Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst

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DEFINING THE EXTRATERRITORIAL REACH OF AMERICAN EXPORT CONTROLS: CONGRESS AS CATALYST

Kenneth W. Abbott†

TABLE OF CONTENTS

INTRODUCTION ........................................... 81
I. THE PIPELINE EPISODE .................................. 82
II. THE ECONOMIC BASIS OF THE DISPUTE OVER EXTRATERRITORIALITY ........................................ 90
   A. INTERNATIONAL TRADING NETWORKS .......... 92
   B. TECHNOLOGY TRANSFER NETWORKS ............ 93
   C. INVESTMENT NETWORKS ........................... 96
   D. SIGNIFICANCE OF THE INTERNATIONAL BUSINESS NETWORKS ................................................. 98
III. THE COSTS OF EXTRATERRITORIAL EXPORT CONTROLS ......................................................... 99
    A. POLITICAL COSTS ................................... 99
    B. ECONOMIC COSTS .................................. 100
IV. THE ROLE OF CONGRESS IN DETERMINING THE SCOPE OF EXTRATERRITORIAL JURISDICTION ............................... 103
    A. ALTERNATIVES AVAILABLE TO CONGRESS ........ 103
    B. THE EVOLUTIONARY APPROACH .................... 104
    C. THE TERRITORIAL APPROACH: REPEAL OF PRESIDENTIAL AUTHORITY TO IMPOSE EXTRATERRITORIAL CONTROLS ............................................ 107
    D. THE MIDDLE ROAD: DEFINING THE SCOPE OF AMERICAN JURISDICTION ................................. 111

V. A PROPOSAL FOR CONGRESSIONAL ACTION ... 114
   A. A MORATORIUM ON EXTRATERRITORIAL TRADE CONTROLS ........................................... 114
   B. A COMMISSION TO STUDY THE EXTRATERRITORIAL APPLICATION OF UNITED STATES EXPORT CONTROLS ........................................... 116
   C. INTERNATIONAL NEGOTIATIONS ........................................... 119
   D. SUGGESTED FORMULATIONS FOR NEGOTIATION ... 120
      1. General Formulations ........................................... 121
         a. Consultation Agreements ........................................... 121
         b. An Anti-Evasion Rule ........................................... 123
            i. Reexports and Analogous Transactions ............................... 125
            ii. Transactions of Controlled Foreign Corporations ................. 128
         c. Contract Sanctity ........................................... 130
      2. Formulations Applicable to Controls on Reexports and Analogous Transactions ........................................... 133
         a. Licensing of De Minimis Transactions ........................................... 133
         b. A “Coming to Rest” Rule ........................................... 134
         c. Renunciation of Retroactive Controls ........................................... 138
      3. Formulations Applicable to Controlled Foreign Corporations ........................................... 141
         a. Licensing of Non-Strategic Trade by Independent Foreign Subsidiaries ........................................... 141
         b. Limitation of Jurisdiction to Activities in U.S. Commerce ........................................... 144
         c. Regulation Based on Agency ........................................... 146
      4. Foreign Accommodations ........................................... 150
         a. Mutuality ........................................... 151
         b. Non-interference with Permissible American Controls ........................................... 151
         c. Cooperation with American Controls ........................................... 152
         d. Substantive Consultations ........................................... 153
         e. Cooperation with National Security Controls ........................................... 153
      5. National Security Controls ........................................... 154
   CONCLUSION ........................................... 158
INTRODUCTION

Since the United States began systematically to restrict exports in peacetime for national security and foreign policy purposes, foreign opposition to the extraterritorial reach of American export controls has been rife. The Reagan Administration's efforts to delay completion of the Soviet Union's natural gas pipeline to Western Europe, however, have raised foreign concern over American claims of extraterritorial jurisdiction to new heights. The jurisdictional reach of the Administration's pipeline sanctions was in several respects unprecedented. The foreign response was similarly unprecedented: both the British and French governments acted to block the application of the American controls, while other European governments openly urged that the controls be defied.

Given the underlying realities of the international economy and the "dynamic of escalation" that some observers have discerned, there is every reason to fear that similar confrontations, with all their political and economic costs, will be played out in the future.

This Article argues that the current period of relative calm in trans-Atlantic political relations provides an unusual opportunity to seek at least partial resolution of a jurisdictional controversy that has split the United States and its major trading partners for over thirty years. The Article does not attempt to analyze the principles and

2. See id. at 867-72.
3. For detailed summaries of the pipeline episode see 3 A. LOWENFELD, INTERNATIONAL ECONOMIC LAW, TRADE CONTROLS FOR POLITICAL ENDS ch. II, §§ 5.4-5.6 (2d ed. 1983); Moyer & Mabry, Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases, 15 LAW & POL'Y INT'L BUS. 1, 60-91 (1983).
4. See infra notes 33-37 and accompanying text.
5. See infra notes 41-48 and accompanying text.
6. See infra notes 57-106 and accompanying text.

The extraterritoriality problem is not increasing at a constant rate: there have been periods of relative quiet in some, if not in all, of its aspects. But the trend over the past 40 years has clearly been upward. And the escalation was more rapid in the 1970s than the 1960s, and in the 1960s than the 1950s. And those countries which see themselves as victims of extraterritoriality are becoming more vigorous in their responses.

Id.
8. See infra notes 107-30 and accompanying text.
9. On issues other than extraterritoriality, of course, conflict between the United States and its major trading partners has continued since the settlement of the pipeline dispute. See, e.g., Vest, Brock Say U.S.-European Ties Weakest Since End of World War II, 20 U.S. EXPORT WEEKLY 159 (1983) (describing Senate testimony of U.S. Ambassador to the European Communities and U.S. Trade Representative on economic disputes between United States and European Communities).
precedents of international law on the reach of national jurisdiction. Rather, it argues for a practical solution to the dispute, centering on international negotiations. In particular, the Article suggests that Congress could be an effective catalyst of such a dispute resolution process and outlines a course of action that Congress might follow to perform this function.

Part I of the Article briefly recounts the facts of the pipeline episode. Part II describes the economic foundations of the dispute over extraterritoriality and explains why the dispute is likely to recur unless remedial measures are taken. Part III analyzes the costs of failing to resolve the dispute. Part IV examines the role that Congress will play in the resolution of the extraterritoriality controversy, and considers several alternative courses of action for Congress. Finally, Part V details the proposal for congressional action mentioned above, and suggests a number of jurisdictional formulations that could serve as concrete bases for international negotiations.

I

THE PIPELINE EPISODE

On December 23, 1981, President Reagan condemned the imposition of martial law in Poland and announced a program of economic sanctions against the Polish regime. Six days later, accusing the Soviet Union of "heavy and direct responsibility for the repression in Poland," he instituted an even more potent set of sanctions, including both trade and non-trade measures, against the Soviets.

Export controls formed the centerpiece of the 1981 trade sanctions against the Soviet Union. First, the Department of Commerce expanded existing controls by requiring validated licenses for


exports from the United States to the Soviet Union of equipment and related technical data used in the transmission and refining of petroleum and natural gas.\textsuperscript{13} Previously, such equipment had been eligible for export to the Soviet Union under general license; only exploration and production equipment and related technical data had required a validated license.\textsuperscript{14} Second, the Department "suspended the processing of applications for validated licenses and other authorizations for export," including reexport authorizations, to the Soviet Union.\textsuperscript{15} Moreover, it announced that all outstanding licenses and authorizations were subject to review and possible sus-

\textsuperscript{13} 47 Fed. Reg. 141-43 (1982) (amending 15 C.F.R. § 385.2(c) and the Commodity Control List, Supp. No. 1 to 15 C.F.R. § 399.1). The Department of Commerce summarized this regulation as follows:

Under current regulations, a validated export license is required for foreign policy purposes for the export to the U.S.S.R. . . . of specific oil and gas exploration and production equipment, and technical data related to oil and gas exploration and production. This rule imposes new foreign policy controls on exports to the U.S.S.R. . . . of commodities for transmission (including transportation) and refinement of petroleum or natural gas and technical data related to oil and gas transmission or refinement. These controls also apply to Afghanistan.

Presently, under 15 C.F.R. 385.2(c) the Department of Commerce controls exports of specified oil and gas exploration and production equipment, technical data . . . related to oil and gas exploration and production, and other commodities that require a validated export license for shipment to the Soviet Union and that are intended for use in oil or gas exploration or production. This rule expands the existing controls by applying the controls to the areas of refinement for energy usage and transmission.

\textit{Id.} at 141.

Under the Export Administration Regulations, the export from the United States of all commodities and all technical data is prohibited—with certain specified exceptions—unless (a) a general license authorizing the export in question has been established by the Commerce Department's Office of Export Administration (OEA), or (b) a validated license or other authorization for such export has been granted by the OEA. 15 C.F.R. § 370.3(a) (1983). A validated license is an actual document issued by the OEA to authorize a specific transaction. \textit{Id.} at § 372.2(a). A general license, by contrast, is an authorization established by OEA regulation. Each general license may be used by any person, except those disqualified on account of prior violations, for any transaction falling within its terms. No application is necessary and no document is issued. \textit{Id.} at §§ 370.2, 371.1.


\textsuperscript{15} 47 Fed. Reg. 144 (1982). The Department described this regulation as follows:

This issuance announces a General Order of the Department of Commerce suspending the processing of all licensing for exports to the U.S.S.R. to further U.S. foreign policy objectives in light of the Soviet Union's heavy and direct responsibility for the repression in Poland. This issuance provides notice that no new licenses or other authorizations for export to the U.S.S.R. will be issued by the Department of Commerce. Outstanding validated licenses and authorizations may be reviewed to determine whether suspension or revocation may be necessary to be consistent with the objectives of this action.

\textit{Id.}
pension or revocation.\textsuperscript{16} This suspension order halted exports to the Soviet Union of goods requiring a validated license, including the contemporaneously controlled oil and gas transmission and refining equipment. Because the transfer to the Soviet Union of nearly all proprietary industrial technology already required a validated license,\textsuperscript{17} technology exports were almost completely prohibited.

The 1981 regulations, although not the focus of the subsequent controversy, had certain extraterritorial effects. First, United States suppliers could no longer export pipeline-related equipment to their European and Japanese customers, or even to their own foreign affiliates, if they knew that it would be reexported to the Soviet Union.\textsuperscript{18} As a result, many foreign firms dependent on United States sources for crucial components encountered difficulties fulfilling their contracts to supply finished products for use on the pipeline. For example, prior to the 1981 controls, the General Electric Company had entered into "Manufacturing Associate Agreements" with several European firms under which General Electric licensed its proprietary technology for the manufacture of turbine compressors, but retained the technology for the manufacture of rotor assemblies necessary to the operation of the compressors.\textsuperscript{19} The Manufacturing Associates had contracted to supply 125 compressors to the Soviet Union, and General Electric appeared to be the only company manufacturing the rotors, but the 1981 regulations blocked export of these crucial components.\textsuperscript{20}

Second, the regulations purported to restrain foreign firms from reexporting\textsuperscript{21} to the Soviet Union U.S.-origin products and technology used in the transmission and refining of petroleum and natural

\textsuperscript{16} Id. A license for at least one major transaction—the export by Caterpillar Tractor of 200 pipelayers—was actually revoked. See 3 A. Lowenfeld, supra note 3, at ch. II, § 5.45.

\textsuperscript{17} Under 15 C.F.R. § 379.4(b) (1981), only a few types of transaction involving exports to the Soviet Union of technical data qualified for General License GTDR, the only general license available for exports of non-public industrial information.

\textsuperscript{18} See 15 C.F.R. § 374.1(b) (1981).


\textsuperscript{20} See 3 A. Lowenfeld, supra note 3, at ch. II, §§ 5.44-.45. The effect of the blocking can be seen in the case of John Brown Engineering Limited, which had contracted to supply twenty-one turbines of General Electric design for use in the pipeline, but had only six rotor assemblies in inventory as of December 1981. See John Brown Memorandum, supra note 19, at 4-5.

\textsuperscript{21} Under the Export Administration Regulations, the term "reexport" includes "reexport, transshipment, or diversion of commodities or technical data from one foreign destination to another." 15 C.F.R. § 370.2 (1983).
gas. In the case of U.S.-origin end products, the Export Administration Regulations made clear that the new reexport prohibition applied even to products previously exported from the United States. It was not clear, however, whether the same could be said of U.S.-origin parts, components, and materials incorporated in end products abroad, because of an ambiguity in the relevant regulations. The Manufacturing Associates of General Electric, which in some cases had on hand a number of rotor assemblies previously exported by General Electric under the relevant agreements, were thus unsure whether sales to the Soviet Union of compressors containing these particular rotors would constitute a violation of the American embargo.

Finally, the 1981 regulations required, as a precondition for use of the only general license available for exports of proprietary industrial technology, that importers of U.S.-origin technology relating to oil and gas transmission and refining equipment in countries other than the Soviet Union give “written assurances” to their suppliers in the United States that such technology and its “direct products”

22. The reexport of goods previously exported from the United States is generally prohibited under the Export Administration Regulations. See 15 C.F.R. § 374.1 (1981). Reexports of products that, at the time of reexport, may be directly exported from the United States to the new foreign destination under general license may, however, be made without express Commerce Department authorization. 15 C.F.R. § 374.2(a)(1) (1981). By requiring a validated license for exports of pipeline equipment from the United States to the Soviet Union, the 1981 regulations made this exception to the requirement of a reexport authorization inapplicable. Cf. 15 C.F.R. §§ 379.8(a)(1), (b)(1) (1981) (parallel regulations concerning reexports of technical data).

23. Under the scheme described in note 22, supra, the availability of a permissive exception to the requirement of a reexport authorization was to be judged “at the time of reexport,” 15 C.F.R. § 374.2(a) (1981), not at the time the goods were first exported from the United States. See Address by John Ellicott, entitled Extraterritorial Trade Controls—Law, Policy and Business, presented to the Southwestern Legal Foundation Symposium on Private Investments Abroad, at 12-14 (June 14, 1983) (copy on file at offices of the Cornell International Law Journal) (Address reprinted in Private Investments Abroad—Problems and Solutions — (Sw. Legal Fdn. 1983) [hereinafter cited as Ellicott]. Cf. 15 C.F.R. § 379.8(b)(1) (1981) (parallel provision on technical data reexports).

24. The Export Administration Regulations include a provision pointing out that parts, components, and materials are subject to the export control laws, and stating that the Commerce Department “exercises vigilance over exports and reexports of these commodities . . . .” 15 C.F.R. § 376.12 (1981). A “Note” to this section lays out a procedure for determining whether United States approval is required for shipments of foreign-produced end products containing such U.S.-origin items. The Note makes the determination turn on the existence of a validated license requirement for shipments of either the end products in question or the U.S.-origin components directly from the United States to the new destination. The Note, as it stood in 1981, however, confused the issue by stating the question as whether Commerce Department approval is required “for the incorporation abroad of U.S.-origin parts or components in a foreign-made end product that will be exported to another country . . . .” 15 C.F.R. § 376.12 Note (1981) (emphasis added). See Ellicott, supra note 23, at 14-16.

would not be transferred to the Soviet Union. Under a longstanding provision of the Export Administration Regulations, the existence of a written assurances requirement made it unlawful for foreign licensees of U.S.-origin oil and gas transmission and refining technology to export the direct products of that technology to the Soviet Union without Commerce Department approval. This regulation, even more than that dealing with parts and components, was ambiguous in its application to foreign holders of technology previously exported from the United States. It seemed clear, however, that the December 1981 regulations, like previous restrictions on foreign products of U.S.-origin technology, were only intended to apply prospectively. Accordingly, the Manufacturing Associates of General Electric, in their capacity as licensees of General Electric compressor technology, were not affected by this aspect of the December embargo because the relevant technology had been disclosed to them well before the regulations became effective. The 1981 controls also did not reach the French firm Alsthom-Atlantique, the only European manufacturer previously licensed to use General Electric’s rotor technology.

By June of 1982, with the severity of military rule in Poland undiminished, it had become clear that the December restrictions were reaching only a limited part of the involvement of American firms in the pipeline project. Therefore, on June 21, President Reagan announced that he had “reviewed the sanctions on the export of oil and gas equipment to the Soviet Union . . . and . . . decided to extend these sanctions . . . to include equipment produced by subsidiaries of U.S. companies abroad, as well as equipment produced abroad under licenses issued by U.S. companies.”

28. 15 C.F.R. § 379.8(a)(3) (1981) prohibited the unauthorized export of any foreign-produced direct product of U.S.-origin technical data “if such direct product . . . is covered by the provisions of § 379.4(f),” which require written assurances for certain technology exports. Id. The section does not specify, however, when the product must be “covered” by § 379.4(f). Since § 379.4(f) requires written assurances at the time the technology is exported, the best interpretation would seem to be that new restrictions cannot be imposed on foreign exports of direct products of previously exported U.S.-origin technology if no written assurance incorporating such restrictions was required when the technology was first exported.
30. See, e.g., John Brown Memorandum, supra note 19, at 3-4.
31. See 3 A. LOWENFELD, supra note 3, at ch. II, §§ 5.45, 5.46, 5.5.
32. In his statement expanding the United States trade sanctions, President Reagan noted that “[s]ince December 30, 1981, little has changed concerning the situation in Poland; there has been no movement that would enable us to undertake positive, reciprocal measures.” Statement on The Extension of United States Sanctions on the Export of Oil and Gas Equipment to the Soviet Union, [1982] 1 PUB. PAPERS 798 (June 18, 1982).
33. Id.
The implementing regulations embargoed exports to the Soviet Union by foreign firms owned or controlled by U.S. individuals or corporations, even if no U.S.-origin components or technology were used. In addition, the ambiguity in the Export Administration Regulations pertaining to foreign exports of products containing U.S.-origin parts, components, or materials—an issue of concern to the General Electric Manufacturing Associates and to other firms—was resolved in favor of tighter controls. Such exports were prohibited, even if the U.S.-origin components had been exported prior to December 1981, when no United States restrictions on exports or reexports of oil and gas transmission equipment were in effect.

Finally, the similar temporal ambiguity pertaining to foreign exports of the direct products of American technology also was resolved in favor of tighter controls, although the clarification only applied to exports of oil and gas equipment. Such exports were to be embargoed if any one of the following three conditions prevailed: (1) if the foreign user of the technology had been required to give a written assurance, at the time of the original technology transfer, that it would not transfer the technology or any of its direct products to the Soviet Union; (2) if the foreign user had agreed to abide by United States export control regulations in a license agreement or similar contract with its American supplier, even if the regulations in effect at the time of the contract had not restricted sales of direct products to the Soviet Union; or (3) if the technology was the subject of a licensing agreement with an American firm or other “person subject to the jurisdiction of the United States,” or—even in the absence of such an agreement—if its use was contingent on the payment of royalties or other compensation to such a person, “regardless of when the [technology was] exported from the U.S. . . . .” Because the third condition covered virtually all commercial technology transfers, the first two were largely superfluous.

American trading partners reacted quite differently to the 1981 and 1982 regulations. Many European nations, such as Great Britain and France, had joined the United States in condemning the
imposition of martial law in Poland. While these nations were unwilling in 1981 to impose economic sanctions except as a joint action of the European Economic Community (E.E.C.) or the North Atlantic Treaty Organization (N.A.T.O.), they essentially agreed not to undercut the initial sanctions imposed by the United States. In a January 1982 communiqué, for example, the foreign ministers of the E.E.C. stated:

The Ten have taken note of the economic measures taken by the United States government with regard to the U.S.S.R. The Ten will undertake in this context close and positive consultation with the United States government and with the governments of other Western states in order to define what decisions will best serve their common objectives and to avoid any step which could compromise their respective actions.

When the June 1982 regulations were promulgated, however, foreign reaction was sharp and hostile. The E.E.C. and its member states, as well as Japan, openly denounced the new measures and issued diplomatic protests accompanied by detailed legal argument. These governments expressed three principal criticisms. First, they felt that the United States had failed to consult adequately with them before taking an important action likely to have a major impact on their economies. Second, they asserted that the Reagan Administration had disregarded their views on the risks and benefits of the pipeline and on the proper conduct of East-West relations. Finally, they argued that the American assertion of jurisdiction to regulate transactions taking place on foreign soil had gone beyond the limits of comity and international law.

U.S. relations with Europe quickly deteriorated. The animosity created by the pipeline episode began to affect negotiations concerning defense and unrelated economic matters. The governments of Europe, moreover, moved to block the American controls.

38. 3 A. Lowenfeld, supra note 3, at ch. II, § 5.45.
39. See id.
41. See, e.g., Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations, reprinted in U.S. EXPORT WEEKLY No. 420, at 717 (Aug. 17, 1982) [hereinafter cited as EEC Comments]; Statement of the Foreign Ministers of the European Economic Community (June 23, 1982), quoted in N.Y. Times, June 24, 1982, § 1, at 1, col. 5 (“[the Reagan Administration's action,] taken without consultation with the Community, implies an extraterritorial extension of U.S. jurisdiction, which in the circumstances is contrary to the principles of international law.”).
The British Secretary of State for Trade ruled that the June 1982 regulations were damaging the trading interests of the United Kingdom within the meaning of the Protection of Trading Interests Act, 1980. A month later, after British diplomatic efforts to reverse the June regulations had failed, the Secretary invoked the Act to order certain British companies not to comply with the American sanctions. The French government also ordered firms operating within its borders—including Dresser (France), a subsidiary of the American firm Dresser Industries—to fulfill contracts with the Soviet Union. The Italian and West German governments, while refraining from ordering performance, urged their firms to honor existing agreements.

The U.S. government, of course, did not passively accept this interference with its embargo. As each European licensee and subsidiary shipped controlled pipeline equipment, the Commerce Department issued ex parte temporary denial orders suspending the firm's "privilege" of participating in future transactions involving the export of oil and gas equipment and related technology from the United States, and revoking any outstanding validated licenses for the export of such goods and technology held by the firm.

These actions resulted in a temporary standoff—European firms were able to make initial deliveries under their pipeline contracts, but suffered damaging penalties that interfered with their performance of unrelated contracts and their ability to attract new orders. Several firms, including Dresser (France) and the General Electric

45. Protection of Trading Interests Act, 1980, ch. 11, reprinted in 21 I.L.M. 834 (1982). According to its preamble, the Act is intended "to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom." 21 I.L.M. at 834.
47. See 3 A. LOWENFELD, supra note 3, at ch. II, § 5.46. The French government stated that "[t]he contracts concluded by the French companies for the pipeline must be honored." N.Y. Times, July 23, 1982, at A1, col. 6. It also ordered specific firms to fulfill contracts. For example, it served Dresser (France) with a Requisition Order for Services (Ordre de Requisition de Services), obligating the firm to fulfill specified contracts for the delivery of compressors. See Ordre de Requisition de Services (Aug. 23, 1982), reprinted in Motion to Vacate Temporary Denial of Export Privileges and Memorandum in Support at Attachment E, in the Matter of Dresser (France) S.A., Case No. 632, U.S. Department of Commerce, International Trade Administration [hereinafter cited as Dresser Memorandum].
49. See Moyer & Mabry, supra note 3, at 72.
50. See, e.g., John Brown Memorandum, supra note 19, at 33-35.
Manufacturing Associates, challenged the denial orders and other penalties in administrative proceedings and in federal court.\(^5\) They typically argued that the suspension of export privileges without a hearing violated due process\(^5\) and that the June regulations exceeded the authority granted the President by the statute and violated international law because of their retroactive effects and their application to foreign corporations.\(^5\) These attacks, and an effort in Congress to terminate the pipeline controls, were unsuccessful.\(^5\)

The standoff ended on November 13, 1982, when President Reagan terminated both the 1981 and 1982 pipeline controls.\(^5\) The President stated that he was lifting the sanctions because of the “substantial agreement” reached between the United States and its trading partners on trade with the Soviet Union and Eastern Europe.\(^5\)

II

THE ECONOMIC BASIS OF THE DISPUTE OVER EXTRATERRITORIALITY

The pipeline episode is merely the most dramatic international confrontation over the extraterritorial application of American export controls; it is not the first. Since World War II, Canada,\(^5\)

\(^5\) See Moyer & Mabry, supra note 3, at 72-73 (describes challenges to the denial orders and other penalties).

\(^5\) See Morse & Powers, supra note 10, at 543 n.26.

\(^5\) See id. at 543-44; Moyer & Mabry, supra note 3, at 72-73. The international law argument was that the Export Administration Act should be interpreted as delegating the power to control only such transactions as were within the jurisdiction of the United States under international law. See Morse & Powers, supra note 10, at 557-58.


\(^5\) See East-West Trade Relations and the Soviet Pipeline Sanctions, 18 WEEKLY COMP. PRES. DOC. 1475 (Nov. 13, 1982) [hereinafter cited as East-West Trade Relations]. The Commerce Department soon vacated the related denial orders. See generally Moyer & Mabry, supra note 3, at 83-85.


\(^5\) For a discussion of Canada’s response to extraterritorial American regulation, see Corcoran, The Trading With the Enemy Act and the Controlled Canadian Corporation, 14 MCGILL L.J. 174 (1968). One of the most publicized disputes occurred in 1958 when the United States Treasury Department, relying on regulations promulgated under the then-current version of the Trading with the Enemy Act, ordered Ford Motor Company to instruct its Canadian subsidiary not to sell 1000 vehicles to the People’s Republic of China. Trading With the Enemy Act of 1917, ch. 106, 40 Stat. 411 (codified as amended...
France, and other important trading partners have vigorously opposed the extraterritorial reach of American export restrictions through diplomatic and legal means. Even the extraterritorial aspects of American controls on exports to the Soviet Union of militarily useful goods and technology—controls accepted in principle and administered cooperatively by our allies—have led to sustained irritation in Europe.

Why has the extraterritorial reach of American export controls become such a recurring source of conflict between the United States and its trading partners? The most important reason is simply the increasing frequency with which the United States has come to rely on export controls, often including an extraterritorial element, as instruments of its foreign policy. More specifically, however, extraterritorial regulation has become a recurrent problem because it reflects a fundamental economic phenomenon of the postwar years—the internationalization of major industrial sectors. I do not

58. See, e.g., Judgment of May 22, 1965, Cour d’appel, Paris, 1968 Dalloz-Sirey, Jurisprudence [D.S. Jur.] 147, reprinted in 5 I.L.M. 476 (1966) (Fruehauf Corp. v. Massardy). In Fruehauf, a majority-owned French subsidiary of an American corporation contracted to supply semi-trailers to a French truck company, Berliet. The trailers, together with tractors manufactured by Berliet, were to be sold to the People’s Republic of China. Under the Trading with the Enemy Act, the Treasury Department ordered the American parent corporation to direct its subsidiary to cancel the contract. Berliet refused to terminate the agreement amicably and threatened to sue for breach of contract. The minority French directors of the subsidiary then sued the American directors and the American parent in the local commercial court, seeking the appointment of a temporary administrator who would assume control of the company and execute the contract. The court agreed to appoint an administrator, and its ruling was upheld on appeal by the Court of Appeals of Paris. In this case, the American authorities did not impose penalties on the Fruehauf firm. See generally Craig, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy, 83 HARV. L. REV. 579 (1970).

59. In the early 1960’s, for example, a British construction firm desired to bid on a project in Poland. The firm had licensed from American companies a number of techniques it planned to use in the Polish project. After consultation with its government, the American licensor told the British firm that use of the know-how in Poland would violate its license and would subject both firms to penalties under the then-current Export Control Regulations. Prime Minister MacMillan personally protested to President Kennedy. See 3 A. LOWENFELD, supra note 3, at ch. I, ¶ 3.27.


61. For a demonstration of the increased use of export regulations for foreign policy purposes, see C. HUBBAUER & J. SCHOTT, ECONOMIC SANCTIONS IN SUPPORT OF FOREIGN POLICY GOALS (1983). See also Abbott, supra note 14, at 756-98; Moyer & Mabry, supra note 3, at 4-6.
refer here to the increasingly sophisticated manufacturing capabilities of wholly foreign firms, although this form of internationalization is highly relevant to export control policy.\textsuperscript{62} Rather, I refer to the fact that many important industries—the pipeline episode has shown the energy industry to be an excellent example—have come to be characterized by a multiplicity of well-established business networks linking firms in different countries. These networks take three principal (though interrelated) forms: international trading networks, technology transfer networks, and investment networks. American export controls have become enmeshed in all three.

A. INTERNATIONAL TRADING NETWORKS

Trade among the industrialized nations has grown prodigiously in recent years.\textsuperscript{63} United States exports have shared in this growth, both in absolute terms and on a per capita basis.\textsuperscript{64} American exports have also changed in composition, undergoing a secular shift toward finished products that require large amounts of capital.\textsuperscript{65} Moreover, even though foreign firms have been developing their technology and manufacturing capabilities quite rapidly, the United States remains the preferred or sole source for sophisticated components and services in a number of important sectors, including the energy industry.\textsuperscript{66} U.S.-origin goods thus flow along vast networks of international trade.

The United States has correctly perceived that these trading networks can threaten the effectiveness of unilateral export controls. Without widespread international cooperation in a program of economic sanctions, foreign buyers of U.S.-origin goods are in a position to supply those goods to any target of American controls in direct substitution for restricted American exports. To avoid this result, the United States has long asserted the right to regulate not only exports from its territory but also reexports of goods shipped

\textsuperscript{62} The ability of foreign firms to supply products and technology that can be substituted for those of U.S. origin ("foreign availability") decreases the United States' ability to impose effective unilateral economic sanctions. See Abbott, supra note 14, at 800-10.

\textsuperscript{63} See Bureau of Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 846-49 (102d ed. 1981). Between 1965 and 1980, merchandise exports of the developed countries increased from $18.3 billion to over $130 billion. In the same period, developed country imports increased from $14 billion to over $125 billion. Id. at 846.

\textsuperscript{64} See id. at 843. From 1960 to 1980, United States merchandise exports rose from $20.6 billion to $220.7 billion; the per capita increase was from $113 to $956. Id.


\textsuperscript{66} See, e.g., Office of Technology Assessment, Congress of the U.S., Technology & Soviet Energy Availability 204 (1981) (listing items of oil and gas equipment "which are either solely available from the United States or for which the United States is generally considered a preferred supplier") [hereinafter cited as OTA REPORT].
abroad.\(^7\) As already seen, reexport controls apply to U.S.-origin parts, components, and materials, as well as to finished goods, so that U.S. controls can apply to foreign-manufactured end products incorporating a U.S.-origin component.\(^8\) In the cases both of end products and of parts, components, and materials, the United States even has asserted the right to impose new restrictions on the disposition of U.S.-origin goods after they have left the United States,\(^9\) a jurisdictional claim made necessary in part by rapid changes in substantive foreign policy.\(^70\)

### B. Technology Transfer Networks

Rather than exporting their products, American manufacturers often find it advantageous to engage in foreign-based production. While this can be accomplished in several ways,\(^71\) many firms choose to transfer elements of their technology and "know-how" abroad through inter-firm or market transactions, typically licenses of technology. Licensing is often the first approach to foreign production taken by a U.S. manufacturer.\(^72\) It is a particularly attractive alternative for small firms and those inexperienced in international business because it requires little capital investment and places no

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\(^{67}\) 15 C.F.R. § 374.1 (1983). See supra notes 21-25 & 35 and accompanying text. The justification for reexport controls under international law has not in the past been clear. See Abbott, supra note 14, at 842-43. In the litigation commenced by Dresser (France), see supra note 51 and accompanying text, the Department of Commerce argued that reexport controls are conditions imposed by the United States on the right to remove goods or technology from its territory, explicitly or implicitly agreed to by the foreign importer, and are thus consistent with the territoriality principle of international law. See Post-Hearing Brief of U.S. Department of Commerce at 48-50, In the Matter of Dresser (France) S.A., Case No. 632, U.S. Department of Commerce, International Trade Administration.


\(^{69}\) See supra notes 23-24 & 35 and accompanying text. Whether such restrictions are proper is "a fundamental legal question left unresolved by the pipeline controversy . . . ." Morse & Powers, supra note 10, at 537. The Commerce Department's argument based on consent to a condition, see supra note 67, must depend in this case upon consent to a general condition permitting subsequent imposition of restrictions. This argument has been strongly criticized. See Morse & Powers, supra note 10, at 549 n.52. In addition, the actual "conditions" in the Export Administration Regulations were in some cases ambiguous. See supra notes 24 & 35 and accompanying text; infra notes 83-87 and accompanying text. Whether private agreement to such conditions can create national jurisdiction under international law also has been questioned. See EEC Comments, supra note 41, at 719; Morse & Powers, supra note 10, at 562-63.

\(^{70}\) On the unpredictability of foreign policy export controls, see Abbott, supra note 14, at 831-37.

\(^{71}\) See F. Root, supra note 65, at 473.

\(^{72}\) Id.
physical assets at risk abroad.\textsuperscript{73} Even multinational firms that invest directly in overseas production facilities often continue to license their technology, but in these cases the licenses typically run to foreign affiliates or joint ventures rather than to independent foreign firms.\textsuperscript{74} In all, licensing constitutes a significant proportion of all transactions by American firms relating to foreign production, with the licensees located overwhelmingly in the industrialized nations.\textsuperscript{75}

Transnational business relationships based upon technology transfers permeate virtually all leading industries.\textsuperscript{76} After an intensive study of the world energy industry, for example, the United States Office of Technology Assessment concluded:

Transfers of technology between U.S. firms and other Western concerns have taken place in nearly all of the key technological areas of the oil and gas industry. . . . The result of these transfers has been to significantly reduce the number of areas in which the United States is a sole source of supply.\textsuperscript{77}

Without governmental restrictions, foreign users of U.S.-origin technology can, to the extent permitted by their license agreements, retransfer the technology itself to countries that are targets of U.S. export controls. As the quotation above indicates, however, foreign licensees can also supply goods produced with the aid of the technology to target countries, thus effectively supplanting U.S.-based exporters constrained by the controls.

The United States has attempted to deal with technology transfer networks in several ways. Under the Export Administration Regulations, reexport controls apply to retransfers of technology as well as transshipments of goods.\textsuperscript{78} The regulations also extend the concept of reexport to encompass foreign exports of goods that are products of U.S.-origin technology, even where the goods are

\begin{itemize}
  \item \textsuperscript{73} Id. Cf. D. Eiteman & A. Stonehill, Multinational Business Finance 215 (2d ed. 1979).
  \item \textsuperscript{74} D. Eiteman & A. Stonehill, supra note 73, at 215.
  \item \textsuperscript{75} See F. Root, supra note 65, at 480.
  \item \textsuperscript{76} Cf. R. Caves & R. Jones, World Trade and Payments 158 (3d ed. 1981). Caves and Jones state: "There is a fast-improving international market in proprietary technology, whereby new industrial knowledge is licensed between independent firms or transferred administratively within multinational companies." Id. Caves and Jones suggest that this development contributes to loss of U.S. competitiveness in high-technology products. Id. at 158-59.
  \item \textsuperscript{77} OTA Report, supra note 66, at 201. The report continues:
    Transfers of technology have affected the position of the United States as sole source in two ways. An initial technology transfer spreads U.S. know-how throughout the world. Once a foreign concern acquires a technological base, it can expand upon this base and develop similar product lines on its own.

  \textit{Id.}
  \item \textsuperscript{78} See 15 C.F.R. § 379.8(a)(1)-(a)(2) (1983). This portion of the regulation states: (a) \textit{Prohibited exports and reexports}.
    Unless specifically authorized by the Office of Export Administration, or otherwise authorized under the provisions of paragraph (b) of this section, no person in the United States or in a foreign country may:
manufactured abroad using foreign-source materials. In most cases, the United States has sought only to regulate "direct products" of U.S.-origin technology. When the direct product is a manufacturing facility, however, the United States has extended its restrictions to the goods produced in the facility. This was the extent of the June 1982 product of technology restrictions, aimed particularly at the European licensees of General Electric's turbine technology and at Alsthom-Atlantique, the licensee of its rotor technology. In at least one case, however, the United States has gone one step further, restricting foreign sales of so-called "subsequent products" of the "direct products" of U.S.-origin technology.

The unprecedented feature of the 1982 product of technology controls was their retroactivity, the result of an abrupt change in foreign policy following the widespread licensing of previously unrestricted technologies. Since 1964, foreign licensees of technolo-

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(1) Reexport any technical data imported from the United States, directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination; or

(2) Export any technical data from the United States with the knowledge that it is to be reexported, directly or indirectly, in whole or in part, from the authorized country(ies) of ultimate destination;

Id. See also 15 C.F.R. § 379.8(b) (1983) (authorizes reexports of technology which, at the time of reexport, could be exported from United States to a new destination under general license).

79. See 15 C.F.R. § 379.8(a)(3) (1983). This section provides that no person in the United States or in a foreign country may:

Export or reexport to Country Group P, Q, W, Y, Z or Afghanistan any foreign produced direct product of U.S. technical data, or any commodity produced by any plant or major component thereof that is a direct product of U.S. technical data, if such direct product or commodity is covered by the provisions of § 379.4(f) or § 379.5(a)(1) or (2).


In 1964, the United States began to restrict sales by foreign firms of products incorporating U.S.-origin technology to a significant degree. From that year until 1978, these restrictions were imposed only for national security reasons. See Eliott, supra note 23, at 8-11. In 1978, however, the United States instituted two sets of foreign policy export controls that involved restrictions on the transfer of products of U.S.-origin technology: (1) as part of an embargo on exports to the South African military and police, see Abbott, supra note 14, at 782-87, the United States sought to prevent private South African firms licensed to use U.S.-origin technology from selling the products of such technology to the embargoed organizations. See 50 Fed. Reg. 7311, 7311-15 (1978) (codified at 15 C.F.R. §§ 379.4(3), 385.4(a)(3) (1983)); (2) as part of the 1978 controls on exports of petroleum exploration and production equipment to the Soviet Union, see Abbott, supra note 14, at 790-94, third country licensees of U.S.-origin technology in the regulated areas were prohibited from exporting direct products of the technology to the Soviets. See 53 Fed. Reg. 33,699-701 (1978) (amending 15 C.F.R. § 379.4(f) and the Commodity Control List, Supp. No. 1 to 15 C.F.R. § 399.1).


81. See supra notes 36-37 and accompanying text.

gies used to produce controlled products had been required to give written assurances that they would not transfer these products to proscribed destinations. The Department of Commerce would not approve the export of the technologies until such assurances had been received. Restrictions on foreign exports of the products of such technologies were only imposed in cases where such assurances had been given. Thus, product of technology controls prior to 1982—including the December 1981 pipeline regulations—were prospective and to some degree consensual. The 1982 pipeline regulations, in contrast, applied to foreign licensees that had never given a written assurance and had acquired U.S.-origin technology at a time when no U.S. regulation restricted the disposition of products of the technology.

C. INVESTMENT NETWORKS

Large networks of foreign direct investment first appeared in the decade after World War II, when U.S.-based multinational enterprises began a period of vigorous expansion. Although some United States and foreign firms had established foreign operations before the war, the explosive growth of the multinational enterprise (MNE) has been a post-war, American phenomenon. Today, MNEs dominate most of the important industries in the international economy. This is notably the case in the petroleum industry,

84. See Ellicott, supra note 23, at 9.
85. Id. The current restriction on foreign sales of products of U.S.-origin technology can be found at 15 C.F.R. § 379.8(a)(3) (1983).
86. See supra notes 26-31 and accompanying text.
87. See supra notes 36-37 and accompanying text. In 1980, for example, General Electric Company had received a formal advisory opinion from the Department of Commerce to the effect that heavy duty gas turbines could be shipped to the Soviet Union under general license. See John Brown Memorandum, supra note 19, at 4-5 and Exhibit 2.
88. See F. Root, supra note 65, at 471-501 (detailed description of multinational enterprises). According to Root, A multinational enterprise denotes a headquarters or parent company that:
1. Engages in foreign production and other activities through its own affiliates located in several different countries.
2. Exercises direct control over the policies of those affiliates.
3. Strives to design and implement business strategies in production, marketing, finance, and other functions that transcend national boundaries, becoming thereby progressively more geocentric in outlook.
Id. at 484-85.
where the "first true multinationals" emerged.\textsuperscript{91}

An MNE establishes foreign production facilities by transferring its technology,\textsuperscript{92} capital,\textsuperscript{93} and organizational skill\textsuperscript{94} abroad in intrafirm transactions, primarily the establishment or acquisition of foreign subsidiaries.\textsuperscript{95} Subsidiaries are for the most part incorporated in the nations where they will conduct most of their operations.\textsuperscript{96} Indeed, the host nation may require local incorporation in order to bolster its claim to control.\textsuperscript{97} Nonetheless, the United States parent company retains ultimate control of the subsidiary by virtue of its significant, often complete, ownership of the foreign company's stock.

In many cases, control by the parent is more direct and immediate. The typical MNE operates a world-wide system of subsidiaries and other affiliates as an integrated unit, aiming to maximize the returns of the entire system.\textsuperscript{98} Executives of the parent in such an MNE system may closely monitor and direct the daily activities of the foreign affiliates.

Depending upon the degree of coordination maintained within an MNE system, the relationships among the parent and its foreign affiliates may involve frequent transfers of goods, capital, personnel, and information.\textsuperscript{99} Many foreign subsidiaries purchase products and components from the parent or from corporate siblings while exporting goods to other members of the corporate family.\textsuperscript{100} The companies in an MNE system also engage in frequent transfers of technology running primarily from parent to subsidiary.\textsuperscript{101} Dresser (France), for example, claimed that its manufacturing operations in France depended upon a constant, even daily, flow of technical information from other parts of the Dresser system.\textsuperscript{102} In sum, in the MNE the three principal forms of international business network are frequently conjoined.

Each subsidiary in an MNE system, if it possesses the necessary capital and technology, can substitute its production for that of its parent or any sibling corporation in the United States, thereby

\begin{itemize}
  \item \textsuperscript{91} OTA Report, \textit{supra} note 66, at 201.
  \item \textsuperscript{92} See F. Root, \textit{supra} note 65, at 494-98.
  \item \textsuperscript{93} Id. at 490-94.
  \item \textsuperscript{94} Id. at 498-500.
  \item \textsuperscript{95} Vagts, \textit{supra} note 89, at 742-43.
  \item \textsuperscript{96} Id. at 742.
  \item \textsuperscript{97} 2 J. Atwood & K. Brewster, \textit{Antitrust and American Business Abroad} § 18.24 (2d ed. 1981).
  \item \textsuperscript{98} See D. Eiteman & A. Stonehill, \textit{supra} note 73, at 2.
  \item \textsuperscript{99} See \textit{supra} notes 92-94 and accompanying text.
  \item \textsuperscript{100} See F. Root, \textit{supra} note 65, at 487-90.
  \item \textsuperscript{101} See \textit{supra} note 92 and accompanying text.
  \item \textsuperscript{102} See Dresser Memorandum, \textit{supra} note 47, at 11.
\end{itemize}
reducing the effectiveness of unilateral American export controls in much the same way as an independent foreign firm. In addition, however, the MNE poses a unique challenge for American regulation because the parent corporation, which controls the entire system, can in theory at least assign the manufacture of politically sensitive products, or even the filling of particular orders for such products, to a foreign affiliate in a country not likely to cooperate in economic sanctions, thus escaping the reach of American export controls. To deal with these challenges, the United States has—in the pipeline case and on other occasions—felt it necessary to extend the reach of its regulations to cover transactions by foreign subsidiaries and other affiliates.

D. SIGNIFICANCE OF THE INTERNATIONAL BUSINESS NETWORKS

Whenever the United States imposes unilateral export controls, its officials face an almost irresistible temptation to bring one or more of these networks, or at least those branches that originate in the United States, within the ambit of American regulation. But the almost certain persistence of the international networks described above—taken with the possible development of new networks, based on such transactions as leasing—virtually guarantees that without creative attention, extraterritorial export controls will continue to be a significant problem in the international relations of the United States.

103. See supra note 62 and accompanying text.


105. On occasion, the United States has resisted the temptation, in particular by refraining from the regulation of foreign subsidiaries. See Abbott, supra note 14, at 845-49.

III

THE COSTS OF EXTRATERRITORIAL EXPORT CONTROLS

Extraterritorial export controls create political and economic costs both for the nation imposing them and for affected third countries, and tend to reduce world economic welfare.107 These costs will be incurred as long as the United States continues to claim an extensive jurisdictional reach for its trade controls and foreign firms and governments continue to oppose its claims as improper.

A. POLITICAL COSTS

The political costs associated with extraterritorial export controls result from strains placed on relationships with third countries that play host to portions of trade, technology transfer, and investment networks originating in the United States. To understand the strength of the resentment such controls can engender, it is necessary first to realize that a transaction based on such a network may be perceived quite differently abroad than in Washington. What appears to the government of the United States as a reexport of U.S.-origin goods may appear to the foreign purchaser and its government as an export of a locally-manufactured product that happens to contain certain imported components. The same difference in perception exists with regard to products manufactured abroad using U.S.-origin technology. Similarly, what appears in the United States as a sale by a foreign unit of a unified American MNE may appear to the local managers and workers of the foreign subsidiary and their government as a much-needed sale by a local employer, albeit one ultimately controlled by foreign investors.108 Indeed the subsidiary may have carefully cultivated this local image, to its economic advantage.109 American efforts to restrict such transactions inevitably irritate the people and governments of the affected foreign nations. Foreign resentment is not, however, based solely on differences in perception. First, extraterritorial controls inhibit exports from third countries, thus reducing foreign exchange receipts and indirectly limiting production, employment, and national tax revenues.110 Second, compliance with such controls may mean that some

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109. Id.
third country firms will be unable to perform binding contracts. Such breaches of contract, or even delays in performance, may lead to liability for damages, or at least impair the commercial reputation of the affected firms. Third, United States controls often conflict with the foreign economic policies of third countries. Finally, third country governments often perceive extraterritorial export controls as unjustified interferences with their territorial sovereignty, their internal ordre publique, and thus as violations of international law. "Each extraterritorial assertion of jurisdiction, when viewed with a sensitivity to territorial sovereignty, appears to be an intrusion which challenges a state's power and authority to control its realm. It can become a matter of national pride, of national dignity."

The political tensions that extraterritorial export controls produce can absorb disproportionate amounts of the time and energy of important government officials on both sides, distract attention from underlying substantive issues, and interfere with the ability of the United States and foreign governments to cooperate on other matters of mutual concern. There may be occasions when these costs are worth incurring, but such occasions are likely to be rare given the relatively poor record of economic sanctions in achieving political objectives and the means and will to resist that the European Governments demonstrated during the pipeline episode.

B. Economic Costs

The economic costs to the United States of extraterritorial

111. See id. at 579-87.
112. A seller's liability for suspending performance or for delay typically depends upon the allocation of risk in the contract. Most contracts in international trade contain a force majeure clause, typically providing that certain governmental actions will constitute sufficient grounds for nonperformance. Some contracts contain general provisions excusing performance in cases of government regulation, while others specifically state that inability to obtain an export license will excuse nonperformance. Id. at 580-81. In a contract between a United States firm and a foreign customer, either type of provision would probably exonerate the American exporter prevented from shipping by American export control regulations. In a contract between a foreign seller and its customer, however, it is unclear whether a force majeure clause that did not specifically refer to regulation by a third country government would relieve the seller from liability. Id.; Berman & Garson, supra note 1, at 872-73.
113. In commenting on the June 1982 pipeline regulations, for example, the European Community stated: "The practical impact of the amendments to the Export Administration Regulations is that E.C. companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though . . . the Community . . . has its own trade policy toward the U.S.S.R." EEC Comments, supra note 41, at 719.
114. See id.; Moyer & Mabry, supra note 3, at 81-82; Abbott, supra note 14, at 841.
117. See supra notes 41-46 and accompanying text.
export controls, particularly those based on foreign policy, are primarily a product of uncertainty. A widespread perception that the United States may in the future attempt to restrict foreign transactions linked to it by trade, technology transfer, investment, or other economic relationships creates an element of uncertainty for any foreign business that contemplates entering into a transaction involving such a link to the United States. In more familiar terms, this uncertainty constitutes political risk. The degree of risk is greatly increased by American assertions of jurisdiction to restrain the disposition of goods, technologies, and products of technology that already have left U.S. territory. Political risk in effect increases the cost to all potential foreign buyers of: (1) U.S.-origin goods and technology; (2) foreign-origin goods containing U.S.-origin parts, components, or materials, or produced with the aid of U.S.-origin technology; (3) goods and technologies offered by foreign subsidiaries of American MNEs and other foreign firms controlled by U.S. persons; and (4) other goods and technologies, such as leased equipment, with an economic link to the United States.

As in other areas of international business, political risk creates an incentive for foreign firms to adjust their activities so as to reduce the level of uncertainty and the related costs. Extraterritorial export controls give firms in Europe, for example, a clear economic incentive to seek suppliers of goods, components, and technology in countries other than the United States. European governments are given a parallel incentive—one they scarcely need—to encourage their firms to buy locally and avoid U.S.-origin products and technology. Even before the 1982 pipeline sanctions, for example, British government officials were advising British firms to avoid American components in politically sensitive transactions.

If political risk creates an incentive for foreign buyers to seek suppliers free of economic links to the United States, it creates a cor-

118. Foreign policy controls are less predictable than national security controls, both in terms of the products and target nations to which they may be applied. See generally Fazzone, supra note 110, at 572-73; Abbott, supra note 14, at 831-37.
119. American firms are most often concerned with political risk in the context of foreign direct investment, particularly in developing nations. See D. Eiteman & A. Stonehill, supra note 73, at 184. In that setting, the existence of political risk has led to the development of numerous business strategies aimed at minimizing losses from foreign government interference. Id. at 202-16. Political risk created by United States policy is economically indistinguishable and should call forth similar adaptive techniques.
120. See R. Posner, Economic Analysis of Law 76 (2d ed. 1977). Posner states that “to the risk averse risk is a cost, and its elimination a gain.” Id.
121. See supra note 119; Fazzone, supra note 110, at 576-77.
122. Fazzone, supra note 110, at 588-93; Ellicott, supra note 23, at 33.
123. Telephone interview with Patrick Morgan, Second Secretary-Commercial, Embassy of the United Kingdom, Washington, D.C. (Feb. 11, 1982).
responding incentive for other foreign firms to produce the goods desired.\textsuperscript{124} In many capital- and technology-intensive industries, it is problematical how quickly and to what extent a demand for non-U.S.-origin goods can call forth an increased supply. There are some cases, however, in which American export controls appear to have stimulated the growth of new capacity abroad, with foreign sellers taking shares of the market formerly held by American exporters.\textsuperscript{125} And at the least, there can be no question that extraterritorial trade restraints create incentives for new entrants, some of which may be assisted by their governments.\textsuperscript{126}

It also has been suggested that the possibility of future extraterritorial export controls creates an incentive for foreign governments to bar U.S.-based MNEs from acquiring locally-owned firms.\textsuperscript{127} In one widely reported case, the British Monopolies and Mergers Commission opposed, and effectively blocked, such a proposed acquisition primarily because of the potential extraterritorial application of American law.\textsuperscript{128} Short of such an extreme policy, the possibility of extraterritorial American regulation may induce foreign governments to exclude local subsidiaries of U.S.-based firms from subsidies, procurement programs, and other dirigiste policies designed to assist locally-owned firms to move into profitable but politically sensitive industries.\textsuperscript{129}

In sum, the risk of extraterritorial trade controls can adversely affect American exports of goods and technology, the operations of foreign subsidiaries of American firms, the expansion of American MNEs, and other economic activities. Moreover, if American exports reflect the operation of comparative advantage, and if licensing and foreign direct investment reflect the efficient movement of capital and technology from an area of relative abundance to one of relative scarcity,\textsuperscript{130} then the distortions in international economic activity caused by extraterritorial trade controls tend to reduce world economic welfare, not simply the welfare of the United States.

\textsuperscript{124} See Int'l Herald Tribune, July 26, 1982, at 1, col. 1; Int'l Herald Tribune, Sept. 29, 1982, at 6, col. 1 (French and West German governments encourage local production); Abbott, supra note 14, at 828 n.532.
\textsuperscript{126} See Fazzone, supra note 110, at 573 n.149, 576.
\textsuperscript{127} See Tittmann, supra note 108, at 733.
\textsuperscript{128} See id.; D. Rosenthal & W. Knighton, supra note 7, at 64-65; Ellicott, supra note 23, at 32.
\textsuperscript{129} See Tittman, supra note 108, at 734-35; cf. Ellicott, supra note 23, at 32.
\textsuperscript{130} See F. Root, supra note 65, at 500-01.
THE ROLE OF CONGRESS IN DETERMINING THE SCOPE OF EXTRATERRITORIAL JURISDICTION

A. ALTERNATIVES AVAILABLE TO CONGRESS

The international controversy over extraterritorial American export controls could be resolved in three general ways. First, foreign governments could unilaterally abandon their opposition to the jurisdictional claims of the United States, out of deference to American power, respect for American economic and political interests, or acquiescence in American arguments based on international law. Alternatively, the United States could unilaterally renounce its claims to extraterritorial jurisdiction, based on similar considerations.

Each of these unilateral approaches, it should be noted, could involve either a total or a partial change of position. Total renunciation by the United States, for example, would mean limiting the President's authority under the Export Administration Act (EAA)\(^1\) to the control of exports from U.S. territory.\(^2\) Partial American

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2. See infra notes 152-75 and accompanying text. Under the original version of the EAA of 1969, the President was authorized only to "prohibit or curtail [export] from the United States, its territories and possessions . . . except under such rules and regulations as he [might] prescribe." Export Administration Act of 1969 § 4(b), 50 U.S.C. app. § 2403(b) (1976) (expired 1979).

This language may be understood as authorizing the imposition of reexport controls. The power to impose such controls can be seen as inherent in the President's authority to prohibit exports completely. Exports are permitted only upon agreement by the foreign importer, express or implied, to adhere to restrictions on resale prescribed by the President in "rules and regulations." See Morse & Powers, supra note 10, at 549. The precise extent of this power, however, is not clear. See id. at 549 n.52.


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 deleted from EAA of 1969; italicized material added). Under the EAA of 1979, the President is similarly authorized to prohibit or control exports of goods or technology "subject to the jurisdiction of the United States or
renunciation would involve a more precise delineation of the jurisdictional reach of the statute, limiting it to transactions as to which the position of the United States under international law is relatively strong. \textsuperscript{133} Similarly, partial withdrawal by foreign governments would involve acceptance of U.S. jurisdiction in situations where a strong foundation in international law exists, but continued opposition to less meritorious claims.

Finally, the various governments party to the controversy could act jointly to resolve the controversy on some common ground, each accommodating the interests and legal arguments of the others. Such a mutual accommodation could also take place in two ways: gradually, through a process of evolution, \textsuperscript{134} or more rapidly, through negotiations. \textsuperscript{135} This Article recommends the latter approach—mutual accommodation through negotiations.

Other than the first, the approaches outlined above require action by the United States. Which approach is chosen, and how successfully it is carried out, will depend in large measure on the actions, or inaction, of Congress. The remainder of this section considers the strengths and weaknesses of each approach, as each is exemplified by a specific proposal for congressional action, then introduces the recommendation upon which the rest of the Article will elaborate.

B. \textbf{THE EVOLUTIONARY APPROACH}

The simplest approach for Congress—exemplified by S. 979, the 1984 Senate bill to extend and amend the EAA of 1979 \textsuperscript{136}—would be to retain the jurisdictional provision presently in the EAA. \textsuperscript{137} This provision authorizes the President to prohibit or curtail, for the statutory purposes, exports of goods or technology “subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States . . . .” \textsuperscript{138} The model for the provision was the amended version of the Trading with the Enemy Act of

\textsuperscript{133} See infra notes 249-92, 319-61, 386-432 and accompanying text.
\textsuperscript{134} See infra notes 136-51 and accompanying text.
\textsuperscript{135} See infra notes 182-99 and accompanying text.
\textsuperscript{136} S. 979, 98th Cong., 2d Sess. (1984), 130 Cong. Rec. S1607 (daily ed. Feb. 23, 1984) S. 979 would leave the jurisdictional provisions of the statute intact. In the case of foreign policy controls, however, it would require the President to “determine” in advance that proposed controls “will not have an extraterritorial effect on countries friendly to the United States adverse to overall United States foreign policy interests.” § 6(4)(b)(4). Id. at S1609.
\textsuperscript{138} Id. See supra note 132.
1917, the statute under which most of the controversial extraterritorial trade controls of the 1950's and 1960's were imposed. Under the "loose phrasing" of this provision, successive Presidents in essence would be free, as a matter of domestic law, to claim whatever jurisdictional reach appeared necessary or appropriate in future episodes of political trade controls. In time, foreign reactions to these jurisdictional claims would in all likelihood lead to a resolution of the extraterritoriality dispute through the evolutionary process of law formation characteristic of the international community.


140. See, e.g., supra notes 57-59.

141. Dresser Memorandum, supra note 47, at 68.

142. The jurisdictional provision in the EAA since 1977 is highly imprecise, perhaps intentionally so. See Dresser Memorandum, supra note 47, at 66. Even the Senate Banking Committee, two years after the provision was enacted, observed that "[t]he possible application of [the jurisdictional provision] to nonemergency situations may not have been considered adequately by the Congress at the time the provision was adopted," and noted that foreign opposition to certain types of extraterritorial regulation was likely. S. REP. No. 169, 96th Cong., 1st Sess. 5 (1979).

In the litigation commenced by the foreign firms subjected to temporary denial orders for violation of the 1982 pipeline regulations, see supra notes 51-54 and accompanying text, a major issue was whether the President's actions were authorized under the statute as a matter of congressional intent. See, e.g., Dresser Memorandum, supra note 47, at 49-70; John Brown Memorandum, supra note 19, at 18-23. This issue was treated separately from the question whether the statute should be interpreted so as to accord with international law, and if so whether the President's actions violated international law and thus, indirectly, the EAA. See, e.g., Dresser Memorandum, supra note 47, at 70-87; John Brown Memorandum, supra note 19, at 23-33. Neither issue was definitively resolved in the course of the litigation. See Dresser Industries, Inc. v. Baldrige, 549 F. Supp. 108 (D.D.C. 1982).
Affected foreign states may react to an exercise of extraterritorial jurisdiction in various ways. They may acquiesce, as the Europeans did for the most part during the first phase of the pipeline episode. Alternatively, if the regulation is particularly burdensome or offensive, they may oppose it, using an assortment of political and economic weapons including diplomatic protests, suspension of negotiations, or agreements on unrelated matters, legal actions in domestic or international forums, blocking orders, nationalizations and other reprisals. The United States may respond to such challenges with additional sanctions. Individual firms affected by the controls may commence their own legal actions. Public opinion in the United States and the affected foreign nations may be mobilized. In the denouement of each such episode, the American assertion of jurisdiction may be maintained—successfully or unsuccessfully—withdrawn, or modified.

These episodes can be treated as something akin to a sequence of common law decisions. Observers will be able to discern a "holding" on the propriety of each claim of jurisdiction in the outcome of the episode and in the consensus of informed opinion. As each new episode of extraterritorial regulation begins, decisionmakers will bear in mind (or so it is hoped) the "holdings" of prior "cases" in the sequence. Over time—perhaps a rather long time—more or less clearly defined jurisdictional rules, based on both principle and power, should emerge. This evolutionary process, in short, would resemble the way in which customary international law normally is formed.

One can hope, however, that the jurisdictional dispute over American export controls will not be consigned to the evolutionary

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143. Cf. Thompson, supra note 10, at 390.
144. See id.
146. Cf 3 A. Lowenfeld, supra note 3, at ch. II, § 5.65.
147. In describing the evolutionary formation of customary international law, one commentator has stated:

Like the Hegelian-Marxist struggle of thesis and antithesis, [a right or obligation under international law] (thesis) is met with a violation (antithesis), which violation, if it "catches hold," may give rise to a new rule (synthesis). The violation of the [right or obligation] may thus contain the seeds of a new rule, but the critical question is what the other nations will do about it. If they accept the violation, a new customary rule is on its way toward being formed. But if they isolate the violation, label it a violation, and punish the transgressor, then instead of the seed of a new rule taking hold, the seed is trampled upon and the original customary rule is reinforced. What might have been an impediment to the formation of a customary rule instead becomes another instance of its confirmation.

law formation process.\textsuperscript{148} International confrontations over extraterritorial regulation result in wasteful political conflict and economic losses for all countries concerned.\textsuperscript{149} Indeed, the mere risk of extraterritorial regulation distorts trade and investment.\textsuperscript{150} The transaction costs of the evolutionary process seem unacceptably high, especially because that process may require decades to complete. The transaction costs would not be unacceptable, of course, if there were no less costly alternatives. This Article, however, argues that Congress could create a more efficient process for generating rules to govern extraterritorial trade controls, with a considerable reduction in political and economic cost.\textsuperscript{151}

C. THE TERRITORIAL APPROACH—REPEAL OF PRESIDENTIAL AUTHORITY TO IMPOSE EXTRATERRITORIAL CONTROLS

Foreign governments\textsuperscript{152} and businesses\textsuperscript{153} affected by extraterritorial export controls have supported a much more radical solution, akin to the full unilateral renunciation described above. They have argued that Congress should limit the President’s authority under the EAA to the control of exports from U.S. territory, at least in the case of controls imposed for foreign policy reasons. This approach was exemplified by a bill introduced early in the 98th Congress by Representative Don Bonker, Chairman of the House Subcommittee on International Economic Policy and Trade.\textsuperscript{154} Under the Bonker bill, the President would have been authorized only to “prohibit or curtail the exportation from the United States of any goods, technology or other information produced in the United States . . . .”\textsuperscript{155} To mitigate the effects of this limitation on executive authority, the

\begin{itemize}
\item \textsuperscript{148} But see Thompson, supra note 10, at 393-95 (evolutionary process preferable to absolute rule favoring territorial state over nationality state in regulation of foreign subsidiaries).
\item \textsuperscript{149} See supra notes 107-30 and accompanying text.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} See infra notes 200-32 and accompanying text.
\item \textsuperscript{152} See, e.g., Reagan Administration Aiming for Bill to be Ready This Week, but Status Unclear, 18 U.S. EXPORT WEEKLY 967, 971-72 (1983) (reports on European Community aide-memoire to the Reagan Administration criticizing recent foreign policy controls practice).
\item \textsuperscript{154} H.R. 1566, 98th Cong., 1st Sess. (1983).
\item \textsuperscript{155} Id. at § 105(a). The quoted language was included in the bill passed by the House of Representatives in October 1983 to extend and amend the EAA of 1979. H.R. 3231, § 113(a), 98th Cong., 1st Sess. (1983). H.R. 3231, however, includes an anti-evasion provision, id. at § 113(b), that would expand the jurisdictional reach of the statute. See infra note 252 and accompanying text.
\end{itemize}
Bonker bill specified that Congress could impose extraterritorial controls by joint resolution at the request of the President.156

In all likelihood, such a revision of the statute would reduce the incidence of extraterritorial controls and thus the political and economic costs associated with them. But the approach has a number of deficiencies. First, limiting the jurisdictional reach of foreign policy controls alone would invite the President to classify proposed export restrictions as national security controls under the EAA of 1979.157

The manner in which President Carter imposed the grain embargo on the Soviet Union in 1980158 demonstrates that such a reclassification could easily take place. This problem could be avoided only by defining the limits of national security controls so precisely that alternate classifications were no longer possible or by repealing the President's power to impose extraterritorial national security controls. The first of these alternatives, however, seems unrealistic, at least given the lack of fundamental agreement on the meaning of "national security" in the context of trade controls.159 The second seems both imprudent and unnecessary for several reasons: (1) national security controls are of fundamental importance to the United States;160 (2) international law may well permit more exten-

156. H.R. 1566, 98th Cong., 1st Sess. § 105(b) (1983). Under section 105(b), if the President determined that extraterritorial export controls were necessary in a particular case, he could "impose those controls only if [he] submits that determination to the Congress, together with a report... with respect to the proposed controls, and only if a joint resolution is enacted authorizing the imposition of those controls." Id. The bill spelled out in detail a procedure for consideration of a Presidential request. Id.

157. Under the EAA of 1979, the President is authorized to control exports only in furtherance of specific policies enumerated in the statute. See 50 U.S.C. app. § 2404(a)(1) (Supp. V 1981) (national security controls), § 2405(a)(1) (foreign policy controls), § 2406(a)(1) (short supply controls), each referring to policies spelled out in 50 U.S.C. app. § 2402. Under the substantive sections of the statute, different criteria and procedures apply to presidential action depending on the particular policies being pursued. See Abbott, supra note 14, at 858-59. The clarity of this scheme is only superficial, however. In particular, within the language of the statute certain types of controls can be labelled either national security controls, foreign policy controls, or both. See id. at 859-60.

158. The grain embargo was identified by the President as being in furtherance of both the national security and foreign policy interests of the United States, and thus authorized under both of the relevant sections of the EAA of 1979. By this characterization, the President was able to avoid both certain procedural requirements and the possibility of a congressional veto, each of which was applicable under the statute only in connection with foreign policy controls. See Moyer & Mabry, supra note 3, at 30-32; Abbott, supra note 14, at 859-60.


160. Such controls are intended to limit the export of items that would make significant contributions to the military potential of foreign countries that would be detrimental to United States national security. 50 U.S.C. app. § 2402(2)(A) (Supp. V 1981). Under the proposed revision of the Restatement of Foreign Relations Law, "the importance of regulation to the regulating state" would be a factor to be considered in determining whether a proposed exercise of jurisdiction is "reasonable." RESTATEMENT OF FOREIGN
sive extraterritorial regulation when national security is involved;\textsuperscript{161} and (3) the major disputes over extraterritorial trade controls in the past have involved politically motivated controls, not national security controls of the sort authorized under the EAA of 1979.\textsuperscript{162} In short, the territorial approach of the Bonker bill is appropriate only for foreign policy controls, and as a result could occasionally be side-stepped by an alert Chief Executive.

A second problem with the territorial approach of the Bonker bill is that it would create an incentive for United States firms to transfer operations potentially subject to export controls overseas to foreign subsidiaries, joint ventures and other affiliates, or licensees. Concern over such “foreign sourcing” is probably the principal objection to this approach in Congress.\textsuperscript{163} Several types of foreign sourcing might be possible under the territorial approach to regulation.

If exports of particular products from the United States were restricted, for example, an MNE with strong central coordination could avoid the restrictions by referring inquiries from potential purchasers of the controlled products to foreign subsidiaries that already produce them. The flexibility needed for such tactics clearly exists among American MNEs.\textsuperscript{164} Without extraterritorial authority, the President could neither prohibit foreign subsidiaries from filling such orders nor penalize them for doing so. This does not mean, however, that the President would lack all power to constrain such activities. An equivalent degree of control over the activities of foreign subsidiaries could probably be achieved by regulations and penalties addressed to American parent corporations or to individual American officers and directors of the subsidiaries, although such

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{161}]
REVISED RESTATEMENT, \textit{supra} note 160, at § 403(2)(c); Marcuss \& Richard, \textit{supra} note 10, at 41.
\item[\textsuperscript{162}]
See \textit{supra} notes 57-59. While the extraterritorial controls on trade with China, Cuba, and other nations involved in these disputes were first imposed in crisis situations, including military action, they soon came to be regarded as foreign policy measures. See Abbott, \textit{supra} note 14, at 758.
\item[\textsuperscript{163}]
\item[\textsuperscript{164}]
The Machinery and Allied Products Institute, for example, recently surveyed thirty-nine multinational manufacturing firms, operating both through exports from the United States and through foreign affiliates, to learn if they diverted transactions abroad to take advantage of generous export financing by foreign governments. The survey results indicate that during one year, 1981, fourteen of these firms sourced thirty-nine transactions, worth nearly $400 million, through foreign affiliates for that reason alone. Machinery and Allied Products Institute, MAPI Survey of Selected Member Companies Concerning Export Financing (Mar. 1982).
\end{enumerate}
\end{footnotesize}
indirect regulation could again ignite foreign resistance.\textsuperscript{165}

In addition, under a territorial approach to regulation, domestic firms concerned about future export restrictions might choose to license their technology to foreign firms, establish foreign manufacturing facilities, or transfer the production of sensitive products to foreign affiliates rather than produce at home for export.\textsuperscript{166} The number of firms that would take such a step to avoid American export controls, however, almost certainly would be small. Major knowledge-intensive firms, in particular, are generally reluctant to transfer their technology to outsiders,\textsuperscript{167} and therefore would be more likely to consider foreign direct investment than licensing. The decision to invest or expand abroad, however, is highly complex, turning on many economic and political variables.\textsuperscript{168} The opportunity to reduce political risk emanating from the United States certainly would figure in the calculus and would tend to offset the normally higher political risk encountered abroad,\textsuperscript{169} but it would be surprising if this factor alone tipped the balance very frequently. In any case, MNEs tend to be large firms in oligopolistic industries, highly visible to American regulators.\textsuperscript{170} Even under the territorial approach of the Bonker bill, if foreign subsidiaries of American MNEs interfered significantly with U.S. export controls, their activities could be restricted by act of Congress.\textsuperscript{171} The threat of such regulation would make foreign investment less attractive in the first instance, but would again keep alive the possibility of international political conflict.\textsuperscript{172}

This discussion points to a third problem with the Bonker bill, the most important from the perspective of this Article: the bill would do nothing to clarify the scope of the United States' extraterritorial jurisdiction. In the case of American MNEs, it would do no

\textsuperscript{165} See Thompson, \textit{supra} note 10, at 360. On the efficacy of indirect regulation, Thompson states: "While the alternative method of regulation purporting to focus on the conduct of the U.S. parent or officer may be a more limited exercise of jurisdiction, it does not seem to result in appreciably less regulation of subsidiaries." \textit{Id. See infra} notes 422-32 and accompanying text.

\textsuperscript{166} For a discussion of the possibility that firms operating in the United States might establish foreign licensee or subsidiary arrangements in order to circumvent export controls, see \textit{Hearings, supra} note 153, at 400 (statement of Theodore L. Thau, former Executive Secretary of The Export Control (Administration) Review Board).

\textsuperscript{167} See \textit{Vagts, supra} note 89, at 768.

\textsuperscript{168} For one model of the kinds of economic calculations that must be made, see F. Root, \textit{supra} note 65, at 523-24.

\textsuperscript{169} \textit{See id.} at 524.

\textsuperscript{170} \textit{Id.} at 525.

\textsuperscript{171} \textit{See supra} note 156 and accompanying text.

more than transfer the power to impose extraterritorial foreign policy controls from the President to Congress. It would also leave the President an undefined level of authority to impose reexport and product of technology controls. Continued uncertainty over the imposition of such controls might reduce the incentive of American firms to move sensitive operations abroad. At the same time, however, this uncertainty would leave nearly intact the incentives now existing for foreign firms to avoid transactions with links to the United States, and it would leave significant potential for international political conflict. The dispute over extraterritoriality would be better solved by an effort to spell out, at least for certain well-understood transactions, just how far the American writ should run and where it should stop.

D. THE MIDDLE ROAD: DEFINING THE SCOPE OF AMERICAN JURISDICTION

The evolutionary rule-formation process almost certainly would establish limits on extraterritorial regulation somewhere between the extensive jurisdictional claims underlying the pipeline regulations and the pure territorial approach of the Bonker bill. An effort to define the scope of American jurisdiction without resort to that process should aim to approximate this mediate position.

Congress could attempt unilaterally to define the reach of U.S. jurisdiction under the EAA of 1979 at some intermediate level, authorizing or refusing to authorize particular forms of extraterritorial regulation depending on the strength of the American arguments under international law and on the ability of the United States to enforce any controls it might impose. The approach of partial unilateral renunciation is exemplified by two current legislative proposals. First, the House bill to amend and extend the EAA of 1979, approved in October 1983, differs from the original Bonker bill dis-

173. The Bonker bill would have allowed the President to "prohibit or curtail" exports from the United States. See supra note 155 and accompanying text. It would have left unchanged the authority granted the Secretary of Commerce under the EAA of 1979 to require export licenses "[u]nder such conditions as may be imposed." 50 U.S.C. app. § 2403(a) (Supp. V 1981). Thus, the President would still have been able to make the argument that controls on reexports and analogous transactions—that is, controls on the reexport of goods and technology, controls on foreign sales of end products containing U.S.-origin components or materials, and foreign sales of products manufactured with U.S.-origin technology—were justified as conditions imposed on the original export of goods or technology from the United States. See supra note 132. See generally Morse & Powers, supra note 10, at 544-53. The same ambiguity is present in the bill ultimately passed by the House of Representatives, H.R. 3231, 98th Cong., 1st Sess. (1983). See supra note 155 and accompanying text.

174. See supra notes 121-23 and accompanying text.

175. See supra notes 108-17 and accompanying text.

176. See supra note 133 and accompanying text.
cussed above in including an anti-evasion provision that could serve to authorize some level of extraterritorial regulation. This provision will be discussed in more detail below. Second, the American Bar Association, acting upon a recommendation from its Section of International Law and Practice, has recommended an amendment to the EAA of 1979 forbidding several forms of extraterritorial regulation. Certain of the ABA recommendations also will be discussed further below.

As persuasive as these proposals are, however, a more acceptable and lasting resolution of the dispute over extraterritorial export controls would be achieved by involving concerned foreign governments in an effort to reach a negotiated settlement. The issue of extraterritoriality is primarily a question of conflict between the laws and policies of two or more nations, not simply a question of the proper reach of U.S. law. It is at the same time a matter of fundamental concern to the international system of nation-states. Direct international negotiation is unquestionably the most sensible way of dealing with an issue of this kind.

Mutual accommodation through negotiation would have several advantages over a unilateral solution. First, moderate negotiated limits on American jurisdiction would reduce the level of political conflict and economic distortion because they would reflect the essential interests of the major affected nations and their firms. Second, from the point of view of the United States, negotiations hold out the prospect of valuable foreign concessions that would not be forthcoming with a unilateral solution. Finally, a demonstrated willingness to negotiate might itself enhance U.S. relations with nations antagonized by the extraterritorial application of American law.

177. See supra notes 154-56 and accompanying text.
178. See supra notes 155 & 172.
179. See infra notes 249-92 and accompanying text.
181. See infra note 361 and accompanying text.
182. See Revised Restatement, supra note 160, at 89-90, 92-93; Address by Deputy Secretary of State Kenneth W. Dam to the American Society of International Law (Apr. 15, 1983) ("conflicts of jurisdiction" describes issue "more neutrally and analytically" than "extraterritoriality") (copy on file at offices of the Cornell International Law Journal) [hereinafter cited as Dam Address].
184. See supra notes 134-35 and accompanying text.
185. See supra notes 107-30 and accompanying text.
186. See infra notes 433-48 and accompanying text.
An appropriate forum for negotiations may already exist. In 1976, the governments of the member countries of the Organization for Economic Cooperation and Development (OECD) issued a Declaration on International Investment and Multinational Enterprises.\textsuperscript{187} Attached as an Annex to the Declaration was a set of Guidelines for Multinational Enterprises.\textsuperscript{188} The Guidelines explicitly recognize the problem of conflicting legal requirements imposed on units of an MNE by two or more member governments,\textsuperscript{189} the problem that arose during the pipeline episode in the case of Dresser (France).\textsuperscript{190} The Guidelines also provide for international consultations, stating that "[m]ember countries have agreed to establish appropriate review and consultation procedures" for handling all issues arising thereunder.\textsuperscript{191} More specifically, when MNEs are subjected to conflicting requirements, "the governments concerned will co-operate in good faith with a view to resolving such problems . . . ."\textsuperscript{192} The governments may negotiate under the auspices of the OECD Committee on International Investment and Multinational Enterprises (CIIME) or through other mutually acceptable arrangements.\textsuperscript{193} The OECD Council, moreover, has issued a formal decision to the effect that member governments may request consultations in the CIIME on any problem of conflicting requirements, with the governments concerned obliged to cooperate in good faith.\textsuperscript{194}

These mechanisms for consultation have never been utilized during a major international dispute.\textsuperscript{195} Since mid-1983, however, a CIIME working group on international investment policies has been

\textsuperscript{189} Id. at para. 11.
\textsuperscript{190} See supra note 51 and accompanying text.
\textsuperscript{191} OECD Guidelines, supra note 188, at para. 11.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{195} Telephone interview with Philip Lincoln, Deputy Director, Office of Investment Affairs, Bureau of Economic and Business Affairs, U.S. Department of State (Mar. 20, 1984).
discussing the general problem of conflicting requirements for MNEs. These discussions seem to have been motivated at least in part by the pipeline episode, but are not limited to export control problems. Indeed, as this is written, the discussions have not yet begun to focus on any specific areas of conflict.

What is needed, then, is some spur to the more aggressive pursuit of negotiations, whether in the CIIME or in some other forum. Negotiation itself is an executive function, but Congress is in a position to promote negotiations, even to require them, as it has done in other contexts in the EAA of 1979. Negotiations also might be aided by the generation of new ideas on how to bridge the diverse positions on extraterritoriality held in the United States and abroad. Again, Congress is in an ideal position to encourage the development of such ideas.

V

A PROPOSAL FOR CONGRESSIONAL ACTION

This section offers a proposal for congressional action to resolve the international dispute over extraterritorial export controls. The proposal is in three parts: (1) that the United States demonstrate its good faith by imposing a moratorium on certain extraterritorial export controls; (2) that Congress establish a national commission to study the problem of extraterritorial trade regulation (or the broader generic issue of extraterritoriality); and (3) that Congress direct the President to commence international negotiations on the issue. While substantive international negotiations are the only essential part of the package, the other two components of the proposal, particularly the second, would be valuable preparatory steps.

A. A MORATORIUM ON EXTRATERRITORIAL TRADE CONTROLS

An interim action manifesting a good faith commitment to the resolution of the extraterritoriality dispute might do much to ensure that negotiations occur in a productive atmosphere free of recrimination. In international relations, an interim action of this sort often takes the form of a standstill agreement. A standstill arrangement serves a dual function: it avoids the outbreak of new disputes during

196. Id.
197. Id.
198. See, e.g., 50 U.S.C. app. § 2404(f) (Supp. V 1981) (negotiations with COCOM member nations); id. at § 2405(g) (negotiations to eliminate foreign availability).
199. Cf. Dam Address, supra note 182, at 23 ("The problem is ripe for creative legal thinking.").
200. See, e.g., General Agreement on Tariffs and Trade, art. XVI(4), added by Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs
the period of negotiation, and it symbolizes a good faith approach to the negotiations themselves.

It would be appropriate for the United States to introduce a unilateral standstill measure, because the actions producing the present controversy have been almost exclusively those of the United States. As one approach, Congress could enact a moratorium on the imposition of new extraterritorial foreign policy export controls under the EAA of 1979 for a period sufficient to complete the other parts of the process recommended here. Such a moratorium would serve the desired political functions without undermining basic American export control programs. Most important, existing national security reexport and product of technology controls under the EAA of 1979 would remain in effect; so would current national security restrictions on sales by foreign subsidiaries, which are not maintained under the EAA. United States embargoes of North Korea, Vietnam, Kampuchea, and Cuba, also maintained under authority other than the EAA, would be unaffected. A moratorium on future extraterritorial foreign policy controls would leave in effect existing political controls under the EAA, but these are few in number and should not create a significant amount of tension.

Furthermore, with the moratorium limited to the EAA, the President would still possess the power to impose emergency controls under the IEEPA. Moreover, a moratorium restricted to action under the EAA technically would not limit the ability of Congress to impose extraterritorial controls by separate legislation. To realize the full political benefits from a moratorium, however, Congress should declare its intention to exercise restraint in the use of extraterritorial controls, and it should be clear that the moratorium is intended to be temporary.

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201. Transaction Control Regulations, 31 C.F.R. §§ 505.01-.60 (1983). These regulations were originally imposed under the TWEA, see supra note 139 and accompanying text. In 1977, the TWEA was amended to limit its applicability to times of war. See Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625, 1625. Regulations then in effect under the TWEA, however, were allowed to continue in effect so long as they were annually extended by the President. Id. at §§ 101(b)-101(c).


ritorial controls and to consult fully with affected nations before imposing them.

B. A Commission to Study the Extraterritorial Application of United States Export Controls

A comprehensive study of the issues raised by extraterritorial export controls could prepare the United States for more productive international negotiations. First, such a study could clarify the fundamental American interests that would require protection under an international agreement. Those interests undoubtedly include, for example, adequate controls on militarily critical goods and technologies. Second, it could clarify those national interests that would benefit from an international agreement. Those include an interest in the free movement of goods and capital and an interest in sound political relations with important allies and trading partners. Third, a study could clarify the interests of foreign governments, foreign firms, and MNEs that should be reflected in any negotiated settlement. Finally, a study could identify a range of jurisdictional formulations that could serve as bases for negotiation and for lasting agreement.

Even if international negotiations never took place, or were not successful, a study could help the United States formulate an internal consensus on the proper scope of extraterritorial regulation, perhaps leading to a unilateral adjustment of its jurisdictional claims. At the very least, a study would produce additional facts concerning the effectiveness and costs of extraterritorial trade controls and a better understanding of the differing views on the issue of extraterritoriality.205

Congress could provide for a study in a number of ways. It could authorize staff reports and conduct hearings through the appropriate standing committees or through an ad hoc committee. Alternatively, it could direct the Executive branch to conduct an interagency study and report to Congress on its findings. The most effective approach, however, would be for Congress to establish a national study commission on extraterritorial trade controls. Such a body would be both more independent than an interagency task force and more efficient and expert than a congressional committee.

An excellent model would be the proposed Commission on the International Application of U.S. Antitrust Laws (CIAAL).206 Crea-

206. See To Establish a Commission on the International Application of Antitrust Laws: Hearings on S. 1010 Before the Senate Committee on Governmental Affairs, 96th Cong.,
tion of a CIAAL was proposed in both the 96th and 97th Congresses, but was never approved. The last two administrations refused to support the CIAAL proposals, despite the fact that scholars, businessmen, and other interested parties widely endorsed them.

Sponsors of the CIAAL structured it to ensure high-level participation from the Executive branch and Congress as well as from concerned private sector groups. The CIAAL would have consisted of eighteen presidential appointees: four members each from the House of Representatives and the Senate; four from the Executive branch; and six from the private sector. Both the congressional and private sector representatives were to be balanced in terms of party affiliation. Working within these limitations, the President was to appoint persons who were “broadly representative of the various interests, needs, and concerns” affected by the antitrust laws. The CIAAL would have been authorized to appoint a staff, to enter into research contracts, to conduct hearings, and to administer oaths.

Of particular interest here are the functions the CIAAL was designed to perform. The Commission would first have had a general mandate to study and make recommendations concerning the international aspects of the antitrust laws. In addition, it would have been specifically directed to examine certain issues of fact and law. Factual matters included the effect of the antitrust laws on the ability of American firms to compete effectively abroad, their effect on U.S. relations with other countries, and the difficulty of enforcing the laws abroad. The first CIAAL proposal also speci-

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210. S. 432, supra note 207, at § 2(b).

211. Id. at § 2(h).

212. Id. at § 2(f).

213. Id. at § 5.

214. Id. at § 3(a)(1).

215. Id. at § 3(b).

216. Id.
fied with particularity the legal issues to be studied: the scope of
sovereign immunity; the act of state doctrine; the effects doctrine;
and other legal rules that frequently arise in antitrust cases.217 The
later proposal was more general, directing the Commission to study
"the jurisdiction and scope of the application of the antitrust laws to
foreign conduct and foreign parties . . . ."218

Like the proposed CIAAL, an export controls commission could
usefully be directed to study relevant factual and legal issues. Among
the factual matters that might be specified are: (1) the effect
of extraterritorial controls on the ability of U.S. exporters, technol-

ogy licensors, and MNEs to compete effectively abroad; (2) the effect
of such controls on relations with other nations; (3) the importance
of extraterritorial regulation to national security and foreign policy
controls, including its effectiveness in preventing trade with target
nations; (4) the forms of blocking action taken by foreign nations in
the past and available for use in the future; (5) the exposure of
the United States to reciprocal measures by foreign governments; and
(6) the forms and likelihood of private evasion and avoidance that
could be expected if the United States were to restrict the scope of its
extraterritorial jurisdiction.

Legal issues the Commission might be directed to study include:
(1) the status under international law of controls on reexports of
goods and technology and on sales of products using American tech-

ology; (2) the nationality of corporations under international law
and the degree to which that law supports the regulation of a subsid-
iary by its parent company's government; (3) the effect under inter-
national law of a private foreign importer's consent to American
regulation; (4) the applicability of the doctrine of foreign sovereign
compulsion; and (5) the role of the comity and reasonableness
doctrines.

At the 1981 congressional hearings on the CIAAL,219 William
Baxter, then Assistant Attorney General in charge of the Depart-
ment of Justice's Antitrust Division, stated that the Department
could not support the CIAAL proposal because it was too limited in
scope. He stated that a study commission should not deal only with
the antitrust laws, because the extraterritoriality problems associated
with antitrust also arise in other fields.220 Other commentators, too,
have argued that extraterritoriality is a "generic" problem.221

Responding to this concern, Senator Mathias, author of the CIAAL

217. S. 1010, supra note 207, at § 2(b).
218. S. 432, supra note 207, at § 3(b)(3).
220. Id.
221. D. Rosenthal & W. Knighton, supra note 7, at 83.
proposals, introduced a bill in 1983 to establish a commission to study the general problem of extraterritoriality.222

The generic approach certainly would be useful, but there remains much to be said for a more narrowly focused commission. If extraterritoriality were treated as a generic problem, it could become more unmanageable than if it were reduced to its specialized parts. Both the CIAAL and an export controls commission could deal with well-defined areas of controversy that involved issues and transactions relatively well understood by the commission members. A specialized commission might thus be able to produce sophisticated and precise recommendations, while a commission focusing on broad issues might produce only generalities.

Moreover, while the extraterritoriality issues in different fields may be similar, they are by no means identical. In antitrust, for example, the most important issue is the applicability of the effects doctrine.223 That doctrine, however, is considerably less relevant in the export control field. Antitrust controversies involve attitudes toward competition policy; that issue is also of little relevance to trade controls. Antitrust disputes often focus on problems associated with private litigation, such as discovery and treble damages,224 but such litigation is basically irrelevant to export controls. The precedents in the two fields also differ considerably; judicial decisions dominate antitrust law, but are quite rare in the area of export controls.

C. INTERNATIONAL NEGOTIATIONS

International negotiations are the most important element of this proposal. Congress should direct the President to enter into negotiations on the extraterritorial reach of American export controls with the major trading and investment partners of the United States. Congress might also urge the President to follow the Commission's findings during these negotiations, although those recommendations should not be binding.

This proposal envisions actual negotiations, i.e., meetings among interested parties designed "to arrive through discussion at some kind of agreement or compromise."225 Such discussions are to be distinguished from mere exchanges of preexisting views that bring about little movement toward a common position. During the pipeline episode, the United States and its allies—particularly Great

223. See D. Rosenthal & W. Knighton, supra note 7, at 18-41.
224. Id. at 23, 70-75.
Britain—appeared to be locked into such fixed positions. More recently, however, both sides have stressed the need for amicable resolution of the controversy,226 and the United States has indicated some willingness to compromise, at least on the issue of retroactivity.227 This is encouraging, because a lasting solution will require all sides to make substantive concessions.

The technique of “principled negotiation” popularized by Roger Fisher and William Ury could be even more productive than an approach based on “concessions.”228 Principled negotiation is to be contrasted with “positional negotiation.” In positional negotiation, “[e]ach side takes a position, argues for it, and makes concessions to reach a compromise.”229 Positional negotiations tend to be lengthy and arduous. More importantly, they often damage the ongoing relationships of the parties, and tend to produce outcomes that fail to satisfy their underlying interests.230

In principled negotiations, the parties jointly attempt to identify the fundamental interests involved in the dispute, rather than exposing only negotiating positions. They then jointly consider many possible ways of reconciling their divergent interests, emphasizing any common interests that appear, and adopt a solution based upon objective criteria.231 The principled negotiation approach stresses the possibility of joint gain.232 This emphasis is appropriate for negotiations on trade controls because the potential gains from resolution of the dispute—improved political relations and elimination of distortions in international trade and investment flows—are substantial and have been neglected in prior discussions of the problem.

D. SUGGESTED FORMULATIONS FOR NEGOTIATION

In line with the emphasis placed by the theory of principled negotiation on the consideration of many possible options for mutual accommodation and gain,233 this section identifies a number of objective formulations that define with some precision a variety of limits on the scope of extraterritorial trade controls. These formulations might be used by negotiators as bases for reconciling conflicting national interests. Although the formulations vary substantially,
several themes recur: (1) the United States should be allowed to regu-
late forms of foreign conduct that contribute to the evasion of con-
trols on exports from U.S. territory; (2) the United States should not
be allowed to regulate foreign conduct when the transaction in ques-
tion is, or has become, predominantly “foreign”; (3) the United
States should not interfere retroactively with foreign conduct.

The ultimate solution may be much different from any
advanced here. Indeed, the theory of principled negotiation suggests
that it may be necessary to consider far more imaginative
options.\textsuperscript{234} The strength of the following formulations, however, lies in their
proven character. Most are taken from the Export Administration
Regulations or from similar regulatory programs. These have
proven to be workable and consistent with fundamental American
interests in closely related contexts. Other formulations, especially
those concerned with retroactivity, are designed to avoid the particu-
lar forms of extraterritorial regulation that provoked intense foreign
opposition during the pipeline episode.

The formulations discussed in subsections 1, 2, and 3 below are
intended to apply only to foreign policy controls. Subsection 4 con-
siders forms of foreign accommodation the United States might seek
in return for moderating its jurisdictional claims in the foreign policy
area. The feasibility of similar compromises applicable to national
security controls is explored in subsection 5.

1. General Formulations

a. Consultation Agreements

In recent years, agreements calling for consultation and forbear-
ance in the exercise of extraterritorial jurisdiction have begun to
assume importance in antitrust enforcement. Similar arrangements
might have a salutary effect on the political controversy over extra-
territorial trade controls.

The central document in the antitrust field is the 1979 Recom-
mandation of the OECD Council Concerning Co-Operation
Between Member Countries on Restrictive Business Practices Affect-
ing International Trade (Recommendation).\textsuperscript{235} The Recommend-

\textsuperscript{234} Id. Generating such options could be the most significant contribution of the
study commission proposed herein.

\textsuperscript{235} Organization for Economic Cooperation and Development, Recommendation of
the OECD Council Concerning Cooperation Between Member Countries on Restrictive
Business Practices Affecting International Trade, OECD Doc. C(79) 154 (final) (Oct. 5,
C (3d ed. 1982) [hereinafter cited as OECD Recommendation]. The 1979 Recommendation
is a combination and expansion of two earlier recommendations. See 2 W. FUGATE,
supra, at 344.
tion states that a member country that is about to commence an antitrust investigation or proceeding "involving important interests of another Member country" should notify that country of its intentions in advance. In this way, the affected country can transmit its comments to or request consultations with the initiating country. Under the Recommendation, the initiating country should give "full and sympathetic consideration" to such comments and particularly to suggestions of alternate courses of action. The initiating country, however, retains "full freedom of ultimate decision." Member countries that engage in consultations should "endeavour to find a mutually acceptable solution in the light of the respective interests involved." The Recommendation, however, states that "cooperation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning restrictive business practices...."

The United States has entered into several bilateral agreements implementing the OECD Recommendation. An example is the 1982 cooperation agreement with Australia. This agreement calls for a slightly greater degree of forbearance than the Recommendation. Each nation agrees that, during consultations, it will "earnestly" seek to avoid possible conflicts with the laws, policies, and national interests of the other, by giving "due regard" to the sovereignty of the other and to international comity. In particular, the U.S. agrees to give "fullest consideration" to the modification or discontinuance of

236. OECD Recommendation, supra note 235, at § I.1(a).
237. Id. at § I.3(a).
238. Id. at § I.3(b).
239. Id.
240. Id. at § I.5.
241. Id., at final preambular para.
243. United States-Australia Treaty, supra note 242, at art. 2(5).
antitrust proceedings when they impinge on Australia’s interests.\footnote{Id. at art. 2(6)(b).} Under the agreement, however, neither side is required to modify its conduct.\footnote{Id. at art. 4(2).}

It would be relatively simple to adapt agreements such as this to the export controls context. In that setting, however, the agreements would constitute essentially unilateral American undertakings on consultation and forbearance. Under the antitrust agreements, by contrast, the American obligation to consider foreign interests when instituting enforcement proceedings is balanced by the foreign party’s obligation to consider American interests when adopting economic policies with extraterritorial effects or when regulating firms that engage in restrictive business practices.\footnote{See, e.g., id. at arts. 1(1), 2(2), 2(4), 2(6). For an argument that even the Australian agreement contains a “basic imbalance” in favor of Australia, see Note, supra note 242, at 70-71.} If the United States required similar balance in an export control agreement, the foreign party would have to undertake a suitable commitment. An agreement linked to trade with a specific country or region, such as Eastern Europe, for example, could obligate the foreign party to give advance notice of planned transactions and to enter into consultations on their implications.\footnote{Cf. Frost & Stent, NATO's Troubles with East-West Trade, 8 INT'L SECURITY 179, 196-97 (1983). Balance might be achieved in a more general agreement by obligating the foreign party to explain the basis of its objections to U.S. jurisdiction, to suggest alternative modes of regulation, and to give “full and sympathetic consideration” in each case to cooperating with the American controls.}

In the end, however, even with symmetrical obligations, consultation agreements would be of limited utility. Although they would help to defuse some international conflicts over extraterritorial regulation,\footnote{See Dam Address, supra note 182, at 21. According to Dam, the United States is “seeking to expand the practice of prior notice, consultation, and cooperation with foreign governments wherever regulatory, enforcement or investigative actions raise a danger of conflicts.” Id. The statement did not, however, refer specifically to export controls.} they would do little to reduce the commercial uncertainty that such regulation creates. Still, consultation agreements would be a useful first step toward more substantive international accommodation.

b. An Anti-Evasion Rule

Preventing evasion is often given as the principal rationale for extraterritorial trade controls.\footnote{See REVISED RESTATEMENT, supra note 160, at § 418 comment h; D. Rosenthal & W. Knighton, supra note 7, at 62; John Brown Memorandum, supra note 19, at 22.} By the same token, the possibility of conduct that might be considered evasionary constitutes a major
obstacle to the elimination of such controls. Accordingly, the United States might be willing to agree to a jurisdictional rule that would authorize it to regulate foreign transactions only to the extent necessary to prevent and punish evasion of foreign policy controls on exports from U.S. territory. There can be, however, many views on what forms of conduct constitute "evasion." Thus an international agreement would have to define the term. A relatively narrow definition, encompassing conduct that contains an element of deception, should satisfy the fundamental interest of the United States in protecting the integrity of its laws. At the same time, such a definition would minimize American interference with foreign sovereignty and would virtually eliminate uncertainty over the applicability of U.S. export controls to legitimate foreign transactions.

The 1983 House bill to amend and extend the EAA of 1979 adopts the first part of this approach. It would limit the President's foreign policy export control authority to the regulation of exports "from the United States," but would extend the application of any control imposed under that authority to "any transaction or activity undertaken with the intent to evade" the control. The bill does not, however, attempt to define "evasion." The U.S. anti-boycott law, on the other hand, which is part of the EAA, already includes an anti-evasion provision, on which the language of the 1983 House bill appears to be modelled. One can look to this statute and the regulations promulgated thereunder for guidance in defining "evasion."

The anti-boycott law directs the President to promulgate regulations "prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States," from engaging in certain specified activities "with intent to comply with, further, or support" certain foreign boycotts. The statute goes on to direct that the regulations exempt a second group of activities. It then ties the package together with an anti-evasion provision, under which the prohibitions of the statute apply to "any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade" the statute or the implementing regulations. The regulations specify several

250. See supra note 163 and accompanying text.
252. Id.
254. Id. § 2407(a)(1).
255. Id. § 2407(a)(2). The exemptions are intended to permit compliance with the primary aspects of foreign boycotts. See Marcuss & Richard, supra note 10, at 452-53.
256. Id. § 2407(a)(5).
forms of conduct that will be deemed to constitute evasion. Two of these are relevant to major problem areas in the administration of export controls.

i. Reexports and Analogous Transactions

The boycott regulations define "evasion" to include the use of "dummy corporations or other devices to mask prohibited activity. . ." In one example, the regulations describe a U.S. firm that has been selling products to a boycotting country for a number of years, regularly furnishing certain boycott documentation. The firm realizes that, upon the effective date of the anti-boycott law, it no longer will be permissible to provide that documentation. The firm therefore "arranges to have all future shipments run through a foreign corporation in a third country," which will supply the required documentation. This arrangement constitutes evasion, according to the example, because it is a "device to mask prohibited activity" by the U.S. firm. The boycott regulations, it should be noted, are concerned only with the activities of United States persons. As a result, only the American exporter in this example is said to have committed evasion. The actions of the foreign corporation are not subject to the prohibitions of the statute, even though they were essential to the evasionary scheme.

Even an anti-evasion rule aimed only at American exporters might be a worthwhile addition to the export control program. The Export Administration Regulations already forbid American firms from exporting goods or technology to a friendly third country "with the knowledge that they are to be reexported to a controlled destination." A restriction of this sort would be needed whatever settlement might be reached on the issue of extraterritoriality. Certain egregious transactions, however, might call for special treatment.

In 1982, for example, two American export brokers, Sakwa and Carter, learned that the Soviet Union wished to acquire a diesel

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258. Id. at § 369.4.
259. The term "reexports and analogous transactions" is intended to include (1) reexports of goods and technology; (2) foreign exports of end products containing U.S.-origin components; and (3) foreign exports of products manufactured using U.S.-origin technology. The term could also include other analogous transactions. See supra note 106 and accompanying text.
261. Id. at § 369.4 example (ii).
262. Id.
263. Id. at § 369.4(a).
264. The result might be different if the foreign corporation were a "United States person," e.g., a foreign subsidiary of the United States exporter. See id.; infra note 287 and accompanying text.
engine assembly line for its Kama River truck plant.  

Exports of these items had been restricted by the United States following the Soviet invasion of Afghanistan.  

Sakwa and Carter planned to enlist a European firm willing to act as a conduit for the illegal export and to provide false documents showing it to be the ultimate recipient of the equipment. Unfortunately for Sakwa and Carter, the firm they approached for the scheme was operated by the U.S. Customs Service. The two were indicted and pleaded guilty to criminal violations of several provisions of U.S. law.  

Schemes like this involve more than mere knowledge that the buyers of exported goods intend to reexport them. They even involve more than willfully exporting with such knowledge.  

They clearly constitute evasion, as envisioned by the anti-boycott rules, and the existence of a separate offense of evasion, with a separate, harsher penalty, could help to deter them. Deterrence of evasionary schemes would become especially important if the United States were to agree to limit its jurisdiction over reexports. In that situation, restrictions on exports from the United States both to controlled destinations and to third countries surely would be tightened, and schemes for routing transactions through apparently innocent firms in friendly third countries would become one of the few ways to carry out an illegal export.  

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266. See Former CIA Employee, Two Others Named in Kama River Complex Export Indictment, 18 U.S. EXPORT WEEKLY 553, 553-54 (1983).


269. See supra note 265 and accompanying text.

270. “Knowing” violations of the EAA of 1979 are punishable by a fine of 5 times the value of the exports involved or $50,000, whichever is greater, and/or imprisonment for not more than 5 years. 50 U.S.C. app. § 2410(a) (Supp. V 1981). “Willful” violations are punishable by a fine of 5 times the value of the exports involved or $1,000,000, whichever is greater, and/or imprisonment for not more than 10 years. Id. at § 2410(b).

271. There are, however, numerous offenses under which perpetrators of this sort of scheme can be prosecuted. Sakwa and Carter, for example, were indicted for conspiracy to defraud the United States of the proper operation of federal agencies, conspiracy to violate the EAA, soliciting and counseling violations of the EAA, and wire fraud. Former CIA Employee, Two Others Named in Kama River Complex Export Indictment, 18 U.S. EXPORT WEEKLY 553, 553-54 (1983).

The United States could, of course, impose such an anti-evasion rule on American firms without international agreement. The issue here is whether an agreement permitting the United States to apply its anti-evasion rule to certain foreign firms as well would be a workable solution to the extraterritoriality dispute. If the United States retained the authority to impose prospective reexport controls,\textsuperscript{273} it would seem largely unnecessary to supplement direct prohibitions on reexport with an anti-evasion rule.\textsuperscript{274} If foreign policy controls on reexports were disavowed by the United States, however, an extraterritorial anti-evasion rule would be a valuable addition to an otherwise purely territorial system.

The primary target of such a rule would be foreign firms that took part in evasionary schemes mounted by American exporters like Sakwa and Carter. Under a territorial approach to jurisdiction, Sakwa and Carter still could be prosecuted for various offenses, perhaps including evasion, but the foreign firm that agreed to act as conduit for their illegal export—or the foreign nationals who established a dummy corporation through which the export could be routed—could not be charged with an illegal reexport. The same boundary on American jurisdiction found in the boycott regulations would limit the reach of United States export controls.\textsuperscript{275}

In many evasionary schemes, the foreign participants could be penalized for making false statements in United States export licensing documents.\textsuperscript{276} This has long been a way of reaching foreign reexporters,\textsuperscript{277} and it could still be used under a regime of territorial jurisdiction. Such a provision might be sufficient to deter and punish foreign participation in evasionary reexport schemes. An anti-evasion provision, however, would be useful in situations where the foreign buyer does not have to submit documentation. In addition, a separate anti-evasion rule could help deter participation in certain deceptive schemes, such as those involving the establishment of dummy corporations, that make it difficult to identify and locate the foreign principals responsible for the filing of false documents. Finally, a separate offense of evasion applicable to foreign firms

\textsuperscript{273} "Prospective" reexport controls are those which are operative at the time of an export from the United States, such that foreign purchasers are, or should be, aware of them. See supra notes 67, 69 & 87 and accompanying text. In this context, "reexport controls" includes controls on analogous transactions. See supra note 259.

\textsuperscript{274} Foreign purchasers could be subjected to a charge of evasion, in addition to illegal reexporting, however, if they utilized dummy corporations or other "masking" devices, making the reexport transaction and its participants difficult to trace.

\textsuperscript{275} But see supra note 264 and accompanying text.

\textsuperscript{276} 15 C.F.R. § 387.5 (1983).

\textsuperscript{277} See, e.g., William Kurt Samuel Wallersteiner et al., 22 Fed. Reg. 1650 (1957) (order denying export privileges in which false statements constitute independent violation and supplement charge of illegal reexporting).
could in all cases provide an additional deterrent, beyond that of the false documents rule, for participation in those evasionary schemes that would present the most serious threat to the integrity of territorial export controls.

The anti-evasion rule outlined here would allow only a very limited assertion of extraterritorial jurisdiction. The general theme of permitting regulation of foreign evasionary conduct, however, runs through other, broader formulations in this section.

It can be argued, for example, that every purchase of U.S.-origin goods or technology by a foreign firm that intends to reexport them to a nation to which exports from the United States are at the time prohibited is evasionary. Accordingly, some commentators have characterized all prospective reexport controls as anti-evasion mechanisms. The United States, however, regularly has asserted jurisdiction to restrict reexports retroactively. Whether or not such controls are valid under international law, it is hard to characterize them as a means of dealing with evasion. Under one formulation discussed below, then, American jurisdiction would be limited to the imposition of prospective reexport controls, consistent with their role as anti-evasion devices.

Furthermore, even prospective American controls on reexports apply to all foreign firms purchasing controlled goods or technology, not only to those that at the time of purchase intend to reexport the items to a proscribed destination. In the absence of such an intent—for example, when goods are purchased for inventory—it is again difficult to characterize the transaction as evasion. Another formulation discussed below would limit American jurisdiction to conform to this understanding.

ii. Transactions of Controlled Foreign Corporations

The anti-evasion provision in the U.S. anti-boycott regulations also classifies as evasion the diversion of specific purchase orders by a U.S. parent company to its foreign subsidiary for the purpose of complying with prohibited boycott requirements. As with the prohibition against the use of dummy corporations just described, this portion of the anti-evasion rule appears primarily, if not wholly,

278. See supra pp. 120-21.
279. See John Brown Memorandum, supra note 19, at 22.
280. See supra notes 23, 35 & 36 and accompanying text.
281. See infra notes 341-61 and accompanying text.
283. See infra notes 333-39 and accompanying text.
285. See supra notes 260-83 and accompanying text.
concerned with the United States parent that refers the purchase order,\textsuperscript{286} not with the foreign subsidiary that carries out the transaction.\textsuperscript{287} This aspect of the rule could be carried over, virtually as it stands, to the export controls context. In addition, the United States could seek authority to control directly the activities of foreign subsidiaries that take over transactions "diverted" to them by their American parents. Such an extension of jurisdiction might be unnecessary, however, given the efficacy of regulation directed at the parent.\textsuperscript{288}

Application of an anti-evasion rule to American MNEs is more troubling than its application to schemes utilizing dummy foreign corporations because the rule has the potential of interfering with legitimate operations of multinational firms. The anti-boycott rules deal with this danger in two ways. First, they require a showing of evasionary intent.\textsuperscript{289} This requirement makes it substantially more difficult for the government to establish a violation of the anti-evasion regulation. Second, they explicitly approve certain MNE operations. The regulation states that "alteration of a [firm's] structure or method of doing business will not constitute evasion so long as the alteration is based on legitimate business considerations and is not undertaken solely to avoid the application" of the anti-boycott rules.\textsuperscript{290} An example in the regulations describes a permissible alteration of a firm's method of doing business. A parent corporation in the United States, which has manufactured products for sale to certain boycotting countries, "assesses" the requirements of the anti-boycott rules and determines it can no longer make products for sale to the boycotting countries. Instead, a controlled foreign subsidiary (apparently acting independently of its parent) expands its facilities so that it can service that market. These actions are said not to constitute evasion, even though the result is to place certain sales beyond

\textsuperscript{286} 15 C.F.R. § 369.4 example (viii) (1983). The example given in the regulations to illustrate this portion of the rule describes a U.S. manufacturer that is about to receive from a regular customer in a boycotting country a purchase order including documentation requirements with which it could not comply if, as usual, it filled the order from its U.S. plant. To permit the documents to be supplied, the firm "diverts" the order to a foreign subsidiary. \textit{Id.} The example states that the diversion constitutes evasion, without mentioning the role of the subsidiary. \textit{Id.}

\textsuperscript{287} There is a suggestion in another regulatory example, however, that the activities of the foreign subsidiary might constitute evasion in appropriate circumstances. \textit{Id.} at example (vii). In that example, however, both parent and subsidiary are exonerated. See also \textit{id.} at § 369.4(a) (no United States person may assist another United States person to violate or evade the regulations).

\textsuperscript{288} \textit{See supra} note 165 and accompanying text.


\textsuperscript{290} 15 C.F.R. § 369.4(e) (1983).
the reach of the anti-boycott rules, because there was "a legitimate business reason" for the actions of the two firms.291 Presumably the same result would obtain if a new subsidiary or other affiliate were established, so long as the firm could demonstrate "a legitimate business reason."

Such an anti-evasion provision, adapted to the export control context, would give the President power to deal with flagrant cases of evasion—defined to include practices involving surreptitious conduct and an effort to disguise the true nature of a transaction—without conferring carte blanche authority to interfere with legitimate MNE operations. The fundamental risks and costs of foreign direct investment and technology licensing could be relied upon to deter wholesale foreign sourcing.292

c. Contract Sanctity

Both the House293 and the Senate294 bills to extend and amend the EAA of 1979 include so-called "contract sanctity" provisions. In general, under these provisions newly imposed foreign policy export controls could only restrict export sales of goods or technology contracted for after the imposition of the controls; transactions previously agreed upon would not be curtailed. The provisions in these two bills are designed primarily to protect the reputation for reliability of exporters in the United States.295 A negotiated contract sanctity provision, however, could do much to limit the adverse effects of extraterritorial regulation by insulating foreign transactions from retroactive interference. Such a rule might give protection in a number of situations.

1. A contract sanctity provision could protect foreign buyers of American goods, components and technology from retroactive reexport and product of technology controls, perhaps the most offensive feature of the 1982 pipeline regulations.296 This aspect of contract

291. Id. at example (vii).
292. See supra notes 166-72 and accompanying text.
293. H.R. 3231, 98th Cong., 1st Sess. § 111(a) (1983). "Any export controls imposed under [section 6 of the EAA of 1979, the authority for foreign policy export controls] shall not affect any contract to export entered into before the date on which such controls are imposed. . . ." Id.
294. S. 979, 98th Cong., 1st Sess. § 6(2), 130 CONG. REC. S2252, S2254 (daily ed. Mar. 2, 1984). "The President may not, under [section 6 of the EAA of 1979], prohibit or curtail the export or reexport of goods, technology, or other information in performance of a contract or agreement entered into before the date on which the President notifies Congress of his intention to impose controls. . . ." Id.
296. See supra notes 35-37, 69 & 83-87 and accompanying text.
sanctity is more fully discussed below.\textsuperscript{297} It should be noted here, however, that a broadly phrased contract sanctity provision that did not explicitly grant protection to foreign transactions might fail to achieve the desired goal.

The 1983 House bill, for example, would protect only those transactions undertaken in performance of a prior “contract to export.”\textsuperscript{298} The bill specifies some of the transactions the term “contract to export” is intended to cover, but gives no indication whether any foreign transactions are to be included.\textsuperscript{299} One might conclude that foreign export contracts do not fall within the provision because the House bill also would limit the President’s authority to impose foreign policy export controls to exports from the United States.\textsuperscript{300} It is not completely clear, however, that this provision would prohibit controls on reexports and analogous transactions.\textsuperscript{301}

If the term “contract to export” were interpreted to mean “contract to export from the United States,” some foreign transactions might possibly be brought within its scope. For example, if an American firm and a foreign licensee entered into a multi-year technology license at a time when no restrictions on sales of the products of the technology existed, freedom from such restrictions might be considered an implied term of the contract to export technology, and as such would be entitled to protection. If the contract called for nothing more than the delivery of goods or the disclosure of information and payment of the purchase price, however, no “contract to export” would exist once the sale had been completed.\textsuperscript{302} In such a case, the House provision respecting existing contracts would not prevent the imposition of new restrictions on the exported goods or technology.\textsuperscript{303}

\begin{itemize}
\item \textsuperscript{297} See infra notes 341-61 and accompanying text.
\item \textsuperscript{298} H.R. 3231, supra note 293, at § 111(a).
\item \textsuperscript{299} Id. “[T]he term ‘contract to export’ includes, but is not limited to, an export sales agreement and an agreement to invest in an enterprise which involves the export of goods or technology.” Id.
\item \textsuperscript{300} Id. at § 113(a). See supra note 155 and accompanying text.
\item \textsuperscript{301} See supra note 173 and accompanying text.
\item \textsuperscript{302} According to Ellicot, if foreign businesses expected retroactive product of technology controls to be imposed in the future, one response might be to cast purchases of United States technology as “one-shot” sales, rather than as licenses. Ellicot, supra note 23, at 33. The aim would be to place the transaction outside the three conditions used as the basis for regulating licensees in the 1982 pipeline regulations. See supra note 37 and accompanying text. There seems to be no reason, however, why the United States could not assert jurisdiction over sales of the products of technology previously exported in a one-shot transaction, just as it does over reexports of goods previously exported in such a transaction. If the analysis in the text is correct, then, the effect of a contract sanctity provision would be to cause more technology transfers—and indeed transfers of goods as well—to be cast as long-term contracts.
\item \textsuperscript{303} Difficulties could arise, however, in drafting a contract sanctity provision so as to protect foreign reexporters. For example, consider a provision that defined a foreign
\end{itemize}
2. A contract sanctity provision could protect foreign licensees of technology and purchasers of plants and capital equipment from the effects of newly imposed restrictions on exports from U.S. territory. For example, even if a foreign licensee could freely export the products of its U.S.-origin technology, without additional protection the United States would remain free to restrict exports from its territory of parts or know-how critical to the successful use of the licensed process. A contract sanctity rule could prevent such indirect retroactivity as long as the subsequent obligations of the United States supplier were included in the original contract.

3. A contract sanctity provision could provide the same level of protection for controlled foreign subsidiaries as for domestic firms. Neither the Senate nor the House bill, however, indicates whether transactions of foreign subsidiaries are intended to be covered.

In sum, a contract sanctity rule could eliminate the retroactive effects of most extraterritorial trade controls, and go far to defuse the controversy over extraterritoriality. A negotiated contract sanctity rule, however, would only be effective if it specified much more clearly than either of the provisions approved by Congress the exact classes of foreign transactions to be protected.

As a means of resolving the dispute over extraterritorial jurisdiction, moreover, the approach has a more fundamental weakness. Even a precise contract sanctity rule would leave the difficult questions of national jurisdiction unanswered, to arise again in situations not covered by the rule: (1) all prospective extraterritorial controls; (2) in the case of controls on reexports and analogous transactions, any retroactive controls imposed on foreign buyers of U.S.-origin goods and technology that have not entered into resale contracts; (3) any classes of retroactive control exempted from the contract sanctity provision; and (4) any retroactive controls imposed under firm's contract to sell U.S.-origin goods to a customer in a third country as a "contract to export" entitled to protection. If a foreign firm entered into a resale contract before purchasing U.S. goods to be delivered thereunder, the firm could argue that its purchases in the United States should be exempt even from prospective reexport controls, since such controls would interfere with its prior contract. This problem could arise under the contract sanctity provision in the 1983 Senate bill, see supra note 294 and accompanying text.

304. The General Electric Manufacturing Associates were in a similar situation after the 1981 pipeline regulations. See supra notes 18-20 and accompanying text.

305. See H.R. 3231, supra note 293, at § 111(a); S. 979, supra note 294, at § 6(2).

306. The House bill, H.R. 3231, supra note 293, at § 111(a), excludes controls imposed for several substantive foreign policy purposes from the contract sanctity provision. A negotiated contract sanctity rule would presumably exclude national security controls, permitting the President to escape the strictures of the rule by classifying particular regulations as national security controls. See supra notes 157-58 and accompanying text.
authority exempted from the provision, such as the President's emergency powers.\textsuperscript{307} A more lasting solution to the extraterritoriality dispute would be achieved through negotiations that directly addressed the issues of jurisdiction.

2. \textit{Formulations Applicable to Controls on Reexports and Analogous Transactions}

a. Licensing of \textit{De Minimis} Transactions

The application of American reexport controls to U.S.-origin parts, components and materials incorporated into final products abroad is particularly irritating to foreign firms and governments.\textsuperscript{308} The inclusion of a single U.S.-origin component can subject a foreign-manufactured end product to reexport restrictions, even if the component is not the principal element of the product.\textsuperscript{309} In implementing certain foreign policy embargoes, however, the United States has responded to foreign pressure by relaxing this rule in cases where the component is a relatively minor part of the product. A similar policy could easily be implemented in all foreign policy export controls.

The United States first introduced a \textit{de minimis} exception in 1975.\textsuperscript{310} Responding to criticism of its trade embargo with Cuba, the United States announced a change in its licensing policy on reexports. The new policy reflected the position of the Organization of American States that each member state should be free to determine its own trade policy toward Cuba.\textsuperscript{311} It provided that, if local law required or local policy favored such trade, the Office of Export Administration would favorably consider requests by exporters in Latin American countries to export to Cuba nonstrategic goods that included only "an insubstantial proportion of U.S.-origin materials, parts, or components. . . ."\textsuperscript{312} U.S.-origin content would be considered "insubstantial" if it amounted to less than 20% of the value of the end product.\textsuperscript{313} The Office of Export Administration also would consider reexport authorization requests for products containing a higher percentage of U.S.-origin content, but approval was "less

\textsuperscript{307} A negotiated contract sanctity rule might be limited to controls imposed under the EAA. \textit{Cf. supra} notes 201-04 and accompanying text (limitation of proposed moratorium to controls under EAA).

\textsuperscript{308} \textit{See supra} notes 24-25, 35 & 68-69 and accompanying text.

\textsuperscript{309} 15 C.F.R. § 376.12 (1983).

\textsuperscript{310} \textit{See U.S. Takes Steps to Conform With OAS Action on Cuba}, 73 \textsc{Dep't St. Bull.} 404 (1975).

\textsuperscript{311} \textit{See} 15 C.F.R. § 385.1(b)(2) (1983).

\textsuperscript{312} \textit{Id}.

\textsuperscript{313} \textit{Id}.
likely.”

The U.S. embargo on goods earmarked for use by the South African military and police was modified in 1982 to incorporate a similar policy. The embargo regulations require prior approval for the use of U.S.-origin components, parts, and materials in the foreign manufacture of controlled end-products when the manufacturer has reason to know that the products will be sold to or used by the South African military or police. Exports of such foreign-produced end products will be approved, however, if the U.S.-origin components constitute 20% or less of the value of the final product. The United States adopted the same policy as part of the expanded embargo of Libya instituted in March 1982.

The 20% de minimis rule has been a feature of the Cuba embargo for eight years. It was explicitly adopted to alleviate concern over U.S. reexport controls among Cuba's traditional trading partners. It apparently has succeeded in accomplishing that task. The fact that the rule has been incorporated into other foreign embargoes demonstrates that it is workable. Thus, some form of de minimis rule deserves serious consideration as a general limitation on the extraterritorial application of U.S. export controls. The de minimis rules used heretofore have been only statements of licensing policy, not retractions of the American claim of jurisdiction to regulate reexports. Nonetheless, as a practical way of easing foreign concern over extraterritoriality, a de minimis rule may have merit.

b. A “Coming to Rest” Rule

The memorandum of law filed by John Brown Engineering Limited (John Brown), one of the General Electric Manufacturing Associates, in its effort to overturn the temporary denial order entered against it for violation of the 1982 pipeline regulations, suggests a formulation that would retract U.S. jurisdiction over reexports and analogous transactions. Under that formulation, Ameri-

314. Id.
317. See 15 C.F.R. § 385.4(a)(5)(v) (1983). In fact, the new South African licensing policy goes even further. It contemplates approval for (i) reexports of "insubstantial portions" of U.S.-origin commodities and technical data, even if they are not incorporated into foreign-produced end products, and (ii) sales to military and police entities of "insubstantial portions" of South African-produced direct products of U.S.-origin technical data, if, in all cases, the commodities, technical data, or direct products will not "contribute significantly to military or police functions." Id. at § 385.4(a)(5)(vi).
320. See supra note 49 and accompanying text.
can jurisdiction over exported goods—and, by extension, technology—would terminate when the goods have "come to rest" abroad.\textsuperscript{321}

American constitutional law applies a "coming to rest" test in a related setting. Under both the Import-Export Clause\textsuperscript{322} and the Commerce Clause\textsuperscript{323} of the Constitution, whether a state may validly apply a non-discriminatory \textit{ad valorem} property tax to imported goods depends upon whether the goods have come to rest in the state at the time the tax is levied or whether they are still in the stream of international or interstate commerce.\textsuperscript{324}

The coming to rest concept in this setting functions negatively to prevent a state from taxing foreign-origin goods that are merely passing through its territory without benefiting materially from its services.\textsuperscript{325} Taxation of such goods by a transit state would adversely affect both consumers in the state of destination and the free flow of trade.\textsuperscript{326} In the export controls context, the exporting state has a more substantial set of connections with the exported goods—and hence a more substantial claim to jurisdiction over them—than a mere transit state, whose contact is purely fortuitous. This is particularly so in the case of prospective reexport controls, of which buyers are likely to be aware or to which they may even agree. Still, the negative function of the coming to rest concept in constitutional law suggests the appropriateness of limiting the ability of one state to burden both the independent economic transactions of another state and the free flow of international trade because of a temporary, albeit important, connection with the traded goods.

The coming to rest concept functions positively under the Import-Export and Commerce Clauses to authorize states to tax goods that have left the stream of commerce and become indistin-

\textsuperscript{321} John Brown Memorandum, \textit{supra} note 19, at 22-23. John Brown's argument was that the jurisdictional provision of the EAA of 1979 should be interpreted not to authorize the imposition of new restrictions on reexport once U.S.-origin goods "have come to rest abroad in the hands of an independent foreign company." \textit{Id.} at 23.

\textsuperscript{322} U.S. Const. art. I, § 10, cl. 2.

\textsuperscript{323} U.S. Const. art. I, § 8, cl. 3.

\textsuperscript{324} See J. Nowak, R. Rotunda \& J. Young, \textsc{Handbook on Constitutional Law} 285-93 (1978) [hereinafter cited as J. Nowak] (whether the goods are imported in interstate or foreign commerce, taxability in the state of destination turns on whether the goods have left the stream of commerce). \textit{See also} Michelin Tire Corp. v. Wages, 423 U.S. 276, 286 (1976) (nondiscriminatory property tax "imposed on imported goods that are no longer in import transit" not objectionable in light of intent of Import-Export Clause). \textit{Michelin} overruled \textit{Low v. Austin}, 80 U.S. (13 Wall.) 29 (1872), which held that imported goods remained exempt from state property taxes even after the termination of transit if the goods remained in their original packages. \textit{Michelin}, 423 U.S. at 301.

\textsuperscript{325} See J. Nowak, \textit{supra} note 324, at 290-91.

\textsuperscript{326} See id.; \textit{Michelin}, 423 U.S. at 287-90.
guishable from other goods within their jurisdiction. In the export controls context, the positive function of the concept suggests that, once U.S.-origin goods have become, for example, French goods—whenever that can be said to occur—France should regulate them. At that stage, significant American regulation is inappropriate.

John Brown actually espoused a weak form of the coming to rest concept. The firm was willing to concede that the United States could properly impose prospective reexport controls on its goods. It argued, however, that if no reexport restrictions were in effect at the time goods were exported from U.S. territory, none could be imposed once the goods had "come to rest" abroad.

Under a stronger version of the concept, both the authority of the United States to impose new restrictions on the disposition of U.S.-origin goods and technology and any restrictions imposed at the time of export would terminate when the items left the stream of international commerce and came to rest abroad. This version of the rule would more drastically limit American jurisdiction. It would, however, permit regulation of reexports and analogous transactions in several important situations.

First, even such a strong coming to rest rule should be interpreted to allow regulation of the kinds of reexport transactions that would be proscribed under an anti-evasion rule. Goods sent to a dummy corporation for transshipment to a controlled destination, for example, should not be considered to have come to rest.

Second, the stronger version of the coming to rest rule would permit the maintenance of reexport controls on U.S.-origin goods that were moving in transit through the customs facilities of a foreign country, without entering either the customs or the export control jurisdiction of that country. Goods in that situation would not seem to have "come to rest." The failure of European governments to assert control over such onward movements of U.S.-origin goods has been a long-standing problem in COCOM and presumably has been even more troublesome in the context of foreign policy controls.

Third, even the strong form of the coming to rest concept might be interpreted to permit at least prospective—and logically even re-

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327. See Michelin, 423 U.S. at 287-90.
328. See John Brown Memorandum, supra note 19, at 22-23.
329. Id. John Brown characterized the power to regulate reexports prospectively as the "power to control evasion." Id. at 22.
330. Id. at 22-23.
331. See supra notes 259-77 and accompanying text.
332. See Hearings, supra note 153, at 392-93 (comments of Theodore L. Thau, former Executive Secretary of the Export Control (Administration) Review Board).
proactive—regulation of the disposition of U.S.-origin goods and technology that are purchased with an intent to resell them to a controlled destination.\textsuperscript{333} Like the other applications of the coming to rest concept, this one depends on the definition given the term “coming to rest.” John Brown, concerned with the facts of its own transaction,\textsuperscript{334} argued that goods acquired by a foreign firm solely for inventory, and not with a view to filling a particular order, should be deemed to have come to rest.\textsuperscript{335} In support of this position, John Brown cited a 1977 Commerce Department interpretation of the anti-boycott rules then in effect.\textsuperscript{336} Under that interpretation, a controlled foreign subsidiary of an American corporation was not required to report the receipt of a boycott-related request for information if it planned to fill the order of the requesting country out of goods previously acquired from the United States for inventory.\textsuperscript{337} In other words, goods acquired for inventory come to rest when received, terminating the flow of U.S. commerce.\textsuperscript{338} In drafting the current anti-boycott regulations, however, the Department of Commerce specifically rejected this understanding of “coming to rest” and implicitly adopted an even narrower definition. Under the anti-boycott rules, U.S.-origin goods acquired for inventory come to rest only if the foreign subsidiary further manufactures them or incorporates, refines or reprocesses them into another product.\textsuperscript{339} This definition would allow significant American reexport controls to continue. Which definition of “coming to rest” would best resolve the export control controversy could only be decided by negotiation.

Like the \textit{de minimis} rule discussed above, these applications of the coming to rest concept reflect the general understanding that goods have no permanent “nationality.”\textsuperscript{340} When goods break their original connection with the United States and become predominantly “foreign,” it seems appropriate that American jurisdiction to restrict their disposition should cease.

\textsuperscript{333} \textit{See supra} notes 282-83 and accompanying text. Such a rule, of course, would present difficult problems of proof.

\textsuperscript{334} John Brown Memorandum, \textit{supra} note 19, at 4.

\textsuperscript{335} \textit{Id.} at 18 n.18.

\textsuperscript{336} \textit{Id.}

\textsuperscript{337} \textit{Id.} The interpretation, in the form of a letter from then Secretary of Commerce Elliott L. Richardson, appears in \textit{id.} at Exhibit 5.

\textsuperscript{338} Under the anti-boycott law, only “activities in the interstate or foreign commerce of the United States” are subject to regulation. 50 U.S.C. app. § 2407(a)(1).

\textsuperscript{339} 43 Fed. Reg. 3,508-09 (1978); 15 C.F.R. § 369.1(d)(12) (1983). \textit{Cf. id.} at § 369.1(d)(8). This definition echoes the test suggested by Chief Justice Marshall in an early Import-Export Clause case. \textit{See Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441-42 (1827)} (“\textit{[W]hen the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import. . . .”).

\textsuperscript{340} \textit{See Marcuss} & \textit{Richard}, \textit{supra} note 10, at 480-81.
c. Renunciation of Retroactive Controls

The unprecedented retroactive application of the 1982 pipeline regulations was the most offensive aspect of the controls.\textsuperscript{341} It may have been the major reason for the strong response of the European governments.\textsuperscript{342} Retroactive trade controls can be more damaging to foreign firms and more disruptive of foreign economies than restrictions in effect when U.S.-origin goods or technologies are purchased. The harshest effects are on foreign buyers who already have contracted to resell\textsuperscript{343} U.S.-origin items to newly controlled destinations.\textsuperscript{344} Such firms may be forced to seek alternative sources of supply on short notice and to pay premium prices. If there are no close substitutes for the American items or if substitutes cannot be procured quickly,\textsuperscript{345} the firms may not be able to cover timely or at all. Then, depending upon the language of the applicable force majeure clauses,\textsuperscript{346} they may be exposed to claims for delay or breach of contract, and may find it necessary to breach contracts with other suppliers.\textsuperscript{347} Such defaults damage the commercial reputation of the firms and of their home states. Firms caught in this plight would receive protection under an appropriate version of a contract sanctity rule,\textsuperscript{348} as well as under a rule limiting retroactive regulation.

Less severe results may occur for foreign firms holding U.S.-origin goods or technologies for future resale—or for the manufacture of products for future resale—without a resale contract. Such firms are less likely to incur out-of-pocket losses, but retroactive controls will still disrupt their commercial expectations and cut off possible avenues for resale. Firms in this situation might be aided by the coming to rest rule,\textsuperscript{349} but not by the contract sanctity approach.\textsuperscript{350}

\textsuperscript{341} See, e.g., supra notes 36-37 & 86-87 and accompanying text.
\textsuperscript{342} See Moyer & Mabry, supra note 3, at 112-13.
\textsuperscript{343} In this connection, the term “resell” includes pure resale contracts, the sale of manufactured items incorporating U.S.-origin components, and the sale of items produced with U.S.-origin technology.
\textsuperscript{344} This was the position, for example, of the General Electric Manufacturing Associates. See, e.g., John Brown Memorandum, supra note 19, at 4-5.
\textsuperscript{345} The timely availability of foreign substitutes became an issue after the December 1981 pipeline regulations. Alsthom-Atlantique had acquired the critical rotor manufacturing technology from General Electric before the controls were put into effect, so that even as of early 1982 it would have been legally able to produce and supply rotors to substitute for those that General Electric was by then forbidden to export. In fact, however, Alsthom would have had to construct a new plant in order to produce the required quantity of rotors; hence, it would not have been a practical alternative source for some time. See 3 A. Lowenfeld, supra note 3, ch. II, § 5.45.
\textsuperscript{346} See Fazzone, supra note 110, at 580-85.
\textsuperscript{347} Id. at 579.
\textsuperscript{348} See supra notes 296-303 and accompanying text.
\textsuperscript{349} See supra notes 319-40 and accompanying text.
It should be recognized, however, that foreign buyers may be able to protect themselves from both prospective and retroactive regulation by bargaining \textit{ex ante} for a reduction in the price of their U.S. purchases sufficient to cover the perceived political risk. Were firms to do so, one would be less concerned about any losses they might later incur, although subcontractors, workers and others unable to bargain effectively still might suffer.

In some situations, \textit{ex ante} bargaining would not be a realistic possibility. If there were no ready substitutes for the American goods or technology, bargaining would not be possible.\textsuperscript{351} Even if alternate sources were available, bargaining probably would not be productive if the industry were oligopolistic and price discounts were uncommon. In the case of prospective controls, however, the foreign firm then could make a relatively informed decision\textsuperscript{352} not to buy the American goods or technology—planning not to bid on contracts that would require their use, to design around the American components, or to turn to substitutes—or to proceed with the transaction and assume the risk. When controls are retroactive, however, the foreign firm does not have sufficient information to make a rational decision. The firm may either underestimate or overestimate the risk. Either way, its commercial activities and expectations are disrupted.

Even when \textit{ex ante} bargaining is possible, it will be difficult to negotiate a price that takes appropriate account of the nebulous risk of retroactive regulation. The foreign firm may overestimate the risk, seek to pay too little, and be unable to strike a deal, or it may underestimate the risk, pay too much, and suffer the full consequences if such controls are imposed.

Whether or not \textit{ex ante} bargaining is possible, the adverse effects on foreign firms will vary inversely with the information available as to the likelihood of retroactive regulation. In the pipeline case, for example, some of the regulations in effect when the affected foreign firms first purchased American goods and technology only ambiguously suggested the possibility of retroactive regulation.\textsuperscript{353}

\textsuperscript{350} See supra notes 293-307 and accompanying text.

\textsuperscript{351} In this situation, Marcuss and Richard suggest that agreement by a foreign buyer to American reexport restrictions would resemble a contract of adhesion. See Marcuss and Richard, supra note 10, at 478.

\textsuperscript{352} The level of information available, however, would depend on the detail and accuracy with which United States licensing policy were set forth. See Abbott, supra note 14, at 794-98 (licensing policy typically described imprecisely or not at all in Export Administration Regulations).

\textsuperscript{353} See supra notes 24 & 28 and accompanying text.
Retroactive controls on reexports and analogous transactions also can damage American economic interests. As previously discussed, the uncertainty created by assertions of jurisdiction to restrict such transactions retroactively leads to a variety of risk-minimizing responses by foreign firms, all of which tend to disadvantage American exporters. The risk-minimizing strategy just discussed, bargaining ex ante for lower prices, also reduces the profits of American exporters. Considering both these economic costs and the hostility to retroactive regulation that foreign governments demonstrated during the pipeline episode, one can easily conclude that American renunciation of retroactive foreign policy controls on foreign transactions would be desirable for all concerned.

An appropriate formulation of this policy can be produced by generalizing John Brown’s version of the “coming to rest” rule. It consists of three parts. First, the United States should be authorized to restrict the reexport of U.S.-origin goods and technology only if, and to the extent that, reexport restrictions are in effect when they are exported from the United States. Second, the United States should be authorized to restrict the export of foreign-manufactured goods incorporating U.S.-origin parts, components, and materials only if, and to the extent that, such restrictions are in effect when the U.S.-origin items are exported from the United States. Third, the United States should be authorized to restrict the export of foreign-manufactured products based on U.S.-origin technology only if, and to the extent that, such restrictions are in effect when the technology is transferred from the United States. The uncertainty in John Brown’s formulation caused by reliance on the “coming to rest” concept could be avoided by omitting the concept completely. The result would be precisely the formulation recommended by the

354. See supra notes 118-23 and accompanying text.
355. According to Ellicott, other adverse effects on American exporters may result from the following strategies of foreign firms: (1) they may seek to narrow the scope of force majeure clauses to place the risk of a supply interruption due to export controls on the seller; (2) they may seek liquidated damages clauses triggered by such interruptions; (3) they may insist on “sales” of technology rather than long-term licenses; and (4) they may refuse to accept extended delivery schedules for goods. Ellicott, supra note 23, at 33-34.
356. See supra notes 351-53 and accompanying text.
357. See supra notes 328-30 and accompanying text.
358. This rule could be further modified by requiring that the U.S.-origin content be “substantial,” the “principal component” or the like.
359. In line with past practice, this rule might also require foreign licensees to give “written assurances” against transfer of direct products to restricted destinations. See 15 C.F.R. § 379.4(f) (1983); supra notes 83-87 and accompanying text.
360. See supra notes 328-30 and accompanying text.
American Bar Association in 1983.\(^\text{361}\)

3. **Formulations Applicable to Controlled Foreign Corporations**

a. Licensing of Non-Strategic Trade by Independent Foreign Subsidiaries

The Cuban Assets Control Regulations (CACR),\(^\text{362}\) administered by the Treasury Department, extend the jurisdictional reach of the United States embargo of Cuba to controlled foreign corporations operating in third countries.\(^\text{363}\) As with the prohibition on reexports of U.S.-origin goods to Cuba, however, the United States has relaxed its licensing standards for exports by such corporations.\(^\text{364}\) The current CACR provide that the Treasury Department will authorize "independent" foreign subsidiaries or affiliates to conduct significant amounts of nonstrategic trade with Cuba.\(^\text{365}\) This compromise licensing policy has defused the most heated opposition to the extraterritorial application of the American embargo.\(^\text{366}\) It provides a promising model for a more widely applicable formulation.

Like the policy governing reexports, the relaxed licensing standards for exports by third-country subsidiaries operate only when the law or policy of the state where the subsidiary does business requires or favors trade with Cuba.\(^\text{367}\) According to some commentators this condition demonstrates "functional deference to the sovereignty of the subsidiary's home state."\(^\text{368}\) Some foreign observers, however, would find the degree of deference implicit in the standard less than satisfactory. Commentators from the United Kingdom, for example,

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\(^{361}\) See Report to the House of Delegates, supra note 180. The resolution adopted by the House of Delegates recommends that the EAA of 1979 be amended to prohibit the application of foreign policy export controls to "reexports from another country of U.S.-origin goods and technology, or exports from another country of foreign-origin goods that contain a principal component of U.S.-origin or that are based on U.S.-origin technology, unless controls existing at the time of the export of the U.S.-origin goods, components, or technology from the United States controlled such reexports or foreign exports." \textit{Id.} at2.\(^{362}\) 31 C.F.R. §§ 515.101-809 (1983).

\(^{363}\) The prohibitions of the CACR apply to transactions undertaken by "any person subject to the jurisdiction of the United States." 31 C.F.R. § 515.201(b)(1) (1983). That phrase is defined to include controlled foreign corporations. 31 C.F.R. § 515.329(a)(4) (1983).


\(^{365}\) 31 C.F.R. § 515.559 (1983).

\(^{366}\) Indeed, in the late 1970's, opposition to the reach of the CACR came from those in the United States who felt the embargo should be tightened to sanction Cuba for its international activities. \textit{See} Thompson, \textit{supra} note 10, at 333-34.

\(^{367}\) 31 C.F.R. § 515.559(a) (1983).

\(^{368}\) See Marcuss & Richard, \textit{supra} note 10, at 471.
argue that a foreign state's *laissez-faire* policy should be entitled to just as much deference as a policy of actively encouraging, or even requiring, trade with a particular nation.\textsuperscript{369} Still, the standard does recognize a foreign state's interest in determining its own international economic policies, and it actually signals a retreat from the "classical" United States position that deference will be given only to a mandatory foreign law.\textsuperscript{370} The United States might be willing to grant an even higher level of deference as part of a general resolution of the extraterritoriality dispute.

Assuming that an appropriate local law or policy is in effect, the regulations provide that licenses will be issued "in appropriate cases" for exports to Cuba from U.S.-owned or controlled subsidiaries in third countries if several conditions are met. The principal requirements are that the goods be manufactured abroad and be "non-strategic,"\textsuperscript{371} that is: (1) not multilaterally controlled for national security purposes; (2) not on the Munitions List; and (3) not related to nuclear energy.\textsuperscript{372} In addition, no U.S.-origin technical data—other than information relating to the repair, maintenance or operation of the exported equipment—may be transferred. The use of U.S.-origin parts or components and the reexport of spare parts must be licensed separately. No U.S. dollar account may be involved in the transaction, and only normal trade credit may be extended.\textsuperscript{373}

Beyond these technical requirements, a foreign subsidiary must be "independent" to be eligible for a license. The regulations require that the subsidiary be "generally independent, in the conduct of transactions of the type for which the license is being sought, in such matters as decisionmaking, risk-taking, negotiation, financing . . . and performance."\textsuperscript{374} A subsidiary will not be considered independent "if there are a substantial number of officers or directors . . . who are also officers or directors of a person within the United States."\textsuperscript{375} Furthermore, a license granted under the exemption does not authorize any "person within the United States" to par-

\begin{itemize}
\item \textsuperscript{369} See, e.g., D. Rosenthal & W. Knighton, supra note 7, at 57-58; Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 1957 Brit. Y.B. Int'l L. 146, 151. A *laissez-faire* policy reflects not only a state's attitude toward trade with particular nations, but also its attitude toward the proper role of government in its economy and society. By requiring affirmative state action, the CACR standard encourages greater intrusion into the private sector by foreign governments.
\item \textsuperscript{370} See D. Rosenthal & W. Knighton, supra note 7, at 57.
\item \textsuperscript{371} 31 C.F.R. §§ 515.559(a)(1)(i) (1983).
\item \textsuperscript{372} Id. §§ 515.559(b)-.559(e).
\item \textsuperscript{373} Id. at §§ 515.559(a)(1)(ii)-.559(a)(1)(vi) (1983).
\item \textsuperscript{374} Id. at § 515.559(c).
\item \textsuperscript{375} Id.
\end{itemize}
ticipate in the transaction.\textsuperscript{376} The regulations specify that participation by a U.S. parent or any of its officers or employees in the negotiation or performance of the transaction will be a sufficient ground for denial or revocation of a license.\textsuperscript{377}

These required elements of independence are intended to prevent U.S. parent corporations from "evading" the embargo by working through their foreign affiliates.\textsuperscript{378} In addition, however, the independence test functions to limit U.S. regulation of foreign subsidiaries to cases where there are links between the subsidiaries and persons clearly subject to the jurisdiction of the United States beyond the single link of ownership or control.\textsuperscript{379} This restraint substantially strengthens the remaining jurisdictional claim, suggesting that the "independence" formulation could be given wider application.

The CACR standard, however, is a very narrow one. In order to adapt it to more general use, some of its technical requirements would have to be relaxed. Variations could seemingly be made in the eligibility requirements for a transaction. For example, the ban on the use of U.S. dollars could be omitted.\textsuperscript{380} Some of the more specific elements of "independence," such as the limitation on overlapping officers and directors, also might be relaxed.\textsuperscript{381} Furthermore, it might be possible to relax the prohibition against the participation of any "person within the United States."\textsuperscript{382} That term, as defined in the CACR, includes any U.S. resident, wherever located.\textsuperscript{383} The participation of an independent, U.S.-based design consultant, for example, need not subject an otherwise foreign transaction to American regulation. From the viewpoint of the United States, the essential elements of the exemption are that the foreign subsidiary is acting independently, i.e., not in league with its parent

\textsuperscript{376} Id.

\textsuperscript{377} Id. Under the original version of this exception, controlled foreign subsidiaries were permitted to export to Cuba under general license, but all other persons subject to the jurisdiction of the United States remained subject to the embargo and were forbidden to participate in the subsidiary's transaction. 31 C.F.R. § 515.541(e) (revoked by 40 Fed. Reg. 47,108 (1975)). \textit{See} Malloy, supra note 202, at 507-09. The Treasury Department adopted the view that American citizens serving as officers, directors or managers of foreign subsidiaries were "participating" in their transactions merely by establishing a corporate policy permitting authorized trade with Cuba. 31 C.F.R. § 515.412 (revoked by 40 Fed. Reg. 47,108 (1975)). \textit{See} Thompson, supra note 10, at 330-31.

\textsuperscript{378} Malloy, supra note 202, at 509.

\textsuperscript{379} \textit{Cf.} Marcuss & Richard, supra note 10, at 471 (approach of CACR strengthens jurisdictional claim of United States).


\textsuperscript{381} \textit{Id.} at § 515.559(c).

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} \textit{Id.} at § 515.330(a)(1).
in an evasionary tactic, and that no strategic goods are involved. Ancillary matters should be open to negotiation.

It must also be kept in mind that the CACR standard, like the related policy on *de minimis* reexports, is only a statement of licensing policy, not a retraction of jurisdiction. In fact, the policy by no means guarantees approval of even those transactions that meet all of its technical requirements; only "in appropriate cases" will a license be issued. To serve as a basis for resolving the extraterritoriality controversy, the independent subsidiary concept would have to be transformed into a more nearly absolute determinant of the limits of jurisdiction.

b. Limitation of Jurisdiction to Activities in U.S. Commerce

The anti-boycott statute and its implementing regulations reach only those activities of controlled foreign subsidiaries that are within the interstate or foreign commerce of the United States. The regulations applying this principle are very complex and have been criticized as producing "unexpected" results. The basic principle is appealing, however, as a basis for compromise on American jurisdiction over foreign subsidiaries.

The anti-boycott statute applies to "United States persons"—including residents, nationals and domestic firms, as well as foreign subsidiaries and other affiliates "controlled in fact" by domestic firms—"with respect to [their] activities in the interstate or foreign commerce of the United States. . . ." This term is often shortened to "U.S. commerce." For U.S. persons located in the United States, activities in U.S. commerce are those that involve a "sale, purchase or transfer of goods or services (including information) between" two states of the Union or between the United States and a foreign country. Similarly, for controlled foreign subsidiaries, activities in U.S. commerce include any transaction with a person located in the United States. Determining when a controlled foreign subsidiary's transaction with a foreign party, such as a buyer in a boycotting country, is in U.S. commerce is a more difficult problem. This is, however, the aspect of the jurisdictional rule that would have to be adapted to the context of political export controls.

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385. 31 C.F.R. § 515.559(a) (1983).
390. *Id.* at § 369.1(d)(6).
It may be easier to address this issue by considering when foreign subsidiary transactions with third parties are not subject to regulation under the anti-boycott rules. First, transactions that do not involve any purchase, sale or transfer of goods, services or information to or from a person in the United States are not activities in U.S. commerce. Thus, if a controlled foreign subsidiary carries on business using only local or other foreign-source inputs, it will not be subject to American regulation. Ownership or control, by itself, does not bring the transaction within the jurisdiction of the United States.

A transaction between a foreign subsidiary and a foreign party can involve some U.S.-origin goods or services and still remain beyond the reach of the anti-boycott rules. If the transaction involves the resale of U.S.-origin goods, the prohibitions of the statute will not apply if the foreign subsidiary acquired the goods without reference to a specific customer order and further manufactured them or incorporated them into another product. This is the "coming to rest" test discussed above. In the situation described, the regulations deem the flow of U.S. commerce to have stopped.

When U.S.-origin services are acquired by a controlled foreign subsidiary, a similar rule applies. If the services are acquired without reference to a specific customer order, or are ancillary to transactions with foreign customers, subsequent transactions will not be considered within U.S. commerce, even if the services helped make them possible. The first part of the rule on services does not include an analogue to the requirement of further processing or manufacture contained in the rule on U.S.-origin goods. The rationale for this omission, it seems, is that services are intangible, and cease to exist once they have been performed. It is neither necessary nor possible to require the subsidiary to act further upon them to ensure that the flow of U.S. commerce has stopped. The definition of "ancillary service" conforms to this interpretation. Services provided for the subsidiary's own use, even in connection with a customer transaction, are ancillary. Services provided to the subsidiary for the customer's use or benefit are non-ancillary. For example, legal advice given by a U.S. person to a foreign subsidiary is an ancillary service; it is rendered for the subsidiary's benefit. In contrast, engineering services that are provided to the subsidiary in con-

391. Id. at § 369.1(d)(11).
392. Id. at § 369.1(d)(12).
393. See supra notes 354-39 and accompanying text.
395. See supra note 392 and accompanying text.
397. Id.
398. Id. at § 369.1(d) example (xi).
nection with a construction project for a customer in a boycotting country and are utilized by the subsidiary in preparing its drawings are non-ancillary; they benefit the customer directly.\footnote{399}{\textit{Id.} at example (xii).}

In sum, if U.S.-origin goods or services flow directly through the foreign subsidiary to its customers with relatively little change in form, the transactions of the subsidiary are considered to be part of a continuous stream of U.S. commerce. If, however, the subsidiary halts or changes the flow to a sufficient degree, the continuity of the stream is deemed to be broken, and subsequent transactions by the subsidiary will be free from regulation. In contrast to the general "independence" test embodied in the Cuban embargo regulations,\footnote{400}{See supra note 374 and accompanying text.} this test benefits considerably from its reliance on relatively objective and verifiable facts.

There remains considerable flexibility within the U.S. commerce test. Foreign subsidiaries could be given greater freedom from regulation, for example, by the adoption of a more liberal definition of "coming to rest." The reach of the regulations also could be expanded. Under the present rules, for example—in striking contrast with the pipeline regulations—the use of U.S.-origin manufacturing technology by a controlled foreign subsidiary will not bring a transaction between it and a foreign party within U.S. commerce.\footnote{401}{15 C.F.R. § 369.1(d) example (vii) (1983).} Because of its flexibility, the meaning of "U.S. commerce" would have to be clearly defined in any international agreement in order to avoid dispute over its application. The initial ambiguity of the principle, however, may add to its value as a basis for negotiations.

c. Regulation Based on Agency

The applicability of American trade regulations to the activities of controlled foreign subsidiaries sometimes depends upon whether an agency, or \textit{alter ego}, relationship exists between a U.S. corporation and a particular subsidiary. Such a relationship involves more than mere ownership, more than ultimate control, and even more than general management supervision. It requires actual direction of the subsidiary's conduct or a similar level of participation by the parent in particular transactions of the subsidiary. Thus, the agency approach has much in common with rules aimed at preventing MNEs from evading American territorial controls by sourcing transactions through foreign affiliates.\footnote{402}{See supra notes 284-93 and accompanying text.} In its emphasis on participation by the parent, the agency approach also resembles the "indepen-
dence” rules of the Cuban embargo. Regulations based on the concept of agency, however, involve somewhat different formulations and provide an additional model for a negotiated settlement.

The 1980 American embargo of exports to the Soviet Union related to the Moscow Olympics best exemplifies the agency concept. The embargo regulations did not apply directly to controlled foreign subsidiaries. Instead, they provided that any “person subject to the jurisdiction of the United States” who “actually authorizes, arranges, [or] directs” an export transaction by a foreign subsidiary might be considered to have performed the transaction itself and thus to have violated the embargo. A parent corporation would not be found to have performed a transaction solely because of its ownership interest in a foreign subsidiary—“actual” participation was necessary.

Under a rule of this sort, the parent’s active participation is seen as transforming the foreign subsidiary from a mere affiliate into an agent. The subsidiary is no longer seen as acting in its own interest, but rather as acting on its parent’s “behalf and subject to [its] control,” or in other words as its parent’s alter ego. Once such an agency relationship is found, the parent can be held responsible under basic agency principles for the consequences of the actions it has set in motion.

The anti-boycott regulations follow a similar approach. They provide that the act of a U.S. corporation in “specifically directing the activities” of a controlled foreign subsidiary is an act within U.S. commerce. As a result, the regulations apply to the parent’s direction even if there is no transfer of goods or services between parent and subsidiary.

The proposed regulations published in 1977

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403. See supra notes 362-85 and accompanying text.
404. For a description of the embargo, see Moyer & Mabry, supra note 3, at 38-41.
406. 15 C.F.R. § 385.2(d)(3) (1983). In this regulatory scheme, “person subject to the jurisdiction of the United States” was defined not to include controlled foreign subsidiaries. Id.
407. Id.
408. Id. See Thompson, supra note 10, at 353-54, 358.
409. RESTATEMENT (SECOND) OF AGENCY § 1 (1957).
410. Id. at § 212.
411. 15 C.F.R. § 369.1(d)(2) (1983). For the precise scope of the term “U.S. commerce,” see supra note 388 and accompanying text. There is a close resemblance between “specifically directing” a foreign subsidiary to perform a transaction and “diverting” a purchase order to a subsidiary, conduct falling within the anti-evasion provision of the boycott rules. See supra note 284 and accompanying text. The word “diverting,” however, seems to imply an element of surreptitiousness and deception. In any case, the Olympics regulations went far beyond evasionary conduct to reach even foreign subsidiary transactions “authorized” by the parent. See supra notes 407-08 and accompanying text.
412. 15 C.F.R. § 369.1(d) example (vi) (1983).
would also have declared the foreign subsidiary’s transaction with its
customer to be within U.S. commerce.\footnote{13} The final regulations, how-
over, dropped this portion of the rule in response to numerous com-
ments suggesting that it was unwise and unnecessary.\footnote{14} In adopting
the final regulations, the Department of Commerce noted that the
change was “immaterial” as a matter of policy.\footnote{15} United States cor-
porations could be satisfactorily deterred from acting through their
foreign subsidiaries by direct regulation; little would be gained by
regulating the subsidiaries themselves.

Recognized legal principles support the regulation of American
parent corporations under an agency approach.\footnote{16} American law is
applied only to entities that are indisputably of U.S. nationality. The
United States only regulates conduct—the giving of directions—that
takes place within its territory. It is true that such regulation
restricts the trade of foreign subsidiaries and affects foreign nations.
It is reasonable, however, for subsidiaries to expect that their activi-
ties may be restricted under U.S. law when they are carrying out the
directions of parent corporations in the United States. The agency
approach also minimizes intrusion into the sovereignty of foreign
host states. United States law restricts the activities of foreign sub-
sidiaries only when they act as tools or extensions of American firms,
not when they carry on business as independent foreign entities.
Furthermore, the United States does not purport to apply its law
directly to foreign subsidiaries, although the same results may be
obtained indirectly.\footnote{17} With this degree of support in international
law, the agency approach might be a particularly fruitful basis for
negotiation.

The approach, however, does have certain drawbacks. One is
the difficulty that would be involved in identifying transactions that
fell within the rule. Proper identification would require not only a
steady flow of information on foreign subsidiary trade in restricted
products or with restricted destinations, but also a means of deter-
mining which transactions were directed or authorized by an Ameri-
can parent firm. Some inferences might be drawn from the
circumstances of particular transactions, but many cases might
require direct proof in the form of internal company documents.

48,560 (1977) (proposed regulations).
\footnote{15} Id.
\footnote{16} Cf. Thompson, supra note 10, at 363-65 (discusses traditional principles of inter-
national law supporting regulation of controlled foreign subsidiaries).
\footnote{17} See supra note 288 and accompanying text.
Another shortcoming of the approach is that, like an anti-evasion rule, it could be interpreted expansively by the United States to support the regulation of MNE transactions far outside the limited range of conduct originally contemplated.\(^{418}\) Therefore, an agreement that incorporated the agency approach might have to delineate permissible types of parental involvement. For example, an agreement could narrow the Olympics embargo regulation somewhat by providing that a parent corporation would be prohibited from actually "arranging or directing" a subsidiary's transaction, but would not be prohibited merely from "authorizing" it.\(^{419}\)

More broadly, the ability of the United States to restrict the conduct of foreign subsidiaries by regulations addressed to parent corporations or American nationals serving as officers, directors or managers of subsidiaries\(^ {420}\) will have to be addressed in any negotiated settlement retracting U.S. jurisdiction over foreign subsidiaries. In most past episodes,\(^ {421}\) even when American trade regulations have expressly applied to transactions by foreign subsidiaries, the United States has chosen to order American firms to direct their foreign subsidiaries not to enter into certain transactions.\(^ {422}\) This was the approach followed, for example, in the well-known *Freuhauf* case.\(^ {423}\) More importantly, in a number of cases the United States has purported to free foreign subsidiaries from direct regulation, but has in effect read the resulting exemptions out of the regulations by means of rules restricting participation by parent corporations or American nationals.\(^ {424}\) Informal pressure may also be placed on parent corporations to induce them to restrict their subsidiaries' activities. For example, while the regulations imposing a trade embargo on Iran during the hostage crisis did not apply to foreign subsidiaries, they required parent firms to notify the U.S. government in advance of any proposed transactions between their subsidiaries and Iran.\(^ {425}\) According to most commentators, the purpose of this rule was to permit "arm-twisting" of the American parent.\(^ {426}\)

This approach, in contrast to the agency rule considered above,\(^ {427}\) focuses on the potential agency relationship between par-

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418. See supra notes 289-91 and accompanying text.
419. See 15 C.F.R. § 385.2(d)(3) (1983). Lesser degrees of involvement, see, e.g., supra note 377, should also be expressly permitted.
420. See Thompson, supra note 10, at 357-58.
421. See, e.g., supra notes 57-58 and accompanying text.
422. See Berman & Garson, supra note 1, at 868.
423. See supra note 58 and accompanying text.
424. See Thompson, supra note 10, at 357-59.
426. See Elliott, supra note 60, at 551-52; Thompson, supra note 10, at 360.
427. See supra notes 402-19 and accompanying text.
ent and controlled foreign subsidiary. It uses that relationship to extend the reach of American law, even beyond the express scope of the relevant regulations. The United States again appears to be on strong jurisdictional ground in this "easy circumvention" of the difficulties faced in asserting direct jurisdiction over foreign subsidiaries. The Restatement (Second) of Foreign Relations Law, for example, approves of it, because the application of United States law is limited to American nationals and American territory. Whatever its legality, however, the practice of indirect regulation has the same economic effects as direct regulation of foreign subsidiaries. The reaction of foreign countries, moreover, is likely to be equally negative. If the United States were to retain broad authority to regulate foreign subsidiaries indirectly, it could undermine any compromise limiting extraterritorial regulation.

4. Foreign Accommodations

Implementation of any of the foregoing formulations would involve a significant retraction of the reach of American export controls. An important issue in any international negotiation based on such formulations would be the nature and extent of the foreign accommodations that the United States should seek in return.

In considering this issue, one must first recall that the benefits of limiting extraterritorial regulation would enure to the United States as well as to its trading partners. In addition, one must bear in mind that the value of the regulatory jurisdiction that the United States would surrender is not as great as it may seem: political trade controls generally have had only limited success, and extraterritorial controls, in addition to creating the political and economic costs previously described, are subject to blocking actions by affected foreign governments. In light of these considerations, the interests of the United States might be well served if it obtained only two foreign concessions: mutuality of agreement and a pledge of non-interference with permissible controls.

428. Thompson, supra note 10, at 365.
430. Cf. supra note 416 and accompanying text.
431. See Thompson, supra note 10, at 339.
433. Those benefits consist of reductions in the political and economic costs described above. See supra notes 107-30 and accompanying text.
434. See supra note 116 and accompanying text.
435. See supra note 117 and accompanying text.
436. See supra notes 107-30 and accompanying text.
a. Mutuality

The United States should insist that any limitations placed on its extraterritorial jurisdiction apply equally to the other states party to the agreement. Except for the Arab boycott of Israel, no foreign government has yet made a significant threat to impose political restrictions on reexports, sales by subsidiaries, or other transactions originating within the United States. The requirement of mutuality, however, is not merely a matter of formal symmetry. With rising levels of trade and foreign direct investment in the United States, it may be only a matter of time before an aggressive foreign government is tempted to impose the sort of extraterritorial trade control that it previously has seen fit to condemn. A requirement of mutuality would prevent such an escalation in the extraterritoriality dispute.

b. Non-interference with Permissible American Controls

The United States also should insist that each foreign government party to a negotiated settlement pledge not to use blocking statutes, such as the British Protection of Trading Interests Act, other legal devices, or informal pressure to interfere with forms of extraterritorial regulation permitted under the agreement. For example, if the United States were to agree to abandon retroactive reexport and product of technology controls, foreign governments should pledge not to block prospective controls. This pledge would also have to be reciprocal, under a general requirement of mutuality.

An international agreement including these two elements would be an exemplary exercise in principled negotiation. The agreed allocation of national jurisdiction would reflect the shared interest of all parties in reducing international political strife and increasing certainty for international trade and investment. All of the formulations discussed herein reflect the primacy of the territorial state's interest in regulating economic activity taking place within its boundaries. At the same time, the mutual pledge of non-interference with permissible controls would reflect the interest of every state in regulating conduct aimed at evading its laws—the other common theme of most of the formulations discussed in this section. The resulting agreement would be balanced and beneficial to all sides.

437. For a description of the Arab boycott and its effects on firms in the United States, see 3 A. LOWENFELD, supra note 3, at ch. III, §§ 1-2.46.
439. See supra note 45.
440. See supra notes 228-32 and accompanying text.
While mutuality of agreement and a pledge of non-interference might be adequate consideration for an American agreement limiting extraterritorial jurisdiction, other concessions might also be desirable.

c. Cooperation with American Controls

The United States could request foreign governments to go further than simply pledging not to interfere with permissible controls and agree to cooperate actively in enforcing the forms of extraterritorial regulation permitted under the agreement. One useful form of cooperation would be publicizing the terms of the agreement, particularly the situations in which American controls could still be applied. Such publicity would help create the desired climate of economic certainty, and would limit the number of cases in which foreign firms could claim surprise at the application of American law.

Another valuable form of cooperation would be assistance in obtaining the information needed to implement permissible forms of regulation, particularly in the area of reexport and product of technology controls. For example, foreign governments might agree to cooperate in gathering information on: (1) dummy foreign corporations or foreign nationals suspected of participating in evasionary schemes; (2) the amount of U.S.-origin content included in foreign-manufactured products; or (3) the status and dates of commercial contracts potentially affected by American controls.

The 1982 agreement between the United States and Australia on cooperation in antitrust matters includes a provision similar to that just suggested.441 Under that agreement, when a proposed antitrust investigation or enforcement action under the law of one party—typically the United States—does not adversely affect the national interests of the other party, the latter will cooperate by, inter alia, providing “information and administrative and judicial assistance to the extent permitted by applicable national law.”442 The exact kinds of administrative and judicial assistance that might be desirable in the enforcement of American export controls and permissible under foreign law are matters beyond the scope of this Article. They would, however, be appropriate questions for the study commission proposed above.

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441. See United States-Australia Treaty, supra note 242, at art. 5(1). The agreement also includes an undertaking not to interfere with United States efforts to obtain needed information. Id. at art. 5(2).

442. Id. at art. 5(1).
d. Substantive Consultations

The United States also could seek agreement on consultations concerning the substantive foreign policy issues underlying the use of export controls. As Deputy Secretary of State Dam recently has noted: "When . . . disputes over jurisdiction turn out to be grounded in disputes over policy, the most effective solution is a major effort to harmonize our policies." Two types of consultation mechanism could be established. First, foreign governments might agree to notify the United States of proposed transactions with the Soviet Union or other politically sensitive countries. The resulting consultations would be aimed at avoiding the sort of unilateral American actions seen in the pipeline episode. Alternatively, or in addition, the United States might be required to initiate consultations when considering the use of extraterritorial political export controls. Such consultations might help remove a significant irritant in past episodes of American regulation. They also would provide the United States with an opportunity to persuade foreign governments to adopt its view of the underlying issue and initiate parallel economic sanctions. Such efforts might produce limited results, but they could hardly do less than past efforts to obtain international cooperation.

e. Cooperation with National Security Controls

In an international negotiation, it would of course be possible to cross agendas and seek foreign accommodations on matters other than foreign policy export controls. It would seem to be a natural compromise, for example, for key foreign governments to agree to strengthen the coverage and enforcement of multilateral controls on products and technologies with military applications in return for limitations on the reach of American foreign policy controls. Negotiations to strengthen multilateral controls are called for by both the Senate and the House bills to extend the EAA of 1979.

443. Compare the joint studies of East-West economic relations, particularly in the energy field, begun by the Western allies as part of the "plan of action" agreed upon contemporaneously with the lifting of American pipeline sanctions in November 1982. See East-West Trade Relations, supra note 55; supra notes 55-56 and accompanying text.

444. See Dam Address, supra note 182, at 16.

445. Under the House bill to extend and amend the EAA of 1979, the President would be required to consult with the member states of COCOM and other appropriate foreign governments before imposing foreign policy export controls. H.R. 3231, 98th Cong., 1st Sess. § 110(d) (1983).

446. See supra notes 41-42 and accompanying text.

447. See Moyer & Mabry, supra note 3, at 144-46; Abbott, supra note 14, at 808.

448. H.R. 3231, supra note 293, at § 107 (1983); S. 979, supra note 294, at § 5(25).
negotiations could be coordinated with the discussions on foreign policy controls suggested in this Article.

5. National Security Controls

The compromise formulations described in this Article have all dealt with foreign policy export controls. A number of considerations justify excluding national security controls from the discussion thus far.

First, national security controls have been applied extraterritorially with more restraint than at least the most expansive political restrictions:

(a) Sales by controlled foreign subsidiaries not involving U.S.-origin goods or technology historically have been regulated by the Treasury Department under the Transaction Control Regulations.\textsuperscript{449} Those regulations apply to every "person within the United States,"\textsuperscript{450} a term defined to include controlled foreign subsidiaries.\textsuperscript{451} They require that any such person obtain a license for a transaction involving the shipment of multilaterally controlled strategic merchandise from a foreign country to the Soviet Union or other controlled Communist destinations.\textsuperscript{452} The regulations automatically authorize, however, any otherwise restricted transaction that originates in and is licensed by one of the member nations of COCOM.\textsuperscript{453} Thus, as a practical matter, American national security controls do not intrude on the COCOM countries' power, based on territorial sovereignty, to regulate controlled foreign subsidiaries even though those nations are the most important hosts for American foreign investment.\textsuperscript{454}

(b) The Export Administration Regulations do restrict, for national security purposes, exports to Communist nations of foreign-produced direct products of U.S.-origin technology.\textsuperscript{455} These restrictions, however, have only been applied prospectively in cases where the foreign licensee has given a written assurance that he will not export the controlled products to proscribed destinations.\textsuperscript{456}

\textsuperscript{449} Transaction Control Regulations, 31 C.F.R. § 505.01-.60 (1983). See Malloy, \textsuperscript{supra} note 202, at 510-11.
\textsuperscript{450} 31 C.F.R. § 505.10 (1983).
\textsuperscript{451} Id. at § 505.20; 31 C.F.R. § 500.330(a)(4) (1983).
\textsuperscript{452} 31 C.F.R. § 505.10 (1983).
\textsuperscript{453} Id. at § 505.31(a). This general license is not available for exports to Cuba or to the nations embargoed under the Foreign Assets Control Regulations (31 C.F.R. § 500.101-.809 (1983)). 31 C.F.R. § 505.31(a)(1), .31(b).
\textsuperscript{454} See D. ETTEMAN & A. STONEHILL, \textsuperscript{supra} note 73, at 12.
\textsuperscript{455} 15 C.F.R. § 379.8(a)(3) (1983).
\textsuperscript{456} See \textsuperscript{supra} notes 83-86 and accompanying text.
(c) While reexport controls generally apply to all items controlled for national security purposes, since 1980 firms located in COCOM countries have been permitted to engage in certain reexport transactions without obtaining the authorization of the United States.\textsuperscript{457} The exemption covers reexports to Communist nations, except those subject to an embargo, of most multilaterally controlled strategic commodities originating in the United States if the sale is made in accordance with the conditions of the license issued by the local authorities and has been approved unanimously by COCOM.\textsuperscript{458} Unlike the authorization for transactions by foreign subsidiaries contained in the Transaction Control Regulations, this exemption does not grant a foreign state discretion to approve transactions. The United States retains the power to block a proposed reexport by exercising its COCOM veto.\textsuperscript{459} At the same time, the United States does cede primary licensing authority to the foreign state, and exercises its influence through a multilateral institution, not by the unilateral application of its domestic law.

Second, U.S. national security controls have had a relatively moderate jurisdictional reach, because other Western governments have agreed in principle with the need to limit Soviet access to strategic goods and therefore have maintained national control systems roughly comparable to those of the United States.\textsuperscript{460} As long as that consensus continues, there is no pressing political need to limit the reach of American national security controls.

Finally, in the current political climate, there is little likelihood that the U.S. Government would agree to reduce the reach of its national security controls. The Reagan Administration, in particular, is working to strengthen national security controls.\textsuperscript{461} The

\textsuperscript{457} 15 C.F.R. § 374.2(i), .3(e) (1983).
\textsuperscript{458} Id. at § 374.3(e).
\textsuperscript{459} COCOM exceptions decisions must be unanimous. Id. at § 374.3(e)(v). See Hunt, Multilateral Cooperation in Export Controls—The Role of COCOM, 14 Toledo L. Rev. 1285, 1292 (1983). The exception was recommended by President Carter on the ground that the United States would have “already approved reexport of the same product as part of the COCOM process.” President Carter’s Recommendations to Congress on Export Disincentives (Sept. 9, 1980), reprinted in U.S. Export Weekly, at M-1, M-3 (Sept. 16, 1980).
\textsuperscript{461} Two recent actions exemplify the Administration’s efforts. First, in January 1984, the Office of Export Administration (OEA) proposed extensive changes in the regulations governing the issuance and use of Distribution Licenses. 49 Fed. Reg. 2264-67 (1984). The Distribution License is a special licensing procedure, widely used by major American exporters, that authorizes multiple exports of certain commodities to foreign consignees approved in advance by OEA as distributors or users. See 15 C.F.R. § 373.3 (1983). OEA also announced “an extensive program of audits of Distribution License
Administration and both houses of Congress, moreover, have expressed less than complete confidence in COCOM. Such confidence is a precondition for further reductions in unilateral regulation.

Nonetheless, it is worth briefly considering further reductions in the duplicative reexport controls that have been the major irritants to foreign governments in American national security controls. There have been numerous proposals to eliminate the requirement that an exporter in a COCOM country whose transaction involves the reexport of multilaterally controlled U.S.-origin goods or components must obtain a reexport authorization from the United States as well as an export license from his own country and an exception decision from COCOM. In 1979, both houses of Congress considered proposals to prohibit reexport controls in this situation. Although the House Foreign Affairs Committee approved one such proposal, the EAA of 1979 did not deal with the issue. The President's Export Council raised the subject again in 1980, and once more in 1982. It recommended a gradual relaxation of duplicative reexport controls not only for COCOM countries but for any country that maintains an adequate export control system. The Council's recommendation was in two parts: (1) eliminate U.S. reexport holders and consignees...
controls in cases where a reexport transaction has been approved unanimously in COCOM; and (2) eliminate such controls in cases where a reexport transaction is in a class of transactions that the COCOM governments have agreed to delegate to the licensing discretion of the individual national authorities. The reexport exception described above, approved by President Carter in 1980, adopts the first part of the Council's recommendation. The issue now is elimination of U.S. reexport controls in favor of foreign national regulation.

The two proposals before Congress in 1979 were abandoned in large part out of concern that, as drafted, they would have prevented the President from reimposing reexport controls if such a step became necessary. This objection could be easily met, however, by drafting the statute to require promulgation of a general license for reexports from COCOM countries, subject to any exceptions that the President or the Secretary of Commerce might proclaim from time to time. Duplicative reexport controls would be eliminated, but if the need were to arise, controls on reexports could be reinstated immediately for particular products or particular COCOM countries. This is essentially the approach followed in the Transaction Control Regulations for foreign subsidiaries. No reason is immediately apparent why the same approach could not be used for reexports.

Limiting duplicative reexport controls in this way might be a valuable negotiating proposal. The EAA of 1979 already directs the President to negotiate with the COCOM nations for better enforcement procedures. The Senate and House bills to extend and amend that Act would prescribe new goals for those negotiations. Neither the Act nor the bills, however, provide any incentives for foreign nations to comply with the demands of Congress. Limiting duplicative reexport controls would be an ideal quid pro quo for concessions of this sort by COCOM members.

467. Id. at 5.
468. See supra notes 457-58 and accompanying text.
469. See S. Rep. No. 169, supra note 463, at 11. (Quoting letter from Department of Defense: "[T]he export control practices of another country may not remain constant. Yet under the proposed legislation we would have no legal remedy to respond to any loosening of such controls until exports damaging to our national security had already taken place.") Accord 125 CONG. REC. 24039 (1979) ("I do not believe that we should prohibit ourselves from utilizing them if we feel it is necessary" (statement of Rep. Wolff)).
470. See supra notes 449-54 and accompanying text.
472. See supra note 448 and accompanying text.
CONCLUSION

The extraterritorial application of U.S. export controls produces political animosity among the nation's major trading partners, hampers American exporters of goods and technology and the foreign subsidiaries of U.S.-based MNEs, distorts international trade and investment flows, and reduces world economic welfare. Because of fundamental developments in the structure of the world economy, extraterritorial trade controls are likely to remain an issue for the foreseeable future.

Almost any solution to the problems of extraterritorial regulation will require action, or at least considered inaction, by Congress. This Article has outlined a procedure through which Congress could address the problem of extraterritoriality without assuming the burden of precisely defining the reach of American jurisdiction, a task for which it is institutionally ill-suited. Under this proposal, Congress's role would be that of catalyst, acting to precipitate action by the executive branch aimed at resolving the international political controversy over extraterritoriality and restoring certainty to international trade. International negotiations, based upon a thorough study of the problem and the available alternatives, are the most likely means of achieving these goals. This Article has suggested a number of compromise formulations, most of which have been used in similar regulatory programs, that could serve as bases for a negotiated agreement.

Whether the United States adopts the precise approach recommended here is of little consequence. What is essential is that the present opportunity to resolve the extraterritoriality dispute in the sensitive area of export controls not be allowed to slip away.
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