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Licensing Impact of Foreign Policy Motivated Retroactive Reexport Regulations

by *Brian G. Brunsvold**
James M. Bagarazzi†

The subject of licensing agreements which transfer technology developed in the United States to companies organized under the laws of Western Europe and Japan seldom has warranted front-page newspaper coverage. An exception occurred when the President of the United States unilaterally imposed¹ foreign-policy motivated, retroactively effective reexport² regulations.³ These regulations impaired licenses transferring

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¹ The imposition of the restrictions was stated to be pursuant to the authority conferred upon the President by the Export Administration Act of 1979 [hereinafter cited as EAA '79] Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (Supp. IV 1980)). The EAA '79 traces its lineage to the Export Control Act of 1949, ch. 11, Pub. L. No. 81-11, 63 Stat. 7 (expired 1969) through the Export Administration Act of 1969 [hereinafter cited as EAA '69], Pub. L. No. 91-184, 83 Stat. 841 (as amended by Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. III, 91 Stat. 1625); the Equal Export Opportunity Act, Pub. L. No. 92-412, 86 Stat. 644 (1972) (expired 1979) and the Export Administration Amendments of 1977, Pub. L. No. 93-500, 88 Stat. 1552.

The EAA '79 expires by its own terms [EAA '79 § 20; 50 U.S.C. app. § 2419 (Supp. IV 1980)] on September 30, 1983. Since the withdrawal of the June Regulations, several bills have been introduced in both houses of Congress regarding the reenactment of the EAA '79. As this paper was sent to the publisher, it was unclear which, if any, of these bills would be enacted into law. Provisions of some of these bills are discussed in later footnotes.

² The term "reexport" will be used in this paper to describe the following two circumstances:

(1) After having been exported from the United States to a first foreign country, the identical exported good or technical information is then "reexported" (the reexported item itself thereby becoming a "reexport") from the first foreign country to a second foreign country; or (2) after having been exported from the United States to a first foreign country, the exported good is incorporated into a second good, or a second good or service is produced in accordance with the exported technical information, and the second good or service is then "reexported" from the first foreign country to a second foreign country.

³ Specifically, the regulations in question, 47 Fed. Reg. 141 (1982) (repealed 1982) [hereinafter cited as either the December export regulations or the December regulations] and 47 Fed. Reg. 27, 250 (1982) (repealed 1982) [hereinafter cited as either the June reexport regulations or the June regulations], were promulgated under § 6 of the EAA '79; 50

U.S.-origin technology to Western Europe and Japan for use in connection with the Soviet natural gas pipeline under construction between Siberia and Western Europe. This paper undertakes a discussion of the legality of these regulations, their practical impact on licensing, the remedies available to parties to licenses impaired by such regulations, and suggests precautions to be taken in future licensing agreements to protect against similar regulations. Also explored, in light of the issues of extra-territorial jurisdiction, retroactive impairment of licensing agreements, and considerations of international comity, is the desirability of providing broad export control powers to the President for use in achieving foreign-policy goals, as opposed to use in affecting national-security requirements.

I. BACKGROUND AND PERSPECTIVES

A. *The Export Control System*⁴

The export of goods, services and technical information from the United States is controlled by a system of export licenses.⁵ The administration of the export licensing system of the United States is entrusted to the Office of the President,⁶ which has delegated authority in this area to the Department of Commerce.⁷

U.S.C. § 2405 (Supp. IV 1980).

⁴ For a comprehensive treatment of foreign-policy export controls, see Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739 (1981); Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981); Brunsvold & Ortolani, *Pitfalls in Licensing—Export Control Regulations and Patent Office Security Procedures*, 3 LICENSING LAW AND BUSINESS REPORT, Nos. 3 & 4 (1980); and Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 808-09 (1967).

⁵ Export licenses are permissions from the government. They are to be distinguished from technology transfer licenses, which are agreements between private parties governing the transfer of technical information. Export licenses authorize the movement of goods, services or technical information across the borders of the United States to foreign destinations. The December export regulations, *supra* note 3, did not withdraw retroactively such permission regarding the movement of U.S.-origin goods, services or technical information from the United States via a foreign country to the ultimate destination of the Union of Soviet Socialist Republics. The June reexport regulations, *supra* note 3, withdrew retroactively such permission regarding the movement of U.S.-origin goods, services or technical information from one foreign country to the Union of Soviet Socialist Republics.

⁶ EAA '79, *supra* note 1, at § 4(e) (codified at 50 U.S.C. app. § 2403(e) (Supp. IV 1980)).

⁷ See, e.g., Exec. Order No. 12,214, 45 Fed. Reg. 29,783 (1980) (delegation to the Secretary of Commerce of the President's power to regulate exports in the interest of foreign policy). See Organization and Function Order, Assistant Secretary for Trade Administration, 47 Fed. Reg. 29,582-88 (1982), for further delegations of authority within the Com-

Most exports leave the country under the provisions of a general license in effect at the time of export. However, a significant number of exports require validated licenses. The criteria for issuance of validated licenses reflect the ultimate export destination and the type of export commodity, technical information or service involved.

B. The Russian Pipeline Export Regulations⁸

The President responded to the December 26, 1981, declaration of martial law in Poland by prohibiting exports of oil and gas technology from the United States to the Soviet Union.⁹ The Commerce Department accordingly promulgated regulations pursuant to the authority of section 6 of the EAA '79.¹⁰ The December export regulations prevented U.S. companies from performing contracts relating to the supply of oil and gas technology for the construction and operation of the Soviet natural gas pipeline between Siberia and Western Europe.

Reaction to the December export regulations was unfavorable among oil and gas business concerns in the United States. The U.S. companies complained about the loss of sales to Western European and Japanese companies,¹¹ which obtained the Soviet business precluded by the December export regulations.¹²

The heads of state of Western Europe, Japan and the United States met in Versailles during June of 1982,¹³ to discuss East-West trade relationships and to attempt formulation of a policy governing trade between

merce Department in the area of export controls.

⁸ 47 Fed. Reg. 141 (1982) (repealed 1982) and 47 Fed. Reg. 27,250 (1982) (repealed 1982).

⁹ 17 WEEKLY COMP. PRES. DOC. 1429 (Dec. 29, 1981); N.Y. Times, Dec. 31, 1981, at 1, col. 3.

¹⁰ The Department of Commerce issued the December regulations, *supra* note 3, on December 30, 1981, and the issued regulations appeared in 47 Fed. Reg. 141 (1982) (repealed 1982).

¹¹ Letter from Richard L. Leshner, President, Chamber of Commerce of the United States of America, to the Honorable William E. Brock, U.S. Trade Representative (March 1, 1982) (questioning the appropriateness of unilateral export controls imposed for foreign policy purposes that result merely in a loss of sales by U.S. companies to foreign competitors).

¹² The concerns of U.S. companies sparked hearings in Congress. Avenues were explored for preventing the business lost by the American companies from being performed by companies outside of the United States for the Soviets. The Senate Foreign Relations Subcommittee on International Economic Policy held hearings on the standing in foreign countries and in international law of U.S. imposed export controls directed against foreign companies utilizing U.S. technology through license or other arrangements to provide equipment or technical assistance for the construction and operation of the Soviet natural gas pipeline. Washington Post, Mar. 8, 1982, at A1, col. 1.

¹³ The conference was held on June 4-6, 1982. See Washington Post, June 6, 1982, at A1, col. 1.

Western nations and the Eastern bloc countries.¹⁴ One of the primary issues discussed was the credit terms to be extended to Eastern bloc nations for financing purchases from the West. At the Versailles meetings, the United States achieved the understanding that the Western European nations would cease extending below-market rate credit terms to the Soviets to finance construction and operation of the Urengoy natural gas pipeline.¹⁵ However, statements made by various Western European leaders at the conclusion of the conference convinced the U.S. leaders that the understanding regarding credit terms for the Soviets would be ignored by the Western European nations.¹⁶

On June 18, 1982, the President ordered promulgation of export regulations prohibiting reexport of goods produced abroad in accordance with technical information furnished pursuant to agreements transferring U.S.-origin technology to companies abroad.¹⁷ The June reexport regulations¹⁸ were retroactive. They affected technology licensing agreements between U.S. and foreign companies executed prior to the June date when the regulations were first announced. Moreover, the June reexport regulations asserted U.S. jurisdiction over companies having no greater connection with the United States than a technology transfer license with a U.S. corporation.¹⁹ Thus, the June regulations prohibited transfers of goods, which were manufactured by a foreign company in accordance with U.S.-origin technical information, to the Soviet Union from a nation outside the United States.²⁰

¹⁴ See Washington Post, June 4, 1982, at A1, col. 4.

¹⁵ Washington Post, June 19, 1982, at A10, col. 1.

¹⁶ N.Y. Times, June 23, 1982, at D3, col. 1. In support of the view that the regulations were a less than subtle prod aimed at the European allies by the executive branch of the United States government, see Schutte, Jr., *Pipeline Politics*, 4 S.A.I.S. REV. 137 (1982).

¹⁷ President's Statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982). The controls also were imposed on non-U.S.-origin goods, services and technical data destined for reexport to the Soviet Union by foreign businesses owned or controlled by U.S. interests.

¹⁸ 47 Fed. Reg. 27,250 (1982) (repealed 1982).

¹⁹ *Id.* at 27,251, amending 15 C.F.R. § 379.8(a) (1982) to add subparagraph (a)(4)(ii). This provision is the primary focus of the present article.

²⁰ Shipments of such goods to the Soviet Union prompted the Commerce Department to issue Temporary Denial Orders (denial of export privileges pending investigation of suspected violation of export regulations, hereinafter referred to as a TDO) against John Brown Engineering Ltd. (JBE) on September 9, 1982, published at 47 Fed. Reg. 40,205 (1982), Creusot-Loire, S.A. (C-L) on August 26, 1982, published at 47 Fed. Reg. 38,169 (1982), Nuovo Pigone, Ltd. (N-P), published at 47 Fed. Reg. 39,709 (1982), AEG-Kanis GmbH (AEG-K) and Mannesmann Anlagenbau AG on October 5, 1982, published at 47 Fed. Reg. 44,604 (1982). JBE's only connection with the U.S. was a technology transfer agreement with the General Electric Company (GE). C-L, a corporation organized under the laws of France, had a license agreement with Cooper Industries, Inc. of Dallas, Texas. N-P, a corporation wholly-owned by the Italian government, had a license agreement with GE. AEG-K, a

Foreign governments and companies resented the June reexport regulations, because the regulations asserted extraterritorial jurisdiction and had a retroactive effect. The regulations eliminated the benefits of foreign licensees under technology transfer licenses, and they precluded performance of supply contracts dependent upon performance of such licenses. Most, if not all, of the affected licenses were executed long before the announcement and promulgation of the regulations. Thus, the June reexport regulations were tantamount to the imposition of a retroactive penalty upon already executed technology transfer licenses and their related sales contracts.²¹ The regulations also purported to regulate reexport of goods from nations outside of the United States to the Soviet Union by non-U.S. affiliated companies. In so doing, the regulations attempted to extend the jurisdiction of U.S. law to govern exports from foreign nations made by non-U.S. origin businesses. This assertion of extraterritorial jurisdiction was resented bitterly in Western Europe.²²

II. LEGALITY OF FOREIGN-POLICY MOTIVATED RETROACTIVE REEXPORT REGULATIONS

The June reexport regulations, by proscribing conduct committed within the borders of foreign countries by foreign licensees of U.S. corporations, purport to extend the legal authority of the United States into foreign countries. Since the regulations were promulgated under the authority of the EAA '79, the legality of these export regulations depends upon whether the EAA '79 provides for such extraterritorial jurisdiction. Addressing this question requires determining the intent of Congress in enacting the jurisdictional provisions of the EAA '79.

The specific provision of the June regulations under consideration in this article predicates the jurisdiction of U.S. law on the existence of an agreement between a U.S.-origin enterprise and a foreign business entity to transfer U.S.-origin technical data. If Congress intended to authorize extraterritorial jurisdiction on this basis, then a second inquiry is posed: the direct extraterritorial effect of the June reexport regulations raises the issues of the legality of these regulations under the laws of foreign nations and the principles of international law.²³

German corporation neither owned nor controlled by U.S. business interests, also had a license agreement with GE.

²¹ The Japanese objected to the retroactive effect of the June reexport regulation on a contract executed in 1974, regarding the Japanese-Soviet petroleum drilling project off the coast of Sakhalin Island. *N.Y. Times*, June 22, 1982, at D16, col. 1.

²² Foreign ministers of Common Market countries condemned United States sanctions on foreign licensees as violations of accepted trade rules and international law. *N.Y. Times*, June 21, 1982, at D3, col. 1.

²³ A Dutch court already has adjudged the extraterritorial jurisdictional provision in-

The June regulations proscribe reexports of goods manufactured abroad using U.S.-origin technical data. This aspect of the June regulations retroactively impairs the performance of contracts concluded in contemplation of the use of U.S.-origin technical data, which was lawfully available when the contract originally was executed. The retroactive character of the June regulations raises the question whether the EAA '79 authorized retroactively effective reexport controls. The answer to this question also requires ascertaining the intent of Congress.

A. *The June Reexport Regulations*

The June reexport regulations²⁴ increased the number of transactions requiring validated export licenses. This increase resulted from an expansion of extraterritorial jurisdiction over a wider range of traded items and trading parties. The amended export controls covered foreign-produced oil and gas related goods and services, if the goods or services utilize U.S.-origin technical data, and if the use of the data was contingent upon royalties or other compensation paid to any "person subject to the jurisdiction of the United States." The June regulations were applicable without regard to the date on which the data originally was exported from the United States.²⁵ Thus, a foreign licensee of U.S.-origin technical data became subject to United States jurisdiction under the new regulations. This result was achieved by adding subparagraph (a)(4)(ii) to the regulations codified under 15 C.F.R. § 379.8, to extend controls over the following:

any foreign produced direct products 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, described in § 379.4 (f)(1)(i)(p) if:

serted into 15 C.F.R. § 385.2(c)(2)(iv) by the June regulations, *supra* note 3, to be ineffective under the law of the Netherlands to provide a basis for a *force majeure* defense entitling the defendant to an exemption *ex* article 74 of the "Law in Respect of the International Sale of Goods." The decision was made in a breach of contract action brought by a corporation of French origin against a Netherlands corporate subsidiary of a U.S. corporation. *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, filed Sept. 17, 1982). See generally Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations, filed Aug. 12, 1982, with the International Trade Administration, U.S. Dept. Commerce.

²⁴ The extension of export controls to cover foreign subsidiaries of U.S. corporations and foreign licensees of U.S. technology was announced by the President on June 18, 1982. President's statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982). The Commerce Department issued the regulations, which were published at 47 Fed. Reg. 27,250 (1982), on June 22, 1982.

²⁵ Specifically, the export controls codified at 15 C.F.R. § 279.8 were expanded by amending paragraphs (a)(2) and (a)(3) and adding paragraph (a)(4). 47 Fed. Reg. 27,250 (1982) (repealed 1982).

. . . (ii) The U.S. technical data are the subject of a *licensing agreement with*, or the use of the data is *contingent upon royalty payments* or other compensation to, any person subject to the jurisdiction of the United States as defined in § 385.2(c), regardless of when the data were exported from the U.S.; . . .²⁶

The June regulations provided the definition of "person subject to the jurisdiction of the United States" for the purpose of applying section 385.2(c) that included:

- (i) Any person, wherever located, who is a citizen or resident of the United States;
- (ii) Any person actually within the United States;
- (iii) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; or
- (iv) Any partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (i), (ii), or (iii) of this section.²⁷

In addition, the June regulations create two additional but separate bases for jurisdiction involving the specific provisions of the agreement transferring the technical information. If under the terms of the technology transfer agreement, (1) "the recipient of the technical data has agreed to abide by U.S. export control regulations,"²⁸ or (2) the original export of the data from the U.S. was conditioned on the furnishing of a written assurance against reexport of the data, or the product of the data, to the Soviet Union,²⁹ then in accordance with U.S. export law, the goods may not be reexported without obtaining a validated license from the Commerce Department.³⁰

Thus, for purposes of imposing export controls, one of the predicates for jurisdiction provided by the June regulations is the mere existence of a contract for technology transfer between a foreign national and a company owned or controlled by U.S. interests. The legality of this jurisdictional predicate is investigated in this paper.

²⁶ 47 Fed. Reg. 27,251 (1982) (repealed 1982) (emphasis added).

²⁷ *Id.* at 27,252 (1982).

²⁸ *Id.* at 27,251 (1982).

²⁹ *Id.*

³⁰ Contracts between private parties cannot alter or determine international law. Only treaties between states may confer on one state party to the treaty, jurisdiction within the other state party to the treaty, if that jurisdiction otherwise would be contrary to international law. RESTATEMENT (SECOND) OF THE FOREIGN REL. LAW OF THE UNITED STATES [hereinafter cited as the RESTATEMENT 2D] § 25; see Akehurst, *Jurisdiction in International Law*, [1972-73] BRIT. Y.B. INT'L L. 145, 147; see also *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 135 (1812) ("The jurisdiction of the nation, within its own territory, . . . is susceptible of no limitation, not imposed by itself . . .").

B. *Legality Under United States Law*

Challenges to the legality of the June reexport regulations under United States law may be based on substantive or procedural grounds.³¹ The substantive grounds arise in consideration of the President's authority under the EAA '79 to promulgate retroactively effective reexport controls, which require an extraterritorial assertion of jurisdiction by the United States. The procedural grounds include the promulgation of the regulations in accordance with the statutory scheme provided by Congress in the EAA '79.

1. The Congressionally Authorized Extraterritorial Jurisdictional Reach of the EAA '79

Did Congress in enacting section 6 of the EAA '79 intend to authorize the President to impose export controls that asserted U.S. jurisdiction over foreign companies for actions taken on foreign soil? More specifically, did Congress intend that jurisdiction be based on the grounds that the foreign companies were licensees of U.S. companies and that the actions involved the exportation of products evolved from licensed technology of U.S. origin?

Executive action constituting an incursion upon the powers of Congress will be found void,³² but the failure of Congress to delegate a partic-

³¹ Attempts to challenge the legality of the June reexport regulations were made in several forums. *Dresser Industries, Inc. v. Baldrige*, No. 82-2385 (D.D.C. filed Aug. 23, 1982); *In re Dresser (France) S.A.*, No. 632 (U.S. Department of Commerce International Trade Administration, filed Aug. 26, 1982); *Creusot-Loire S.A. v. Baldrige*, No. 82-2787 (D.D.C. filed Sept. 29, 1982); *In re Creusot-Loire S.A.*, No. 633 (U.S. Department of Commerce International Trade Administration, filed Sept. 9, 1982); *In re John Brown Engineering Ltd.*, No. 635 (U.S. Dept. of Commerce International Trade Administration, filed Oct. 1, 1982). In the *Creusot-Loire* Commerce Department proceeding, the hearing commissioner issued an order on September 10, 1982, requiring *Creusot-Loire* and the Department of Commerce to brief the question of the jurisdiction of a Commerce Department hearing commissioner to determine the authority of the President under the EAA '79. See *Complaint for Declaratory and Injunctive Relief* at 13, *Creusot-Loire S.A. v. Baldrige*, No. 82-2787 (D.D.C. filed Sept. 29, 1982). The hearing commissioner ruled orally at the hearing that he only had jurisdiction to apply the regulations to the facts before him, and that jurisdiction to consider the legality of the regulations rested with the Office of Assistant Deputy Secretary for International Trade on appeal from the initial decision of the hearing commissioner. This ruling was repeated by the hearing examiner in his initial decision, *In re Creusot-Loire S.A.*, No. 633, slip op. at 7 (U.S. Dept. Comm., Oct. 29, 1982).

The June regulations were withdrawn before a decision on the merits was rendered in any of the judicial forums regarding the authority of the President under the EAA '79 to impose foreign policy motivated retroactive reexport regulations. President's Announcement of Lifting of Soviet Natural Gas Pipeline Export Sanctions, 18 WEEKLY COMP. PRES. DOC. 13,265 (Nov. 13, 1982); 47 Fed. Reg. 51,858 (1982).

³² *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other*

ular authority to the President in the area of foreign policy and national security does not imply disapproval of presidential action consistent with the nondelegated authority.³³ However, in promulgating the June regulations, the President purported to act pursuant to the authority of the EAA '79,³⁴ and not pursuant to any other authority legally vested in the President by either Congress or the Constitution.³⁵

The specific question of presidential authority that is considered here is whether foreign-policy motivated, retroactively effective regulations, asserting extraterritorial jurisdiction over foreign licensees of U.S. technology based upon the existence of a technology transfer license between the foreign licensee and a U.S. company, can be imposed validly pursuant to the EAA '79.³⁶ This requires investigation of the jurisdictional provisions of the EAA '79, and specifically, the intent of Congress regarding these jurisdictional provisions.

a. Jurisdictional provisions of the EAA '79

The authority of the President to promulgate foreign-policy controls³⁷ under the EAA '79 is limited to exports of goods, technology or other information "subject to the jurisdiction of the United States" or

grounds, 348 U.S. 296 (1955) (executive agreement with Canada attempting to avoid compliance with congressional action in the area of foreign trade) and *Yoshida International, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974) (executive order issued contrary to congressionally enacted scheme of foreign trade law).

³³ *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citing *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

³⁴ 47 Fed. Reg. 27,250 (1982). The question of the President's authority under the EAA '79 is separate from the question of the legality of the regulations as complying with the criteria set forth in the act itself. The criteria are set forth in EAA '79, *supra* note 1, at § 6(b) (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)).

³⁵ However, after the fact, the Department of Justice defended the legality of the June regulations by adverting to the constitutionally authorized power of the President to conduct foreign policy. These powers and their constitutional sources were identified as: The Executive Power, U.S. Const. art. II, § 2, cl. 1; the Power to make Treaties and Appoint Ambassadors, other public Ministers and Consuls, U.S. CONST. art. II, § 2, cl. 2; the power to receive Ambassadors and other public Ministers, U.S. CONST. art. II, § 3; and the duty to see that the Laws be faithfully executed, U.S. CONST. art. II, § 3. Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 49, *Dresser Industries, Inc. v. Baldrige*, No. 82-2385 (D.D.C. filed Aug. 23, 1982).

³⁶ The Committee on Foreign Affairs in the House of Representatives concluded, "that export controls on oil and gas transmission, refining, and related equipment, and technical data, and the assertion of those controls extraterritorially to subsidiaries and foreign licensees of U.S. firms, fulfill virtually none of these [EAA '79, *supra* note 1, at § 6(b), codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)] criteria." H.R. REP. No. 762, 97th Cong., 2d Sess. 3 (1982).

³⁷ The June reexport regulations were promulgated under the foreign-policy export control section of the EAA '79, *supra* note 1, at § 6; 50 U.S.C. app. § 2405 (Supp. IV 1980).

exports by any person "subject to the jurisdiction of the United States."³⁸ Thus, promulgation of rules under the authority conferred by the EAA '79 extends to things exported and persons exporting, both of which are "subject to the jurisdiction of the United States."

Since the EAA '79 explicitly authorizes export controls regarding things or persons "subject to the jurisdiction of the United States,"³⁹ investigation into the congressional intention to authorize promulgation of retroactive reexport regulations under the EAA '79 begins with the definition of jurisdiction provided by the Act itself. Unfortunately, the Act fails to provide any explicit definition of jurisdiction.⁴⁰ Nor does the EAA '79 provide a definition which describes what constitutes either a person or thing "subject to the jurisdiction of the United States."

The EAA '79 defines "person" to include corporations,⁴¹ but no mention is made of foreign corporations. The Act expands the definition of person by defining, "United States person" to include "any foreign subsidiary or affiliate . . . of any domestic concern."⁴² However, the definition of "United States person" provided by the EAA '79⁴³ is too narrow to include the foreign licensee of technology of a U.S. corporation or to encompass a foreign company not owned or controlled by U.S. interests.

This also may be seen by inference from the term's use elsewhere in the Act. For example, the antiboycott provisions of the EAA '79,⁴⁴ enacted in response to the Arab boycott of Israel, apply to a "United States person."⁴⁵ However, the extraterritorial scope of the antiboycott provisions is expressly limited to "activities in the interstate or foreign commerce of the United States."⁴⁶ This would exclude from the Act's jurisdiction trade between two foreign nations that does not involve U.S. interests.

The phrase "United States person" does not appear in the foreign-policy export controls section of the EAA '79.⁴⁷ Instead, the foreign-policy controls section uses the phrase "person subject to the jurisdiction of the

³⁸ EAA '79, *supra* note 3, at § 6(a)(1) (codified at 50 U.S.C. app. § 2405(a)(1) (Supp. IV 1980)).

³⁹ EAA '79, *supra* note 3, at § 6(a) (codified at 50 U.S.C. app. § 2405(a) (Supp. IV 1980)).

⁴⁰ The only definitional sections of the EAA '79, are codified, as amended, at 50 U.S.C. app. §§ 2403-1(d), 2415 (Supp. IV 1980).

⁴¹ EAA '79, *supra* note 1, at § 16(1) (codified at 50 U.S.C. app. § 2415(1) (Supp. IV 1980)).

⁴² 50 U.S.C. app. § 2415(2) (Supp. IV 1980).

⁴³ *Id.*

⁴⁴ EAA '79, *supra* note 1, at § 8 (codified at 50 U.S.C. app. § 2407 (Supp. IV 1980)).

⁴⁵ Codified at 50 U.S.C. app. § 2407(a) (Supp. IV 1980).

⁴⁶ *Id.*

⁴⁷ EAA '79, *supra* note 1, at § 6 (codified at 50 U.S.C. app. § 2405 (Supp. IV 1980)).

United States."⁴⁸ Nevertheless, no jurisdictional distinction between regulations issued in furtherance of national-security goals,⁴⁹ versus regulations motivated by foreign-policy aims,⁵⁰ is apparent from the language of the EAA '79.

The historical precedent for the congressional enactment of the EAA '79 provides a useful perspective for the determination of congressional intent. This history includes prior statutes and regulations. Three factors are important for a review of the legislation and regulatory actions preceding the EAA '79. These factors are the regulations' extraterritorial character regarding the assertion of jurisdiction over non-U.S. owned or controlled licensees of U.S.-origin technology, the regulations' retroactive applicability and the distinction between national-security controls and foreign-policy controls.⁵¹

b. Legislative precedent for jurisdictional provisions of the EAA '79

The phrase "subject to the jurisdiction of the United States," brings with it a congressional history both inside and outside the field of export controls.⁵² This history begins with the United Nations Participation Act of 1945, which permits the President to implement measures recommended by the U.N. Security Council through regulation of "economic relations . . . between any foreign country or any . . . person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States."⁵³ The Trading With The Enemy Act⁵⁴ applies to "any person, or . . . property, subject to the jurisdiction of the United States."⁵⁵ Further, the International Emergency Economic Powers Act⁵⁶ provides the President with the authority to deal with any unusual and extraordinary threat

⁴⁸ 50 U.S.C. app. § 2405(a) (Supp. IV 1980).

⁴⁹ EAA '79, *supra* note 1, at § 5 (codified at 50 U.S.C. app. § 2404 (Supp. IV 1980)).

⁵⁰ 50 U.S.C. app. § 2405 (Supp. IV 1980).

⁵¹ See Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 479 (1981), for the view that a greater presumption of validity under international law attaches to national-security motivated controls than to foreign-policy motivated controls.

⁵² United Nations Participation Act of Dec. 20, 1945, c. 583, § 5, 59 Stat. 620, 22 U.S.C. § 287c; International Emergency Economic Powers Act, Pub. L. 95-223, Title II, § 203(a)(1), 91 Stat. 1626, 50 U.S.C. § 1702(a)(1) (Supp. IV 1980); Trading With The Enemy Act, § 5(b)(1), 50 U.S.C. app. § 5(b)(1); Export Administration Act of 1979, §§ 5(a)(1), 6(a)(1), 50 U.S.C. app. §§ 2404(a)(1), 2405(a)(1) (Supp. IV 1980); Bretton Woods Agreement Amendments Act, Pub. L. No. 95-435, § 5(d), 92 Stat. 1051, 1052 (1978) (repealed 1979).

⁵³ 22 U.S.C. § 287c(a) (Supp. V 1981).

⁵⁴ 50 U.S.C. app. §§ 1-40 (Supp. IV 1980) (hereinafter cited as the TWEA).

⁵⁵ 50 U.S.C. app. § 5(b) (Supp. IV 1980).

⁵⁶ 50 U.S.C. §§ 1701-1706 (Supp. IV 1980).

from outside the United States to the national security, foreign policy or national economy. For the purposes of this Act, the President is invested with authority over persons and property, "subject to the jurisdiction of the United States."⁵⁷ In 1977, the Export Administration Act of 1969⁵⁸ was amended to include the jurisdictional language under discussion.⁵⁹

c. Export controls issued under prior export laws⁶⁰

A statute reenacted after years of an established and consistent administrative practice, must be read as being consistent with that established administrative practice.⁶¹

The Foreign Assets Control Regulations,⁶² the Transaction Control Regulations⁶³ and the Cuban Assets Control Regulations⁶⁴ were promulgated under the TWEA. They apply to persons or property "subject to the jurisdiction of the United States."⁶⁵ The Foreign Assets Control Regulations and the Transaction Control Regulations are administered by the Treasury Department for the protection of national-security interests. The Cuban Assets Control Regulations originally were adopted as national-security controls under the TWEA in 1963, in response to the Cuban Missile Crisis. Nonetheless, the Cuban regulations provided an exception to permit foreign subsidiaries of U.S. firms to trade with Cuba, if neither U.S.-origin goods nor U.S. citizens or residents were involved.⁶⁶ Each set of regulations defines "persons subject to the jurisdiction of the United States" to include persons physically present in the United States, corporations organized under U.S. law, or foreign businesses owned or controlled by either U.S. citizens or residents.⁶⁷ In addition, the Foreign

⁵⁷ 50 U.S.C. § 1702(a)(1) (Supp. IV 1980).

⁵⁸ EAA '69, *supra* note 1.

⁵⁹ Title III of the Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625 amended the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 to add the jurisdictional language in question.

⁶⁰ Congress considered prior export regulations during its deliberations over the EAA '79. *E.g.*, S. REP. No. 169, 96th Cong. 1st Sess. 18 (1979) (Senate Report on Export Administration Act of 1979) (deliberation over the scope of technology to be subjected to export controls).

⁶¹ *CBS v. FCC*, 453 U.S. 367 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 433, 450, 457 (1978); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976); *Blackfeet Tribe v. Montana*, 507 F. Supp. 446, 451 (D. Mont. 1981).

⁶² 31 C.F.R. pt. 500 (1981). These regulations prohibit trade with certain Communist countries.

⁶³ 31 C.F.R. pt. 505 (1981). These regulations embargo transactions in strategic products bound for actual or potential strategic adversary countries.

⁶⁴ 31 C.F.R. pt. 515 (1981). These regulations embargo trade with Cuba.

⁶⁵ 31 C.F.R. §§ 500.201(a), 505.20, 515.201 (1981).

⁶⁶ 31 C.F.R. § 515.541 (1963) (modified 1975).

⁶⁷ 31 C.F.R. §§ 500.329, 505.20, 515.329 (1981).

Assets Control Regulations, the Transaction Control Regulations and the Cuban Assets Control Regulations include in their definition of "property subject to the jurisdiction of the United States," securities issued by U.S. persons and governmental agencies or securities evidenced by certificates located within the United States.⁶⁸ However, prior to the 1977 amendment of the EAA '69, it is doubtful whether exports by foreign subsidiaries of U.S. corporations were within the TWEA's jurisdiction.⁶⁹ Thus, the TWEA regulations apply only to persons or things bearing some territorial nexus to the United States at the time of the assertion of jurisdiction.

The retroactive assertion of jurisdiction forbidding reexport of products produced under licenses for U.S. technology and transferred prior to either notice or imposition of the export controls is an unprecedented occurrence. Export controls were issued in 1978, prohibiting exports of oil and gas technology to the Soviet Union without a validated export license.⁷⁰ These controls were promulgated in furtherance of foreign-policy objectives related to Soviet actions against two dissidents. The controls asserted U.S. authority over goods produced by foreign licensees of U.S. technology. However, by their terms, the controls were not retroactively applicable. They only applied to reexports of the product of technical data, which had not yet been exported at the time the controls were imposed. Moreover, the 1978 controls only required the exporter, as a prerequisite to an entitlement to export under a general export license for technical data under restriction (GTDR), to obtain from the importer written assurance that neither the technical data nor the direct product of the technical data was intended to be shipped, directly or indirectly, to the Soviet Union.

The Rhodesian embargo by the United Nations resulted in foreign-policy motivated regulations promulgated by the Treasury Department under the authority of the United Nations Participation Act.⁷¹ Foreign subsidiaries of U.S. firms, other than subsidiaries in Rhodesia itself, were not included within the regulations' definition of "person subject to the jurisdiction of the United States."⁷²

⁶⁸ 31 C.F.R. §§ 500.313, 505.20, 515.313 (1981).

⁶⁹ See S. REP. No. 466, 95th Cong., 1st Sess. 6, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4540, 4545. See also Malloy, *Embargo Programs of the United States Treasury Department*, 20 COLUM. J. TRANSNAT'L. L. 485, 511 (1981) (since Export Control Regulations only reached exports from the U.S., the Transaction Control Regulations, issued under § 5(b) of the TWEA, provided no authority over exports from foreign countries by U.S.-owned foreign subsidiaries).

⁷⁰ The 1978 regulations were published at 43 Fed. Reg. 33,699 (1978).

⁷¹ 22 U.S.C. § 287c (Supp. V 1981).

⁷² 31 C.F.R. § 530.404 (1979), revoked by Exec. Order No. 12,183, 44 Fed. Reg. 74,841 (1979).

The Iranian Assets control Regulations⁷³ were issued pursuant to the International Emergency Economic Powers Act⁷⁴ to implement the trade embargo on Iran in response to the seizure of U.S. hostages. This act authorized the imposition of export controls upon any person "subject to the jurisdiction of the United States."⁷⁵ These regulations applied to foreign property in the possession of a person subject to the jurisdiction of the United States.⁷⁶ Nonbanking foreign subsidiaries of U.S. corporations were expressly excluded from the Iran trade embargo by the President's Executive Order.⁷⁷ The implementing regulations contain the same limitation on the jurisdictional reach of the Iranian Financial Transaction Controls.⁷⁸ However, the Iranian trade embargo also asserted jurisdiction over Iranian government property in the hands of persons "subject to the jurisdiction of the United States," which was defined within the regulations to include foreign subsidiaries of U.S. firms.⁷⁹

The export controls implementing the Uganda embargo protesting human rights violations, asserted jurisdiction over exports of non-U.S.-origin goods by foreign companies controlled by U.S. interests.⁸⁰ These regulations were proposed (but never became final) to prohibit exports of goods to Uganda by "any person subject to the jurisdiction of the United States" until Presidential certification to Congress that the Ugandan Government violations of human rights had ceased.⁸¹

d. Prior export controls issued under the EAA '79

Export controls issued pursuant to § 6 of the EAA '79 were applied to Libya⁸² and to the military and police authorities of South Africa and Namibia.⁸³ None of those export controls reached technical data after the data originally was exported from the United States.⁸⁴ Regulations implementing a partial embargo on trade with military and police authorities

⁷³ 31 C.F.R. pt. 535 (1981).

⁷⁴ 50 U.S.C. §§ 1701-1706 (Supp. IV 1980).

⁷⁵ 50 U.S.C. § 1702(a)(1) (Supp. IV 1980).

⁷⁶ 31 C.F.R. §§ 535.201, 535.329 (1981).

⁷⁷ Exec. Order No. 12,205, § 1-102, 45 Fed. Reg. 24,099 (1980), revoked by Exec. Order No. 12,282, § 101, 46 Fed. Reg. 7,925 (1981).

⁷⁸ 31 C.F.R. § 535.207(b) (1980) (repealed 1981).

⁷⁹ 15 C.F.R. § 535.329, 44 Fed. Reg. 65,957 (1979).

⁸⁰ 43 Fed. Reg. 58,571 (1978).

⁸¹ The statutory authority for the Ugandan regulations was the Bretton Woods Agreement Amendments Act, Pub. L. No. 95-435, § 5(d), 92 Stat. 1051, 1052 (1978) (repealed 1979), which amended the EAA '69, specifically, 50 U.S.C. app. § 2403(m), *repealed by* Pub. L. No. 96-67, 93 Stat. 415 (1979).

⁸² 47 Fed. Reg. 11,247 (1982) (repealed 1982).

⁸³ 43 Fed. Reg. 7,311 (1978).

⁸⁴ 43 Fed. Reg. 7,311 (1978) and 47 Fed. Reg. 11,247 (1982).

in South Africa and Namibia were not asserted over transactions involving foreign-origin products exported from countries other than South Africa and Namibia by subsidiaries controlled by U.S.-origin interests.⁸⁵

Moreover, both sets of regulations avoided interfering with existing contractual arrangements. The regulations applicable to South African and Namibian military and police authorities permitted a two month grace period for service contracts in effect at the time the regulations were promulgated.⁸⁶ The Libyan regulations excepted from the export controls: (1) transactions involving preexisting contractual commitments under which performance would not be excused for failure to obtain an export license, (2) validated export licenses issued prior to the effective date of the regulations, and (3) export of nonstrategic foreign-produced direct product of U.S.-origin technical data.⁸⁷

The 1980 Olympic Boycott Regulations⁸⁸ extended to any "person subject to the jurisdiction of the United States." The key phrase was defined to exclude foreign subsidiaries of U.S. corporations.⁸⁹

The 1980 embargo on Russian grain sales also was inapplicable to transactions conducted by foreign companies in non-U.S.-origin grain.⁹⁰ Moreover, the Russian grain embargo was prospective in its application to wheat and corn⁹¹ and permitted fulfillment of shipments of other agricultural commodities already in transit on the date of the President's directive.⁹² The Russian grain embargo regulations were motivated by national-security concerns in addition to foreign-policy concerns,⁹³ and thus were made applicable to reexports of U.S.-origin agricultural commodities from other countries to the Soviet Union.⁹⁴

The December export regulations⁹⁵ also were not retroactively applied. Only products produced in accordance with technical data transmitted on or after December 30, 1981, were subjected to the regulations. Nor did they apply to reexports of goods produced in accordance with U.S. licensed technology. They were not asserted extraterritorially. Both foreign subsidiaries of U.S. companies and foreign companies controlled by U.S. interests were unaffected by the December export regulations.

⁸⁵ 15 C.F.R. § 385.4(a) (1982).

⁸⁶ 43 Fed. Reg. 7,311-12 (1978).

⁸⁷ 47 Fed. Reg. 11,247 (1982) (repealed 1982).

⁸⁸ 15 C.F.R. § 385.2(d) (1982).

⁸⁹ 15 C.F.R. § 385.2(d)(3) (1982).

⁹⁰ 15 C.F.R. § 376.5, 45 Fed. Reg. 1,883 (1980) (repealed 1981).

⁹¹ 15 C.F.R. § 376.5(b), 45 Fed. Reg. 1,884 (1980) (repealed 1981).

⁹² 15 C.F.R. § 376.5(c), 45 Fed. Reg. 1,884 (1980) (repealed 1981).

⁹³ 45 Fed. Reg. 1,883 (1980) (repealed 1981).

⁹⁴ 15 C.F.R. § 376.5(a), 45 Fed. Reg. 1,884 (1980) (repealed 1981).

⁹⁵ 47 Fed. Reg. 141 (1982) (repealed 1982).

e. Case law interpretations of the extraterritorial jurisdictional provisions of the EAA '79

There is no U.S. case law specifically treating the merits of the extraterritorial jurisdictional issues created by the June regulations.⁹⁶

The phrase "subject to the jurisdiction of the United States" was interpreted in a judicial opinion⁹⁷ issued shortly before the Congress began its deliberations over the EAA '79.⁹⁸ The phrase occurred outside the area of exports controls, in the Marine Mammal Protectional Act.⁹⁹ The court held that a U.S. citizen hunting in the waters of a foreign nation under a license from the foreign nation was not within the ambit of the jurisdictional reach of the Act.¹⁰⁰

The reaction of courts in the United States to attempted assertions by foreign governments of extraterritorial jurisdiction over events, persons and things in the United States sheds some light on the legality of the June regulations under American law. In this regard, orders of foreign governments for the seizure of assets in the United States are not accepted as valid.¹⁰¹ Nor may the use of technology in the U.S. be governed by foreign patent laws.¹⁰² Thus, there is evidence that U.S. courts tend to resist assertions by foreign governments of extraterritorial jurisdiction into the United States.

⁹⁶ The Commerce Department has issued a decision upholding the extraterritorial jurisdictional reach of the June regulations as authorized by the EAA '79. In re Dresser (France) S.A., No. 632, slip op. (Ass't Sec'y of Commerce for Trade Administration, filed Nov. 1, 1982).

⁹⁷ *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

⁹⁸ The phrase also was interpreted by the Hong Kong Supreme Court, sitting as a trial court, so as to preclude U.S. jurisdiction over goods unloaded from a U.S. transport ship and placed onto Hong Kong soil. This interpretation was noted when the Supreme Court of Hong Kong sat in *American President Lines, Ltd. v. China Mutual Trading Co.*, 1953 A.M.C. 1510, 1518 (Hong Kong Sup. Ct. 1953) as a reviewing court. In the appellate decision, the Hong Kong Supreme Court reviewed the definitions of "Property subject to the jurisdiction of the United States" contained in the Foreign Assets Control Regulations, which were issued pursuant to the TWEA in the 50's, and concluded that the phrase was inapplicable to goods situated in a foreign country and owned by a foreign national, even if the goods were under the control of a U.S. citizen. *Id.* at 1527.

⁹⁹ Codified at 16 U.S.C. § 1361 *et seq.* The phrase itself occurred in the law at 16 U.S.C. §§ 1372(a)(1) and (3) and in the codified regulations at 50 C.F.R. §§ 216.11(c) and 216.13(b) (1974).

¹⁰⁰ *United States v. Mitchell*, 553 F.2d 996, 997 (5th Cir. 1977).

¹⁰¹ *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

¹⁰² *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972) ("[O]ur patent system makes no claim to extraterritorial effect . . . and we correspondingly reject the claims of others to such control over our market."); *Boesch v. Graff*, 133 U.S. 697, 703 (1890); *Sanofi, S.A. v. Med-Tech Veterinarian Products, Inc.*, 565 F. Supp. 931 (D.N.J. 1983); *Griffin v. Keystone Mushroom Farm, Inc.*, 453 F. Supp. 1283 (E.D. Pa. 1978).

f. Subsequent congressional action

Actions taken by Congress in response to the imposition of the June reexport regulation are relevant in any judicial determination of the original intent of Congress.¹⁰³

The sponsors¹⁰⁴ of a bill¹⁰⁵ to rescind the December 30, 1981, and June 22, 1982, Export Trade Administration Regulations did not question or deny the authority granted to the President by the EAA '79 to impose extraterritorial export controls.¹⁰⁶ However, the House Committee on Foreign Affairs determined that the December and June regulations failed to satisfy the criteria¹⁰⁷ set forth by the EAA '79 for presidential consideration prior to imposition of such controls.¹⁰⁸ The Committee concluded that the extraterritorial assertion of such controls against subsidiaries and foreign licensees of U.S. firms failed to fulfill any of the relevant criteria prescribed by the EAA '79 for consideration by the President.¹⁰⁹ Moreover, though not challenging whether such extraterritorial controls as the June regulations exceed the President's authority under the EAA '79, the Committee did determine that such authority was not explicit in the EAA '79.¹¹⁰ The amended version of the bill narrowly passed by the House, called for repeal of the December and June regulations in 90 days, if at that time the President certified to Congress that the Soviets were not using forced labor to build their natural gas pipeline.

2. Compliance of the June Regulations with Statutory Requirements of the EAA '79

The EAA '79 requires presidential consideration of several factors¹¹¹ when the President imposes, expands or extends export controls under the foreign-policy control authority of the statute. The President must

¹⁰³ The doctrine of congressional acquiescence has been recognized by the Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). See also *Persinger v. Islamic Republic of Iran*, 690 F.2d 1010 (D.C.Cir. 1982); *Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (7th Cir. 1976).

¹⁰⁴ The sponsors of the bill were members of the President's political party.

¹⁰⁵ H.R. 6838, 97th Cong., 2d Sess. (1982).

¹⁰⁶ H.R. REP. NO. 762, 97th Cong., 2d Sess. 6 (1982).

¹⁰⁷ EAA '79, *supra* note 1, at § 6(b) (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)).

¹⁰⁸ H.R. REP. NO. 762, 97th Cong., 2d Sess. 3 (1982).

¹⁰⁹ *Id.*

¹¹⁰ H.R. REP. NO. 762, 97th Cong., 2d Sess. 6 (1982).

¹¹¹ EAA '79, *supra* note 1, at § 6(b) (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980) (Criteria)); EAA '79, *supra* note 1, at § 6(d) (codified at 50 U.S.C. app. § 2405(d) (Supp. IV 1980) (alternative means)); EEA '79, *supra* note 1, at § 6(e) (codified at 50 U.S.C. app. § 2405(e) (Supp. IV 1980) (notification to Congress)) and EAA '79, *supra* note 1, at § 6(g) (codified at 50 U.S.C. app. § 2405(g) (Supp. IV 1980) (foreign availability)).

report to Congress regarding the conclusions of the President with respect to each of the criteria set forth in section 6(b) of the EAA '79.¹¹² The President also is required to report to Congress regarding how the controls in question significantly further the foreign policy of the United States.¹¹³

Promulgation of the June reexport regulations was accompanied by conclusory statements of presidential compliance¹¹⁴ with the EAA '79 mandated consideration of the requisite criteria,¹¹⁵ alternative means¹¹⁶ and foreign availability.¹¹⁷ However, the notice of rule promulgation published in the Federal Register does not state that the requisite report was submitted to Congress. The EAA '79 provides for confidential submission of the report to Congress.¹¹⁸ Thus, the President may have submitted the congressionally mandated conclusions in compliance with the EAA '79, and Congress may have considered these conclusions in due course.¹¹⁹

¹¹² The Presidential reporting requirement, EAA '79, *supra* note 1, at § 6(e) (codified at 50 U.S.C. app. § 2405(e) (Supp. IV 1980)).

¹¹³ *Id.*; The Committee on Foreign Affairs of the House of Representatives has expressed general dissatisfaction with past Executive adherence to the statutory scheme for implementing foreign policy controls under the EAA '79, as follows:

The committee has assessed the imposition of controls for foreign policy purposes since 1979 by two Presidents. Setting aside disagreements on whether or not the authority to impose controls should have been used in particular ways and foreign policy circumstances, the committee finds that the executive branch process for deciding to employ controls has been deficient. The executive branch has generally failed to consult with other countries before imposing controls, which has reduced possibilities for bilateral or multilateral cooperation, and has increased allied irritation. The Congress has generally not been consulted prior to the imposition of control [sic], but merely has been notified after the controls were imposed. The reports to the Congress required of the President have been received so long after the imposition of controls that the committee concludes that consideration of the criteria in the act for imposing controls occurs only after the controls are imposed, and only in the context of justifying the controls to the Congress.

H.R. REP. NO. 257 Part 1, 98th Cong., 1st Sess. 20 (1983).

¹¹⁴ 47 Fed. Reg. 27,250 (1982) (repealed 1982).

¹¹⁵ EAA '79, *supra* note 1, at § 6(b) (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)).

¹¹⁶ *Id.* at § 6(d) (codified at 50 U.S.C. app. § 2405(d) (Supp. IV 1980)).

¹¹⁷ *Id.* at § 6(g) (codified at 50 U.S.C. app. § 2405(g) (Supp. IV 1980)).

¹¹⁸ *Id.* at § 6(e) (codified at 50 U.S.C. app. § 2405(e) (Supp. IV 1980)).

¹¹⁹ The EAA '79 also requires the Secretary of Commerce prior to imposing foreign-policy controls to consult with industry regarding: (1) the probability that the controls will achieve the intended foreign policy purpose in light of the availability of non-U.S. sources of supply, and (2) the domestic economic impact of the controls. EAA '79, *supra* note 1, at § 6(c) (codified at 50 U.S.C. app. § 2405(c) (Supp. IV 1980)). It is unclear when and in what manner this consultation in regard to the June reexport regulations occurred. *See, e.g.*, Letter from Richard L. Leshner, President, Chamber of Commerce of the United States of America, to the President of the United States (Feb. 5, 1982) (filed with the Office of Export

Moreover, the President is required only to consider the specific criteria enumerated in section 6(b) of the EAA '79.¹²⁰ The President neither is required to conclude favorably with respect to any one criterion, nor a majority of the criteria, before imposing export controls. It is sufficient that the President has considered each criterion, notwithstanding any negative effects that might result upon imposition of any particular set of export controls. Thus, the criteria would appear to impose no prerequisites to the validity of the June regulations.¹²¹

At least one committee of Congress, the House Committee on Foreign Affairs, concluded that the June reexport regulations fulfilled virtually none of the section 6(b) criteria¹²² set for consideration by the President when promulgating export control regulations.¹²³ The House Committee on Foreign Affairs took particular note of the fact that, "all affected European governments have directed U.S. subsidiaries and licensees within their jurisdiction to fulfill pipeline contracts in contravention of the U.S. controls, so the controls can be enforced only with respect to U.S. firms themselves."¹²⁴ The Committee concluded that the controls would have no significant effect upon Soviet decisions regarding events in Poland.¹²⁵ Having concluded that the controls had failed to achieve their foreign policy aims, the Committee saw no reason to prolong the controls in force.¹²⁶

C. Legality of Extraterritorial Jurisdictional Provisions Under Foreign Laws

The courts of foreign nations refuse to uphold the applicability of United States law over acts committed in their territories by their nationals.¹²⁷

Administration, pursuant to the public comment period provided in 47 Fed. Reg. 27,250 (1982) (repealed 1982)) (urging consultation by the Administration with the business community prior to the imposition of extraterritorial controls).

¹²⁰ Codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980).

¹²¹ S. 397, 98th Cong., 1st Sess. § 7 (1983) would substantially change § 6(b) of the EAA '79, *supra* note 1, (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)) to make satisfying the criteria regarding foreign policy controls a mandatory prerequisite to the imposition of such controls and puts the burden of proof on the Executive.

¹²² EAA '79, *supra* note 1, at § 6(b) (codified at 50 U.S.C. app. § 2405(b) (Supp. IV 1980)).

¹²³ H.R. REP. No. 726, 97th Cong., 2d Sess. 3 (1982).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ H.R. REP. No. 762, 97th Cong., 2d Sess. 7 (1982).

¹²⁷ *E.g.*, *Viscount Dilhorne in Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 1 All E.R. 434, 460:

For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is

A Dutch court declined to recognize the validity of the June regulations, which were offered as the basis for a *force majeure* defense in an action to compel performance of a contract.¹²⁸ Sensor, a Dutch corporation wholly owned by a U.S. corporation, refused to perform its obligations under a contract with CEP, a French corporation, to supply equipment bound for the Soviet Union's natural gas pipeline. Sensor argued that it would be subject to severe penalties upon performance of its contract with CEP, because Sensor, as a subsidiary of a U.S. corporation, was subject to the extraterritorial jurisdiction of the June reexport regulations. Applying Netherlands law, the court looked to international law principles in determining that the extraterritorial jurisdictional provision¹²⁹ of the June regulations regarding foreign subsidiaries of U.S. corporations was invalid.

A U.S. vessel was transporting goods to Hong Kong in late 1950. The ship docked in the Hong Kong harbor on the very day that the Foreign Assets Control Regulations were promulgated pursuant to the authority of the TWEA. After the goods had been unloaded from the ship and placed in the custody of a Hong Kong warehouseman, the ship owner was notified by the United States Government that the newly promulgated regulations prohibited delivery of the goods to the Hong Kong purchaser. The U.S. shipowner refused to execute the bills of lading, which would permit the Hong Kong purchaser to retrieve the goods from the warehouseman. Sitting as a court of original jurisdiction, the Supreme Court of Hong Kong ruled that the goods in question were not "subject to the jurisdiction of the United States" within the meaning of that phrase in the Foreign Assets Control Regulations, once the goods were unloaded from the U.S. ship and deposited on Hong Kong soil. After conducting a review of the use of the phrase by the Foreign Assets Control Regulations in relation to securities, the Supreme Court of Hong Kong affirmed its trial court decision.¹³⁰

A British corporation was ordered by a U.S. court to relinquish patent rights in United Kingdom patents owned by the corporation. The British corporation previously had contracted to assign the patent rights in question to a third party. The third party sued in a British court to compel the British corporation to assign the patent rights in accordance

not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.

¹²⁸ *Compagnie Europeenné des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, filed Sept. 17, 1982).

¹²⁹ Specifically, 15 C.F.R. § 385.2(c)(2)(iv), as amended by 47 Fed. Reg. 27,252 (1982).

¹³⁰ *American President Lines, Ltd. v. China Mutual Trading Co.*, 1953 A.M.C. 1510 (Hong Kong Sup. Ct. 1953).

with the contract, notwithstanding the U.S. court order. The British court held that the British corporation must fulfill its contract with the third party regarding assignment of the patent rights. The order of the U.S. court was regarded as "an assertion of an extraterritorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts."¹³¹ The British court noted that "American courts would likewise be slow (to say the least) to recognize an assertion on the part of British courts of jurisdiction extending, in effect, to the business affairs of persons and corporations in the United States."¹³²

The legislative bodies of foreign nations have enacted protective laws to shield their citizens from the extraterritorial reach of U.S. laws. Some of these foreign laws have included retaliatory measures, called "claw-back" clauses.¹³³

On March 20, 1980, the British Parliament enacted the Protection of Trading Interests Act.¹³⁴ The primary, though unstated, purpose of the Act was to resist incursions upon British jurisdiction and trading interests by U.S. courts and other governmental authorities.¹³⁵ The Act empowers the British Secretary of State for Trade to forbid British citizens and businesses to comply with orders of foreign authorities, if the orders have extraterritorial effects within Britain to the prejudice of British trading interests.¹³⁶ The Secretary may invoke the powers of the Act after finding that a proposed law of a foreign government would apply extraterritorially to acts done by persons within the United Kingdom where such proposed foreign law threatens to damage the trading interests of the United Kingdom.¹³⁷

The Secretary invoked the powers of the PTI Act against the June regulations, thereby effectively rendering the June regulations invalid under U.K. law.¹³⁸

¹³¹ *British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd.*, 2 All E.R. 780, 783 (Ct. App. 1952).

¹³² *Id.* at 782.

¹³³ *E.g.*, Section 6 of the British Protection of Trading Interests Act, 1980, ch. 11, in force March 1980 (permitting recovery of antitrust damages awarded by foreign courts against British antitrust defendants).

¹³⁴ 1980, c. 11; in force Mar. 20, 1980 [hereinafter cited as the PTI].

¹³⁵ *See generally* Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

¹³⁶ The Protection of Trading Interests Act, 1980, ch. 11, § 1.

¹³⁷ *Id.*; the PTI also forbids enforcement in the United Kingdom of foreign judgments for multiple damages (PTI s. 5) and affords U.K. citizens the right to recover in U.K. courts the non-compensatory portion of multiple damage awards paid under foreign judgments (PTI s. 6).

¹³⁸ The PTI (U.S. Reexport Control) Order, made June 30, 1982, in force July 1, 1982,

Canada has enacted legislation amending the Combines Investigation Act¹³⁹ to protect Canadian subsidiaries of U.S. corporations from the extraterritorial effects of U.S. laws, such as the TWEA.¹⁴⁰ Section 31.5 of the Act prohibits implementation in Canada of foreign judgments adversely affecting Canadian internal commerce or export trade.¹⁴¹ Section 31.6 of the Act prohibits compliance of Canadian persons or companies with foreign laws, or private directives giving extraterritorial effect to foreign laws, if such foreign laws or private directives would be likely to impose adverse effects on the internal commerce or export trade of Canada.¹⁴²

Australia has enacted the Foreign Proceedings (prohibitions of certain evidence) Act of 1976.¹⁴³ The Act is applicable when the Attorney General is satisfied that "a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity. . . ."¹⁴⁴ The Act also applies when the Attorney General is satisfied that restrictions must be imposed for the purpose of protecting the national interest in relation to matters over which the laws or executive powers of the Commonwealth of Australia assert jurisdiction.

The June regulations epitomize the resented extraterritorial jurisdictional incursions proscribed by the preceding British, Canadian and Australian laws.¹⁴⁵

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¹³⁹ CAN. REV. STAT. ch. C-23 (1970), amended by ch. 76 § 12, 1974-1975-1976 Can. Stat. 1535.

¹⁴⁰ See R. ROBERTS, *ANTICOMBINES AND ANTITRUST: CANADIAN LEGAL TEXT SERIES*, 327, 329-30 (1980); M. FLAVELL, *CANADIAN COMPETITION LAW: A BUSINESS GUIDE*, 130 (1979).

¹⁴¹ CAN. REV. STAT. ch. C-23 (1970), amended by ch. 76 § 12, 1974-1975-1976 Can. Stat. 1535.

¹⁴² *Id.*

¹⁴³ Austl. Acts No. 121 (1976) (assented to November 19, 1976).

¹⁴⁴ *Id.*

¹⁴⁵ H.R. 3231, 98th Cong., 1st Sess. (1983), would substantially reduce the authority of the President to impose foreign policy controls by limiting the President's authority to exportation from the United States. The changes that H.R. 3231 would make upon EAA '79, *supra* note 1, at § 6(a)(1) (codified at 50 U.S.C. app. 2405(a) (1)) are as follows, with excisions square bracketed and additions italicized:

In order to carry out the policy set forth in paragraph (2)(b), (7), (8), or (13) of section 3 of this Act, the President may prohibit or curtail the exportation from the United States of any goods, technology, or other information [subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of] *produced in the United States*, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international objections.

H.R. 3231, 98th Cong., 1st Sess. § 113(a) (1983). Exports from foreign countries by either subsidiaries of U.S. corporations or licensees of U.S. corporations would not be subject to

*D. Legality of Extraterritorial Jurisdictional Provisions of the June Regulations Under International Law Principles*¹⁴⁶

Extraterritorial jurisdiction is commonly founded on one or more of five international law principles.¹⁴⁷ They have come to be known as the territorial principle, the nationality principle, the protective principle, the passive personality principle and the universality principle. Of these five, the last two fail to bear any significant relevance to the subject matter at hand, and thus are not discussed.¹⁴⁸

The assertion of extraterritorial jurisdiction may be contrary to international law, even if some generally accepted basis for jurisdiction exists, if the extraterritorial jurisdiction also interferes with the jurisdictional prerogatives of the governing authority of the foreign territory.¹⁴⁹

the authority of the Executive acting alone. If the President wanted to impose reexport controls, such as controls prohibiting the export from foreign countries of goods produced in foreign countries using licensed technology of U.S. origin, the imposition of such controls would require a joint resolution of Congress. H.R. 3231, 98th Cong., 1st Sess. § 113(c) (1983).

¹⁴⁶ Absent an expressed purpose of Congress to legislate contrary to international law principles, e.g., *Rainey v. United States*, 232 U.S. 319, 316-17 (1914); *Whitney v. Robertson*, 124 U.S. 190, 193-95 (1888), the United States Supreme Court looks unfavorably upon statutory interpretations at odds with the tenets of international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138, 147 (1957); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1306 (D.C. Cir. 1980); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); RESTATEMENT 2d, *supra* note 30, at § 38 and RESTATEMENT OF THE FOREIGN REL. (REVISED) § 403(4) (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT TD2]. Thus, the validity under international law principles of the extraterritorial reach of the June regulations becomes relevant to the validity of those regulations under U.S. law, as well as international law.

¹⁴⁷ Marcuss and Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981).

¹⁴⁸ The passive personality principle applies to acts done by aliens which have a direct effect upon nationals of the state seeking to impose extraterritorial jurisdiction. The universality principle permits exercises of jurisdiction by any nation in regard to acts which are deserving of punishment as a general matter of international public policy. The most often cited example of the latter is piracy. Regarding the universality principle, see RESTATEMENT OF THE FOREIGN REL. § 404 (Tent. Draft No. 3, 1982) [hereinafter cited as RESTATEMENT TD3].

¹⁴⁹ *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 1634 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). See RESTATEMENT TD2, *supra* note 146, at § 403, comment a. ("Although one of the bases for jurisdiction . . . is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable." See also RESTATEMENT 2D, *supra* note 30, at § 40.

1. The Territorial Principle

The territorial principle¹⁵⁰ holds that a nation may extend its jurisdiction over acts occurring within its own borders.¹⁵¹ This is the most fundamental basis for jurisdiction.¹⁵² Nations possess unlimited power to prescribe conduct within their boundaries.¹⁵³

The territorial principle has been extended beyond national geographical boundaries by the so-called "effects doctrine." This doctrine holds that a nation may extend its jurisdiction over actions occurring outside its territory, if the actions affect events within its territorial borders.¹⁵⁴ Acts producing effects within the territory of a nation are considered to occur within the territory of the nation.¹⁵⁵

The full significance of the effects doctrine is largely undefined. The *Restatement (Second) of Foreign Relations Law of the United States* requires the effect to be "substantial" and a "direct and foreseeable result of the conduct outside the territory." The effects doctrine is to be applicable only in instances where "the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."¹⁵⁶ Such terms permit considerable latitude of interpretation. However, the effects doctrine has been held in one forum to provide an insufficient basis for the jurisdictional provisions found in

¹⁵⁰ A general discussion of the territorial principle can be found in Sarkar, *The Proper Law of Crime in International Law*, 11 INT'L. & COMP. L.Q. 446, 447-56 (1962).

¹⁵¹ *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977); RESTATEMENT 2D, *supra* note 146, at § 17.

¹⁵² *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 136 (1812); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

¹⁵³ RESTATEMENT 2D, *supra* note 30, at § 17; RESTATEMENT TD2, *supra* note 146, at § 402(1)(a).

¹⁵⁴ RESTATEMENT 2D, *supra* note 30, at §§ 10(a), 18(b) (1965); RESTATEMENT TD2, *supra* note 146, at 402(1)(c), 403(b), 415; *see e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (antitrust violation of foreign subsidiary of U.S. corporation); *Strassheim v. Daily*, 221 U.S. 280 (1961); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981) (antitrust violation of foreign subsidiary of U.S. corporation), *cert. denied*, 102 S. Ct. 1634 (1982); *United States v. Ricardo*, 619 F.2d 1124 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980) (extraterritorial jurisdiction over persons intending to distribute heroin within U.S.); *Rivard v. United States*, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945) (antitrust violation of foreign firm having no U.S. subsidiary corporate relationship). *But see Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (no U.S. jurisdiction over fraudulent acts committed abroad and only generally affecting U.S. economy or the investing sector of the economy).

¹⁵⁵ *See 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, 586 (1970).

¹⁵⁶ RESTATEMENT 2D, *supra* note 30, at § 18(b), comments f, g and i.

the June reexport regulations.¹⁵⁷

Tentative Draft No. 2 of the Restatement raises an interesting issue in its discussion of the due process clause of the Fifth Amendment as a limitation upon the extraterritorial thrust of federal law. The due process clause of the Fourteenth Amendment is there interpreted to prohibit exercises of jurisdiction as to persons or property not within the territory of the exercising body.¹⁵⁸ Therefore, the extraterritorial jurisdictional reach of the EAA '79 is arguably prohibited by the due process clause of the Fifth Amendment.¹⁵⁹

2. The Nationality Principle

The nationality principle permits a nation to exercise extraterritorial jurisdiction over its nationals,¹⁶⁰ even where the exercise of this jurisdiction may confront the national in question with a choice between incurring a penalty under the law of its home state or the law of the state of residence.¹⁶¹ The most important aspect of the nationality principle for purposes of the present discussion involves the determination of the extent to which a foreign licensee of a U.S. corporation may be considered a national of the United States for purposes of the United States trade laws.¹⁶²

The nationality of a corporation is elusive.¹⁶³ According to a basic principle, a corporation is invested with the nationality of its creating authority.¹⁶⁴ This principle is tempered by the view that primary jurisdic-

¹⁵⁷ *Compagnie Européenne des Petroles S.A. v. Nederland Sensor B.V.*, No. 82-716, slip op. (District Court of the Hague, Sept. 17, 1982).

¹⁵⁸ RESTATEMENT TD2, *supra* note 146, at § 403, reporter's note no. 9 (1981); See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 255-57 (1972).

¹⁵⁹ Aliens are entitled to the due process protection of the Fifth Amendment to the Constitution. *United States v. Pink*, 315 U.S. 203, 228 (1942); *Korematsu v. United States*, 323 U.S. 214 (1944); *Sardino v. Fed. Resv. Bd. of N.Y.*, 361 F.2d 106, 111 (2d Cir. 1966).

¹⁶⁰ *Blackmer v. United States*, 284 U.S. 421, 436 (1932); RESTATEMENT 2D, *supra* note 30, at §§ 10(b) and 30(1).

¹⁶¹ RESTATEMENT TD2, *supra* note 146, at § 406 (1981).

¹⁶² Some guidelines exist for the determination of the nation with which a juristic person should be identified in relation to the anti-boycott statute section of the EAA '79. Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 455-458 (1981).

¹⁶³ See Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579, 589-92 (1970) (different nations determine corporate nationality according to different tests; some nations apply several tests depending on the purpose of the determination; both the tests and the purposes may conflict); see also RESTATEMENT 2D, *supra* note 30, at § 18b.

¹⁶⁴ RESTATEMENT 2D, *supra* note 30, at § 27. See *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925); *Steamship Co. v. Tugman*, 106 U.S. 118 (1882); *Barcelona Traction, Light &*

tion over an enterprise belongs to the state in which the enterprise is doing business.¹⁶⁵

In the *Nottebohm* case,¹⁶⁶ the International Court of Justice analyzed the circumstances under which a state legitimately could confer nationality upon an individual of another state. The court concluded that states were required to recognize such grants of nationality only in instances where a "genuine connection" between the individual and the state granting nationality existed.¹⁶⁷

Regarding licensees of U.S. corporations, a specific question becomes whether payment of royalties to an entity over which U.S. jurisdiction exists is sufficient to confer jurisdiction over the royalty-paying entity, the latter residing outside the territorial bounds of the United States and having no other link to the United States.¹⁶⁸ It already has been established in several foreign forums that U.S. extraterritorial jurisdiction cannot be predicated on U.S.-origin goods, once those goods have been discharged in the territory of another country.¹⁶⁹ Therefore, it would appear that a sales agreement requiring payment for purchase of U.S.-origin goods is not sufficient to confer jurisdiction on the entity making payment to the U.S. entity.

A further distinction may be drawn between goods originating in the United States and goods produced in a country outside of the United States, but nonetheless manufactured using U.S.-origin technical data.¹⁷⁰

Power Co., 1970 I.C.J. 3; RESTATEMENT TD2 *supra* note 146, at § 216. *E.g.*, Convention of Establishment, United States-France, Nov. 25, 1959, art. XIV(5), 11 U.S.T. 2398, T.I.A.S. No. 4625 (defining the nationality of a corporation as the incorporating state).

¹⁶⁵ RESTATEMENT TD2, *supra* note 146, at § 418, comment c. See also RESTATEMENT TD2, *supra* note 146, at § 402, comment b; RESTATEMENT TD3, *supra* note 148, at § 419, comment b.

¹⁶⁶ *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 1.

¹⁶⁷ *Id.* at 23; see also *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District court at the Hague, filed Sept. 17, 1982) (holding that a treaty between U.S. and Netherlands precluded conclusion that 15 C.F.R. § 385.2(c)(2)(iv) [added by the June regulations] conferred U.S. nationality on a Netherlands corporation wholly-owned by a United States corporation).

¹⁶⁸ The June reexport regulations revised 15 C.F.R. § 379(a) to include in the list of prohibited exports and reexports, the "[e]xport or reexport to the U.S.S.R., . . . [of] any foreign produced direct products of U.S. technical data . . . if: . . . the use of the data is contingent upon *royalty payments* or other compensation to, any person subject to the jurisdiction of the United States as defined in § 385.2(c), regardless of when the data were exported from the U.S." 47 Fed. Reg. 27,251 (1982) (emphasis added).

¹⁶⁹ *American President Lines, Ltd. v. China Mutual Trading Co.*, 1953 A.M.C. 1510, 1526 (Hong Kong Sup. Ct. 1953); *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, filed Sept. 17, 1982).

¹⁷⁰ This very distinction was implicitly made, but ignored, in *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, filed Sept. 17, 1982), a suit brought by a French company against a Netherlands-

Implicit in the June regulations' assertion of extraterritorial jurisdiction over the foreign-origin product of U.S.-origin technical data is the premise that goods and technical data possess nationalities. The problem with this premise is that the nationality principle is essentially a principle of allegiance. The nationality principle is properly applied to persons who pledge their allegiance to a nation in return for the benefits of that nation's citizenship or residency. Goods and technology obviously cannot pledge their allegiance to any nation. They are not citizens that derive benefits from a country. Thus, the nationality principle generally will not operate in relation to goods or technical data as a basis for extraterritorial jurisdiction.

3. The Protective Principle

According to the protective principle, a nation has jurisdiction over any action committed outside its territory by an alien person so long as the action is committed against the security, territorial integrity or political independence of the nation in question.¹⁷¹ Thus, the protective principle primarily functions to justify extraterritorial jurisdiction in situations involving the national security of nations. The day-to-day foreign policy concerns of nations do not rise to the level of national security concerns, and therefore cannot justify extraterritorial assertions of jurisdiction in accordance with the protective principle of international law. The June reexport regulations were issued as foreign policy motivated export controls under section 6 of the EAA '79,¹⁷² not as national security motivated regulations under section 5 of the EAA '79.¹⁷³ Therefore, the protective principle fails to provide an acceptable basis for the extraterritorial jurisdictional provisions of the June regulations.¹⁷⁴

based wholly owned subsidiary of a United States corporation for breach of contract; the sole defense asserted by the Netherlands-based subsidiary of the U.S. corporation being that the June reexport regulations prohibited subsidiaries of U.S. companies from exporting oil and gas related goods to the U.S.S.R. In rejecting the validity of the jurisdictional provisions contained in 15 C.F.R. § 385.2(c)(2)(iv) based on the international law principle of protection or security, the court concluded that the exports to the U.S.S.R. would not have any direct and prohibited consequences within the United States, because the goods did not originate in the United States. The fact that the goods were able to be produced in the Netherlands by directly applying technical data originating from the United States was not considered.

¹⁷¹ RESTATEMENT 2D, *supra* note 30, at §§ 10(c), 33(1); *e.g.*, *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161 (E.D. Pa. 1980).

¹⁷² 50 U.S.C. app. § 2405 (Supp. IV 1980).

¹⁷³ *Id.* at § 2404.

¹⁷⁴ *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, filed Sept. 17, 1982) (declining to hold June regulations

In the *Barcelona* case,¹⁷⁵ Belgium attempted to extend diplomatic protection to a foreign corporation in which Belgian nationals were majority shareholders. The action of the government of Belgium was taken in response to the wasting of corporate assets by the Spanish Government to the economic detriment of Belgian shareholders. The International Court of Justice declared that the protective principle of international law could not be used to transform the Spanish State into the insurer of the wealth of the Belgian State. Thus, the protective principle was held insufficient to justify an exercise of extraterritorial jurisdiction to prevent infliction of purely economic harm on the country asserting jurisdiction.

E. Conclusions

Promulgation of the June reexport regulations under § 6 of EAA '79 was contrary to the intent of Congress insofar as the regulations purport to extend United States jurisdiction over foreign companies, which are neither owned nor controlled by U.S. companies, but rather are merely foreign licensees of U.S. companies, for acts occurring within foreign nations. The EAA '79 does not expressly apply its jurisdiction so as to authorize the foreign licensee jurisdiction in question. Neither the statutory nor regulatory practice preceding enactment of the EAA '79 contains any instance of U.S. jurisdiction over the acts of foreign nationals committed on foreign soil, based solely on the existence of an agreement between the foreign national and a U.S. citizen or resident. Moreover, the authorization of foreign licensee jurisdiction is not a permissible judicial interpretation of the EAA '79 absent the expressed intent of Congress, since the extraterritorial jurisdiction in question is contrary to international law principles.

III. CONSEQUENCES AND REMEDIES FOR LICENSORS AND LICENSEES OF IMPAIRED LICENSES

A. Consequences

The immediate consequences are contract cancellations and the ensuing loss of business embodied in the lost contracts.¹⁷⁶ The long term consequences include a rising U.S. trade deficit, as foreign manufacturers avoid incorporating U.S. components into their specifications.¹⁷⁷ U.S.

valid under the protective principle, because the regulations were not motivated by national security concerns).

¹⁷⁵ *In re Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3.

¹⁷⁶ See H.R. REP. NO. 762, 97th Cong., 2d Sess. 5 (1982). The Commerce Department estimates that U.S. businesses will lose a minimum of \$850 million in export contracts because of the June regulations. At least 25,000 jobs also are likely to be lost.

¹⁷⁷ The June regulations are expected by the Commerce Department to cause U.S. firms to lose several billions of dollars in follow-on contracts. *Id.*

companies will be viewed as unreliable suppliers.¹⁷⁸

A troublesome interim consequence is the prospect of breach of contract litigation.¹⁷⁹ Suits for breach of contract are likely to be brought by foreign licensees of U.S. technology, the Soviets¹⁸⁰ and businesses contracting to supply the Soviets.¹⁸¹ Suits may be brought against the foreign

¹⁷⁸ Commercial insurance firms are reluctant to insure U.S.-origin goods against political risks of nondelivery in view of the possibility of a recurrence of an episode like the imposition of the June reexport regulations. The inability of U.S. firms to obtain such insurance precludes their participation in bidding for foreign supply contracts. See H.R. REP. No. 762, 97th Cong., 2d Sess. 6 (1982).

H.R. 1565, 98th Cong., 1st Sess. (February 22, 1983) attempts to provide indemnification against such losses in the future by authorizing the Overseas Private Investment Corporation to issue insurance against losses incurred from the imposition of certain export controls. The insurance covers: "losses incurred in the production and preparation for sale of goods or technology on which such export controls are imposed." The parties eligible to receive such insurance include foreign businesses wholly owned by U.S. citizens or legal entities created under the laws of the United States or any state or territory of the United States.

¹⁷⁹ Many of the bills proposing reenactment and revision of the EAA '79 include so-called "contract sanctity" provisions.

S. 397, 98th Cong., 1st Sess., 129 Cong. Rec.-S. 899-903 (Feb. 2, 1983) prohibits the President from imposing foreign policy controls that break contracts signed prior to the imposition of the foreign policy controls. S. 397, 98th Cong., 1st Sess. § 15 (1983). This "contract sanctity" provision would have obviated "[t]he vast majority of the complaints arising out of the imposition of controls on the Siberian natural gas pipeline", in the view of its sponsor. 129 CONG. REC.-S-900 (daily ed. Feb. 2, 1983) (Statement of Sen. Heinz).

H.R. 3231 adds a contract sanctity provision to the foreign policy controls section (§ 6; 50 U.S.C. app. 2405) of the EAA '79, providing that "Any export controls imposed under this section may not affect any contract to export entered into before the date on which such controls are imposed or any export license issued under this Act before such date." H.R. 3231, 98th Cong., 1st Sess. § 111(a) (1983).

The legislation proposed by the Executive, H.R. 2500, 98th Cong., 1st Sess. (1983) and S. 979, 98th Cong., 1st Sess. (1983), stopped short of an absolute sanctity of contract provision. The Executive proposal calls for a new subsection at the end of EAA '79 § 6 as follows:

(1) Sanctity of Contract.—The President shall not prohibit or curtail the export of any good or technology that is controlled under this section if such good or technology is to be exported pursuant to a sales contract (1) entered into before the President places the export under control, and (2) the terms of which require delivery of the export within 270 days after the control is imposed, except that the President may prohibit or curtail such export if he determines that not prohibiting or curtailing such export would prove detrimental to the overriding national interests of the United States.

H.R. 2500, 98th Cong., 1st Sess. § 5(5) (April 4, 1983).

¹⁸⁰ In the early 1960's, the Soviets apparently opted to sue the breaching party under circumstances bearing many similarities to the present political situation. The German government, at the behest of the U.S. government, abrogated contracts between German corporations and the Soviets for manufacture of pipe for a Soviet oil pipeline project. A. STENT, FROM EMBARGO TO OSTPOLITIK—THE POLITICAL ECONOMY OF WEST GERMAN-SOVIET RELATIONS, 1955-1980 at 110 (1981).

¹⁸¹ *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip

licensees in foreign tribunals and against U.S. licensors in both foreign and U.S. courts.

A *force majeure* defense may prove ineffective in foreign tribunals. The defense may not be credible in view of denials of responsibility by the host government of the proceeding, notwithstanding that the host government has countermanded the U.S. regulations.¹⁸² The defense also may fail, because the foreign tribunal likely will refuse to recognize the validity of the U.S. export controls.¹⁸³

B. Remedial Options¹⁸⁴

1. Challenging the Export Regulations¹⁸⁵

The only immediate remedy available to a party subjected to the

op. (District Court at the Hague, Sept. 17, 1982) (French corporation, under contract to Soviets, sued its breaching supplier, a Dutch subsidiary of U.S. corporation).

¹⁸² See A. STENT, *supra* note 180, at 110. (German government denied responsibility during 1962 pipe embargo); Wall St. J., Aug. 3, 1982, at 37, col. 1. (British Government denies responsibility for consequences of obedience to government ordered violation of U.S. export regulations).

¹⁸³ *E.g.*, *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, decided Sept. 17, 1982).

¹⁸⁴ Remedies between licensors and licensees to the impaired technology transfer agreement are contract remedies. Detailed discussion of these remedies is beyond the scope of this article. The typical license agreement insulates the licensor from consequences of non-performance under the agreement by obtaining the consent of the licensee to be bound by all valid present and future U.S. export laws and regulations. One such provision reads as follows:

Licensee agrees to comply with the Export Administration Regulations of the United States Department of Commerce, as they may be amended from time to time, to the extent applicable, and hereby gives to Licensor the assurances required by Part 379 of the Regulations.

Another form taken by such provisions is as follows:

Licensee agrees that none of the Technical Data obtained pursuant to this license shall be shipped directly or indirectly to any county, citizen, agent government, or any other person or body contrary to law or regulations of the United States of America.

However, the operability of clauses like the preceding two may require a determination of the validity of the law or regulation in question, since one may be presumed not to have agreed to abide by invalid laws or regulations. Thus, the law chosen by the parties to govern interpretation of their agreement becomes determinative, because regulations or laws valid in the United States may be invalid in the Netherlands, for example. See *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op. (District Court at the Hague, decided Sept. 17, 1982). Moreover, the agreement of private parties cannot allocate extraterritorial jurisdiction between nations. Only treaties permit one nation to exert jurisdiction over events and citizens within another nation's borders. See *The Schooner Exchange v. M'Fadden*, 11 U.S. 116, 135 (1812).

¹⁸⁵ Once the Commerce Department has begun enforcement proceedings, it become appropriate to challenge on constitutional grounds of due process, the *ex parte* enforcement

June reexport regulations lies in the power of federal district courts to issue preliminary injunctive relief enjoining enforcement of such regulations pending a decision on the merits of their applicability and validity. The availability of such injunctive relief is dependent upon the ability of the moving party to establish a substantial likelihood of success on the ultimate merits of the challenge to the validity of such a regulation.¹⁸⁶ The burden on the party requesting preliminary injunctive relief is especially heavy in cases bearing on the foreign policy of the United States.¹⁸⁷ Lacking any precedent upholding a similar challenge to the validity of such regulations, a court is unlikely to grant preliminary injunctive relief in these cases.¹⁸⁸

In practical terms, the ultimate legality of future restrictions similar to the June reexport regulations is of secondary importance in relation to the slow pace at which the legality of future similar regulations may be determined. Such regulations remain in effect during the time in which their legality is challenged in the courts. Six or seven months easily could transpire between imposition of such reexport regulations and the ultimate legal determination of their illegality. The parties to impaired technology transfer licenses, or to other contracts dependent upon performance of such impaired licenses, suffer substantial hardship during this waiting period. The experiences of the companies affected by the June reexport regulations amply demonstrate the hardships caused by the im-

scheme of the Commerce Department. However, discussion of the constitutionality of the enforcement procedures is beyond the scope of this article.

¹⁸⁶ *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

¹⁸⁷ *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977).

¹⁸⁸ Three separate motions for a temporary restraining order and one motion for a preliminary injunction were denied under similar circumstances. *Dresser Industries, Inc. v. Baldrige*, No. 82-2385, slip op. (D.D.C. Aug. 25, 1982) (Denying motion for TRO to prevent issuance of a temporary denial order by the U.S. Department of Commerce. In denying the motion, the court relied on, *inter alia*, the insufficiency of the showing of likelihood of success on the merits of the issue of whether the June 22, 1982 regulation was beyond the authority conferred on the President under the EAA '79); *Dresser Industries, Inc. v. Baldrige*, No. 82-2385, slip op. (D.D.C. Sept. 9, 1982) (denying motion for TRO to vacate August 26, 1982, TDO issued by a Commerce Department Hearing Commissioner; the grounds for the TRO motion included, *inter alia*, that promulgation of the June 22, 1982 regulations was beyond the authority conferred on the President under the EAA '79; denial of the TRO motion was predicated upon insufficient showing of likelihood of success on the merits of the jurisdictional authority granted to the President under the EAA '79); *Creusot-Loire S.A. v. Baldrige*, No. 82-2787, slip op. (D.D.C. September 29, 1982) (denying motion for TRO to vacate TDO on grounds that promulgation of June 22, 1982 regulation was unauthorized by the EAA '79); and *Dresser Industries, Inc. v. Baldrige*, No. 82-2385, slip op. (D.D.C. November 8, 1982) (denying motion for preliminary injunction; showing of success on the merits of the issue of the legality of the June 22, 1982 regulation was deemed insufficient).

position of retroactive reexport controls as a negotiating tool of the President in the foreign policy arena.

No judicial determination¹⁸⁹ of the validity of the June reexport regulations has occurred, because they were withdrawn¹⁹⁰ before any decisions were rendered on their merits. No legal precedent has been rendered to discourage future impositions of foreign-policy motivated retroactive reexport regulations.¹⁹¹ The practical usefulness of such export controls as a short-term foreign-policy tool of the President has remained intact. Thus, the President has maintained the option to resort again to imposition of similar controls.

2. Remedies against the Government

The remedies available to any private party against the U.S. Government depend initially on the consent of the sovereign to be sued. Some statutory or constitutional grounds for relief must be found. Since Congress has not seen fit to provide a statutory basis for relief from government termination of export privileges, private parties to a contract for the transfer of technology must turn to a constitutional basis for relief. The most promising avenue for relief would appear to be a suit brought against the U.S. Government in the United States Claims Court under the Fifth Amendment for a taking of contractual rights in furtherance of U.S. foreign policy.¹⁹²

¹⁸⁹ An administrative determination upheld the extraterritorial jurisdictional reach of the June regulations as being authorized by the EAA '79. In re Dresser (France) S.A., No. 632, slip op. at 2-9 (Assistant Secretary of Commerce for Trade Administration, filed Nov. 1, 1982). However, Dresser (France) was a French subsidiary wholly owned by a U.S. corporation in addition to being a licensee of the parent U.S. corporation.

¹⁹⁰ 47 Fed. Reg. 51,858 (1982).

¹⁹¹ See Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J., 174, 184 (1969) (concluding that the U.S. Treasury Department avoided enforcement and licensing conflicts with foreign countries over its TWEA authority in order to prevent judicial constructions and interpretation of the statute and regulations).

¹⁹² The general rule has long been that while the Government may regulate private property to a certain extent, if the government regulation goes too far, it will be recognized as a taking under the Fifth Amendment. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).

Contractual rights are considered property for which just compensation must be paid in accordance with the Fifth Amendment. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1923); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1922); *T.A. Moynahan Prop., Inc. v. Lancaster Village Coop., Inc.*, 496 F.2d 1114, 1117-18 (7th Cir. 1974).

Federal agency action may result in inverse condemnation of a property interest in contracts for which recovery may be obtained in a suit brought under the Tucker Act, codified as amended, 28 U.S.C. § 1491 (1980). *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1923) (taking of private corporation's contract for construction of a ship by lawful requisition order of the U.S. Shipping Board Emergency Fleet Corporation).

Such actions would be predicated upon the theory of government usurpation of private property without payment of just compensation.¹⁹³ In accordance with the Fifth Amendment of the Constitution, the Federal Government may not take property without making just compensation to the property owner.¹⁹⁴ An agreement providing for the transfer of technical data from licensor to licensee creates contractual rights. Contract rights are among the property interests protected by the Fifth Amendment's Just Compensation Clause.¹⁹⁵

It is certain that the United States Claims Court has jurisdiction over takings committed by an officer or agent of the Federal Government in the course of performing governmental duties.¹⁹⁶ The key question in any Claims Court suit must be whether promulgation of the June reexport regulations constitutes a taking of property under the Fifth Amendment of the Constitution.¹⁹⁷ However, the inquiry also may focus on the seizure

In determining when the Fifth Amendment requires that economic injuries caused by governmental regulation be compensated by the Government, the Supreme Court has engaged in factual inquiries in which the following factors have been identified as particularly significant: (1) The economic impact of the regulation; (2) its interference with reasonable investment backed expectation; and (3) the character of the governmental action. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

¹⁹³ Even a friendly non-resident alien is entitled to the protection of the Fifth Amendment against government taking without just compensation, notwithstanding that the United States no longer recognized the country of the alien. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931).

¹⁹⁴ *Lynch v. United States*, 292 U.S. 571, 579 (1934).

¹⁹⁵ *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1923); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1922); *Kearney & Trecker Coop. v. United States*, 688 F.2d 780, 783 (Ct. Cl. 1982); *T.A. Moynahan Prop., Inc. v. Lancaster Village Corp., Inc.*, 496 F.2d 1114, 1117-18 (7th Cir. 1974). *But see Consolidated Edison Co. of N.Y. v. FERC*, 676 F.2d 763, 778-79 n. 43 (D.C. Cir. 1982) (expressing doubt that private contractual arrangements are "property" within the meaning of the Fifth Amendment).

¹⁹⁶ *Persinger v. Islamic Republic of Iran*, 690 F.2d 1010 (D.C. Cir. 1982). (While acknowledging that subject matter jurisdiction over takings resides within the Claims Court, the D.C. Circuit made no judgment on whether a presidential cancellation of the claim pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1603(c), 1605(a)(5) (1976) of an Iranian hostage for damages, would constitute a taking under the Fifth Amendment that was also compensable by recovery in the Claims Court pursuant to the Tucker Act; the latter codified at 28 U.S.C. § 1491(a) (1976). *See also*, Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 874-75 (1981).

¹⁹⁷ Though not before the court for review, the merit of the claim that federal regulatory action preventing receipt of contractual performance constitutes a Fifth Amendment taking for which just compensation is due, was doubted in *Consolidated Edison Co. of N.Y. v. FERC*, 676 F.2d 763, 778 (D.C. Cir. 1982). *Accord Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1922) (Government frustration of receipt of performance under contract); *Cf. Kearney & Trecker Corp. v. United States*, 688 F.2d 780 (Ct. Cl. 1982), *cert. denied*, 103 S. Ct. 1498 (1983) (Government frustration of ability to perform contract).

However, in the *Omnia* and *Kearney* cases, the governmental action was not directed to

of goods by U.S. customs agents to prevent export in accordance with the June reexport regulations.¹⁹⁸

The following scenario presents one set of possible circumstances in which action of the Executive Branch that precludes receipt of rights due pursuant to a contract between private parties may constitute a Fifth Amendment taking requiring the government to pay just compensation to the owner of the contract rights. Party A contracts to provide Party B with transport services from the U.S. to foreign nation C. In the interest of U.S. foreign policy, the Government promulgates regulations prohibiting Party A from providing the contracted transport service to foreign country C, by requiring Party A instead to provide transport service to country D. Assuming the legality of the regulations, it would appear that Party A has a *force majeure* defense to any breach of contract action brought by Party B. It also would appear that the only viable remedy of Party B would be suit for just compensation under the Fifth Amendment against the Government for the contract rights "taken" by the regulations in question.¹⁹⁹

IV. PRECAUTIONARY LICENSING MEASURES

In concluding licensing agreements, which would be subject to U.S. export controls, it may be wise for the U.S.-origin licensor to provide for an express choice of U.S. law as the law governing the agreement.²⁰⁰ How-

the plaintiff's contract with the third party. Thus, any effect on the plaintiff's contractual rights by the governmental action in *Omnia* and *Kearney* was a consequential effect, not the direct effect required to support an action for just compensation under the Fifth Amendment. *Louisville & N.R.R. v. Mottley*, 219 U.S. 467, 484 (1911). In the case of the June Regulations, the governmental regulation may be said to have been directed to the plaintiff's contract with third parties, because the applicability of the regulation in question was predicated on the existence of the very license which the regulation deprived of the originally bargained for benefit. Thus, the *Omnia* and *Kearney* precedent would appear distinguishable.

See also *International Paper Co. v. United States*, 282 U.S. 399 (1931); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121 (1923); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 691 (1897). (These latter three cases may not have been considered by the D.C. Circuit panel in *Con Ed. v. FERC*).

¹⁹⁸ On October 15, 1982, U.S. customs officials seized turbines manufactured by G.E. and bound for Italy and Nuovo Pignone for use on the Algerian natural gas pipeline. *Washington Post*, Oct. 16, 1982, at A-20, col. 6.

¹⁹⁹ Cf. *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897). *Contra Omnia Commercial Co. v. United States*, 261 U.S. 502 (1922).

²⁰⁰ In *American President Lines, Ltd. v. China Mutual Trading Co.*, 1953 A.M.C. 1510, 1519, 1525 (Hong Kong Sup. Ct. 1953), the Supreme Court of Hong Kong deferred to the parties' choice of United States Law as governing interpretation of their rights under their shipping agreement. In *Compagnie Europenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82-716, slip op., (District Court at the Hague, Sept. 17, 1982), the Dutch court began its

ever, such a choice of law poses disadvantages for the non-U.S.-origin licensee. Such a choice also is unlikely to be made when the contract is concluded between two companies organized under the laws of nations other than the United States. Moreover, it is equally unlikely that a non-U.S. court would feel bound by such a choice of law even though expressed by the parties, if the court determined that the interests of the nation providing the legal forum warranted application of the law of the forum nation.

Force majeure clauses offer both parties to the agreement an agreed avenue for escaping breach of contract litigation between them in the event of nonperformance caused by retroactive reexport regulations.²⁰¹ Most agreements currently operative include a written assurance by the licensee to be bound by U.S. Export Administration regulations, as changed from time to time. It is likely that such promises would be enforced by U.S. courts, but uncertain whether the same would be true in a foreign tribunal.²⁰²

V. DESIRABILITY OF PRESIDENTIAL EXERCISE OF FOREIGN-POLICY MOTIVATED EXPORT REGULATIONS

A. *Reaction of U.S. Business Community*

Businessmen in the United States expressed fears that the June regulations would lessen the willingness of foreign companies to enter into licensing or joint venture projects with U.S. companies.²⁰³

B. *Reaction of Foreign Governments*

One month to the day after promulgation of the June regulations, the

analysis by determining that the law to be applied to the controversy was the law of the Netherlands. The court made this determination after first satisfying itself that the parties themselves had made no choice of law for interpretation of their contract.

²⁰¹ One form for such clauses follows:

This License shall at all times be subject to immediate termination at the election of either party by written notice from one party to the other by registered letter upon the occurrence of one or more of the following events:

a. The making of any payment required hereunder or the performance by either party or any other undertaking hereunder shall be declared or found to be illegal or impossible, by reason of any law, regulation or policy authority or by the decree of any court of competent jurisdiction, and such illegality or impossibility shall continue for a period of one hundred and twenty (120) days.

²⁰² See *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.*, No. 82/716, slip op. (Dist. Ct. at the Hague, Sept. 17, 1982) (Dutch court fails to accord validity to June regulations for purpose of *force majeure* defense to breach of contract suit).

²⁰³ See H.R. REP. NO. 762, 97th Cong., 2d Sess. 5-6 (1982); Felix Kessler, Wall St. J., Aug. 27, 1982, at 21, col. 1.

French Government issued a strongly worded communique in defiance of the regulations.²⁰⁴ The communique proclaimed that "contracts entered into by French companies for the construction of the pipeline must be honored" and that the French Government "cannot accept the unilateral measure taken on June 18, by the United States."

The Government of the Federal Republic of Germany has decried the June regulations as "unacceptable under international law because of their extraterritorial aspects."²⁰⁵ The German Government also concluded that the June Regulations "interfere with previously concluded licensing contracts and unduly contain an element of retroactivity."²⁰⁶

The European Community protested formally²⁰⁷ to the United States on July 14, and August 12, 1982. The protests condemned the June regulations for prohibiting the use of previously exported technical data to supply European produced equipment for the Soviet natural gas pipeline. The June regulations were labelled violations of international law because of their extraterritorial assertion of jurisdiction over businesses organized within the European Economic Community.

1. Orders of the British and French Governments

The British Secretary of State for Trade issued an Order²⁰⁸ on June 30, 1982, under the authority of the Protection of Trading Interests Act of 1980.²⁰⁹ The British Order declared that Parts 374, 376, 379, 385 and 399 of Chapter 15 of the Code of Federal Regulations, as modified by the December and June Regulations, were damaging or threatening to dam-

²⁰⁴ The translated text of the communique of the Prime Minister of France, July 22 1982 is as follows:

The contracts entered into by French companies for the construction of the pipeline must be honored. The deliveries contemplated in 1982 must therefor be made on time. The government cannot accept the unilateral measures taken on June 18 by the United States. This is also the opinion of our partners in the European community. Such measures unduly cause commercial harm to European companies. They injure, moreover, cooperation between the United States and its allies.

²⁰⁵ Undated memorandum stating the position of the Government of the Federal Republic of Germany on the natural gas project between Western European companies and the Soviet Union, submitted on July 30, 1982, to the Subcommittee on International Economic Policy, Senate Committee on Foreign Relations, at p. 5.

²⁰⁶ *Id.*

²⁰⁷ In practical terms, the Ambassador of the European Communities to the United States put it succinctly when he stated that as a result of the June Regulations, "foreign buyers will be reluctant to sign up and pay for transfers of technology with what they are bound now to consider an unreliable partner." Address by Sir Roy Denman, U.S. Chamber of Commerce's International Forum (approx. Sept. 15, 1982).

²⁰⁸ The Protection of Trading Interests (U.S. Reexport Control) Order 1982, STAT. INST. 1982 No. 885 (made June 30, 1982, *in force* July 1, 1982).

²⁰⁹ 1980, c. 11; *in force* Mar. 20, 1980.

age the trading interests of Britain insofar as the regulations affected the export or reexport of goods from the United Kingdom. On August 2, 1982, a second Order directed specific British corporations to refrain from compliance with any U.S. Export Administration Regulations affecting exports from the United Kingdom.

The Minister of State of the French Ministry of Research and Industry issued a Requisition Order for Services,²¹⁰ which obligated a French corporation to undertake acts in violation of the June regulations.

C. Considerations of Comity and Foreign Government Compulsion

Multinational corporations often find themselves subjected to conflicting laws of different nations. These conflicts must be resolved, if international commerce is to flourish. One way to resolve these conflicts is for governments to recognize the principle of comity among nations when dealing with parties and events on an international scale.²¹¹ The idea of national forbearance in international commerce is by no means novel.²¹² However, movement towards practical acceptance of this doctrine might be described as glacial.

In recent years, nations have become determined to resist assertions of extraterritorial jurisdiction by other nations. Statutes have been enacted to address this problem of nations attempting to assert extraterritorial jurisdiction over parties and events within the territories of other nations.²¹³ The antitrust laws of the United States in particular have incited enactment of several foreign statutes designed to frustrate the ability of litigants in U.S. federal courts to obtain financial information from or enforce judgments against parties residing in foreign nations.²¹⁴

²¹⁰ The Order was issued pursuant to Ordinance No. 59.63 of Jan. 6, 1959 and Decree No. 62.367 of Mar. 26, 1962.

²¹¹ See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.").

²¹² In the early 1950's, the U.S. Supreme Court expressed itself on this subject: [I]n dealing with international commerce, we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

²¹³ *E.g.*, The Foreign Boycott legislation of the United States, codified at 50 U.S.C. app. § 2407 (Supp. IV 1980).

²¹⁴ See British Protection of Trading Interests Act, 1980, ch. 11, *in force* Mar. 20, 1980; J.O. 1980 No. 538 (French law forbidding export of economic, commercial, industrial, financial, or technical information); Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, Austl. Acts No. 121 (1976) (Australian law permitting imposition of restrictions on production of documents for foreign tribunals likely to exercise jurisdiction contrary to in-

The trade laws of different nations offer many opportunities for conflict.²¹⁵ In practical application of the law to such conflict areas, courts have developed principles which accord due deference to actions of businesses mandated by compliance with foreign host-nation trade laws.²¹⁶

D. Conclusion

Extraterritorial assertions of jurisdiction are incidents of a broad trend toward interdependence among nations.²¹⁷ In today's world, the effects of events cannot easily be confined to a particular geographical place. These extraterritorial effects create internal pressure on nations to assert extraterritorial jurisdiction over the causative events. Conflicts between local and extraterritorial authorities become inevitable in such an environment. Resolution of such conflicts is stymied by the lack of a single international body recognized as having authority to adjudicate these conflicts.²¹⁸

ternational law or comity); Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979, Austl. Acts No. 13 (1979) (Australian law protecting Australian companies from antitrust judgments rendered by foreign courts pursuant to jurisdiction exercised in a manner inconsistent with international law or comity); Sections 31.5 and 31.6 of the Combines Investigation Act. CAN. REV. STAT. ch. C-23 (1970), amended by Ch. 76 § 12, 1974-1975-1976 Can. Stat. 1535 (§ 31.5 prohibits foreign decrees injurious to the commercial interests of Canada, and § 31.6 prohibits foreign parent corporations from giving effect to foreign laws by orders directed to Canadian subsidiaries). See also Business Records Protection Act, ONT. REV. STAT. ch. 56 §§ 1-3 (1980) (prohibiting removal from Ontario of business records at the behest of governmental authorities outside Ontario).

²¹⁵ See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 1 All E. R. 434 (discovery problems related to antitrust suits). In the words of Lord Wilberforce, "It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack." *Id.* at 448.

²¹⁶ *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976) (referring to the "often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself"); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970) ("When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign."); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456 (S.D.N.Y. 1962) (when "the defendant's activities had been required by Swiss law, this court [may] do nothing."); see also *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); RESTATEMENT 2D *supra* note 30, at 40.

²¹⁷ See Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 281 (1981) (recognizing the link between economic interdependence and the resolution of questions of sovereignty and jurisdiction).

²¹⁸ See Marcuss and Butland, *Reconciling National Interests in the Regulation of International Business*, 1 NW. J. INT'L L. & BUS. 349 (1979) (identifying and discussing two schools of international conflict resolution, the comity school and the international agreement school, and analyzing conflicts according to the institutions, such as statute, policies or regulations, in conflict).

The impetus for the creation of such a body must come from the powerful economic incentives posed by the impairment and loss of international trade in the present environment of conflicting assertions of jurisdiction by trading nations.²¹⁹ The machinery for this body already may exist under the auspices of the United Nations and the International Court of Justice at the Hague. The political concessions required to confer the necessary authority on either of these bodies are analogous to those made by the nations forming the European Economic Community.

In its present stage of development, the United Nations may be constituted too diversely to develop the needed consensus on the economic principles underpinning the decision-making authority of an international adjudicatory body.²²⁰ The model of the European Economic Community appears more suited to reaching the political and economic consensus required before such an international adjudicatory body can be charged with the authority needed to resolve jurisdictional conflicts between individual nations.

The immediate beneficiaries of the formation of such an adjudicatory forum would be the multinational businesses and other companies engaged in international trade. The certainty eventually afforded by such an international forum for adjudication of jurisdictional disputes should promote international trade to the eventual advantage of all participating nations.

VI. CONCLUDING REMARKS

Foreign policy motivated reexport controls tend to be imposed by the Executive for their coercive effects. Their imposition requires an extraterritorial assertion of U.S. jurisdiction. In basing such assertions upon the existence of a private agreement for transferring U.S.-origin technology to a foreign national for use within a foreign nation to produce foreign-origin goods, such assertions of extraterritorial jurisdiction exceed the jurisdictional grounds recognized under the principles of international law. Such extraterritorial assertions of jurisdiction are invalid under the laws of foreign nations. The EAA '79, while intended to have some extraterritorial jurisdictional reach, did not provide expressly for jurisdiction over foreign licensees of U.S.-origin technology. Some degree of Congressional acquies-

²¹⁹ See Comment, *A Turnabout in Extraterritoriality*, 76 AM. J. INT'L L. 591, 593 (1982) (outlining the possibility that the U.S. and Europe might come to terms on jurisdiction by either adopting an agreed neutral standard or allocating responsibility to a joint agency).

²²⁰ For the view that diversely constituted international forums provide little opportunity for formulating an effective consensus, see Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & Bus. 1, 10 (1979).

cence in the unprecedented extraterritorial assertion of United States jurisdiction has been demonstrated. It also has been demonstrated that, all questions of their validity under U.S. law aside, such extraterritorial assertions of U.S. jurisdiction have adverse consequences for United States Government and business. They disrupt normal trade relationships between U.S. and foreign businesses. They detract from the reliability, and therefore the competitiveness, of U.S. businesses engaged in international commerce. They embroil the United States and its allies in exacerbating jurisdictional squabbles, unduly preoccupying diplomatic resources.

In the final analysis, the damage done to relations between the United States and its allies would appear to outweigh the efficacy of such regulations in achieving any given foreign policy goal. Thus, imposition of further reexport controls should be avoided, either by forbearance by the President, by nullification of imposed regulations by the courts, or preferably by prohibition of such regulations through legislation. Consideration also should be given to the creation of a neutral international body empowered to enforce its decisions resolving the conflicting jurisdictional claims of separate nations. In the meantime, U.S. licensors and foreign licensees should provide in their agreements for the contingent disruption of their agreements by sudden changes in the U.S. export laws.