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NOTES

Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law

The United States embargo is a serious mater . . . . By claiming the right to extend American law to other territories it is affecting not only the interests of the European trading nations but also their sovereignty.
—West German Chancellor Helmut Schmidt*

Section six of the Export Administration Act of 1979 (EAA)[1] authorizes the President to "prohibit or curtail the exportation of any goods,[2] technology,[3] or other information subject to the jurisdiction of the United States or exported by any person[4] subject to the jurisdiction of the United States,[5] to the extent necessary to further significantly the foreign policy of the United States. . . ."[6] Pursuant to this authorization, on June 18, 1982, President Reagan announced that, as an intensified response to the continued repression in Poland, he was extending and expanding export controls on oil and gas

* N.Y. Times, July 24, 1982, at 5, col. 2 (commenting on the extraterritorial application of oil and gas equipment regulations promulgated under the Export Administration Act).

1. 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979).

2. The term "good" as used in EAA means "any article, material, supply or manufactured product, including inspection and test equipment, and excluding technical data." 50 U.S.C. app. § 2415(3) (Supp. III 1979).

3. The term "technology" as used in the EAA means "the information and knowhow that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data but not the goods themselves." 50 U.S.C. app. § 2415(4) (Supp. III 1979).

4. The term "person" as used in the EAA includes "any individual, partnership, corporation, or other form of association, including any government or agency thereof." 50 U.S.C. app. § 2415(1) (Supp. III 1979).

5. The term "subject to the jurisdiction of the United States" is not defined anywhere in the EAA. The term "person subject to the jurisdiction of the United States," for the purposes of the Amendment of the Oil and Gas Controls to the USSR, was defined as:

(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 (i), (ii), or (iii) of this section.

15 C.F.R. § 385.2(c) (1982).

The United States has not consistently defined the scope of "person subject to the jurisdiction of the United States" in the same manner as it did in the Amendments of the Oil and Gas Controls. *See generally* note 93 *infra* and accompanying text.

6. 50 U.S.C. app. § 2405(a)(1) (Supp. III 1979) (footnotes added). The EAA also authorizes the President to prohibit or curtail exports for national security reasons where there is a shortage of the product in the United States. *See* 50 U.S.C. app. §§ 2404, 2406 (Supp. III 1979). The short supply controls are not pertinent to the discussion in this Note.

equipment destined for the Soviet Union.[7] The expanded controls sought to regulate not only exports from American corporations[8] but also goods produced by the overseas subsidiaries of American corporations.[9] Furthermore, the export controls purported to control the exports of foreign corporations[10] that had received specified American goods[11] or were producing these goods under licensing agreements with the American companies.[12] This action marked the first extraterritorial application of the EAA to foreign subsidiaries and licensees.[13]

The European Economic Community (EEC) sharply criticized these controls.[14] In addition, several countries ordered the corporations located in their countries not to comply with President Reagan's directive[15] even when the companies confronted serious threats

7. *See* Statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 21, 1982). The June 18, 1982 regulations expanded the Controls on Exports of Petroleum Transmission and Refining Equipment, 15 C.F.R. §§ 376, 379, 385, 399 (1982), which had been issued on December 30, 1981. The December regulations imposed foreign policy controls on exports to the U.S.S.R. of commodities for the transmission and refinement of petroleum or natural gas and technical data related to oil and gas transmission or refinement emanating from the United States. *See* Johnston, *Foreign Policy Export Controls,* 82 U.S. DEPT. ST. BULL., June 1982, at 55, *reprinted in* 21 INTL. LEGAL MATERIALS 853 (1982); Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 25,250 (1982) (codified at 15 C.F.R. §§ 376, 379, 385 (1982)), *reprinted in* 21 INTL. LEGAL MATERIALS 854 (1982).

8. The term "American corporation or company" as used in this Note is defined to mean an artificial person or legal entity created under the authority of the laws of the United States or a state, territory, district or possession of the United States.

9. The term "foreign subsidiaries of American corporations" as used in this Note is defined to mean a corporation organized under the laws of a state other than the United States in which an American corporation has control in fact.

10. The term "foreign corporation" as used in this Note is defined to mean a corporation created by or under the laws of a country other than the United States.

11. *See* 15 C.F.R. § 399.1 (supp. No. 1, 1982), *reprinted in* INTL. LEGAL MATERIALS 864-65. (The products whose reexports was prohibited included: equipment and parts used in the transmission, transportation and refining of petroleum and natural gas, compressors, industrial gas turbines and chemicals intended for use in the refining process).

12. *See* 15 C.F.R. § 379.4 (1982), *reprinted in* 21 INTL. LEGAL MATERIALS 864-65 (1982).

13. N.Y. Times, June 19, 1982, at 1, col. 2; Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739, 847 (1981) [hereinafter cited as Abbott].

14. *See, e.g.,* European Communities: Comments on the U.S. Regulations Concerning Trade With the U.S.S.R., 21 INTL. LEGAL MATERIALS 891 (1982) [hereinafter EEC Comments on U.S. Regulations]. ("[T]he U.S. regulations as amended contain sweeping extensions of U.S. jurisdiction which are unlawful under international law.") For the French reaction, see N.Y. Times, July 23, 1982, at A1, col. 6. (French Foreign Minister Claude Cheysson warned of a "progressive divorce" between the United States and European nations). For a non-European perspective on the export restrictions, see, e.g., N.Y. Times, June 22, 1982, at D16, col. 1 (Japanese business and government leaders voiced irritation with the American action and lodged a "strong protest" with the American Government).

15. *See, e.g.,* N.Y. Times, Aug. 3, 1982, at A1, col. 2 (The British invoked Section 1(1) of the Protection of Trading Interests Act, ordering four companies to comply with their contracts with the Soviet Union. In issuing the order, Lord Cockfield, Great Britian's Foreign Trade Secretary, stated: "The embargo in the terms which it has been imposed is an attempt to interfere with existing contracts and is an unacceptable extension of American extraterritorial jurisdiction in a way that is repugnant to international law."). For the full text of the British

from the American government.[16] The European defiance of the American restrictions resulted in severe sanctions to the exporting companies.[17] These sanctions were later partially abated due to strong domestic and international pressure[18] and ultimately were terminated on November 13, 1982, when President Reagan lifted the embargo.[19]

This Note investigates the legality of the extraterritorial application of the EAA[20] under American and international law, with a particular focus on the presidential action in the Soviet Oil and Gas Equipment Export Controls case (hereinafter the Soviet Pipeline case). Part I examines the language and legislative history of the EAA and concludes that Congress clearly and affirmatively expressed its intention to apply export controls to foreign subsidiaries of American corporations as well as goods and technology[21] that

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Protection of Trading Interests Act, see 21 INTL. LEGAL MATERIALS 834 (1982). For the text of the British Statement and Order invoking the Protection of Trading Interests Act, see *Id.*, at 851. For an account of the French action, see N.Y. Times, Aug. 27, 1982, at D1, col. 4. (The French government "requisitioned" the services of Dresser France, a subsidiary of the American corporation Dresser Industries, and ordered the company to comply with its $700 million contract for pipeline equipment with the Soviet Union).

16. *See, e.g.,* Wall St. J., Aug. 25, 1982, at 3, col. 2; N.Y. Times, June 24, 1982, at A1, col. 5 (The U.S. threatened complete blacklisting of companies that did not comply with the embargo).

17. *See, e.g.,* N.Y. Times, Aug. 27, 1982, at A1, col. 4 (on August 26, 1982 the Reagan Administration placed Creusot Loire and Dresser France on the "temporary denial list" which prevented those companies from doing any business with the United States).

18. *See, e.g.,* N.Y. Times, Sept. 2, 1982, at A1, col. 4 (President Reagan eased the sanctions on the French companies to encompass only a denial of American oil and gas equipment. Treasury Secretary Donald Regan called the original sanctions "a little too sweeping.") It was reported that the real reason behind the abatement of sanctions was to appease the British government. At the time that the French sanctions were abated the United States was about to impose sanctions on British companies as well. *Id.* at col. 1. The British companies were sanctioned on September 9, 1982 but the sanctions only included denial of oil and gas equipment from the United States. *See* N.Y. Times, Sept. 10, 1982, B1, col. 1. The British reaction to the abated restrictions was still strong. On the day following the sanctions the British government accused the United States of "damaging trans-Atlantic relations" and ordered two other British companies to disregard the American restrictions or face large penalties under the British Protection of Trading Interests Act. *See* N.Y. Times, Sept. 11, 1982, at 19, col. 2.

19. *See* N.Y. Times, Nov. 14, 1982, at 1, col. 6 (President Reagan lifted the sanctions because the United States had reached a "substantial agreement" with its allies on a comprehensive plan to restrict trade to the Soviet Union. The specifics of the agreement included stricter controls on high technology equipment and tighter controls on preferential credit terms given to the Soviet Union.).

20. This Note will focus on the legal problems presented by the extraterritorial application of the EAA's foreign policy and national security export controls. 50 U.S.C. app. §§ 2404, 2405 (Supp. III 1979). The Note will not discuss the issues presented by the extraterritorial application of the EAA's antiboycott provision as applied to foreign subsidiaries of American corporations. For a discussion of the latter issue *see* Note, *Extraterritorial Application of the Export Administration Amendments of 1977,* 8 GA. J. INTL. & COMP. L 741 (1978).

21. In the Soviet Pipeline case, controls on goods and technologies involved two types of foreign corporations: (1) companies such as Alsthome Atlantique, a French corporation that used American technology to produce goods in its home country, and (2) corporations such as John Brown Engineering, a British corporation, who were to make products with component parts received from American companies. *See generally* ECONOMIST, Aug. 14, 1982, at 59.

originate in the United States. Part II analyzes the extraterritorial application of the EAA under the generally recognized principles of international law. The Note argues that the United States' bases for extraterritorial jurisdiction are generally unsupportable. Additionally, even if the United States did have a valid ground for jurisdiction, considerations such as comity and respect for the sovereignty and territorial integrity of foreign nations should persuade the United States to acquiesce to assertions of territorial jurisdiction by affected states in the event of a conflict.

I. CONGRESSIONAL INTENT TO APPLY THE EAA EXTRATERRITORIALLY

Although the EAA[22] permits the President to control exports

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These types of foreign corporations are discussed separately in this Note because they raise different issues under the EAA.

22. The EAA of 1979 is the most recent in a long line of export control statutes that began with the Act of July 2, 1940, Pub. L. No. 76-703, § 6, 54 Stat. 712 (1940). The intent of this act was to prohibit or curtail the exportation of military equipment and munitions. *See* Berman, *The Export Administration Act: International Aspects*, 74 AM. SOCY. INTL. L. PROCEED. 82 (1981). Following World War II, the principal purpose of the various export control acts was to exercise "the necessary vigilance over exports from the standpoint of their significance for national security" and to prevent exports of goods that were in short supply in the United States. *See* Berman and Garson, *United States Export Controls — Past, Present, and Future.* 67 COLUM. L. REV. 791, 796 (1967) [hereinafter cited as Berman & Garson]. The 1979 EAA was the first export control act to treat national security controls and foreign policy controls separately. By distinguishing the two types of controls, Congress attempted to limit presidential authority to control exports for foreign policy purposes. *See* Abbott, *supra* note 13, at 857-58. The Congress attempted to circumscribe executive power by requiring the President to apply specified criteria when imposing, expanding or extending export controls for foreign policy reasons. These criteria include:

(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 the 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.

50 U.S.C. app. § 2405(b) (Supp. III 1979). Both the December and June regulations on exports of petroleum equipment stated that the President had considered the criteria set forth in the EAA. *See* Controls On Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., 47 Fed. Reg. 141-44 (1982) (to be codified at 15 C.F.R. §§ 379.4(f)(1)(i)(p), 385.2(c), Supp. I to 399.1, (Supp. I to 399.2)), *reprinted in* 21 INTL. LEGAL MATERIALS 855-58 (1982); Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250-52 (1982) (to be codified in 15 C.F.R. §§ 376.12, 379.8(a)(2)-(4), 385.2(a) & (c)), *reprinted in* 21 INTL. LEGAL MATERIALS 864-66 (1982). The EEC maintained that the President had violated the criteria set forth in the EAA. *See* EEC Comments on U.S. Regulations, *supra* note 14, at 901-02. ("It

physically leaving from the United States,[23] the President is not constitutionally authorized to control exports outside the territorial boundaries of the United States absent a clear and affirmative congressional delegation of such power.[24] Furthermore, while congressional action can extend beyond the United States' boundaries,[25] an established rule of statutory construction dictates that a congressional act presumptively does not apply extraterritorially.[26] Hence, the extraterritorial application of the EAA raises a question of statutory construction rather than congressional power.

Although some observers found the language and legislative history of the EAA unclear,[27] an amendment to the 1969 version of the

can hardly be claimed that the U.S. measures satisfy the criteria laid down in the Export Administration Act.").

23. Although the power to regulate commerce with foreign nations is expressly vested in Congress, U.S. CONST. art. I, § 8, cl. 3, this power may be delegated to the President by an express or implied authorization of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The authority delegated to the President by section 6 of the EAA, 50 U.S.C. app. § 2405 (Supp. III 1979), was used by the President to impose the Soviet oil and gas equipment export controls. For an analysis of the constitutional separation of powers problems arising from the broad delegation of congressional power in the EAA, see Note, *Accountability and the Foreign Commerce Power: A Case Study of the Regulation of Exports,* 9 GA. J. INTL. & COMP. L. 577 (1979).

24. *See, e.g.,* Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 146-47 (1957); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977).

25. It is a well established principle of American law that Congress can attach extraterritorial effect to its enactments. There are no constitutional limitations to this power. *See, e.g.,* Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952) ("Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.") (citations omitted); Vermila-Brown Co. v. Connell, 335 U.S. 377, 381, 497-508 (1948); Blackmer v. United States, 284 U.S. 421, 437 (1932) (the United States can require, under pain of criminal contempt, the return of a citizen residing in a foreign country). In the past, courts have applied American laws extraterritorially in many areas. *See, e.g.,* IIT v. Vencap Ltd., 519 F.2d 1001 (2d Cir. 1975) (finding subject matter jurisdiction under federal securities laws in suit for damages or rescission by defrauded foreigner where United States served as base for manufacturing fraudulent security devices for export); Stegeman v. United States, 425 F.2d 984 (9th Cir.), *cert. denied,* 400 U.S. 837 (1970) (applying Bankrupty Act where American debtors outside the United States had concealed property belonging to the bankruptcy estate, since to do otherwise "would frustrate the statute's purpose by creating an obvious and readily available means of evasion."); Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1093 (1969) (applying antitrust laws to the carriage of foreign-owned goods between foreign ports in American vessels). *But see* Reyes v. Secretary of Health, Education and Welfare, 476 F.2d 910, 915 n.10 (D.C. Cir. 1973) (social security laws do not apply extraterritorially).

26. *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). *Accord,* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 (1965) [hereinafter RESTATEMENT] ("Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.").

27. *See Economic Relations With the Soviet Union: Hearings Before the Senate Subcomm. on International Economic Policy and the Senate Comm. on Foreign Relations,* 97th Cong., 2d Sess. 195 (1982) ("The legislative history of this amendment reveals more than a little confusion over what powers Members of Congress thought they were granting the President.") (statement of Alexander Trowbridge, President, National Association of Manufacturers).

EAA clearly demonstrates the congressional intent to control the exports of foreign subsidiaries of American corporations. While the 1969 statute could not be applied extraterritorially,[28] in 1977 Congress amended the Act to allow the President to control exports "subject to the jurisdiction of the United States or exported by any *person* subject to the jurisdiction of the United States."[29] The congressional reports discussing this amendment state that the purpose of the change was "to confer non-emergency authority under [the EAA] to control non-U.S.-origin exports by foreign subsidiaries of U.S. concerns."[30] The language of the 1977 amendment remained intact when the Act was renewed in 1979.[31]

The legislative history of the 1979 EAA adds further evidence of congressional intention to continue presidential power to control exports by American subsidiaries. The Senate report on the 1979 EAA considered an amendment to the EAA which would have prohibited controls on non-U.S.-exports of foreign subsidiaries.[32] Although the report noted the diplomatic friction generated by claims of U.S. jurisdiction over foreign subsidiaries, the Senate nevertheless rejected the amendment.[33] Thus, by adding the language "person subject to the jurisdiction of the United States" to the EAA in 1977, Congress clearly expressed its intention to include American subsidiaries based in foreign nations.

Congress also intended the 1979 EAA to apply extraterritorially to goods and technology that originate in the United States. The scope of the relevant statutory language — "goods [and] technology . . . subject to the jurisdiction of the United States"[34] — is ambiguous, necessitating an inquiry into its legislative history. The 1977 amendment of the 1969 EAA is again enlightening.[35] After discussing the intent to provide authority to control exports of foreign subsidiaries of American corporations, the House report states that the power to control subsidiaries "is in addition to the authority cur-

28. Abbott, *supra* note 13, at 846.

29. Section 4(a)(b)(1) of the 1969 EAA was amended to read:

> To effectuate the policies set forth in section 3 of this Act, the President may prohibit or curtail the exportation [from the United States, its territories and possessions, of any articles, materials, or supplies including technical data or any other information], *except under such rules and regulations as he shall prescribe, of any articles, materials or supplies, including technical data or any other information, subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States.*

H.R. Rep. No. 459, 95th Cong., 1st Sess. 21 (1977) (bracketed material was deleted from the 1969 EAA; italicized material was added).

30. S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977).

31. *See* text at note 6 *supra*.

32. S. Rep. No. 169, 96th Cong., 1st Sess. 5 (1979).

33. *Id.*

34. 50 U.S.C. app. § 2405(a)(1) (Supp. III 1979).

35. *See* note 29 *supra*.

rently provided in the EAA for control over the exports of U.S. origin goods and technology *whether from the U.S. or abroad.*"[36] Read in light of the long history of extraterritorial reexport[37] controls[38] under the various export control acts, this language indicates that Congress intended to continue the extraterritorial application of the EAA with respect to goods and technology originating in the United States. That the Congress rejected an amendment that would have eliminated reexport controls when it adopted the 1979 EAA[39] further demonstrates the congressional intention to control goods and technology extraterritorially.

In short, the legislative history of the EAA convincingly evidences congressional intent to authorize extraterritorial application of the EAA to subsidiaries as well as goods and technologies. Because such an authorization does not exceed congressional authority, under American law the President can apply the EAA to activities outside the United States.

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36. H. REP. No. 459, 95th Cong., 1st Sess. 17 (1977) (emphasis added).

37. "The term reexport [as used] in the Export Administration Regulations includes reexport, transshipment, or diversion of commodities or technical data from one foreign destination to another." 15 C.F.R. § 370.2 (1982).

38. The United States has a long history of controlling reexports of goods and technology in the possession of both American and foreign entities. Several common fact patterns emerge from the reported cases. For example, in Jarach Guetta Indus. Overseas Co., 22 Fed. Reg. 4510 (1957), and Sudexport and General Import Export Co., 22 Fed. Reg. 4512 (1957), the exporters obtained export licenses by falsely representing the ultimate destination of the goods. When the goods were transshipped to restricted countries after they reached their stated destination, the government revoked the export licenses and imposed a denial of future export privileges. *See also* William Kurt Samuel Wallersteiner, 22 Fed. Reg. 1650 (1957).

The case of Raytheon Manufacturing Co., 24 Fed. Reg. 2626 (1959), presents a common illustration of how reexport controls are imposed on foreign companies. In that case, Raytheon, an American corporation, exported restricted microwave communication equipment to Pye Telecommunications, an English corporation. Pye incorporated the equipment into a larger product and shipped it to an unauthorized destination. The government imposed sanctions on both Raytheon and Pye.

The EAA has also been applied to control the reexport of technological data licensed by an American corporation to a foreign corporation. *See* SNAM Progetti S.P.A., 35 Fed. Reg. 2460 (1970).

In all three of the scenarios noted above the exports were restricted *before* they left the United States. However, this fact alone is not dispositive. *See* American President Lines v. China Mut. Trading Co., 1953 A.M.C. 1510 (Supreme Court of Hong Kong) (United States attempted to restrict goods that were not subject to export controls when they departed from the United States).

39. In 1979, the House rejected an amendment that would have eliminated reexport controls on U.S. goods in certain specified countries. The House decided that reexport controls were a necessary evil without which there would be an "enormous loophole through which third country transfers could legally be made." 125 CONG. REC. 24039 (1979) (remarks by Rep. Wolff). The decision to keep reexport controls, given the long history of extraterritorial application, *see* note 38 *supra*, demonstrates the congressional intent to apply the EAA extraterritorially to goods and technology.

II. Extraterritorial Application of National Security and Foreign Policy Export Controls Under International Law

One of the principal objections made by the European Economic Community (EEC) to the extraterritorial application of section six of the EAA in the Soviet pipeline case was that the assertion of extraterritorial jurisdiction violated fundamental principles of international law.[40] After analyzing the relevance of international law for the future extraterritorial application of United States export controls, this Part critically assesses the EEC's claim. This analysis concludes that the extraterritorial application of the EAA in the Soviet pipeline case indeed exceeds the limits on a state's jurisdiction generally recognized under international law. Moreover, when foreign states assert territorial jurisdiction in conflict with the application of the Act, international law favors the claim of the territorial state.

A. *The Relevance of International Law*

Skeptics dubious about the influence of international law on the behavior of sovereign states[41] might describe the Soviet pipeline case as a classic example of power politics overriding legal norms. A conflict between the superpowers is among the least promising contexts for the influence of international law on perceptions of national interest.[42] Analysis of the legal issues should therefore begin by responding to the legitimate question whether "it is fruitless to dissect the legal technicalities of the pipeline controls because it is really a policy issue."[43]

The role of international law in the municipal law of the United States tends to reinforce this view. It is well established that international law is part of American law and must be ascertained and ap-

40. *See* EEC Commentary on U.S. Regulations, *supra* note 14, at 897 ("[I]t is clear that the U.S. measures . . . do not find a valid basis in any of the generally recognized — or even more controversial — principles of international law governing state jurisdiction to prescribe rules. . . . [T]he measures by their extra-territorial character simultaneously infringe the territoriality and nationality principles of jurisdiction and are therefore unlawful under international law.").

41. *See, e.g.,* H. Morganthau, Politics Among Nations 282 (4th ed. 1967) ("[W]hether or not an attempt will be made to enforce international law and whether or not the attempt will be successful do not depend primarily upon legal considerations and the disinterested operation of law-enforcing mechanisms. Both attempt and success depend upon political considerations and the actual distribution of power in a particular case.").

42. *See, e.g.,* Acheson, *Remarks,* 57 Am. Socy. Intl. L. Proc. 14 (1963) (concerning the Cuban missle crisis: "I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power. . . .").

43. *Hearings, supra* note 27, at 190 (testimony of Alexander Trowbridge, President, National Association of Manufacturers).

plied by American courts.[44] International law, however, "bends to the will of Congress"[45] and must give way when it conflicts with a federal statute[46] such as the EAA. Given this hierarchy, even if a federal statute directly conflicts with a principle of international law, American courts will enforce the national legislation.[47]

To minimize such conflicts, American jurisprudence recognizes a rule of statutory construction requiring that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[48] Part I of this Note, however, has demonstrated the clear congressional intent to apply the EAA extraterritorially. Moreover, the Act's legislative history indicates that Congress was aware of the likely response of the international community to such action. Congress received a great deal of testimony noting that, because other countries perceive an offense to their sovereignty,[49] extraterritorial trade controls had been a source of irritation in the past. Despite this testimony, Congress included provisions in the EAA that go beyond the limits set by generally recognized principles of international law.[50]

Nevertheless, the status in international law of the 1982 oil and gas export controls, as well as other potential extraterritorial actions

44. *See, e.g.,* The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. James-Robinson, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981).

45. The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1179 (E.D. Pa. 1980) (quoting The Over the Top, 5 F.2d 838, at 842).

46. *See* Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

47. *See, e.g.*, RESTATEMENT, *supra* note 26, § 3, comment j. ("[i]f there is domestic legislation contrary to international law that is also pertinent, courts in the United States will normally apply the legislation.").

48. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). This rule of construction has retained its vitality for nearly two centuries and is firmly entrenched in American law. *See, e.g.,* McCulloch v. Sociedad Nacionale de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957); RESTATEMENT, *supra* note 26, § 3. One of the principal arguments advanced by attorneys for Dresser France, a French corporation ordered not to export oil and gas equipment to the Soviet Union by the export controls of June, 1982, was that Congress had not clearly expressed its intent to violate international law in the EAA. *See* Memorandum of Points of Authorities in Support of Motion for Temporary Restraining Order 15, Dresser Indus. v. Baldridge (D.D.C. Aug. 24, 1982) [hereinafter cited as Dresser Memorandum].

49. *See, e.g., Use of Export Controls and Export Credits For Foreign Policy Purposes: Hearings Before the Committee on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. 10 (1978) (testimony of George Ball noting "outrage" in Canada over action by the United States to control subsidiary of American corporation based in Canada); *Extension and Revisions of the Export Administration Act Hearings Before the Committee on Foreign Affairs*, 96th Cong., 1st Sess. 489 (noting that countries are offended by reexport controls). On the subject of American attempts to interfere with Canadian subsidiaries of American corporations, see generally Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968). *See also* Abbott, *supra* note 13, at 839-49.

50. Part II of this Note argues that the legislative intent to control foreign subsidiaries of American corporations as well as goods and technology that are not physically located in the United States, set forth in Part I, violates international law in several instances.

under the EAA, is important for several reasons. First, international law affects the policy calculus itself.[51] Not only do nations, including ours, have a policy interest in the effectiveness of the international legal system,[52] but the effectiveness of a policy measure may depend on its consistency with international law. Extraterritorial action has created a tremendous amount of diplomatic tension,[53] a friction intensified by perceptions of illegality.[54] Alienation among the members of the Atlantic alliance, for example, is a policy cost whose magnitude increased significantly because of the perceived illegality of the extraterritorial aspects of the export controls.[55]

Second, legal disputes concerning the extraterritorial application of the EAA have arisen,[56] and will continue to arise, in jurisdictions where international law is dispositive or influential.[57] In these juris-

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51. *See, e.g.,* L. HENKIN, HOW NATIONS BEHAVE 92-95 (2d ed. 1979) ("In fact, law and policy are not in meaningful contrast, and their relation is not simple, whether in domestic or international society. All law is an instrument of policy, broadly conceived. . . . International law, too, serves policy, and the policies are not too different from the domestic: order and stability, peace, independence, justice, welfare.").

52. *See* LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 5-6 (1951):

> [T]he principal sanctions of international law. . . are the disadvantages incurred by its breach, including the termination of the relations regulated by it and retaliation. . . . [S]ince the stronger nations have a preponderant influence in the development of some rules of international law, they often find it advantageous to support the observance of such rules. These sanctions are reinforced by the principles of moral obligation and good faith, the influence of public opinion, the advantages of a reputation for integrity and fair dealing, and the force of habit.

53. For a sample of the diplomatic protests engendered by the Soviet oil and gas equipment controls, see note 14 *supra. Cf.* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 365-72 (2d ed. 1970) (The author discusses the protests by foreign nations of the extraterritorial application of American antitrust laws.).

54. *See* notes 14-19 *supra*. While the legal emphasis of the EEC protest provides some evidence of the importance of how the international lawfulness of extraterritorial sanctions may affect the policy calculus, the timing of the protest provides stronger evidence of the relationship between the alienation of NATO allies and the perceived illegality of United States policy. That serious European protests followed the *extraterritorial extension* of sanctions *already* applied to American companies strongly suggests that the intrusion on sovereignty, rather than effective interference with the project itself, provoked the response of America's allies.

55. *See, e.g.,* Ball, *The Case Against Sanctions,* N.Y. TIMES MAG., Sept. 12, 1982 at 63, 126 ("Nothing could more help the Soviet Union than a bitter argument within the alliance that would weaken the cohesion of the West."); Stern, *Specters and Pipe Dreams,* 48 FOREIGN POLICY 21, 35 (1982) ("The extension of the pipeline sanctions has created a major rift in the alliance. . . .").

56. *See, e.g.*, Compagnie Europeene des Petroles S.A. V. Sensor Nederland B.V., No. 82/716 (Dist. Ct. The Hague Sept. 17, 1982), *cited in* Petitioner's Memorandum in Support of Motion to Vacate Order Temporarily Denying Export Privileges, at Exhibit G, In the Matter of John Brown Engg. Ltd., International Trade Administration, Oct. 1, 1982 [hereinafter cited as John Brown memorandum] (In this case international law was applied and the court concluded that the American Export Controls violated international law and would not be given effect in the Netherlands.).

57. The power of international law vis-a-vis domestic law varies from country to country. In Great Britain, for example, international law has no force until it is specifically "incorporated" into the laws of Britain by an act of Parliament. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45-53 (3d ed. 1979) [hereinafter cited as I. BROWNLIE]. In the

dictions, which exercise effective power over American subsidiaries located in their territory, the character of a future export control under international law may determine whether the subsidiary can lawfully comply with the EAA.

Finally, a showing that extraterritorial action under the EAA contravenes international law could provide impetus for legislative action,[58] or international agreements[59] to block extraterritorial jurisdiction. The EAA undergoes congressional review in 1983,[60] and the tenuousness of the claim to extraterritorial jurisdiction coupled with the related policy costs of the the pipeline sanctions may persuade the Congress to amend the EAA to prevent future extraterritorial action that violates international law. Given these concerns, the Note proceeds to analyze the possible grounds of jurisdiction which might support the extraterritorial application of the Act.

B. *The EAA and Generally Recognized Principles of Jurisdiction in International Law*

The most fundamental precept of international law — indeed, "the basic constitutional doctrine of the law of nations"[61] — recog-

United States, on the other hand, international law is part of the law of the land and will be given effect unless it is contrary to an act of Congress. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221 (1972). *See also* notes 44-48 *supra*. Italy is an example of a state where a constitutional mandate dictates that domestic laws must conform with the principles of international law. I. BROWNLIE, *id.*. Given the divergent status of international law in various countries, the locus of the litigation would determine the relative importance of international law in a dispute over export controls.

58. Past assertions by the United States of extraterritorial jurisdiction have led to legislation in other countries designed to block what these countries believe to be violations of international law and infringements of territorial sovereignty. Thus, a number of foreign states have enacted "blocking" or "claw-back" statutes designed to protect their citizens from assertions of extraterritorial jurisdiction by the United States. *See* Note, *Foreign Non-disclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 613 (1979). *See also* Herzog, *The 1980 French Law on Documents and Information,* 75 AM. J. INTL. L. 382 (1981); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980,* 75 AM. J. INTL. L. 257 (1981); Note, *Enjoining the Application of the British Protection of Trading Interest Act in Private American Antitrust Litigation*, 79 MICH. L. REV. 1574 (1981). The British Protection of Trading Interests Act was invoked to order British companies not to comply with the American directives in the Soviet pipeline case. *See* note 18 *supra* and accompanying text.

59. Nations have developed sensible rules to resolve international economic disputes that have arisen due to conflicts of jurisdiction. *See, e.g.,* Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, United States-Federal Republic of Germany, 5 U.S.T. 2768, T.I.A.S. No. 3133; Leich, *The Australian-United States Agreement on Cooperation in Antitrust Matters*,76 AM. J. INTL. L. 866 (1982) (This agreement is designed to minimize jurisdictional conflicts by providing for consultation and possible modifications of policies.).

60. Wash. Post, Jan. 15, 1982, § A, at 2, col. 1 (discussing the political battle over the renewal of the EAA. *See also* Wall St. J., April 5, 1983, § 1, at 3, col. 2 (discussing President Reagan's proposal for the renewal of the EAA and a strengthening of presidential power over exports).

61. I. BROWNLIE, *supra* note 57, at 286 (3d. ed. 1979).

nizes the sovereign[62] and equal status of the nations comprising the international community.[63] As a function of this status, nations are generally considered to possess rights of independence, territorial supremacy, and personal supremacy.[64] Territorial supremacy is a state's power to "exercise supreme authority over all persons and things" within its territory; personal supremacy is the state's power "to exercise supreme authority over its citizens at home and abroad."[65]

As a corollary to territorial supremacy, each state has jurisdiction over acts committed within its territory and over the permanent population living therein.[66] This "territorial principle" provides that a state has absolute dominion and control over all individuals and property within its borders,[67] including an unchallenged right to regulate corporations within its territory.[68] As the United States Supreme Court declared at an early date: "The jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it . . . from an external source, would imply a diminution of its sovereignty . . . ."[69]

Territorial jurisdiction is closely related to the concepts of territorial integrity[70] and nonintervention.[71] While territorial jurisdiction gives the state the *right*[72] to prescribe or enforce a rule of law within its territory, the latter concepts impose a *duty* on other states to refrain generally from any act that infringes on the territorial supremacy of a state,[73] including any action that interferes with the

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62. Although the term "sovereignty" lacks a precise definition, it is used to describe the "whole body of rights and attributes which a state possesses in its territory, *to the exclusion* of all other states, and also in its relations with other states." The Corfu Channel Case, 1949 I.C.J. 39, 43 (separate opinion of Alvarez, J.) (emphasis added).

63. 1949 I.C.J. 39.

64. 1 L. OPPENHEIM, INTERNATIONAL LAW 286 (H. Laughterpach 8th ed. 1955) [hereinafter cited as L. OPPENHEIM].

65. *Id.*

66. I. BROWNLIE, *supra* note 57, at 287.

67. *See, e.g.,* G. SCHWARTZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 72-78 (1976); 1 L. OPPENHEIM, *supra* note 64, at 325; 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 183-86 (1965) [hereinafter cited as M. WHITEMAN].

68. 5 M. WHITEMAN, *supra* note 67, at 288.

69. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

70. The right of territorial integrity possessed by a state gives it the prerogative to demand that other states abstain from committing any act that constitutes a violation of the independence or territorial supremacy of that state. 5 M. WHITEMAN, *supra* note 67, at 321-902 (1965).

71. Nonintervention is the duty of a state under international law not to interfere with the internal and external affairs of another state. 5 M. WHITEMAN, *supra* note 67, 321-702 (1965). Extraterritorial actions are unlawful if they interfere with the duty of nonintervention. I. BROWNLIE, *supra* note 57, at 309.

72. 5 M. WHITEMAN, *supra* note 67, at 216; F. MANN, STUDIES IN INTERNATIONAL LAW 2 (1973) [hereinafter cited as F. MANN].

73. 1 L. OPPENHEIM, *supra* note 64, at 288; I. BROWNLIE, *supra* note 57, at 287, 289-91; 5

domestic relations or international intercourse of another nation.[74] A state's attempts to enforce its laws extraterritorially may violate this duty,[75] and give rise to a cause of action for the states adversely affected.[76]

Although a state's right to territorial jurisdiction is frequently phrased in exclusive terms, some exceptions have evolved and are now generally accepted in international law.[77] But as assertions of extraterritorial jurisdiction typically risk interference with the territorial integrity of other nations — and at the same time provide a precedent for such nations to engage in similar interference — the evolution of these exceptions has provoked serious controversy,[78] and the accepted scope of the exceptions remains rather limited.[79] Customary practice among states confirms the need for limiting principles to preserve the core notion of territorial jurisdiction: even those states taking the most expansionist view of extraterritorial jurisdiction have generally recognized these concerns.[80]

M. WHITEMAN, *supra* note 67, at 187 (citing Article 11 of the Convention on Rights and Duties of States).

74. 1 L. OPPENHEIM *supra* note 64, at 288; I. BROWNLIE, *supra* note 57, at 287 (The corollary to independence and equality of states is the duty of nonintervention).

75. RESTATEMENT, *supra* note 26, at §§ 8, 3(1); F. MANN, *supra* note 72, 110-39 ("[T]he first and foremost restriction imposed on a state is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state") (quoting from the case of the S.S. Lotus, France v. Turkey, 1927 P.C.I.J., ser. A, No. 10, at 18 (Judgment of Sept. 7), 2 World Ct. Rep. 20 (1935)); I. BROWNLIE, *supra* note 57, at 306-07 ("The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter".).

76. *See* HENKIN, PUGH, SCHACTER & SMIT, INTERNATIONAL LAW 556 (1980) ("If a state by its act or omission breaches an international obligation, it incurs international responsibility. If the consequence is an injury to another state, the delinquent state is responsible to make reparation or give satisfaction for the breach to the injured state."). *See generally* 5 M. WHITEMAN, *supra* note 67, at 6-7 (discussing correlative rights and duties: "For every right there is a correlative duty and for every wrong there should be a remedy.").

77. The principal exceptions according to one major study are:

(1) the nationality principle, under which a state can exercise jurisdiction over its nationals anywhere in the world,
(2) the protective principle, under which a state can attach legal consequences to conduct outside its territory that threatens the state's national security,
(3) the universality principle, under which states can exercise jurisdiction over certain offenses, such as piracy, that are universally prohibited, and
(4) the passive personality principle; under which a state can exercise jurisdiction over the offense due to the nationality of the victim.

Research in International Law: Jurisdiction with Respect to Crime, 29 AM. J. INTL. L. 443 (Supp. I 1935). *Accord,* Rivard v. United States, 375 F.2d 882, 885 (5th Cir.), *cert. denied* Groleau v. United States, 389 U.S. 884 (1967). *See generally* RESTATEMENT, *supra* note 26, at § 40. One other exception that is not generally recognized by a majority of nations but is gaining wider acceptance is the "effects" or "objective territorial principle," discussed at notes 112-25 *infra* and accompanying text.

78. *See, e.g.,* note 118 *infra* and accompanying text.

79. *See* notes 86-94, 98-99, 117, 129, 131-33 *infra* and accompanying text.

80. *See* Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 1957 BRIT. Y.B. INTL. L. 146, 150 [hereinafter cited as Jennings]:

Are we to conclude then that extraterritorial jurisdiction is a matter left within the discre-

The extraterritorial application of the EAA calls into question the scope of these exceptions. As this application involves foreign subsidiaries and licensees acting within the territory of other sovereign nations, it may impermissibly intrude on the right of territorial jurisdiction and violate the United States' duty to respect the territorial integrity of these nations. For example, in the Soviet pipeline case the United States sought to interfere with the domestic relations and international intercourse of the EEC countries by attempting to enforce export controls and curtail export activities that were legal in the EEC countries. The remainder of this section considers whether such interference is sustainable under three principles of extraterritorial jurisdiction: the nationality principle, the objective territorial principle, and the protective principle.

1. *Jurisdiction Under the Nationality Principle*

The most important exception to the territorial principle of jurisdiction under international law is the nationality principle. The nationality principle allows a country to proscribe[81] conduct of its

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> tion of each sovereign State; that it is not governed by international law? The practice of States leans against such a conclusion. For the fact is that States do not give themselves unlimited discretion in the matter. Their municipal laws — even those of States which make extensive claims of extraterritorial jurisdiction — contain principles of jurisdiction such as the nationality principle, the protection principle, the universality principle and the like. It seems reasonable to infer from the existence of these principles of extraterritorial jurisdiction, firmly entrenched as they are in the practice of States, that some justifying principle is thought to be necessary to found extraterritorial jurisdiction; that it is not a matter of sovereign discretion.

The position taken by the United States, which has one of the broadest views of extraterritorial jurisdiction, is illustrative. While recognizing exceptions to territorial jurisdiction, the United States has not rejected the common law's "preference for the territorial basis of jurisdiction." RESTATEMENT, *supra* note 26, at § 33 reporter's note. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 402, comment b (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT (Revised)] ("In general, territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction."). This position is reflected in judicial attempts to limit the application of principles permitting extraterritorial jurisdiction. *See, e.g.,* notes 121 (RESTATEMENT's attempt to limit objective territorial principle) and 131-33 (limits on protective principle) *infra*. It is also reflected in American jurisprudence's growing acceptance of a balancing approach, under which the United States must consider the interests of other nations — including their interest in territorial supremacy — prior to extraterritorial application of United States law, even if such an application can be validated under a generally accepted jurisdictional basis. *See* notes 136, 139-41 *infra*.

81. RESTATEMENT, *supra* note 26, at §§ 6-7, distinguishes two types of jurisdiction, jurisdiction to prescribe and jurisdiction to enforce:

> Jurisdiction to prescribe signifies a state's authority to enact laws governing the conduct, relations, status or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation. Jurisdiction to enforce, by contrast, describes a state's authority to compel compliance or impose sanctions for noncompliance with its administrative or judicial orders.

F.T.C. v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980) (footnotes omitted).

Although a state cannot *enforce* a rule of law within the territory of another state because that would violate the other state's sovereignty and the duty of nonintervention, there are circumstances in which a state can validly *prescribe* a rule of law that attaches legal conse-

citizens anywhere in the world and is often used to support extraterritorial actions.[82] The extraterritorial action taken under section six of the EAA was based in large part on the nationality principle.[83] While the rules governing the nationality of corporations are not yet settled, and there appear to be virtually no rules of international law governing the nationality of goods or technology, this exception furnishes at best extremely weak support for the extraterritorial extension of the EAA.

a. *Nationality of subsidiaries.* The principles governing the nationality of corporations have been described as "unsettled"[84] or more precisely as a "haphazard melange made of scraps of national rules stuck together. . . ."[85] The traditional common law rule attributes to a corporation the nationality of the state of incorporation,[86] while the well-settled rule in civil jurisdictions decides the nationality of a company according to its "seat" *(siege social)*[87] — *i.e.*, the principal place of business or the location of the company's central administrative offices.[88] The most important pronouncement

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quences for actions taken in other countries. The following fact pattern describes one situation where there is no jurisdiction to enforce the rule of law, yet there is jurisdiction to prescribe the rule:

> X is a national of state A residing in state B. State A has jurisdiction to prescribe a rule of law subjecting X to punishment if he fails to return to A for military service. X does not return. A has no jurisdiction to *enforce* its rule by action against X in the territory of B even though it has jurisdiction to *prescribe* such a rule.

RESTATEMENT, *supra* note 26, at § 7 comment a, illustration 1. It must be emphasized that under international law a state does not have jurisdiction to enforce a rule of law unless it has jurisdiction to prescribe the conduct in question. *See* note 108 *infra*.

82. *See* I. BROWNLIE, *supra* note 57, at 303.

83. *See* note 5 *supra* (The United States attempted to assert jurisdiction over foreign subsidiaries by attributing to the subsidiaries the nationality of the entity that owned or controlled the subsidiary.).

84. 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, 589 (1970) [hereinafter cited as Craig].

85. Vagts, *The Global Corporation in International Law*, 6 J. INTL. LAW & ECON. 247, 247 (1972).

86. *See* 17 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 8300 (rev. perm. ed. 1977) ("It is a settled general rule that insofar as a corporation can be regarded as a citizen . . . of any state or country, it is a citizen . . . of the state or country by or under the laws of which it was created . . . . it is equally well settled . . . that a corporation has its legal domicile in the country or state by or under whose laws it was created"); W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 488 (3d. ed. 1971); 2 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 31 (2d ed. 1960) [hereinafter cited as E. RABEL]. *See generally* Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1 (1974) (The author discusses the traditional approaches to corporate nationality, including advantages and disadvantages of each, and demonstrates how national interests with respect to specific laws change the traditional rules. He also proposes a new flexible test for determining nationality).

87. W. FRIEDMAN, O. LISSITZYN, & R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 513 (1969) [hereinafter cited as W. FREIDMAN, O. LISSITZYND & R. PUGH].

88. Many factors are used in different jurisdictions to determine the "seat" of a corpora-

by the International Court of Justice on the nationality of a corporation for purposes of international law states that a corporation is a national of the state under the laws of which it was incorporated and in whose territory it has its registered office.[89] This rule was followed in a Dutch case during the Soviet pipeline controversy.[90] Furthermore, a recent United States Supreme Court case held that a wholly owned Japanese subsidiary incorporated in New York was an American corporation and had to comply with American civil rights laws.[91] It should also be noted that the United States has consistently adhered to the state of incorporation test in its commercial treaties with other countries[92] and that recent trade embargoes have exempted foreign subsidiaries from the definition of "person subject to the jurisdiction of the United States."[93]

According to either of the accepted tests of a corporation's nationality, the American claim of jurisdiction over foreign subsidiaries (or foreign corporations) is invalid under the nationality principle.[94] As these subsidiaries are neither incorporated under the

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tion. These factors include the corporate headquarters, the place where the board of directors meets, or the location of the general meeting of the shareholders. *See* 2 E. RABEL, *supra* note 86, at 40-42.

89. Barcelona Traction, Light and Power Co., 1970 I.C.J. 3, 41-45 (judgment of Feb. 5). The issue presented was whether Belgium could exercise a right of protection for shareholders of Belgian nationality in a corporation created under the laws of Canada and having its primary place of business in Spain. After noting that there were no well established principles in the area, the court held that a country where the shareholders were located could not assert diplomatic protection because the corporation was not a national of that state. The proper state(s) to assert diplomatic protection is (are) the states where the corporation is incorporated and where it has its registered office. Under this rationale any EAA regulations that attempt to control the activities of foreign subsidiaries of American corporations would be invalid under the nationality principle.

90. Compagnie Europeene des Petroles v. Sensor Nederland B.V., No. 82/716 (Dist. Ct. The Hague, September 17, 1982) (unofficial translation provided in Exhibit G, John Brown memorandum, *supra* note 56) (holding that an American subsidiary incorporated and having its principal place of business in the Netherlands is a Dutch corporation).

91. Sumitomo Shoji America, Inc. v. Avagliano, 102 S. Ct. 2374 (1982).

92. U.S. commercial treaties "provide that a company's national status shall be determined by its place of incorporation and this test 'has been found acceptable by all countries with which the U.S. has signed commerical treaties since . . . ' " World War II. W. FRIEDMAN, O. LISSITZYN, & R. PUGH, *supra* note 87, at 513 (quoting R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960)). *See, e.g.,* Franco American Treaty of Establishment, Nov. 25, 1959, art. xiv, para. 5, 11 U.S.T. 2398, 2416, T.I.A.S. No. 4625.

93. *See* Abbott, *supra* note 13, at 782, 840 n.604, 843-49, (noting that recent export embargoes relating to Uganda, Afghanistan, the Moscow Olympics and the Iranian hostage crisis did not purport to control foreign subsidiaries of American corporations); Berman & Garson, *supra* note 22, at 869 (noting decision not to control subsidiaries in Cuban assets control regulations).

94. It should be noted that even if the United States could assert jurisdiction over subsidiaries based on the nationality principle, it is generally recognized that in a conflict between the territorial principle and the nationality principle, the territorial principle controls. *See* L. OPPENHEIM, *supra* note 64, at 288. Moreover, the United States still could not *enforce* its rule of law in the territory of another sovereign even if it could prescribe for subsidiaries. *See* note 81 *supra*.

laws of the United States nor have their "seat" inside the United States, they are not American nationals. Even though Congress intended the President to have the power under the EAA to control the exports of foreign subsidiaries, this assertion of jurisdiction cannot be justified by the nationality principle.

b. *Nationality of goods and technology.* With the exception of airplanes,[95] ships,[96] and possibly historical cultural artifacts,[97] there are no rules of international law governing the nationality of goods. The extraterritorial reach of the United States to licensees of American technology, and to those using American-made goods in the production of other goods, based on its claim that its exports are unalterably American, has been rejected by at least two foreign courts[98] and has no accepted basis in international law.[99]

Initially, attributing any nationality to inanimate objects poses formidable conceptual difficulties.[100] International law has developed the idea of nationality almost exclusively in the context of indi-

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95. Aircraft have the nationality of the state where they are registered. Convention on International Civil Aviation, Dec. 7, 1944, art. 17, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, *reprinted in* W. FRIEDMAN, O. LISSITZYN & R. PUGH, *supra* note 87, at 630.

96. Ships have the nationality of the state whose flag they fly if there is a "genuine link" (*i.e.*, the state controls the technical and social matters of the ship) between the ship and the state. *Id.*

97. *See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* 10 INTL. LEGAL MATERIALS 289 (1971). *See generally* Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. OF TRANSNATL. L. 439, 480 (1981) [hereinafter cited as Marcuss & Richard].

98. *See* American President Lines v. China Mut. Trading Co., 1953 A.M.C. 1510, 1526 (Hong Kong Sup. Ct.) (Goods are no longer under American jurisdiction once they are discharged.); Moens v. Ahlers Am. Lloyd, 30 R.W. 360 (Tribunal of Commerce Antwerp 1965).

99. The EEC rejected this claim in the Soviet pipeline case, stating that "[g]oods and technology do not have any nationality and there are no known rules for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them." EEC Comments on U.S. Regulations, *supra* note 14, at 894.

Under United States law, the closest analogy to the jurisdiction asserted in the Soviet pipeline case is that of actions *in rem.* But a state can only base jurisdiction on property, either *in rem* or *quasi in rem,* if the *res* is in the territory of the state asserting jurisdiction. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1070 (1969).

100. International agreements and scholarly commentary have universally spoken in terms of "nationals," *i.e.*, persons, when describing the concept of nationality and its relevance to jurisdiction. *See, e.g.*, Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (no suggestion that entities other than persons can have status as "nationals"); Sahovic & Bishop, *The Authority of the State: Its Range With Respect to Persons and Places,* in MANUAL OF PUBLIC INTERNATIONAL LAW 311, at 360-62 (M. Sorensen ed. 1978) (discussing nationality as a basis for extraterritorial jurisdiction without any suggestion that nationality might attach to entities other than persons). While to some extent artificial, assigning nationality to corporations reflects, fundamentally, their legal personhood — the ability to make decisions with legal consequences. The focus on the location of various corporate decisionmaking functions in the nationality inquiry confirms this distinction. Mere objects, by contrast, cannot make decisions, owe allegiance, or otherwise act as legal persons who might be described as "nationals."

vidual persons, according to principles inapplicable to commercial goods.[101] To argue by these principles against territorial jurisdiction over goods and technology leads to exceedingly anomalous results. The central political consequence of nationality is allegiance;[102] machinery owes allegiance to nobody. To assert that inanimate objects somehow do owe allegiance to their country of origin — that they are "unalterably American" — compounds the paradox. What, for example, is the "nationality" of pipeline equipment manufactured in the United States from raw materials or components imported from other nations?

The serious assertion of so expansive a view of extraterritorial jurisdiction risks the creation of an unmanageable precedent. The notion that goods have an unalterable nationality would permit nations to prescribe regulations for the resale of their export commodities in other countries. Such a result would enormously complicate the already difficult areas where different nations press competing claims to jurisdiction, such as the regulation of anticompetitive practices.[103]

To the extent principles governing the nationality of individuals rationally relate to jurisdiction over goods, the international law of nationality reinforces the territorial principle. The "dominant nationality" principle relied on in cases of competing claims to the nationality of individuals accords great importance to residence[104] as reflecting the "real and effective nationality."[105] Claims of extraterritorial jurisdiction over goods and technology thus contravene the nationality principle relied upon to justify the derogation of the territorial principle.

In the usual case where exporters seek to export restricted goods under the EAA, they are required to provide "written assurances" that the final destination or use of the goods or technology is not

101. *See, e.g.,* Nottebohm Case (Liechtenstein v. Guatemala) 1955 I.C.J. 4 ("According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."). Identifying any "genuine connection of existence, interests and sentiments" between the United States and compressor equipment located in a foreign nation defies ordinary powers of analogy.

102. *See* Blackmer v. United States, 284 U.S. 421, 436 (1932) (The defendant, charged with criminal contempt for refusing to return from overseas upon being summoned to testify in a criminal case, "was, and continues to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.").

103. *See* notes 77-79 *supra.*

104. *See* Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4; United States *ex rel.* Merge v. Italian Republic, 14 R. Intl. Arb. Awards 236 (1955).

105. Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4.

prohibited by the EAA.[106] In these cases it has been argued that the exporters and their clients have voluntarily submitted to the jurisdiction of the United States and that the U.S. Government can impose extraterritorial restrictions since it could deny export privileges completely if it chose to do so. Thus, the written assurance might make the goods, and those entities possessing the goods, subject to American jurisdiction.[107]

This argument is unpersuasive. First, the mere fact that an exporter and a foreign importer agree that they will not reexport a product in violation of the regulations does not constitute submission to the jurisdiction of the United States wherever they or the goods may be. The United States may have a cause of action against the parties — and may be able to enforce its rights if the goods or parties are present in the United States or if the United States can gain the cooperation of the relevant foreign states[108] — but this does not mean that the United States has authority under international law to enforce such regulations extraterritorially. Second, there is good reason to doubt a private party's authority voluntarily to subject property that is located in another country to the jurisdiction of the United States. Since application of the Act derogates the sovereignty of the territorial state rather than that of the contracting party, the party's consent does not confer jurisdiction on the United States. In American jurisprudence, the Supreme Court has drawn an analogy between domestic jurisdictional principles and those found in international law.[109] Under those principles, the "parties cannot waive lack of [subject matter] jurisdiction by express consent, by conduct, or even by estoppel . . . ."[110] The rationale behind this rule is that jurisdictional concerns are too fundamental in our federal system to be left to the "whims" of the litigants. This rationale applies even more forcefully in the international arena, where jurisdictional issues involve claims of competing sovereigns to dominion and control over the goods within their territory. These are legitimate interests of sovereign states and should not be subject to waiver by private parties.[111]

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106. *See* 15 C.F.R. §§ 379.4(f), 379.8(a)(3) (1982).

107. Marcuss & Richard, *supra* note 97, at 478.

108. The United States can only enforce its rights *if* it had a valid basis to proscribe the conduct in question. *See, e.g.*, Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967), *cert. denied*, Grobeau v. United States, 389 U.S. 884 (1967). The mere physical presence of the defendants within the United States does not give the court subject matter jurisdiction unless the rule of law was validly prescribed. United States v. Keller, 451 F. Supp. 631, 634 (D. P.R. 1978). The generally recognized principles of jurisdiction under which a state can prescribe a rule of law are discussed at notes 67, 77 *supra* and accompanying text.

109. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

110. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 46-47 (1975).

111. The voluntary submission argument is especially weak in the Soviet Pipeline situation

2. *Jurisdiction Under the Objective Territorial Principle*

American jurisprudence has taken the position that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[112] This principle, which is known as the "objective territorial principle" or the "effects doctrine," has been widely used by American courts as a basis for jurisdiction in cases involving antitrust law,[113] criminal law,[114] and securities regulation.[115]

Although jurisdiction under this principle has some basis in international law,[116] the American position[117] has been subject to considerable criticism.[118] Much of this criticism stems from concern

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because the restrictions on goods and technology were imposed *after* they had left the territorial jurisdiction of the United States. Consequently, it cannot be said that companies importing these goods or technology had voluntarily consented to American jurisdiction. In fact, some companies, such as General Electric, inquired about export controls before they exported the goods and were told by government officials that there were none. *See* John Brown Memorandum, *supra* note 56, at Exhibit 2.

112. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

113. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 703-08 (1962); United States v. Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40 (S.D.N.Y. 1955); United States v. Imperial Chem. Indus., 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

114. *See, e.g.,* United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974).

115. *See, e.g.,* Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); SEC v. Kasser, 391 F. Supp. 1167 (D.N.J. 1975).

116. *See* Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J., Ser. A., No. 10, 19-23 (Judgment of Sept. 7), 2 World Ct. Rep. 20 (1935) ("[M]any countries . . . interpret criminal law in the sense that offenses, the authors of which at the moment of commission of [the crime] are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its *effects*, have taken place there . . . .") (emphasis added).

117. Other countries have adopted the American approach in certain instances. *See* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 36-37 (2d ed. 1973) [hereinafter W. FUGATE]; Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INTL. LAW. 645, 648 (1979). For an example of a case where the EEC has applied the effects principle, see Imperial Chem. Indus., Ltd. v. E.C. Comm., 1972 Comm. Mkt. L. R. 557. But the objective territorial principle probably continues to enjoy the support of only a minority of states. *See* 1 L. OPPENHEIM, *supra* note 64, at 331.

118. *See generally* Sonarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INTL. & COMP. L.Q. 127 (1982); Riedwig, *The Extra-Territorial Application of Restrictive Trade Legislation—Jurisdiction and International Law,* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE 351, 372-73 (1964) ("Nearly all European writers have been critical of the Restatement's notion of extraterritorial application of a state's laws to aliens. The European Advisory Committee on the Restatement . . . criticized the Restatement rule of extraterritorial jurisdiction stating:

> "In our view the exercise of jurisdiction based on territory is not justified in cases where all that has occurred within the territory is the effects of certain conduct and not the least part of the conduct itself."

Jennings, *supra* note 80, at 159-60; Becker, *The Antitrust Law and Relations with Foreign Nations,* DEPT. STATE BULL. 72-73 (1959) (discussing passionate belief among many of America's allies that the effects principle as applied in American cases violates international law and infringes on their sovereignty).

about its potentially limitless scope.[119] The various attempts to develop limits are generally couched in somewhat ambiguous terms and hence do not completely blunt the force of this objection.[120] Illustrative is the formulation by the *Restatement (Second) of Foreign Relations Law*, which specifies that a state has jurisdiction to attach "legal consequences to conduct that occurs outside its territory and causes an effect within its territory," if the effect is direct, foreseeable, and substantial. Furthermore, the rule must not be "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."[121]

Even if one accepts this formulation as a valid basis for jurisdiction under international law, extraterritorial application of the EAA typically cannot be justified on this ground. In most situations to which the EAA might be applied, there is no tangible effect *within the United States*, let alone a substantial one. Instead, any effect is most likely to be on the United States' rather amorphous perceptions of its national security or foreign policy interests. To suggest that effects such as these constitute effects within the United States would largely eviscerate the concept of territorial integrity.[122] This result cannot be reconciled with the theoretical justification for the objective territorial principle, which is simply to expand the notion of when conduct occurs within a territory, rather than to eliminate notions of territoriality altogether.[123]

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119. *See, e.g.*, Akehurst, *Jurisdiction in International Law*, [1972-73] BRIT. Y.B. INTL. L. 145, 154 (describing objective territorial principle as "a slippery slope which leads away from the territorial principle toward universal jurisdiction"); Jennings, *supra* note 80, at 159 ("If indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limit to a State's territorial jurisdiction.").

120. For an illustration of these attempts, see Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611-12 (9th Cir. 1976) (The court states that there is no consensus on the formulation of the objective territorial principle and cites many different formulations in case law and by commentators.). *See generally* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 142-81 (2d ed. 1981) (tracing the development of the objective territorial principle and attempting to reach some conclusion about the current status of the law). Despite some efforts to limit this principle, American cases rarely analyze the type of effect that is required for jurisdiction. Courts seem to assume that the effect is "intuitively obvious." *See* Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 504-05 (1980).

121. RESTATEMENT, *supra* note 26, at § 18.

122. The comments of Professors Marcuss and Richard, in their discussion of the protective principle, are pertinent: "[L]ike the 'effects' doctrine, the protective principle has generated concern in the minds of students of international law because of its potentially infinite reach. Even a passing familiarity with recent history confirms that '[a] State might have peculiar and even outrageous notions of what affects its security or what is a vital interest.' " Marcuss & Richard, *supra* note 97, at 445 (quoting Jennings, *supra* note 80, at 155). *See generally* note 119 *supra*.

123. Jennings, *supra* note 80, at 160:

> Thus it is clear from the authorities that the objective application of the territorial principle is limited to those "effects" which are direct, if not immediate, and which form a part of the *actus reus;* where, in the language of the older cases, the crime was "consummated",

Moreover, any effects within the United States are, at most, indirect. Direct effects are those which have no intervening elements, but rather flow in a straight line without deviation or interruption.[124] The direct effect of exports between foreign nations is upon those nations (and private parties) who are actually parties to the trade.[125] Any effect on the United States depends on an intervening element, namely, the policies of the importing or exporting nation which are perceived as a threat to the interests of the United States.

Finally, to the extent that national security interests do provide a basis for extraterritorial jurisdiction, the protective principle offers the soundest guidance to determining the scope of the jurisdiction so conferred. As the protective principle focuses more directly on national security interests, it provides a more relevant — and potentially limited — means to balance the relevant concerns, than does a more general concept of objective territoriality.

3. *Jurisdiction Under the Protective Principle*

The protective principle allows a state to prescribe rules of law for conduct outside its territory that threatens its security as a state, provided that the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.[126] This principle has generally been viewed as a "special limited exception" to jurisdiction based on either nationality or territoriality.[127]

viz. completed, in the territory claiming jurisdiction. And, indeed, the same conclusion is required by the reason of the thing, for a different conclusion would permit a practically unlimited extension of the principle to cover almost any conceivable situation. It would be absurd, indeed, if an almost unlimited extraterritorial jurisdiction could be ostensibly based upon a territorial principle of jurisdiction.

124. Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 989 (N.D. Ill. 1980) (no effect in United States due to breach of contract); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978), *affd. mem.*, 607 F.2d 494 (D.C. Cir. 1979) (no direct effect in United States from collapse of airport terminal roof in Iran causing American deaths); Carey v. National Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978), *affd. per curiam*, 592 F.2d 673 (2d Cir. 1979) (no direct effect in United States from breaches of petroleum contracts by Libyan owned corporation against Bahamian subsidiary of American corporation). *But see* Ohnthup v. Firearms Center Inc., 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) (direct, substantial and foreseeable effect found due to importation of defective gun that caused physical injury in the United States.).

125. Compagnie Europeene des Petroles v. Sensor Nederland B.V., No. 82/716 (Dist. Ct. The Hague Sept. 17, 1982), *cited in* John Brown memorandum, *supra* note 56, at Exhibit 6, p. 8 ("[I]t cannot be understood that exports to Russia of goods not originating in the United States by a non-American exporter would have any direct or prohibited consequences within the United States."). *Cf.* Marcuss & Richard, *supra* note 97, at 469 (arguing that effects principle could be applied to give jurisdiction in trade regulation cases only if the most "speculative and ephemeral effects of foreign conduct" suffice to meet the effects doctrine, but suggesting that if doctrine is asserted on national security grounds, courts must make "individual judgments on the security impact of particular transactions." *Id.* at 479).

126. RESTATEMENT, *supra* note 26, at § 33.

127. RESTATEMENT (Revised), *supra* note 80, § 402, comment a, defines the protective principle in very open-ended language: international law permits a state "to exercise jurisdiction to prescribe and apply its law with respect to . . . certain conduct outside its territory by

The *Tentative Restatement of Foreign Relations Law (Revised)* enumerates espionage, counterfeiting of the state's seal or currency, the falsification of official documents, perjury before consular officials, and conspiracies to violate the immigration or customs laws as examples of crimes to which the protective principle might be applied.[128]

Although there are no American cases so holding, some circumstances may arise in which conduct overseas that threatens American national security is subject to American jurisdiction pursuant to the protective principle. As the EAA allows the President to control exports for both national security and foreign policy purposes,[129] the extraterritorial application of these controls might be sustained in such circumstances.

As suggested in the preceding discussion of the objective territorial principle, recognition of extraterritorial jurisdiction to protect national security interests raises fears that such a doctrine has the potential to emasculate notions of territorial integrity.[130] The breadth of contemporary perceptions of threats to national security interests aggravates these apprehensions. For example, any event that contributes to the military strength of potentially antagonistic nations may adversely affect the security of other states. Alliances add to the the scope of activity that might be subject to extraterritorial jurisdiction. To take one illustration, the American perception of a threat to European national security caused by reliance on Soviet gas might correspondingly be perceived as a threat to American security as a member of NATO.

Perhaps in recognition of the protective principle's potential breadth, American case law has developed stringent prerequisites to assertion of jurisdiction based on this basis. First, the conduct in question must generally be recognized as criminal by civilized nations.[131] Second, a potential generalized effect — which may or may not affect the United States — is insufficient;[132] "[a]ll cases which have invoked the protective principle [involved] actions where there

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persons not its nationals which is directed against the security of the state or certain state interests." *Id.* at § 402(3).

128. *Id.*, at § 402, comment d.

129. 50 U.S.C. app. §§ 2404, 2405 (Supp. III 1979).

130. Jennings, *supra* note 80, at 155; Marcuss & Richard, *supra* note 97, at 445.

131. RESTATEMENT, *supra* note 26, at § 33, comment d ("The requirement that the conduct be generally recognized as a crime under the law of states that have reasonably developed legal systems prevents a state from basing an extension of its jurisdiction on the rule stated in Subsection (1)."); F. MANN *supra* note 72, at 80 ("It would be abusive if a State invoked the protective principle without due regard to the importance of the offense. In all cases, here as elsewhere, the standard is supplied solely by international law, *i.e.*, by the general practice of civilized states.") (footnote omitted).

132. United States v. James-Robinson, 515 F. Supp. 1340, 1345 (S.D. Fla. 1981).

was a demonstrable effect on the United States *in particular.*"[133]

In light of these requirements, the protective principle can only justify prescribing regulations under the EAA in unusual situations. The exportation controlled by the Act will rarely be generally considered criminal activity by the international community, and such exports most likely will not impair U.S. interests in particular unless the relationship between the United States and the importing nation is particularly antagonistic.

The export controls imposed in the Soviet pipeline case provide a clear illustration of the inapplicability of the protective principle. As these controls were promulgated under the EAA's provision for foreign policy controls,[134] the United States would be hard pressed to justify its assertion of jurisdiction by national security concerns.[135] Moreover, since the controlled exportations were neither generally considered criminal by the international community, nor likely to produce effects on the United States in particular, the protective principle cannot justify extraterritorial controls in this situation.

C. *Resolving Conflicts of Jurisdiction*

While the jurisdictional basis for extraterritorial application of the EAA by the United States is quite dubious in most cases, it is particularly weak when the Act's controls create a direct conflict with another sovereign's assertion of jurisdiction.[136] Such was the situation in the Soviet pipeline case, as a number of European nations took action that was intended to force corporations within their territory to disregard the dictates of the EAA.[137] In these circumstances, even if the United States can establish some jurisdictional basis, principles of international law may persuade the United States to refrain from asserting jurisdiction.

Traditional rules of international law resolved such conflicts of

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133. 515 F. Supp. 1340, 1345 (emphasis in original).

134. *See* note 7 *supra*.

135. *See* Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V., No. 82/716 (Dist. Ct. The Hague Sept. 17, 1982), *cited in* John Brown memorandum, *supra* note 56, at Exhibit 6 (holding that foreign policy controls do not justify assertion of jurisdiction under the protective principle).

136. This section focuses on the use of a balancing test when two or more nations assert jurisdiction, thereby creating a jursidictional conflict. It is important to note, however, that the use of the balancing approach may not be limited to such clear situations of conflict. Indeed, there is growing support in the United States for *always* balancing United States interests in extraterritorial application of United States law against the interests of nations whose territorial integrity may be effected before sustaining the United States' assertion of jurisdiction. *See, e.g.,* RESTATEMENT (Revised), *supra* note 80, § 403; Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). While an actual assertion of jurisdiction by the affected nations helps evidence the strength of their interests, and in light of the Soviet pipeline this case seems highly likely in future cases, it need not be a precondition to application of the balancing test.

137. *See* note 15 *supra*.

jurisdiction by focusing on the preeminence of the territorial principle.[138] However, in recent years a balancing approach to conflicts of jurisdiction has developed a broad base of support in the United States in case law,[139] in legal commentary,[140] and in the position taken by the Justice Department.[141]

Section 40 of the *Restatement (Second) of Foreign Relations Law* recognized and codified the need to balance the competing interests of nations asserting jurisdiction.[142] The Restatement provides that where two states enjoy concurrent jurisdiction, and the rules they prescribe may require inconsistent conduct by a person, international law requires each state to consider moderating its enforcement jurisdiction in light of factors such as:

(a) vital national interests of each of the states,
(b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which the enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.[143]

An analysis of many of these factors — for example, the relative national interests of the involved states — will vary substantially in different scenarios involving extraterritorial application of the EAA. Other factors, such as territoriality, will remain fairly constant. An

138. *See, e.g.,* 1 L. OPPENHEIM, *supra* note 64, at § 128 ("The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of the foreign state.").

139. *See, e.g.,* Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 702-08 (1962); In re the Uranium Antitrust Litigation, Westinghouse Elec. Indus. Corp. v. Reo Algom, 617 F.2d 1248 (7th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co., v. Bank of American, 549 F.2d 597, 605-6 (9th Cir. 1976); United States v. First Natl. Bank, 396 F.2d 897 (2d. Cir. 1968).

140. *See, e.g.,* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law,* 76 AM. J. INTL. L. 280 (1982); RESTATEMENT, *supra* note 26, at § 40; Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise,* 11 INTL. COMP. L.Q. 127 (1982); Jacobs, *Extraterritorial Application of Competition Laws: An English View,* 13 INTL. LAW 645 (1979); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach,* 28 STAN. L. REV. 1005 (1976).

141. *See* W. FUGATE, *supra* note 117, at 443.

142. RESTATEMENT, *supra* note 26, at § 40. The test found in Section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW is widely used by the courts. *See, e.g.,* United States v. Bank of Nova Scotia, 691 F.2d 1384, 1389 (11th Cir. 1982) (*in re* Grand Jury Proceedings); United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981). Several commentators and courts have suggested alternative tests that are similar to § 40 of the RESTATEMENT. *See, e.g.,* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 607 (9th Cir. 1976); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958); RESTATEMENT (Revised), *supra* note 80, § 403.

143. RESTATEMENT, *supra* note 26, at § 40.

analysis of all of these concerns, in the context of the Soviet Pipeline case, indicates that the balancing approach should often compel the United States to moderate its asserted jurisdiction under the EAA.

The comments to the *Restatement* define the term "vital national interest" as "an interest such as national security or general welfare to which the state attaches overriding importance."[144] While the stated purpose of the EAA controls was to "advance reconciliation in Poland,"[145] other underlying objectives were preventing the Soviet Union from gaining hard currency from the sale of gas to Europe and avoiding European dependence on Soviet energy supplies. However, these concerns were also relevant to the European decision — their national security was most directly threatened by their increased dependence on Russia. Their decision to participate in the pipeline venture implicitly reflects their belief that such concerns were outweighed by their interest in the thousands of jobs and billions of dollars in trade generated by the pipeline, as well as the possibility of diversifying their energy sources.[146] While the relative weight of the competing considerations is subject to debate, the fact that the parties most directly affected by these competing concerns — the European nations — decided in favor of the pipeline, suggests that this factor counsels against American jurisdiction.

The *Restatement*'s second factor — the extent and nature of the hardship of inconsistent enforcement — provides no basis for favoring any party's exercise of jurisdiction in the Soviet pipeline case. While courts in other contexts have examined whether each party is imposing civil or criminal sanctions,[147] this inquiry has little utility in the Soviet pipeline case because many of the parties were invoking criminal sanctions. With strong penalties on both sides of the Atlantic awaiting the targeted corporations, enforcement by any of the parties could create great hardships on the corporations. Yet, while this concern does not identify the state that should yield on its claim to jurisdiction, the impossible situation of the corporations facing severe penalties for both obeying and defying the controls makes a very strong case for moderation on the part of the national governments.

The third and fourth factors mentioned in the *Restatement* — the location of the regulated activity and the nationality of the regulated party — have been discussed in detail earlier, and both argue strongly in favor of the Europeans' exercise of enforcement jurisdic-

144. *Id.* at § 40, comment b.

145. Statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 21, 1982).

146. *See Over to the Lawyers,* ECONOMIST, Aug. 14, 1982, at 59.

147. *See, e.g.,* United States v. First Natl. City Bank, 396 F.2d 897 (2d Cir. 1968); Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978).

tion. As the very essence of extraterritorial export controls is control over the exports of corporations located outside the United States — in this case, in Europe — the location test supports European jurisdiction. The same result is dictated by considerations of nationality. It is clear that European licensees are European nationals even if their goods originate in the United States.[148] Although this is not quite as clear, the majority tests do indicate that the foreign subsidiaries regulated by the EAA should also be considered European nationals.[149]

Finally, the Restatement looks to the extent to which the enforcement action by either state will achieve compliance with the rule prescribed by the state. In the Soviet pipeline case, the U.S. order was defied by France, Great Britian, and Italy, among others.[150] All of these states ordered their corporations to fulfill the export contracts with the Soviet Union and *all* of the companies complied. The United States had to fall back to applying sanctions on the corporations, based in its territory even though these corporations were powerless to prevent most of the exports.

In short, even if the United States has some basis for extraterritorial enforcement of the EAA, the *Restatement*'s balancing test consitutes an additional barrier to enforcement. The foregoing analysis of the Soviet Pipeline case illustrates how many of the factors enumerated in section 40 will typically require the United States to moderate its enforcement of the EAA and acquiesce to the stronger jurisdictional claims of the countries where the subsidiaries, goods or technology are located. Given the relationship between international and municipal law in the United States,[151] and the clarity with which the EAA expresses a congressional intention to enable extraterritorial jurisdiction, such restraint must take the form either of executive branch moderation in the enforcement of the Act (which seems improbable once the President has determined to invoke the Act to begin with), or legislative amendment of the EAA to incorporate the *Restatement*'s approach to resolving conflicting claims to jurisdiction.[152]

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148. *See* notes 98-99 *supra* and accompanying text.

149. *See* notes 86-94 *supra* and accompanying text.

150. *See, e.g.,* J. OF COMM., Aug. 3, 1982, at 1, col. 6.

151. *See* notes 44-47 *supra* and accompanying text.

152. This approach would enable an American corporation to defend itself in the federal courts by arguing that the Act itself incorporates international law by reference, so that domestic legislation subject to judicial rather than executive interpretation would require weighing the various interests. The courts have conducted just such a balancing approach when a civil discovery order conflicted with the asserted jurisdiction of a foreign sovereign. *See* United States v. First Natl. City Bank, 396 F.2d 897 (1968) (per Kaufman, C.J.). Amending the EAA to incorporate the RESTATEMENT's approach to conflicts of international jurisdiction would enable a similar solution in the export control area.

CONCLUSION

Even though Congress delegated to the President the power to control exports extraterritorially, this power has, at best, tenuous support under international law. The affected countries can support their claims of jurisdiction with the territorial and nationality principles while the United States must claim jurisdiction on minority positions such as the ownership and control theory of corporate nationality. Furthermore, any attempt to enforce the EAA extraterritorially runs the risk of violating the sovereignty of other nations as well as the duty of nonintervention.

The politial and economic costs of extraterritorial export controls are significant.[153] These controls engender vehement protests,[154] strain relations with allies, create the loss of hundreds of millions of dollars in exports[155] and damage the reputation of American exporters as reliable sources of goods.[156] These political and economic costs are incurred despite the fact that the effectiveness of export embargoes has been severely questioned.[157]

There are several ways to prevent or attenuate the political and economic costs of extraterritorial export controls. For example, Congress could limit export controls to those rare situations in which they can be validated under international law, tighten the criteria for implementation of controls,[158] or eliminate *extraterritorial* export controls altogether. Congress could also reserve the right to veto any presidential action that does not meet the statutory guidelines.[159] The executive branch could also mitigate the problems caused by extraterritorial export controls by seeking better coordination on export control policy[160] and refraining from unilateral action when the cooperation of our allies cannot be obtained.

Assertions of extraterritorial jurisdiction are increasing on both

153. *See generally* Abbott, *supra* note 13, at 826-57; Berman & Garson, *supra* note 22, at 876-78.

154. *See, e.g.,* note 14 *supra*.

155. *See* Abbott, *supra* note 13, at 826-31; Berman & Garson, *supra* note 22, at 876-77.

156. *See* Abbott, *supra* note 13, at 831-37.

157. *See* Abbott, *supra* note 13, at 800-21. *See also id.* at 84 (concluding that there is a "striking consensus" that economic sanctions have been ineffective in the fulfillment of their objectives). *Accord* H. STRACK, SANCTIONS: THE CASE OF RHODESIA 253 (1978); Taubenfeld & Taubenfeld, *The "Economic Weapon": The League and the United Nations,* 1964 AM. SOCY. INTL. L. PROC. 183, 188 (1964).

158. Among other things, Congress could require the President not to apply export controls if "equivalent products" are available from other sources or require that enforcement measures not be taken in countries that have been consulted and refuse to adhere to the American position due to foreign policy differences.

159. Congress has often retained veto power in trade-related matters. *See, e.g.,* Trade Act of 1974, §§ 151, 152, 19 U.S.C. §§ 2191, 2192 (1976).

160. For a detailed discussion of current and past multilateral attempts for a coordinated export control policy, see Berman & Garson, *supra* note 22, at 834-42.

sides of the Atlantic.[161] The political furor created by the EAA export controls in the Soviet Pipeline case could provide the needed impetus for constructive negotiations to prevent, or at least to regulate, this form of economic warfare in the future.

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161. *See* Vagts, *A Turnabout in Extraterritoriality*, 76 AM. J. INTL. L. 591 (noting recent extraterritorial laws, passed by *European* nations and subsequent *American* protests).