlled technology. The controls were an explicit condition of the original authorization and thus the recipient should have limited expectations of being able to export them.<sup>133</sup> If the technology is significantly improved upon or changed by the recipient some expectations may develop that items produced using the technology are no

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<sup>130</sup> See *supra* notes 105-06 and accompanying text.

<sup>131</sup> See *supra* note 105 and accompanying text.

<sup>132</sup> See *supra* text accompanying note 108.

<sup>133</sup> If, however, the controls were imposed as part of subsequent restrictions on reexport of technology, the regulated party would have a better argument under the fairness criterion.

longer "contaminated" by United States controls. Whether those expectations are justified would depend upon the terms of the original agreement, the extent to which the exported technology contributes to the production of the item, and the significance of the changes made by the recipient. In spite of those factors, however, the recipient knew the controls existed when he originally acquired the technology and, as with other terms of a contract, the recipient is bound by his original bargain. That bargain, moreover, conferred on him the benefit of lower research and development costs, albeit at the price of accepting the technology controls. There is nothing in the exchange that a court or policymaker should consider inherently unfair.

Here again, one reaches the opposite conclusion regarding the reasonableness of controls imposed on the basis of the corporate ownership test. There is a justified expectation, based upon international law and conflict of laws, that corporations are nationals of the state of their incorporation and are bound by the laws of that state.<sup>134</sup> Thus, when a French corporation enters into a contract valid under French law, it has a justifiable expectation that it can fulfill that contract without interference from other states. The fact that shares in the corporation may be owned by foreigners does not lead to the conclusion that the corporation should expect to comply with laws of its shareholders' home states.

The manner in which United States export control laws are enforced against foreign corporations also interferes with the corporations' justified expectations. The United States directs its enforcement against the United States citizens who own or control the foreign entity.<sup>135</sup> That creates a tension between the formal corporate interest and the personal interests of those who own or control the corporation.<sup>136</sup> It is a fundamental precept of corporate law that the interests of the corporation should predominate over the personal interests of the individual shareholders, directors, and managers.<sup>137</sup> Thus the imposition of export controls on the basis of the nationality of its directors, managers, or shareholders unfairly undermines the corporation's justified expectation that its fiduciaries will owe primary loyalty to its interests.

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<sup>134</sup> See *supra* notes 100-01 and accompanying text.

<sup>135</sup> See Corcoran, *supra* note 106, at 177.

<sup>136</sup> See, e.g., *Freuhauf v. Massardy*, [1968] D.S. Jur. 174, [1965] J.C.P. II 14,274 bis (Cour d'appel, Paris).

<sup>137</sup> See, e.g., H. HENN, *LAW OF CORPORATIONS* 450-51 (2d ed. 1970) ("duties of directors, officers, and controlling shareholders are owed clearly to the corporation as an entity and sometimes to the community of corporate interests").

### 3. Effect of the Regulation Beyond the Regulating State's Borders

This factor requires a court or policymaker to consider the wider effects of the proposed regulation. The primary focus of this factor is on whether the extraterritorial application of one nation's law would prevent another state from effectuating its national policy.<sup>138</sup> Again, the analysis does not attempt to value a particular national goal, or to weigh the significance of one state's interests against another. Rather, it considers the level of interference caused by the extraterritorial application of law.

European export goals were complex in the pipeline case and included a variety of political, diplomatic, and energy security goals which the construction of a gas pipeline was thought to further. Reexport controls did not necessarily prevent the European states from effectuating those goals; they merely closed off one source of supply for goods. Alternative sources could have been used or domestic production relied upon. Technology controls and controls upon foreign subsidiaries have a much more profound effect upon the European states' ability to effectuate their national policies, because those controls prevent them from relying upon their domestic resources. The overall impact of the last two controls is to prevent the European states from controlling their foreign economic policy.

In the case of technology controls, as with reexport controls, an argument can be made that the foreign state is aware when the goods or technology enter its territory that such items may not be reexported freely. By allowing them in, so restricted, the state gains certain advantages and waives subsequent claims that its sovereignty has been violated.<sup>139</sup> That argument is more difficult to sustain for technology controls that seek to control many generations of products where foreign and domestic technologies have been substantially intertwined.<sup>140</sup>

Corporate nationality controls essentially seek to deny the foreign state the use of its own resources by claiming ownership rights in corporations operating there and have the most direct impingement upon the other state's ability to achieve its national goals.

This last factor of the analysis raises the most serious questions with respect to the validity of any extraterritorial application of law and supports a presumption against such applications. States turn to extraterritorial applications of law only when they have failed to con-

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<sup>138</sup> Cf. RESTATEMENT (Tent. Draft), *supra* note 48, § 403(2)(e)-(h) (analogous factors in reasonableness test), *quoted supra* note 117.

<sup>139</sup> See *supra* text accompanying notes 34-35.

<sup>140</sup> See *supra* text accompanying notes 38-39.

vince other states to adopt complementary policies. Thus, in the export control field, if the United States wishes to ensure that certain items do not reach unacceptable destinations, it has two alternatives. It must either convince other states to impose export controls or it must attempt to use its extraterritorial reach to prevent the export. If it chooses the former, the first step is to negotiate with the other state to convince it to impose controls.<sup>141</sup> Only when that state rebuffs the United States and decides that its interests lie in unrestricted exports does the United States proceed to try an extraterritorial application of its laws to nullify the other state's decision. In general, therefore, whenever the United States unilaterally uses extraterritorial controls, it is attempting to override the other state's decision to allow unimpeded exports, and seriously impinging upon the other state's sovereignty interests. That may be justified depending upon an assessment of the other factors previously discussed.<sup>142</sup> In order to advance international relations, states must be willing to accept some impingements upon their sovereignty or suffer a return to economic isolationism. A too rigid adherence to concepts of sovereignty brings with it some of the same dangers as an overexpansive interpretation of national jurisdiction. The result is that states attempt to nullify the effect of other state's policies, and concepts of comity and respect for other states' laws fall by the wayside.

#### 4. Results of Abstention Analysis

Abstention analysis provides a framework within which to analyze extraterritorial applications of United States law and can provide guidance to policymakers seeking to determine whether a proposed extraterritorial application of domestic law is consistent with international law. The analysis attempts to focus upon more concrete, less subjective factors than those advocated by the *Restatement's* reasonableness analysis. Thus, rather than attempting to value each state's interest, the analysis looks to the actual links between the state and the activity, and to the effect of the extraterritorial application in either advancing or inhibiting the achievement of national goals.

When applied to the United States export control structure, it demonstrates that reexport controls would, in almost all cases, be legitimate. Such an analysis indicates that they are consistent with principles of international law and comity, and may well command the acquies-

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<sup>141</sup> The United States has indicated that it will not impose extraterritorial export controls without prior consultation with the foreign government affected. See M. NASH, *supra* note 107, at 1292-93.

<sup>142</sup> See *supra* notes 122-41 and accompanying text.

cence of other states. Technology controls, in certain circumstances, can be similarly justified. The analysis yields almost no case, however, in which export controls based on corporate nationality comport with international law.

## VI. SUGGESTIONS FOR LEGISLATIVE AND EXECUTIVE SOLUTIONS

There are a number of changes which would make the United States export control system more acceptable under international law principles, enhance the security of foreign corporations, and still allow achievement of most United States export control goals:

1) Repeal provisions allowing nonemergency restrictions of exports of foreign corporations owned or controlled by Americans. The President would still have the power to implement such controls in times of war or national emergency when vital American interests are most directly engaged.

That leaves open the possibility that Congress could react to specific nonemergency situations and grant such authority to the President on a case-by-case basis.<sup>143</sup> Limiting the use of this questionable basis for jurisdiction would not significantly harm United States foreign policy interests and would indicate a greater respect for the sovereignty of other states.

2) Congress should retain the legislative authorization to control reexports and exports of foreign goods produced using American technology but should legislate standards on when such extraterritorial controls are appropriate. There are no specific standards in the present legislation. The legislative history indicates that the Senate did not expect extraterritorial controls to be the general rule, but gives no specific guidance.<sup>144</sup>

3) The executive branch should attempt to negotiate agreements with other states recognizing the right of the United States to apply export control restrictions to corporations owned by Americans, similar to tax agreements and other international conventions which use the ownership standard.<sup>145</sup> That would establish an acceptable basis under international law for implementing those controls. It would also serve

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<sup>143</sup> See, e.g., 50 U.S.C. app. § 2403(m)<sup>1</sup> (Supp. II 1978) (expired Sept. 30, 1979) (United States response to human rights violations in Uganda).

<sup>144</sup> See *supra* notes 42-47 and accompanying text.

<sup>145</sup> See, e.g., Organization for Economic Cooperation and Development (OECD), Committee on Fiscal Affairs *Draft of Double Taxation Convention on Income and Capital* (1963); *United Nations Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102 (1980); Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.

the United States interest in securing other nations' consistent acquiescence in the extraterritorial application of United States law in specific instances, because those nations will have already given their general assent in a multilateral or bilateral accord.

4) The executive branch should seek common export guidelines, more binding than the present CoCom system, from states prior to approving the export of sensitive technology to those states. That would deprive the United States of the flexibility of tightening export controls whenever it wished but would ensure the effectiveness of export controls over the most sensitive items without relying on extraterritorial controls.

## VII. CONCLUSION

This Comment has examined the bases of jurisdiction for the extraterritorial application of law by examining the United States export control system, a particularly controversial area in which the United States has attempted such extraterritorial applications. Although the traditional territorial and nationality bases for jurisdiction have expanded to encompass multinational corporations, unilateral attempts to extend them further produce serious international conflict and few benefits because other states possess ample means to nullify the export controls. The interests of international comity as well as the national interests of regulating states will best be served if policymakers undertake an abstention analysis before attempting to apply their laws extraterritorially.

Under such an analysis, which is easier to apply and more restrictive of extraterritorial applications of law than the *Restatement* test, United States reexport and technology controls are legitimate, whereas export controls based on corporate nationality are probably not. Finally, the Comment has suggested legislative and executive reforms by which such abstention analysis might be institutionalized.