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Stanley J. Marcuss

D. Stephen Mathias

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# U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?

by  
Stanley J. Marcuss†  
and  
D. Stephen Mathias\*

## I

### INTRODUCTION

On numerous occasions since the late 1970s the United States has restricted exports for foreign policy purposes. Foreign policy export controls were imposed on virtually all exports to South African and Namibian military and police entities in February 1978 to express U.S. opposition to apartheid.<sup>1</sup> In May 1978, as a response to Libya's alleged support of international terrorism and interference with the stability of the region, controls were imposed on specific exports to Libya.<sup>2</sup> Certain exports to the Soviet Union were also restricted following the highly publicized trials of noted Soviet dissidents in August 1978.<sup>3</sup> In early 1980, other exports to the Soviet Union were subject to restrictions as a protest of the Soviet invasion of Afghanistan,<sup>4</sup> and in December 1981 and June 1982, still further restrictions were imposed on the U.S.S.R. because of its alleged complicity in political repression in Poland.<sup>5</sup>

All these instances of export controls share important similarities. Each was issued under the authority of the Export Administration Act.<sup>6</sup> Each was imposed by means of regulations promulgated by the U.S. Department of Commerce.<sup>7</sup> Each was intended to accomplish a significant

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† Partner, Milbank, Tweed, Hadley & McCloy, Washington, D.C. Member of the Bar, Connecticut, Washington, D.C., and New York.

\* Associate, Milbank, Tweed, Hadley & McCloy, Washington, D.C. Member of the Bar, Maryland and Washington, D.C.

1. 43 Fed. Reg. 7,311 (1978). *See infra*, discussion in Section II.A.

2. 43 Fed. Reg. 20,484 (1978). *See infra*, discussion in Section II.B.

3. 43 Fed. Reg. 33,699 (1978). *See infra*, discussion in Section II.C.

4. 45 Fed. Reg. 3,027 (1980). *See infra*, discussion in Section II.D.

5. 47 Fed. Reg. 141 (1982). *See infra*, discussion in Section II.E.

6. 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1983).

7. Authority for issuing these regulations, cited *supra* in notes 1-5, is found in 50 U.S.C.A. app. § 2414 (West Supp. 1983).

U.S. foreign policy objective. Yet, each engendered substantial opposition from the U.S. business community and, on occasion, from America's European allies.

More important are the differences among these controls. Some of the controls completely halted exports to the country in question, while others merely established a procedure to review export applications on a case-by-case basis. Certain controls did not become effective immediately, while others, such as those imposed on Libya, took immediate effect. In addition, some of the controls applied to foreign subsidiaries of U.S. companies, while others did not.

This Article examines these variations to assess the statutory scheme for imposition of export controls as a tool of foreign policy, to explain the authority under the Export Administration Act for the various controls imposed during this period, and to evaluate whether these controls constitute a legitimate exercise of U.S. authority under international law. As amplified below, we conclude that the grant of statutory authority is sufficiently broad to justify each of the foreign policy export controls imposed over the past several years. We note that congressional attempts to limit executive discretion over the imposition of foreign policy export controls have been unsuccessful and may be doomed to ineffectiveness by their very nature. In spite of domestic statutory authority, however, we conclude that substantial questions exist as to whether the broadest aspects of these controls can be justified under the prevailing rules of international law.

Before discussing the authority of the Export Administration Act and its legitimacy under international law, we will review recent examples of U.S. export controls.

## II

### FOREIGN POLICY EXPORT CONTROLS—THE RECENT RECORD

#### *A. South Africa and Namibia: Opposition to Apartheid*

On February 16, 1978, an embargo was imposed on the export and re-export<sup>8</sup> of all U.S.-origin commodities and technical data (except data generally available to the public) to or for use by military or police entities in the Republic of South Africa and Namibia.<sup>9</sup> The stated purpose of the embargo was to further United States human rights policy and to implement United Nations Security Council resolutions of 1963 and 1977 regarding exports of arms and munitions to South Africa.<sup>10</sup>

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8. Re-export is the act of exporting a product which has been imported and left relatively unchanged in form before being exported again. BLACK'S LAW DICTIONARY 1151 (5th ed. 1979).

9. 43 Fed. Reg. 7,311 (1978).

10. *Id.*

The embargo expressly included the export and re-export of commodities and technical data used to service equipment owned, controlled, or used by military or police entities.<sup>11</sup> In addition, South African and Namibian recipients of technical data of U.S. origin were prohibited from selling or otherwise making available, directly or indirectly, the direct product of such data, as well as any products of the direct products, to military or police entities.<sup>12</sup> Technical data sales to *all* customers in South Africa and Namibia were to be accompanied by a written notice from the U.S. exporter that the direct products of such data, as well as subsequent products of the direct product, could not be sold or otherwise made available, directly or indirectly, to military or police entities.<sup>13</sup> Finally, foreign consignees, warehouses, distributors, end-users, exporters, and service facilities utilizing special licensing procedures—such as project, distribution, foreign-based warehouse, or service supply licenses—whether located in South Africa or elsewhere, were required to certify that commodities received under one of these special licensing procedures would not be sold or used in violation of the embargo.<sup>14</sup>

#### *B. Libya: Regional Stability and Terrorism*

On May 9, 1978, in response to Libya's alleged support of international terrorism and its alleged efforts to undermine the governments of neighboring countries friendly to the United States, the Department of Commerce amended the Export Administration Regulations to require validated licenses for the export of certain off-highway transport vehicles to Libya.<sup>15</sup> Until that time, such vehicles could be exported to Libya under a general license, that is, without prior notice to the Commerce Department.<sup>16</sup> The statement accompanying publication of the amendment in the *Federal Register* did not explain the action. It did state that proposed exports to Libya require "individual applications so that proposed transactions can be reviewed to determine whether they would be in the foreign policy interests of the United States."<sup>17</sup> In a later statement, the Commerce Department claimed that such vehicles were capable of transporting tanks and other military vehicles.

Subsequently, additional controls were imposed on other U.S.-origin commodities on the allegation that Libya supported international terrorism.<sup>18</sup> Furthermore, along with Iraq, South Yemen, and Syria, Libya was subjected to export controls for aircraft, helicopters, and certain crime con-

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11. *Id.*

12. *Id.* at 7,313.

13. *Id.*

14. *Id.* at 7,312.

15. 43 Fed. Reg. 20,484 (1978).

16. *Id.*

17. *Id.*

18. 45 Fed. Reg. 33,955, 33,956 (1980).

trol and detection equipment.<sup>19</sup> Validated licenses were required for shipments of these goods, and applications for such licenses were considered on a case-by-case basis.<sup>20</sup>

*C. U.S.S.R. I: Trials of Dissidents*

On August 1, 1978, in response to Soviet treatment of certain dissidents, a validated license requirement was imposed on the export of petroleum and natural gas exploration and production equipment and related technical data to the U.S.S.R., Estonia, Latvia, and Lithuania.<sup>21</sup> An additional requirement was imposed on exports to any destination of technical data relating to petroleum exploration and production under a general license. The exporter had to receive a written assurance from the importer that neither the data nor the direct product thereof was intended to be shipped, directly or indirectly, to the U.S.S.R., Estonia, Latvia, or Lithuania.<sup>22</sup> The stated purpose of these controls was "to provide for prior review . . . to assure that . . . export would be consistent with the foreign policy objectives of the United States."<sup>23</sup>

*D. U.S.S.R. II: Invasion of Afghanistan*

During the early months of 1980, additional controls were imposed on the U.S.S.R. in response to its invasion of Afghanistan. For example, all outstanding licenses to ship to the U.S.S.R. were suspended for an indefinite period on January 11, 1980, for national security reasons.<sup>24</sup> Other controls were based on both national security and foreign policy considerations, such as the January 7, 1980 restriction on the export and re-export of certain agricultural commodities to the U.S.S.R., the "grain embargo."<sup>25</sup> The regulations imposing these controls, while requiring validated licenses for exports and re-exports, also stated that the licenses would generally not be granted.<sup>26</sup> A special enforcement note warned against indirect shipment to the U.S.S.R.<sup>27</sup>

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19. *Id.*

20. *Id.* See also U.S. DEP'T OF COMMERCE, 1980 EXPORT ADMINISTRATION ANN. REP. 33 [hereinafter cited as 1980 EXPORT ADMINISTRATION ANN. REP.].

21. 43 Fed. Reg. 33,699 (1978).

22. *Id.*

23. *Id.*

24. 45 Fed. Reg. 3,027 (1980).

25. 45 Fed. Reg. 1,883 (1980).

26. *Id.*

27. This note read:

Exporters are advised that the Department, in consultation with the Department of Agriculture, intends to monitor closely exports and reexports of agricultural commodities to other countries to assure that the actions announced herein are not subverted through indirect shipment to the U.S.S.R. Should it appear that such indirect shipments are taking place, the Department intends to announce such further measures as may be necessary to assure the effectiveness of the actions announced herein.

*Id.* at 1,884.

Additional controls were based solely on foreign policy grounds. On February 4, 1980, the Commerce Department imposed new controls on the export and re-export to the Soviet Union of phosphates.<sup>28</sup> Under these regulations, a validated license was required for exports to the Soviet Union of phosphate rock, phosphatic fertilizers, and phosphoric acid of all levels of concentration.<sup>29</sup> On February 25, the President announced an embargo on such shipments.<sup>30</sup>

In addition, on March 13, 1980, the Department of Commerce announced that the President had asked all U.S. companies voluntarily to cease exporting to the U.S.S.R. products for use in the 1980 Moscow Summer Olympics.<sup>31</sup> On March 28, exports of goods or technical data for any use related to the 1980 Summer Olympic Games and payments or transactions in any way related to arrangements involving such exports were prohibited.<sup>32</sup> The prohibition applied to any "person subject to the jurisdiction of the United States," which was defined to include:

- (i) any individual who is a citizen or resident of the United States . . . ,
- (ii) any partnership, corporation, company, association or other entity organized under the laws of the United States or any jurisdiction therein, and
- (iii) any permanent establishment in the United States of any foreign partnership, organization, company, association or other entity.<sup>33</sup>

Finally, on May 6, 1980, a validated license requirement was imposed on the export of truck assembly lines to the Kama River complex (Kam AZ). At the same time, the Commerce Department issued a statement that applications for licenses to export such commodities would generally be denied,<sup>34</sup> noting that "trucks produced at the Kama River truck complex were used in the Soviet invasion of Afghanistan."<sup>35</sup> The purpose of the control was to hinder the construction of a second line that would have doubled the truck engine assembly capacity of the plant.<sup>36</sup>

### *E. U.S.S.R. III: Poland*

In December 1981, in response to the role allegedly played by the Soviet Union in certain political events in Poland, the Commerce Department broadened the validated license requirement for petroleum industry equipment and data to include U.S.-origin goods and technical data related to oil and gas transportation and refinement, the "pipeline regulations".<sup>37</sup> The

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28. 45 Fed. Reg. 8,293 (1980).

29. *Id.*

30. 1980 EXPORT ADMINISTRATION ANN. REP., *supra* note 20, at 34.

31. *Id.* at 34-35.

32. 45 Fed. Reg. 21,612 (1980).

33. *Id.* at 21,613.

34. 45 Fed. Reg. 30,617 (1980).

35. *Id.*

36. 1980 EXPORT ADMINISTRATION ANN. REP., *supra* note 20, at 35.

37. 47 Fed. Reg. 141 (1982).

Commerce Department further stated that applications for validated licenses with respect to oil-and-gas-related goods and data would be denied.<sup>38</sup>

In June 1982, in response to the alleged lack of progress in alleviating political repression in Poland, the Commerce Department imposed further restrictions on the export and re-export of oil and gas equipment to the Soviet Union.<sup>39</sup> These new controls prohibited the export of non-U.S.-origin petroleum industry goods and technical data by "any person subject to the jurisdiction of the United States," defined in this context to include:

- (i) Any person, wherever located, who is a citizen or resident of the United States;
- (ii) Any person actually within the United States;
- (iii) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; or
- (iv) Any partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (i), (ii), or (iii) of this section.<sup>40</sup>

These controls also prohibited, under certain circumstances, the export to the Soviet Union and Afghanistan by any exporter anywhere of foreign-made direct products of oil-and-gas-related U.S.-origin technical data.<sup>41</sup>

### III A COMPARISON OF SELECTED FOREIGN POLICY EXPORT CONTROLS

These foreign policy export controls differed in three critical respects. First, the extent of the controls varied. In some cases the export of items subject to the controls was not actually denied.<sup>42</sup> Some controls effectively prohibited exports by establishing a licensing requirement, followed by Commerce Department refusal to grant licenses.<sup>43</sup> In still other cases, while no licensing procedure was established, an embargo was imposed.<sup>44</sup>

Second, controls differed in the extent to which they retroactively applied to existing contracts or previously exported goods. A re-export control is retroactive when it bars the re-export of goods to a destination to which a direct export of the goods would have been lawful at the time of the original export from the United States. There is no retroactivity, by contrast, when the re-export is barred only if a direct export could not have been lawful at the time of the original export. Retroactivity took three

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38. *Id.* at 144.

39. 47 Fed. Reg. 27,250 (1982).

40. *Id.* at 27,252.

41. *Id.* at 27,250.

42. For example, in fiscal year 1980 no applications for exports to Libya of the off-highway transport vehicles were denied. 1980 EXPORT ADMINISTRATION ANN. REP., *supra* note 20, at 32.

43. *See, e.g.*, 45 Fed. Reg. 30,617 (1980).

44. *See, e.g.*, 43 Fed. Reg. 7,311 (1978).

forms: controls applying to contracts made but not yet performed, controls on the re-export of U.S.-origin products, and controls on foreign products manufactured with previously exported U.S.-origin technical data.<sup>45</sup>

All the controls described above were retroactive in the first two respects. For example, the grain embargo prohibited shipments to the Soviet Union of grain for which sales contracts had already been made.<sup>46</sup> The re-export by a foreign exporter to the Soviet Union of U.S. grain also was prohibited, even if the foreign exporter had acquired the grain at a time when no such prohibition existed.<sup>47</sup> This was true even if the foreign entity had itself contracted to sell the grain to the Soviet Union prior to the imposition of the controls.

The grain embargo did include, however, a savings clause. It stated that shipments of these commodities could continue provided either that their loading aboard an exporting carrier had actually commenced prior to January 8, 1980, or that prior to January 8, 1980, they were actually en route to a port of export aboard a rail car or truck which would itself serve as the exporting carrier. Furthermore, in either case, the shipments had to have actually departed the United States or the foreign country from which they were being re-exported within forty-eight hours thereafter.<sup>48</sup>

Some of the other controls described above had savings clauses of comparable breadth. In the South African restrictions, for example, the export and re-export of commodities and technical data for the servicing of equipment owned, controlled, or used by or for military or police entities was allowed to continue for two months, provided that such servicing was pursuant to a contract or other legal commitment and that certain other circumstances were present.<sup>49</sup> In the case of the "dissident" controls imposed on the Soviet Union on August 1, 1978, goods already laden on board a vessel or en route to port were given fifteen days to leave the United States.<sup>50</sup> The Libyan controls and the Kam AZ controls, by contrast, had no savings clauses at all.<sup>51</sup>

Not all controls on foreign products derived from U.S.-origin technology are retroactive. If exports are barred to a destination where the product could have been shipped when the underlying U.S.-origin technical data were shipped, the control is retroactive. If, on the other hand, the control bars the export of the product in a manner that is consistent with the controls in effect at the time the technical data was originally exported, the

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45. Retroactivity may not apply where controls are imposed over exports by persons subject to the jurisdiction of the United States. *See, e.g.*, 47 Fed. Reg. 27,250 & 27,252 (1982), "the pipeline regulations".

46. 45 Fed. Reg. 1,883 (1980).

47. *Id.*

48. *Id.*

49. 43 Fed. Reg. 7,311 (1978).

50. 43 Fed. Reg. 33,701 (1978).

51. *See* 43 Fed. Reg. 20,484 (1978); 45 Fed. Reg. 21,612 (1980).

control is not retroactive. The South African controls were not retroactive in this sense; the pipeline regulations, on the other hand, were. Thus, a foreign manufacturer of a product utilizing U.S.-origin technical data would be subject to U.S. export control with respect to all proposed exports utilizing that data, even if those controls had not been in force at the time he acquired the U.S.-origin data. Furthermore, it does not matter when the data were acquired or how important the data were to the manufacture of the product.

Third, the controls varied in the extent of their attempted extraterritorial reach. "Extraterritoriality" refers to the application of U.S. law to transactions or other activities taking place outside the borders of the United States. While all the controls purported to control re-exports of U.S.-origin goods and technical data, the South African and the Soviet pipeline regulations contained broader extraterritorial controls. The South African restrictions, placed on sales or transfers to police or military entities, applied to foreign products manufactured with U.S.-origin technical data where the recipient of that data was located in South Africa or Namibia.<sup>52</sup> The pipeline regulations, like the South African restrictions, applied to the export of foreign products. The extraterritorial reach of these regulations extended to goods manufactured with non-U.S.-origin technical data and exported by persons who are subject to the jurisdiction of the United States, which, as defined in the regulations, included foreign subsidiaries of U.S. companies.<sup>53</sup> Thus, goods and data of wholly foreign origin were subject to the pipeline regulations if exported by a foreign subsidiary or licensee of a U.S. company.

For the most part, the variations among these controls went unexplained at the time they were imposed. One was left to wonder whether the issues of retroactivity and extraterritoriality had seriously been considered. Although Congress has demonstrated a keen interest in being consulted about foreign policy controls,<sup>54</sup> such consultation has, for the most part, been limited and generalized.<sup>55</sup>

#### IV

#### THE EXPORT ADMINISTRATION ACT OF 1979

##### *A. Statutory Provisions Relating to Foreign Policy Export Controls*

Section 6(a)(1) of the Export Administration Act of 1979 (hereinafter the Act) authorizes the President to "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of

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52. 43 Fed. Reg. 7,311 (1978).

53. 47 Fed. Reg. 27,252 (1982).

54. See, e.g., S. REP. NO. 169, 96th Cong., 1st Sess. 8, 18 (1979).

55. See, e.g., the rather formalistic annual reports to Congress extending foreign policy export controls. The 1982 report is reprinted as Appendix D to the U.S. DEP'T OF COMMERCE, 1982 EXPORT ADMINISTRATION ANN. REP.

the United States or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States.”<sup>56</sup>

Section 6(b) of the Act provides that when imposing foreign policy export controls, the President shall consider:

(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States policy toward the country which is the proposed target of the controls;

(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.<sup>57</sup>

Section 6 further provides that the Secretary of Commerce shall consult such affected U.S. industries as he deems appropriate before imposing foreign policy export controls,<sup>58</sup> and that Congress shall “in every possible instance” be consulted before controls are imposed.<sup>59</sup>

### *B. Retroactivity Under the Export Administration Act*

Exports under existing unperformed contracts are controlled by the Act despite the retroactive character of such an exertion of authority. The Act authorizes, without limitation, restrictions on the *exportation* of goods or technology subject to the jurisdiction of the United States or exported by a person subject to the jurisdiction of the United States.<sup>60</sup> This authority is not limited by pre-existing contract rights, since the operative act is the “exportation”, not, for example, the agreement to export. It is for this reason, presumably, that the Act expressly requires the executive branch to consider “the effects of the controls on existing contracts,” thus acknowledging the possibility that the controls might affect the performance of existing contracts.<sup>61</sup> Despite this requirement, the President has not specifically re-

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56. 50 U.S.C.A. app. § 2405(a)(1) (West Supp. 1983).

57. *Id.* at § 2405(b)(1)-(6).

58. *Id.* at § 2405(c).

59. *Id.* at § 2405(e).

60. 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1983).

61. 50 U.S.C.A. app. § 2405(b)(4) (West Supp. 1983).

ported to Congress on the effects on existing contracts of any export controls imposed to date.

The foreign policy export controls described above typically made only minimal concessions to existing contracts by means of narrow savings clauses. For example, the usual savings clause provided that goods, already loaded on a vessel or in transit to a port of departure and actually exported within forty-eight hours of the new controls, were not subject to the new restrictions.<sup>62</sup> It is unclear why savings clauses are narrowly drawn to encompass only a certain class of goods or to require exportation within a particular period of time. Why not also exempt, for example, those goods that are waiting to be picked up to be transported to a port of departure, or those goods specially made for the customer but not yet completed? The requirement of actual export within forty-eight hours is especially mysterious. The regulations issued subsequent to the Soviet dissident trials, for example, provided a fifteen day period.<sup>63</sup> The difference has never been explained; perhaps there was a concern about interference with particular contracts which the Administration never disclosed.

The lack of a consistent, clearly stated policy regarding existing contracts inevitably diminishes the ability of the U.S. exporters to anticipate the treatment that will be accorded existing contracts in any given case. As a result, the exporter has much more difficulty arranging his affairs in a manner that will limit his exposure in the event foreign policy export controls are imposed. There is a serious question as to whether this lack of predictability is counterbalanced by the need to accomplish the purposes for which export controls were imposed. It is difficult to discern any incremental effect that might attach to foreign policy export controls because of their varying treatment of existing contracts. Thus, it is difficult to justify such variance in light of the harm that unpredictability itself causes to individual U.S. exporters as well as to long-term U.S. trade interests.

It can be argued that the executive branch must have the flexibility to apply foreign policy export controls in a manner appropriate to different circumstances and degrees of urgency. For example, for foreign policy reasons it may be necessary to convey the strongest possible signal of disapproval regarding a foreign government's conduct. Such a signal could be the immediate curtailment of certain exports to that foreign country. At the same time, there may be situations in which existing contracts could be honored without any serious consequences for U.S. foreign policy. Indeed, frequently significant foreign-policy gains will result by permitting performance of existing contracts, particularly where any interference with them has adverse spillover consequences.

In any event, it is not possible to conclude that the variations in the retroactive scope of U.S. foreign policy export controls in recent years are

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62. See *supra* discussion accompanying notes 48–51.

63. See 43 Fed. Reg. 33,701 (1978).

entirely attributable to a well-conceived exercise of executive discretion. Some of the variations might only reflect the failure of the executive to be consistent when consistency may have been desired. It is, in fact, difficult to construct a rationale for some of the variations among the controls that have been imposed in recent years.

Notwithstanding this lack of consistency with respect to certain factors in the past, the fact remains that Congress cannot anticipate all the circumstances in which controls might be imposed; therefore Congress cannot statutorily circumscribe the precise nature of the controls that might be most appropriate in a given case. For this reason, and because of the primary position of the President in foreign affairs, substantial discretion must remain vested in the executive branch. It does not necessarily follow, however, that such discretion must be without any effective limit. For example, controls might be more effectively formulated if the executive branch made a choice from among a range of congressionally approved options rather than possessing unbridled discretion. Yet even where Congress authorizes a range of options, its influence on the ultimate content of the controls would clearly be modest relative to that of the executive.

Interestingly enough, Congress has recently enacted a law limiting executive discretion.<sup>64</sup> Under the law, the President is barred from prohibiting or curtailing agricultural exports pursuant to contracts made prior to the imposition of export controls if the contracts' terms require delivery within 270 days of the imposition of controls, unless the President has declared a national emergency or Congress has declared war.<sup>65</sup> In this instance at least, Congress has developed a savings clause in accord with practical trading activities since most agricultural export contracts call for actual export within 270 days. Congress has not, however, extended similar protection to contracts to export other commodities or products.

### *C. Extraterritoriality Under the Export Administration Act*

The foreign policy export controls described above contained three different degrees of extraterritoriality: (1) the control over re-exports of U.S.-origin goods or technical data by any foreign person; (2) the control over exports of foreign products manufactured using U.S.-origin technical data; and (3) the control over exports, regardless of origin, by a "person subject to the jurisdiction of the United States," which includes any entity, wherever organized or doing business, owned or controlled by a U.S. person or entity.<sup>66</sup>

As discussed below, actual practice under the Act and its predecessor, and the legislative history of the Act, provide a basis for the broadest extraterritorial authority asserted by the executive branch in imposing foreign

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64. Futures Trading Act of 1982, Pub. L. No. 97-444, § 238, 96 Stat. 2294, 2326 (1983).

65. *Id.*

66. 50 U.S.C.A. § 2405(a)(1) (West Supp. 1983).

policy export controls during this period. The Act could be clearer in granting such authority, and the executive branch could be more willing to explain variations in the degree of extraterritoriality of the controls.

*Re-exports of U.S.-origin goods and technical data.* Great controversy surrounds the use of controls over re-exports of U.S.-origin goods and technical data as a tool of foreign policy. Some ability to control re-exports is necessary, however, if export controls are to be effective and foreign policy objectives are to be achieved. Without re-export controls, a product could be shipped to a proscribed destination merely by first shipping it to another country. Not surprisingly, therefore, for many years the United States has claimed authority to control re-exports from foreign countries.

It is clear from the re-export provisions of the regulations that the Commerce Department claims the authority to control re-exports retroactively as well as prospectively. Section 374.1 provides—and has provided for many years—that the decision on whether to approve a re-export application is made by determining the treatment it would receive if it were an application to export directly from the United States.<sup>67</sup> Thus, even though re-export of a U.S. product would have been permitted at the time of the original export from the United States, permission for such re-export can retroactively be denied even if the recipient of the original export anticipated its eventual re-export at the time of purchase. Permission can be denied even if the recipient of the original export was unaware that its intended re-export would be subject to U.S. export controls that might exist at the time of the re-export.

The basis in the Act itself for any authority to control re-exports is unclear. There is no express authorization for controls over re-exports in the foreign policy controls section of the Export Administration Act.<sup>68</sup> Significantly, the only reference in the Act to re-exports occurs in the national security section. That section states that one of the factors to be considered in determining U.S. export control policy with respect to any individual country is “[that country’s] ability and willingness to control retransfers of United States exports in accordance with United States policy.”<sup>69</sup> This provision might be read to suggest that re-export controls are a matter of agreement among nations and not within the unilateral authority of the United States; in our view, however, the better reading is that this provision takes account of a foreign country’s cooperation with U.S. re-export controls only because of the extent to which that cooperation might affect the enforcement of the controls, not the authority initially to impose the controls.

Statutory basis for re-export controls must be found within the broad authority of the President to curtail or prohibit “exportations of property

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67. 15 C.F.R. § 374.1 (1983).

68. 50 U.S.C.A. app. § 2405 (West Supp. 1983)

69. 50 U.S.C.A. app. § 2404(b) (West Supp. 1983).

subject to the jurisdiction of the United States.”<sup>70</sup> Prior to 1977, the Export Administration Act of 1969 authorized the President to “prohibit or curtail the exportation *from the United States*, its territories and possessions, of any articles, materials, or supplies . . . .”<sup>71</sup> In 1977, Congress amended the Export Administration Act of 1969 to provide the President with authority to “prohibit or curtail the exportation” of goods or technology “exported by any person subject to the jurisdiction of the United States.”<sup>72</sup>

It is clear that Congress intended by this phrase to give the President authority to impose controls on foreign subsidiaries of U.S. companies. Since control over foreign subsidiaries would naturally involve restrictions on exports outside the territorial United States, the geographical limitation, “from the United States,” was deleted.<sup>73</sup> By so doing, however, Congress demonstrated no intent to limit the President’s ability to control exports made by persons that are not U.S. subsidiaries. It appears likely that Congress intended that its traditional exercise of authority to control re-exports of U.S.-origin goods and technical data be included in the authority to control exports of “property subject to United States jurisdiction.” Since this phrase is not defined or explained in the Act or in the legislative history, other sources must be consulted to illuminate its scope and meaning.

Both the Trading with the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA), authorize the President to regulate financial transactions “by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>74</sup> While there are no statutory definitions of the phrase “property subject to the jurisdiction of the United States” in these contexts, the Foreign Assets Control Regulations, issued under TWEA, provide that:

(a) The phrase “property subject to the jurisdiction of the United States” includes, without limitation, securities, whether registered or bearer, issued by:

(1) The United States or any State, district, territory, possession, county, municipality, or any other subdivision or agency or instrumentality of any thereof; or

(2) Any person within the United States whether the certificate which evidences such property or interest is physically located within or outside the United States,

(b) The phrase “property subject to the jurisdiction of the United States” also includes, without limitation, securities, whether registered or bearer, by whomsoever issued, if the certificate evidencing such property or interest is

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70. 50 U.S.C.A. app. § 2405(a)(1) (West Supp. 1983)

71. Export Administration Act of 1969, Pub. L. No. 91-184, § 4(b), 83 Stat. 841, 842 (1969) (amended 1977) (emphasis added).

72. Amendments to the Export Administration Act of 1969, Pub. L. No. 95-223, § 301(a), 91 Stat. 1625, 1629 (1977).

73. See *infra* text accompanying notes 74-76.

74. 50 U.S.C.A. app. § 5(b)(1) (West Supp. 1983) (TWEA); 50 U.S.C.A. § 1702 (West Supp. 1983) (IEEPA).

physically located within the United States.<sup>75</sup>

Under these definitions, the term "property subject to the jurisdiction of the United States" is virtually without limit but appears to be grounded in concepts of jurisdiction over the person involved in the transaction. As such, it would not include property handled by a person not subject to U.S. jurisdiction, such as a re-export of U.S.-origin products or technical data by a foreign corporation not affiliated with a U.S. corporation. Hence, authority to control such re-exports must be found, if at all, in implied congressional acquiescence in an exercise of authority which has been engaged in over the years as a necessary part of an effective export control program.

*Exports by "foreign persons owned or controlled by U.S. persons."* As noted above, there is clear statutory authority for controls imposed on foreign subsidiaries of U.S. persons. As the Senate Report noted, the phrase "persons subject to the jurisdiction of the United States" was intended to confer "nonemergency authority under the [Export Administration Act] to control non-U.S.-origin exports by foreign subsidiaries of U.S. concerns."<sup>76</sup> There was an effort to ban the "imposition of new controls on non-U.S.-origin exports of foreign subsidiaries of U.S. companies, except in international economic emergencies."<sup>77</sup> The Senate rejected the idea when the State Department submitted a letter stating that such a provision would adversely affect the President's flexibility.<sup>78</sup>

*Exports of foreign products manufactured using U.S.-origin technical data.* The second form of extraterritorial reach consists of controls over exports by foreign entities unaffiliated with U.S. companies that manufacture products using U.S.-origin technical data. Conceptually, controls of this nature are similar to re-export controls. Just as the effectiveness of export controls could be vitiated in the absence of re-export controls by first shipping the product in question to another country, so could their effectiveness be vitiated in the absence of controls over foreign products of U.S.-origin technology by exporting the technology to produce that product abroad. As with re-exports, any statutory authority for the control of foreign products of U.S.-origin technical data must be under the notion of

75. 31 C.F.R. § 500.313(a)(1)-(b) (1982).

76. S. REP. NO. 466, 95th Cong., 1st Sess. 6, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540, 4545.

77. S. REP. NO. 169, 96th Cong., 1st Sess. 4-5, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1147, 1151.

78. *Id.* at 1151-52. This phrase has a substantial history of administrative construction, primarily under the TWEA and the IEEPA. In the Foreign Assets Control, Cuban Assets Control, and Iranian Assets Control Regulations, for example, the phrase "persons subject to the jurisdiction of the United States" is expressly defined to include foreign subsidiaries. 31 C.F.R. § 500.329 (1982) (Foreign Assets Control Regulations); 31 C.F.R. § 515.329 (1982) (Cuban Assets Control Regulations); 31 C.F.R. § 535.329 (1982) (Iranian Assets Control Regulations) (subsequently revoked).

"property subject to U.S. jurisdiction."<sup>79</sup> Notwithstanding such similar rationales, these controls have historically been treated differently from re-export controls under the Export Administration Regulations.

Traditionally, controls over exports of foreign products of U.S. technology have been asserted only prospectively; that is, they were controlled only where the acquisition of the underlying technical data was subject to such controls. An agreement by the foreign importer of the U.S. technology not to export the direct product of the technology to certain destinations was required at the time of export by way of a "written assurance" that export to those destinations was not intended.<sup>80</sup> The pipeline regulations are the first example of retroactivity of foreign policy export controls in the foreign-product context. Foreign licensees of U.S.-origin technology were prohibited from exporting the products of that technology to the Soviet Union for use in the pipeline even though no such restriction had existed at the time the technology was originally acquired.<sup>81</sup> This retroactive nature makes these controls materially broader than the prospective controls of products manufactured abroad by using U.S.-origin technical data. Consequently, Congress should not be viewed as having acquiesced in retroactive application of controls over foreign products.<sup>82</sup>

Two factors distinguish controls over foreign products of U.S.-origin technical data from controls over re-exports of U.S.-origin goods. First, as noted, re-export controls have been imposed retroactively and have been accepted international practice for some time.<sup>83</sup> Congress has acquiesced implicitly in re-export controls.<sup>84</sup> Second, the United States has attempted to control foreign products of U.S.-origin technology only where there is some continuing connection with the United States. Even where the export controls are broad, as in the pipeline regulations, controls over foreign products of U.S.-origin technical data applied only if a written assurance was required under these regulations, if the recipient of the technical data had agreed to abide by U.S. export control regulations, or if the U.S.-origin technical data were the subject of a licensing agreement between the foreign manufacturer and "any person subject to the jurisdiction of the United States."<sup>85</sup>

Written assurances and agreements to honor U.S. law have the common element of consent, although, effectively, the "consent" is mandatory if the foreign importer wishes to obtain the technology under the regulation. Controls based on written assurances, however, are limited to the restric-

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79. See *supra* discussion accompanying notes 67-75.

80. See, e.g., 15 C.F.R. § 379.4(f) (1983).

81. 47 Fed. Reg. 27,250 (1982).

82. The basis for the inference of congressional acquiescence is absent in such a case. See, e.g., *Josephs v. Government of the United States*, 532 F. Supp. 795 (E.D. Pa. 1982).

83. See *supra* discussion accompanying note 67.

84. See *supra* discussion following note 75.

85. 47 Fed. Reg. 27,251 (1982). See *supra* definition accompanying note 40.

tions that were in place at the time of the original export from the United States. Under these circumstances, the foreign importer acquires the technology with full knowledge of the restrictions on its transfer. Thus, these controls have no retroactive effect.

Where the foreign importer agrees to abide by U.S. export regulations, the importer does not limit its agreement only to the restrictions that exist at the time of export from the United States.<sup>86</sup> Consent under these circumstances includes the possibility of retroactive controls. The foreign importer is in no position to complain since it has agreed to abide by any controls that may be imposed in the future.

Where controls are imposed on the basis of an existing licensing or similar agreement with a person subject to the jurisdiction of the United States, there is no element of consent. The Department of Justice has taken the position that the authority for such controls continues as long as the licensing arrangement is in effect, on the theory that "exportation" is a continuing process under a licensing agreement. In *Dresser Industries, Inc. v. Baldrige*,<sup>87</sup> relating to the enforcement of the pipeline regulations, Dresser Industries argued that there was no jurisdictional basis for the imposition of controls based on the existence of a licensing agreement.<sup>88</sup> The Justice Department responded by arguing that:

Exportation of technology often involves an international license agreement under which a foreign firm is given the contractual right to use technology for a period of time in exchange for payment of royalties. An exportation of technology thus occurs as long as the foreign firm is licensed to use technology of the domestic firm, and Section 6 provides explicit authority to prohibit or curtail exportation of technology. Consistently with Section 6, the regulations curtail the exportation of technology by barring foreign licensees of U.S. technology from shipping products of that technology to the USSR. The regulations thus apply where there is an existing continuous contractual relationship under which a foreign firm is receiving and has the contractual right to use U.S. technology. Indeed, in this case, Dresser (France) is producing gas compressors for exportation to the USSR based on technology received under license from its U.S. parent, Dresser Industries. What is at issue here is plainly an exportation of U.S. technology and Section 6 of the Act provides authority to "prohibit or curtail exportation" of "goods" or "technology."<sup>89</sup>

The court denied Dresser's motion for a temporary restraining order enjoining enforcement of the pipeline regulations but did not expressly

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86. Some contractual agreements contain express agreements to abide by subsequent amendments to the Regulations. The pipeline regulations were not limited to this sort of agreement, however.

87. *Dresser Industries, Inc. v. Baldrige* (sic), 549 F. Supp. 108 (D.D.C. 1982).

88. Plaintiff's Memorandum in Support of a Temporary Restraining Order, *Dresser Industries, Inc. v. Baldrige* (sic), 549 F. Supp. 108 (D.D.C. 1982).

89. Defendant's Memorandum of Points and Authorities in Opposition to Application for Temporary Restraining Order at 25, *Dresser Industries, Inc. v. Baldrige* (sic), 549 F. Supp. 108 (D.D.C. 1982).

adopt the Justice Department's position.<sup>90</sup> Thus, this issue remains unresolved.

At the same time, the executive branch has taken an extraordinarily expansive view of its jurisdiction over foreign users of U.S. technology. By treating the use of U.S. technology pursuant to a licensing agreement as a continuous export, U.S. controls over foreign users of U.S. technology are virtually limitless, since all or nearly all technology that is not in the public domain or that has not been sold outright is used pursuant to a licensing agreement. The flag thus follows technology just as it follows goods: those who use U.S. goods or technology abroad are subject to U.S. jurisdiction in the eyes of the executive branch just as if the users were located in the United States.

In essence, the executive branch treats "goods, technology, or other information subject to the jurisdiction of the United States" as including any commodities or information exported *at any time* from the United States. In short, it attributes U.S. "nationality" to all U.S.-origin goods and virtually all U.S.-origin technology and its resulting products. Basis for such authority, either in the statute or its legislative history, is hard to find. Nor can Congress be said to have acquiesced in such an exercise of jurisdiction since its first invocation occurred in the pipeline sanctions. Should Congress choose not to renounce such a broad exercise of jurisdiction when it renews the Act, it might be argued that congressional approval has been implicitly conferred.

## V

### FOREIGN POLICY EXPORT CONTROLS AND INTERNATIONAL LAW

International law poses no obstacle to a state's control of exports by exporters within its boundaries to accomplish its foreign policy objectives. Yet the use of foreign policy export controls to regulate exports by exporters from other countries and to impose new conditions on already consummated transactions with foreign parties raises substantial questions of legitimacy under prevailing international legal concepts.

#### A. *Extraterritorial Jurisdiction*

The international law of extraterritorial jurisdiction is by no means a subject of universal agreement among nations, or, for that matter, among scholars.<sup>91</sup> Two bases of state jurisdiction—territoriality and nationality—are universally accepted, but there is disagreement about their precise

90. *Dresser Industries, Inc. v. Baldrige* (sic), 549 F. Supp. 108 (D.D.C. 1982) (order denying plaintiff's temporary restraining order).

91. See Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 440-47 (1981).

scope.<sup>92</sup> Three other principles—the “protective”, “passive personality”, and “universality” principles—are clearly subordinate in importance, but are widely thought to justify a state’s assertion of jurisdiction in certain circumstances when neither the territoriality nor nationality principles are applicable.<sup>93</sup>

The territoriality principle in its most basic form provides that a nation has jurisdiction to prescribe rules over persons and acts taking place in its territory.<sup>94</sup> The “objective territorial” principle, also known as the “effects” doctrine, is more controversial. While it is widely accepted that a state has jurisdiction over acts or omissions taking place outside its territory when those acts or omissions have effects within its territory if certain conditions are met, there does not seem to be a consensus as to what constitutes those conditions.<sup>95</sup> Some of the most frequently mentioned conditions are that the effect be substantial, that the act or omission be intended to cause that effect, that the act or omission be unlawful where it takes place, or that the act or omission not be required by law where it takes place.<sup>96</sup> In any event, mere incidental or minor effects are probably not enough to justify the assertion of jurisdiction based on the effects doctrine.<sup>97</sup>

Under the nationality principle, a state has jurisdiction to govern the conduct of its nationals even when its nationals are outside their home territory.<sup>98</sup> Controversy over this principle arises chiefly from disagreements about when a state is entitled to treat a person or entity as a national.<sup>99</sup> This controversy will be discussed more fully below in the context of whether foreign subsidiaries can be considered nationals of the country of their parent or controlling entity for purposes of foreign policy export controls.<sup>100</sup>

The remaining three principles may be summarized briefly. The protective principle holds that a state has jurisdiction with respect to crimes committed by aliens outside its territory against the security, territorial integrity, or political independence of that state.<sup>101</sup> The passive personality principle asserts that a state has jurisdiction in certain cases to punish aliens

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92. See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) [hereinafter cited as RESTATEMENT (SECOND)].

93. See, e.g., The Harvard Law School Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 439 (Supp. 1935) [hereinafter cited as Harvard Research].

94. See, e.g., RESTATEMENT (SECOND), *supra* note 92, at § 17.

95. *Id.* § 18(b).

96. See generally Marcuss & Richard, *supra* note 91, at 442–43.

97. See Akehurst, *Jurisdiction in International Law*, 1972–1973 BRIT. Y.B. INT’L L. 145, 154.

98. See L. OPPENHEIM, I INTERNATIONAL LAW § 145 (H. Lauterpacht ed. 8th ed. 1955).

99. See, e.g. Nottebohm Case (Liecht. v. Guat.), 1955 I.C.J. 4 (Judgment); Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4 (Judgment of February 5).

100. See *infra*, text accompanying notes 121–140.

101. Harvard Research, *supra* note 93, at 440, art. 7.

for acts committed abroad that are harmful to nationals of that state.<sup>102</sup> The universality principle holds that there is at least one crime—piracy—and there may be others, which justify punishment anywhere as a matter of international public policy.<sup>103</sup>

In issuing foreign policy export controls, the United States generally has not explained the basis for its assertion of jurisdiction. The conduct which is the basis of the controls is not alleged to have direct or substantial effects in the United States, nor does such an effect generally appear likely.<sup>104</sup> Were such effects alleged or likely, the national security section of the Act would be more appropriately used. That being the case, the effects, protective, and passive personality principles can be readily dismissed as potential bases for jurisdiction, as can the universality principle, for violations of export laws are in no sense “internationally criminal,” as are acts of piracy. Thus, if there is an international legal basis for foreign policy export controls, it must be either the territoriality or nationality principles.

Even where one of the above bases for jurisdiction exists, there is an emerging rule of international law holding that jurisdiction can be properly exercised only where it is “reasonable” to do so. The *Tentative Draft of the Restatement of Foreign Relations Law of the United States (Revised)* provides that, even if one of the bases for jurisdiction is present, a state may not apply its laws extraterritorially when the exercise of such jurisdiction is unreasonable.<sup>105</sup> Reasonableness is determined by evaluating where the act took place and where it has effects, the links between the regulating state and the persons primarily responsible for the regulated activity, the character of the regulated activity, the importance of regulation to the regulating state, the extent to which other states regulate such activities, the existence of justified expectations that might be protected or hurt by the regulation in question, and other factors.<sup>106</sup> The draft *Restatement (Revised)* further suggests that an exercise of regulation which is not unreasonable on the basis of the factors just stated may nonetheless be unreasonable if it would require a person to take action that would violate a regulation of another State which is itself not unreasonable according to the same factors.<sup>107</sup> Thus the “reasonableness” principle incorporates elements of the effects doctrine and the protective principle.

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102. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (3d. ed. 1979).

103. *Id.* at 304.

104. Even the more thorough explanations of the U.S. position have not claimed U.S. effects as a basis for the controls. See, e.g., *Export Controls on Oil and Gas Equipment, 1982: Hearings on H.R. 6838 Before House Comm. for Foreign Affairs, 97th Cong. 2nd Sess. 96 (1982)* (statement of James L. Buckley, Undersecretary of State for Security Assistance, Science and Technology).

105. *RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 403(1) (Tent. Draft No. 2, 1981) [hereinafter cited as *RESTATEMENT (REVISED)*].

106. *Id.* at § 403(2)(a)–(h).

107. *Id.* at § 403(3).

The reasonableness approach finds some support in U.S. case law, most notably in the antitrust context. In cases such as *Mannington Mills, Inc. v. Congoleum Corp.*<sup>108</sup> and *Timberlane Lumber Co. v. Bank of America*,<sup>109</sup> courts have explicitly undertaken the kind of balancing of factors discussed in the draft *Restatement (Revised)*, although not all the factors listed in the draft *Restatement (Revised)* were considered in either of the two cases, and the two cases to some extent differed in their approach.

One further international legal consideration that may be increasingly relevant pertains to the friction between the laws of foreign governments, where an act required by one state is prohibited by another state. Section 419 of the draft *Restatement (Revised)* provides that:

(1) A person may not ordinarily be required by authority of the United States

(a) to do an act outside the United States prohibited by the law of the state where the act is to be done or, if he is an alien, by the law of the state of which he is a national; or

(b) to refrain from doing an act outside the United States required by the law of the state where the act is to be done or, if he is an alien, by the law of the state of which he is a national.<sup>110</sup>

The stern resistance of certain foreign governments to the pipeline regulations suggests that at least some foreign governments will not hesitate to compel actions prohibited by U.S. export controls when they believe that their vital interests are at stake.<sup>111</sup>

### *B. Extraterritorial Foreign Policy Export Controls Under International Law*

*Re-exports of U.S.-origin goods and technical data.* As discussed above, the exercise of jurisdiction over re-exports is authorized by the Export Administration Act because the goods in question are regarded as "goods, technology, or other information subject to the jurisdiction of the United States" within the meaning of the Act.<sup>112</sup> It must be assumed, however, in the absence of any indication to the contrary, that Congress intended jurisdiction to attach only to property *clearly* subject to U.S. jurisdiction under international law.<sup>113</sup>

The territoriality principle can be immediately dismissed as a potential basis for jurisdiction; the goods and parts in question have already been exported from the United States. Not even a continuing contractual relationship, as might exist with respect to licensing technology, is present.

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108. 595 F.2d 1287 (3d Cir. 1979).

109. 549 F.2d 597, 613-15 (9th Cir. 1976).

110. RESTATEMENT (REVISED), *supra* note 105, at § 419(1) (Tent. Draft No. 3, 1982).

111. *See* N.Y. Times, Aug. 24, 1982, § D, at 1.

112. *See supra* text accompanying notes 74-75.

113. Congress could, of course, have acted unequivocally. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Moreover, the nationality principle has not traditionally been viewed as applying to property.<sup>114</sup> It has been limited to persons, natural and legal.<sup>115</sup> There appear to be exceptions with respect to "cultural property"<sup>116</sup> and, perhaps, vessels and aircraft,<sup>117</sup> but there is no basis for suggesting that these exceptions would apply to commodities and technical data of U.S. origin.

In *American President Lines, Ltd. v. China Mutual Trading Co.*,<sup>118</sup> the court found no legitimate basis for U.S. jurisdiction over exported property being stored in a foreign country by a third party. The issue was whether American President Lines should be held liable to China Trading for damages resulting from American Lines' refusal to "deliver" certain cargo it had contracted to deliver. American Lines had unloaded the cargo and was storing it with a third party until China Trading would take delivery when American Lines learned that the transaction was barred by the Foreign Assets Control Regulations and certain other regulations. On so learning, American Lines refused to endorse the bill of lading, and China Trading sued. The trial court held:

Regarding the [Foreign Assets Control Regulations], I am of the opinion that the governing words are "subject to the jurisdiction of the United States". Once therefore these goods were discharged in the sense I have held [unloaded from the vessel], they ceased to be subject to the jurisdiction of the United States. Indeed it seems to me to be the only possible construction of these . . . Regulations . . . to ignore the limitations I have quoted from the [Regulations] would be to create an incursion into the sovereign rights of Hong Kong, which I am sure could never have been the intention of the draftsman . . .<sup>119</sup>

It can be argued that re-export controls can be justified on the ground that foreign parties dealing with U.S. exporters are presumed to be aware of U.S. assertions of authority to control re-exports and, thus, can be presumed to have accepted such controls by entering into contracts to acquire U.S. goods. This quasi-consent justification raises the same issues as the consent justification itself, and will be discussed below in connection with controls over foreign products of U.S.-origin technical data.<sup>120</sup>

More persuasive is the argument that re-export controls are justified by international practice. Whatever the original basis for this practice, it is too much a part of the accepted scheme of U.S. export controls for new complaints to be given much weight. The nations which would challenge the

114. See L. OPPENHEIM, *supra* note 98, at § 145.

115. *Id.*

116. *Id.*

117. See RESTATEMENT (REVISED), *supra* note 105, at § 402 reporter's note 2 (Tent. Draft No. 2, 1981).

118. 37 Hong Kong L. Rep. 38 (1953), *appeal dismissed*, 37 Hong Kong L. Rep. 111 (1953); 1953 A.M.C. 1510.

119. 37 Hong Kong L. Rev. at 48-49, 1953 A.M.C. at 1518.

120. See *infra* text accompanying notes 141-149.

practice have in some sense waived their rights to do so by their prior acquiescence.

The fact that international practice may in some sense provide an international legal basis for the imposition of some controls over re-exports does not necessarily indicate, however, that re-export controls of all degrees of retroactivity and extraterritoriality are lawful. The exercise of the re-export control still must not be unreasonable in light of all the facts of the particular case. Controls that would prohibit the immediate re-export from a foreign country to a third country of a sophisticated piece of equipment which could not have been exported from the U.S. to the third country at the time of its original export generally appear reasonable; controls of this nature are arguably the sort that international practice can be said to justify. Controls that would prohibit the re-export after five years from a foreign country to a third country of a minor U.S.-origin component in a foreign-made product when either the part or the product could have been exported directly from the United States to the third country at the time of the original export appear less reasonable. Unless some particularly compelling circumstances are present, it seems unlikely that the exercise of such controls would be authorized under international law. The determination of the lawfulness of a particular set of controls must be made on a case-by-case basis, after evaluation of the facts existing at the time.

*Exports by foreign persons owned or controlled by U.S. persons.* Under international law, it is a highly controversial proposition that a foreign person owned or controlled by a U.S. person is a person subject to U.S. jurisdiction. Recently, the assertion by the United States of authority to prohibit the export of non-U.S.-origin goods by foreign subsidiaries of U.S. companies in connection with the pipeline regulations was rejected by the District Court at The Hague in *Compagnie Européenne des Petroles S.A. v. Sensor Nederland B.V.* (hereinafter *C.E.P.*).<sup>121</sup>

In *C.E.P.*, the plaintiff company brought suit to compel Sensor, a wholly-owned indirect subsidiary of a U.S. company, to perform certain contracts for products destined for the Soviet Union and subject to the pipeline regulations. In ordering Sensor to deliver the products, the court rejected Sensor's contention that delivery was prohibited by the pipeline regulations.<sup>122</sup>

On the question of U.S. authority to regulate Sensor's activities pursuant to the nationality principle, the court stated:

What particularly merits attention is the fact that, under international law as commonly interpreted, Sensor Nederland B.V. has Netherlands nationality, having been organized in the Netherlands under Netherlands law and both

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121. The Netherlands: District Court at the Hague, Judgment of September 17, 1982 *Compagnie Européenne Des Petroles S.A. v. Sensor Nederland B.V.*, reprinted in 22 I.L.M. 66 (1983).

122. 22 I.L.M. at 74.

its registered office and its real centre of administration being located within the Netherlands. In accordance with this interpretation, the Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America of March 27, 1956, provides in Article XXIII, third paragraph:

Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.<sup>123</sup>

The court also rejected the protective principle and the effects doctrine as bases for U.S. jurisdiction.<sup>124</sup> It then noted that this case was not one involving "American citizens who, wishing to evade the American embargo," set up a foreign corporation, suggesting that a different result would apply in such a case.<sup>125</sup> Finally, the court dealt with a provision of Netherlands law providing that the Netherlands courts are required to accord priority to foreign law over Netherlands law in a situation in which an international contract possesses a sufficient nexus with the foreign country concerned. The court concluded that this condition was not met in this case.<sup>126</sup> Without stating what *would* constitute a sufficient nexus with the United States in the case, the court ordered Sensor to deliver the product and bear the costs of the suit.

In the past, the United States has also asserted authority over the conduct of foreign subsidiaries of U.S. companies in contexts other than foreign policy export controls.<sup>127</sup> On at least two such occasions, other nations have responded that the jurisdiction was improperly asserted.<sup>128</sup> In the French case of *Fruehauf Corp. v. Massardy*,<sup>129</sup> for example, the Cour d'appel of Paris approved the attempt of the French directors of a French subsidiary to block the implementation of its U.S. parent's directive to cancel a contract barred under U.S. law with the People's Republic of China. The court held that the existence of the French subsidiary would be threatened by the breach of contract and appointed an administrator to execute the contract and manage the company temporarily.<sup>130</sup> The court acted under the French principle of *abus de droit*, a concept used to overturn corporate decisions where they are determined to be contrary to the corpo-

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123. *Id.* at 71.

124. *Id.* at 72-73.

125. *Id.* at 73.

126. *Id.* at 73-74.

127. See *supra* text accompanying note 78.

128. See, e.g., Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 867-72 (1967); Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970).

129. Judgment of May 22, 1965, Cour d'appel, Paris, 1968 Dalloz-Sirey, *Jurisprudence*, [D.S. Jur. 147], reprinted in 5 I.L.M. 476 (1966).

130. *Id.* at 476.

rate interest.<sup>131</sup>

Notwithstanding *C.E.P. and Fruehauf*, the international legal authority on the issue is not dispositive. In the *Case Concerning the Barcelona Traction, Light and Power Co., Ltd.*,<sup>132</sup> the International Court of Justice was called upon to determine whether the Belgian government could extend diplomatic protection to a corporation incorporated in Canada but owned primarily by Belgian stockholders. Although the Court's discussion is phrased in terms of the right of diplomatic protection, it has been widely viewed as relevant to the question of extraterritorial jurisdiction:

The 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. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another.<sup>133</sup>

The Court rejected the Belgian position. In so doing, it noted that the company had many close ties with Canada.<sup>134</sup> Thus, the approach of the Court in *Barcelona Traction*, although not its holding, seemed to suggest that a state's rights with respect to a foreign corporation may be a question of "contacts", as that term might be used in a conflict of laws sense.

The Court in *Barcelona Traction* expressly noted that "[i]n allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the

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131. *Id. Abus de droit* means "abuse of a legal principle." See Craig, *supra* note 128, at 581.

132. *Barcelona Traction* (Second Phase), 1970 I.C.J. at 4.

133. *Id.* at 42.

134. The Court stated:

[I]t is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century.

*Id.*

rules governing the nationality of individuals.”<sup>135</sup> In *Nottebohm*, the Court had been confronted with a question of individual nationality and had determined that “real and effective nationality” was a matter of the “genuine connection” between the individual and the state.<sup>136</sup> Although the Court in *Barcelona Traction* noted that *Nottebohm* was not relevant to its decision,<sup>137</sup> *Nottebohm*’s approach does not seem substantially different from the approach taken in *Barcelona Traction*. Moreover, both of these cases seem to apply a “reasonableness” analysis like that suggested by section 403 of the draft *Restatement (Revised)*.<sup>138</sup>

Section 418 of the draft *Restatement (Revised)* deals expressly with jurisdiction to control foreign subsidiaries of U.S. corporations. It provides:

(2) Subject to § 403, the United States has jurisdiction to apply its law to corporations (or similar juridical entities) organized under the laws of a foreign state that are substantially owned or controlled by nationals of the United States (including corporations organized under the laws of the United States).

(3) Under § 403, the United States may apply law to entities set forth in subsection (2)

(a) as part of a program of economic regulation applicable to nationals of the United States (including corporations, or a specific class of corporations, organized pursuant to the laws of the United States); and

(b) in furtherance of a national interest which cannot effectively be carried out without applying the law or regulation in question also to corporations organized under the laws of a foreign state.

(4) Under § 403, the United States may not exercise jurisdiction in respect of entities referred to in Subsections (1) or (2)

(a) to require conduct that is prohibited, or to prohibit conduct that is required, in the state where the branch or corporation is organized or is doing business; or

(b) to regulate conduct in a foreign state that is predominantly local in character.<sup>139</sup>

The lawfulness of an attempt by the United States to prescribe the behavior of foreign subsidiaries pursuant to foreign policy export controls thus depends, according to the draft *Restatement (Revised)*, on whether the foreign subsidiary is substantially controlled by the U.S. corporation, the extent to which U.S. national interest requires such extraterritorial reach, and whether such conduct is prohibited or required under local law or is predominantly local in character.

More broadly, under the rules developed in analogous circumstances and formulated in section 403 of the draft *Restatement (Revised)*, the assertion of U.S. jurisdiction over subsidiaries must be evaluated in light of the connections of the subsidiary with other countries and the interests of those

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135. *Id.*

136. *Nottebohm*, 1955 I.C.J. at 22–26.

137. *Barcelona Traction*, 1970 I.C.J. at 42.

138. *See supra* text accompanying notes 105–107.

139. RESTATEMENT (REVISED) § 418 (Tent. Draft No. 2, 1981).

other countries. Unfortunately, this suggests the need either for a case-by-case analysis as to each foreign subsidiary over which the U.S. desires to assert jurisdiction—an unworkable solution—or for some neutral mechanism for weighing interests in gross. It is clear in the case of the pipeline regulations that the countries of Western Europe believed that their connections and interest in that matter were more substantial than those of the United States.<sup>140</sup> The United States believed otherwise. Given the uncertain nature of the law in this area, it appears that the United States may continue to assert such authority and foreign countries will certainly object to it, with each side having a basis for its position and neither able to refute the other definitively.

*Exports of foreign products manufactured using U.S.-origin technical data.* As with prohibitions on re-exports of U.S.-origin goods,<sup>141</sup> there is no apparent basis under international law for U.S. jurisdiction over foreign products of U.S.-origin technical data. As discussed below, neither written assurances, agreements to abide by U.S. export controls, nor continuing licensing agreements appear to provide a basis for jurisdiction under traditional theories of international law.<sup>142</sup> Moreover, while re-export controls over U.S.-origin goods are not proscribed by international law, there is no international practice that can be invoked as reflecting international custom or even acquiescence in such broad controls over foreign products of U.S.-origin technology.<sup>143</sup>

If the foreign importer consented to U.S. jurisdiction, the United States would appear able to assert jurisdiction on the basis of ordinary contract principles. It is not clear, however, that such principles suffice to establish a basis for the exercise of extraterritorial authority under international law. For example, in commenting on the pipeline regulations, the European Community took strong exception to the U.S. policy of securing agreements to abide by U.S. export control regulations from foreign persons and to the notion that consent was sufficient to establish jurisdiction:

[I]t is reprehensible that present U.S. regulations encourage non-U.S. companies to submit "voluntarily" to this kind of mobilization for U.S. purposes. Even when submission to a foreign boycott is entirely voluntary, such submission *within* the U.S. has been considered to be undesirable and contrary to U.S. public policy. By the same token, it must have been evident to the U.S. government that the statutory encouragement of voluntary submission to U.S. public policy in trade matters *within* the E.C. is strongly condemned by the European Community. Private agreements should not be used in this way as instruments of foreign policy. If a government in law and in fact systematically encourages the inclusion of such submission clauses in private

140. *European Community: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891 (1982) [hereinafter cited as *European Community Comments*].

141. See *supra* text accompanying notes 112–119.

142. See *infra* text accompanying notes 144–147.

143. See *supra* text accompanying note 120.

contracts, freedom of contracts is misused in order to circumvent the limits imposed on national jurisdiction by international law.

It is self-evident, moreover, that the existence of such submission clauses in certain private contracts cannot serve as a basis for U.S. regulatory jurisdiction which can properly be exercised solely in conformity with international law. Nor can a company prevent a State from objecting to any infringement, which might occur, of the jurisdiction of the State to which it belongs.<sup>144</sup>

This last point emphasizes the fundamental principle that international law is between States.<sup>145</sup> The consent of private parties is not dispositive of international jurisdictional issues raised when one country asserts jurisdiction over the conduct of a national of another. The Supreme Court noted this point in *The Schooner Exchange v. McFadden*:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself . . . . All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.<sup>146</sup>

The consent of private parties seems an even less persuasive basis for extra-territorial jurisdiction when it is clear that such consent was effectively coerced.

Where jurisdiction is asserted on the basis of a continuing licensing agreement, the issue is less one of consent than it is of relative "connections". A licensing agreement could create a link between the United States and the foreign-made goods, yet it is unclear that such a link is sufficient to outweigh the links connecting the location of the property and the person in the foreign country, the foreign nationality of the person, and the foreign state's interest in the transaction.<sup>147</sup> Finally, even if some basis for U.S. jurisdiction over foreign-made products of U.S. technical data can be found, there is the troubling retroactivity question. Although vague allegations of due process violations have been made in this regard,<sup>148</sup> the arguments in opposition to retroactivity seem to be primarily based on the interference with the expectations of the parties involved in the transaction, in particular, the foreign manufacturer. This reliance interest seems expressly provided for by § 403(2)(d) of the draft *Restatement (Revised)*: "the existence of justified expectations that might be protected or hurt by the regulation in question" must be considered where the United States controls foreign products.<sup>149</sup> Where justified expectations of foreign manufacturers are frustrated by the retroactive imposition of U.S. export controls,

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144. *European Community Comments, supra* note 140, at 904.

145. See RESTATEMENT (SECOND) § 25 (1965) ("A state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state." (emphasis added)).

146. 11 U.S. (7 Cranch) 116, 136 (1812).

147. See *supra* notes 105-107.

148. See, e.g., *supra* note 88.

149. See *supra* text accompanying notes 105-107.

an even more persuasive case for the unreasonableness of those controls can be made.

## VI CONCLUSION

The inconsistencies of U.S. foreign policy export controls in recent years have not generally been explained or justified, nor has the resulting unpredictability of American foreign policy been publicly recognized by the executive branch as a cost of these variations. The value to the executive branch in maximizing its flexibility of response in different situations undoubtedly provides it with a powerful incentive to avoid such explanations. The lack of clear authority under the Export Administration Act for most of the retroactive and extraterritorial aspects of foreign policy export controls also undoubtedly diminishes executive branch interest in exposing these issues to intense public scrutiny. Perhaps of greatest significance is the apparent lack of authority under international law for the more extreme formulations of U.S. foreign policy controls.

In the case of the pipeline regulations, foreign governments and foreign courts rejected U.S. jurisdictional claims on the ground that those claims were improper under accepted international legal principles. They will presumably continue to do so and thus impair the effectiveness of U.S. foreign policy insofar as it is conducted through the use of export controls. It is therefore apparent that any long-term U.S. foreign policy would likely be more effective if it were pursued in accordance with international law.