

A Prescription for Curing U.S. Export Controls

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A PRESCRIPTION FOR CURING U.S. EXPORT CONTROLS

GREGORY W. BOWMAN*

Unlike inbound trade regulation, which is characterized by deep multilateralism, the regulation of export trade is characterized by significant unilateralism. Nowhere is this more apparent than with the United States' assertions of prescriptive extraterritorial jurisdiction under its export control laws. Since 1982, the United States has claimed the power to regulate the use and reexport of U.S. origin goods, software, and technologies located abroad, based primarily on the fact that these items are of U.S. origin (or are foreign-origin items with some U.S. content). These "item origin-based" jurisdictional claims, which first were made as part of a trade dispute with European countries over a proposed natural gas pipeline from the Soviet Union, resulted in a flurry of academic commentary in the 1980s, with most commentators condemning this U.S. assertion of extraterritorial jurisdiction. In the years since, attention to the issue has waned, but the United States' assertion of item origin-based export control jurisdiction remains in place and unresolved as a matter of international law.

This Article asserts that the United States' longstanding claim of extraterritorial export control jurisdiction is an underappreciated but vitally important issue that needs to be readdressed. International trade has grown exponentially since 1982, and the result is that the United States' asserted jurisdictional reach has grown vastly broader. This Article explains the nature and mechanics of the United States' item origin-based jurisdictional claim, provides a summary of the 1982 Soviet gas pipeline trade dispute, reconsiders the justifiability of the United

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States' jurisdictional claim under the prescriptive jurisdictional principles of international law, and finds the current approach legally awkward and strategically insufficient. It then considers the issue through the lens of more recent scholarship on transnational networks, mutual recognition arrangements, and unilateral trade actions, and concludes by recommending a multilateral approach that offers greater promise of both policy effectiveness and legality under international law.

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“Few questions of international law are more complex than those posed by extraterritoriality.”¹

—Report by A.L.C. de Mestral & T. Gruchalla-Wesierski to Canadian Council on International Law, 1990

“By acting unilaterally on the basis of dubious concepts of jurisdiction, the United States wastes political capital and jeopardizes its influence”²

—Dorinda G. Dallmeyer, Council on Foreign Relations, in *Export Controls in Transition* (1992)

I. INTRODUCTION

Export controls are a troubled area of international trade regulation. In contrast to inbound trade matters such as customs (import) laws and trade remedy laws, for which there is significant multilateral cooperation and enforcement through the World Trade Organization (WTO),³ relatively little WTO attention is devoted to export control matters.⁴ To the extent that outbound trade issues do garner attention within the WTO, the focus usually is on trade-prohibiting sanctions or embargoes,⁵

1. A.L.C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, *EXTRATERRITORIAL APPLICATION OF EXPORT CONTROL LEGISLATION: CANADA AND THE U.S.A.* 3 (1990).

2. Dorinda G. Dallmeyer, *The Problem of Extraterritoriality in U.S. Export Control Policy*, in *EXPORT CONTROLS IN TRANSITION: PERSPECTIVES, PROBLEMS, AND PROSPECTS* 148, 163 (Gary K. Bertsch & Steven Elliott-Gower eds., 1992).

3. See GREGORY W. BOWMAN, NICK COVELLI, DAVID A. GANTZ & IHN HO UHM, *TRADE REMEDIES IN NORTH AMERICA* 1–2 (2010); ROBERT HOWSE, *THE WTO SYSTEM: LAW, POLITICS & LEGITIMACY* 10–12 (2007); Valentina Delich, *Developing Countries and the WTO Dispute Settlement System*, in *DEVELOPMENT, TRADE, AND THE WTO* 71, 71 (Bernard Hoekman et al. eds., 2002); Bernard Hoekman, *The WTO: Functions and Basic Principles*, in *DEVELOPMENT, TRADE, AND THE WTO*, *supra*, at 41, 41–42.

4. See DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 1, at 5, 44–48 (1990); see also HOWSE, *supra* note 3, at 185–92 (describing John Jackson’s proposal to incorporate GATT into the WTO); Kenneth W. Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 *MINN. L. REV.* 739, 849–57 (1981).

5. See, e.g., Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States Under the GATT National Security Exception*, 11 *FLA. J. INT’L L.* 559, 560 (1997); Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 *J. INT’L ECON. L.* 133, 133 (2002); Peter L. Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 *CORNELL INT’L L.J.* 1, 3 (2001); Joaquín Roy, *Lawyers Meet the Law: Critical U.S. Voices of Helms-Burton*, 6 *U. MIAMI Y.B. INT’L L.* 39, 42 (1997–1998); Matthew Schaefer, *Sovereignty, Influence, Realpolitik and the World Trade Organization*, 25 *HASTINGS INT’L & COMP. L. REV.* 341, 356

which (as discussed below) are conceptually distinct from export controls.⁶ The result is that current multilateral cooperation in export controls is based largely on consensus,⁷ and unilateralism is hard to restrain.⁸

Nowhere is unilateralism in export control measures more apparent than in the United States' longstanding assertions of extraterritoriality in U.S. export controls. Since the early 1980s, the United States has claimed the right to assert jurisdiction over foreign transactions, based on the fact that those transactions involve goods, software, or technologies that are of U.S. origin or contain U.S. content.⁹ This "item origin-based" jurisdictional approach is quite different from traditionally accepted forms of prescriptive extraterritorial jurisdiction under international law, such as territorial jurisdiction or jurisdiction based on the nationality of persons.¹⁰ The United States' novel approach has infringed on the trade regulation efforts of the United States' trading partners, and by preventing deeper multilateral consensus in export control matters, it has impaired the collective effectiveness of multilateral export controls through various international organizations and agreements.¹¹ By the same token, this

(2002); John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313, 1313–14 (1998).

6. See *infra* Part II.A.

7. See *infra* Part II.G.

8. In fact, multilateral export control cooperation has moved backward since the end of the Cold War. The now-defunct Coordinating Committee (COCOM) system of the Cold War era had meaningful enforcement mechanisms to promote national compliance with its multilateral export control scheme. However, its successor, the current Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, relies on consensus for compliance, with no meaningful enforcement mechanisms for noncompliance. For further discussion of COCOM and the Wassenaar Arrangement, see *infra* Part II.G.

9. See Andreas F. Lowenfeld, *Trade Controls for Political Ends: Four Perspectives*, 4 CHI. J. INT'L L. 355, 358, 362–65 (2003); see also Gregory W. Bowman, *E-Mails, Servers, and Software: U.S. Export Controls for the Modern Era*, 35 GEO. J. INT'L L. 319, 328, 334–35 (2004).

10. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT (THIRD)].

11. See Missile Technology Control Regime, *The Missile Technology Control Regime*, MCTR.INFO, <http://www.mctr.info/english/index.html> (last visited Jan. 30, 2014); *Objectives of the Group*, AUSTRALIAGROUP.NET, <http://www.australiagroup.net/en/objectives.html> (last visited Jan. 30, 2014); Org. for the Prohibition of Chem. Weapons, *Overview of the Chemical Weapons Convention*, OPCW.ORG, <http://www.opcw.org/chemical-weapons-convention/about-the-convention/> (last visited Jan. 30, 2014); Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *Introduction*, WASSENAAR.ORG,

U.S. approach to export control jurisdiction also has hindered the United States' own foreign policy and national security objectives in the realm of international trade.¹² The impact of the item origin-based approach is magnified by the fact that the United States has been the world's largest economy for decades and is one of its largest exporters.¹³

The nature of U.S. export control jurisdiction thus presents an important and perplexing problem. And yet a threshold question must be asked: why address this topic *now*? It was considered in detail by scholarly commentators in the 1980s, in the wake of a U.S. trade dispute with European trading partners over the construction of a natural gas pipeline from the Soviet Union.¹⁴ If the efforts of those scholars did not

<http://www.wassenaar.org/introduction/index.html> (last visited Jan. 30, 2014); *What Are the Guidelines?*, NUCLEARSUPPLIERSGROUP.ORG, <http://www.nuclearsuppliersgroup.org/Leng/02-guide.htm> (last visited Jan. 30, 2014).

12. In general, unilateral approaches to international trade regulation are not successful. See William J. Long, *Global Security, Democratization, and Economic Development After the Cold War: New Goals for U.S. Export Control Policies*, in INTERNATIONAL COOPERATION ON NONPROLIFERATION EXPORT CONTROLS 59, 69 (Gary Bertsch et al. eds., 1994) (noting that unilateral controls "seldom succeed in inflicting meaningful economic damage on the target").

13. According to WTO trade figures, U.S. GDP in 2012 was U.S. \$15,684,800 million, and its exports of goods totaled U.S. \$1,545,709 million (f.o.b. value)—which made the United States the world's second-largest exporter by value, behind only China. See World Trade Org., *United States Trade Profile*, WTO.ORG, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US> (last visited Jan. 30, 2014); World Trade Org., *International Trade Statistics 2013*, WTO.ORG, www.wto.org/english/res_e/its2013_e.pdf.

14. See, e.g., DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 53–67 (1982); Cecil Hunt, *The Jurisdictional Reach of Export Controls*, 26 COLUM. J. TRANSNAT'L L. 19, 19–20 (1987); see also Kenneth W. Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, 50 LAW & CONTEMP. PROBS. 117, 118, 130 (1987); J.W. Bridge, *The Law and Politics of United States Foreign Policy Export Controls*, 4 LEGAL STUD. 2 (1984); Stanley J. Marcuss & D. Steven Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?*, 2 INT'L TAX & BUS. LAW. 1, 12 (1984); Duane D. Morse & Joan S. Powers, *U.S. Export Controls and Foreign Entities: The Unanswered Questions of Pipeline Diplomacy*, 23 VA. J. INT'L L. 537 (1983); Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1 (1983) (discussing, *inter alia*, extraterritorial application of U.S. export control laws); Janet Lunine, Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663, 667–68 (1986); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983) [hereinafter *Extraterritorial Application*]; Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1317–18, 1318 n.42 (1985) [hereinafter *Predictability and Comity*].

lead to successful resolution of this jurisdictional issue, is it worth re-opening this vein of inquiry now? Why not just let sleeping dogs lie?

This Article contends that the item origin-based extraterritoriality of U.S. export controls is a critically important matter that deserves immediate reexamination. There are several reasons why this is so. First, the topic is timely. There is renewed U.S. interest in export control reform and modernization for the first time in nearly two decades,¹⁵ and extending this discussion to jurisdictional matters is a natural progression. Second, there has been a dramatic upsurge in global trade in recent decades, which means that these U.S. assertions of broadly extraterritorial export control jurisdiction have much larger consequences than ever before.¹⁶

Third, the current U.S. national security and foreign policy landscape is vastly different from that of the Cold War and the pre-9/11 era, and that has enormous implications for the jurisdictional reach of U.S. export controls. During the Cold War, the need to regulate an exported item depended largely on where it was going, and a central purpose of export controls was to prevent (or at least heavily restrict) exports and reexports to various communist countries. In the post-Cold War era, however, “destination” cannot be used nearly as readily as a proxy for “undesired export” (or reexport). Some exports or reexports to Russia or China (or any other destination) are desirable, and some are not, depending on the intended use for the items and the parties

15. The last time serious attention was paid to U.S. export control reform was immediately prior to the September 11, 2001, attacks; those legislative efforts were abandoned following those attacks. See Bowman, *supra* note 9, at 325–26.

16. This upsurge in global trade is due to a number of reasons. Tariff rates have dropped dramatically for all WTO countries, with the result (predicted by neoclassical economics) that trade has grown as this particular transaction cost has been eliminated. See Gregory W. Bowman, *Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border*, 44 HOUS. L. REV. 189, 196–97 (2007). Shipping and multimodal transportation costs also have dropped significantly, reducing another key transaction cost of imports and exports. *Id.* at 197–98. Both production activities and research and development (R&D) have become more trans-border in nature, which of course necessitates international trade in goods, software, and technology to support these activities. See Bowman, *supra* note 9, at 321. And the growth of e-commerce and electronic communications means that today there are many trans-border transfers of software or technology that were not possible two decades ago—transfers that, while non-physical, are nonetheless considered exports or reexports by the United States. *Id.* at 351–56. Considered together, these changes mean there are exponentially more U.S.-origin goods and technologies outside the United States—and that, in turn, means there are exponentially more foreign activities over which the United States now claims item origin-based extraterritorial jurisdiction.

involved.¹⁷ The same is true of exports or reexports to anywhere else. As a result, the United States is now far more inclined to assert jurisdiction extraterritorially over activities in many different countries, and expansive extraterritoriality has become an ever more central and indelible feature of U.S. export controls.

Fourth, none of the U.S. export control reform efforts since 1982 (when the issue of item origin-based jurisdiction came to the fore) have addressed questions of extraterritorial jurisdiction. A major modernization of U.S. export controls was undertaken in 1995–1996, but it left the jurisdictional reach of U.S. export controls untouched.¹⁸ Unsuccessful efforts in 2000 and 2001 to enact new U.S. export control legislation also ignored jurisdictional matters.¹⁹ Current initiatives by the Obama Administration to simplify the structure of U.S. export controls and double U.S. exports are highly laudable—such streamlining and export promotion efforts are badly needed and long overdue—but these efforts too are blind to the problematic nature of U.S. export control jurisdiction.²⁰ The subject of U.S. export control jurisdiction is, therefore, an important one that warrants renewed attention. A solution not only could resolve the long-simmering question of jurisdictional reach, but also actually advance the goals of U.S. export controls and those of the United States’ major trading partners.

This Article presents a two-part thesis. First, it reconsiders whether item origin-based export control jurisdiction might be justified under

17. The term of art used for such determinations is “end-user.” Export Administration Regulations, 15 C.F.R. § 772.1 (2013) (defining “End-user” as “[t]he person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.”).

18. See Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. 12,714 (Mar. 25, 1996) (providing for reform and simplification of U.S. Export Administration Regulations).

19. See Bowman, *supra* note 9, at 324–26.

20. See *Export Control List Review and Creating a Single Control List*, EXPORT.GOV, http://export.gov/ecr/eg_main_027617.asp (last visited Jan. 14, 2014) (discussing export classification reform); *Licensing Policy Review and Building a Single Licensing Agency*, EXPORT.GOV, http://export.gov/ecr/eg_main_027616.asp (last visited Jan. 14, 2014) (discussing unification of export licensing into a single agency in order to increase licensing process transparency and predictability and reduce processing times); *A Modern Information Technology (IT) System for Export Controls*, EXPORT.GOV, http://export.gov/ecr/eg_main_027615.asp (last visited Jan. 14, 2014) (discussing export control information technology modernization); *Export Control Enforcement*, EXPORT.GOV, http://export.gov/ecr/eg_main_027618.asp (last visited Jan. 14, 2014) (discussing harmonization of export violation investigations and penalties); see also THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 32 (2010) (setting forth the “goal of doubling U.S. exports by 2014”).

existing international law principles of prescriptive jurisdiction. It concludes that it remains quite awkward to do so. Specifically, while it is possible today to justify *more* of the reach of U.S. item origin-based export control jurisdiction than in 1982, the full scope of item origin-based jurisdiction still cannot be justified under these principles. Second, and more importantly, the national security and foreign policy goals pursued by the United States through its export controls are not well-served by item origin-based jurisdiction, and for that reason the current approach should be abandoned in favor of an approach that better serves those goals.

In exploring the first part of this thesis, Part II of this Article will provide an overview of U.S. export controls and their history, in order to explain how the item origin-based approach to jurisdiction developed. The subject of export controls is a technical one, so understanding the mechanics and history of U.S. export controls is an essential predicate to analyzing it. Part III then will review the United States' assertions of item origin-based extraterritorial jurisdiction through the lens of the *Restatement (Third) of Foreign Relations Law of the United States* and earlier scholarship relevant to extraterritorial export control jurisdiction.²¹ In exploring the second part of this thesis, Part IV will consider the matter through the lens of more recent scholarship on network theory,²² transnational mutual recognition arrangements,²³ and unilateralism and norm development.²⁴ This discussion will underscore how both the jurisdictional principles of international law and the policy

21. The *Restatement (Third)* is generally considered an accurate rendering of international law's principles of prescriptive jurisdiction. See, e.g., DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 1, at 17 ("Major treatises address the issue of extraterritoriality. . . . What emerges from this body of writing is something close to a consensus on the categories of analysis in terms of jurisdiction to prescribe. . . ." (footnote omitted)). It is worth noting that much of the original 1980s scholarship on this topic was published before the *Restatement (Third)* had been finalized, and much of the previous analysis was pursuant to the *Restatement (Second) of Foreign Relations Law of the United States*.

22. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (arguing for the adoption of network theory).

23. See generally Kalypso Nicolaïdis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 *LAW & CONTEMP. PROBS.* 263 (2005).

24. See generally Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1 (2001) (discussing unilateral U.S. efforts in the area of international human rights as a means to promote multilateral cooperation or norm development); Cleveland, *supra* note 5 (same).

goals pursued by the United States through export controls would be better satisfied by a new “purpose-based” jurisdictional approach to export controls that bases extraterritoriality on generally agreed-upon nonproliferation and missile technology-restrictive goals of the U.S. and multilateral export control regimes. It also will make clear that while a new jurisdictional approach likely would be more multilateral than the current U.S. item origin-based approach, the United States would not need to abandon all unilateral or asymmetrically expansive aspects of its current approach.

Part V will draw on this recent scholarship to recommend changes to the jurisdictional reach of the U.S. export control regime, and for jurisdiction within the multilateral export control system generally. Part VI will offer concluding thoughts, including practical suggestions for implementation of such an approach.

It is worth emphasizing at the outset that this Article deliberately focuses on doctrine and doctrinal change—on understanding the extent to which U.S. assertions of export jurisdiction fall within the boundaries of traditional international law doctrine, and on considering how both U.S. practice and international law doctrinal rules might be altered to bring U.S. activities within the permissible scope of international law prescriptive jurisdiction. The analysis, therefore, proceeds from the traditional premise that international law is indeed law.²⁵ Regardless of one’s view of international law and its limits,²⁶ the hope is that doctrinal consideration of this topic will help clarify and resolve, both legally and policywise, a long-festering and increasingly important problem of international trade regulation.²⁷ Revisiting this topic also will prove

25. See Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293 (1984–1985); see also Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L. J. 121, 134–35 (2007) (discussing state adherence to, versus refusal to follow, universal jurisdiction as customary international law).

26. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (asserting that international law rests not on *opinio juris* but rather on interest maximization, that international law is less robust than domestic law, and that states have no normative, moral obligation to comply with the rules of international law); D’Amato, *supra* note 25, at 1314 (discussing differences and similarities between domestic and international law, and concluding that “[t]he ‘serious students of law’ who claim that international law isn’t really ‘law’ make the same mistake that some political scientists make in ignoring norms in order to be ‘scientific’ in their ‘descriptions’”).

27. The question of whether the doctrinal rules of prescriptive international jurisdiction should be altered is also a question worthy of consideration, but that is outside the scope of this Article.

useful in light of current efforts by the American Law Institute to prepare a *Restatement (Fourth) of Foreign Relations Law of the United States*.²⁸

II. BACKGROUND: U.S. EXPORT CONTROLS AND THEIR JURISDICTIONAL BASIS

The details of U.S. export controls have been discussed at length elsewhere,²⁹ and it is not the goal of this Article simply to retread that same ground. Yet because export controls are complex, an understanding of their history and structure is necessary to appreciate fully the problems presented by extraterritorial reach. This Part accordingly provides an overview of U.S. export controls, their evolution, and their intended purposes. First, however, it is important to clarify the under-appreciated distinction between export controls and trade sanctions (or embargoes).

A. *The Distinction Between Export Controls and Trade Sanctions*

Modern scholars and policymakers, as well as the *Restatement (Third)*, typically do not make a clear distinction between export controls and trade sanctions, but rather treat them as two sides of the same coin.³⁰ This is understandable because export controls and trade sanctions both are used to prevent unwanted transactions, and because current U.S. export controls originated as a post-World War II trade-restrictive regime (as discussed below).³¹ Yet in the modern context, the strong trade-promotion focus of U.S. export controls³² stands in clear

28. The Am. Law Inst., *Publications Catalog*, ALL.ORG, http://www.ali.org/index.cfm?fuseaction=%20publications.ppage&node_id=33 (last visited Jan. 14, 2014).

29. See, e.g., Bowman, *supra* note 9, at 328–49 (discussing the origins of modern U.S. export controls for civilian and dual use goods and the current technical structure of these controls); Lowenfeld, *supra* note 9, at 357–60 (discussing post-World War II origins and development of U.S. export controls for civilian and dual use goods). For detailed technical analyses of U.S. export control laws and regulations, see ERIC L. HIRSCHHORN, *THE EXPORT CONTROL AND EMBARGO HANDBOOK* (3d ed. 2010); WILLIAM A. ROOT, JOHN R. LIEBMAN & ROSZEL C. THOMSEN II, *UNITED STATES EXPORT CONTROLS* (5th ed. 2010).

30. See, e.g., Abbott, *supra* note 4, at 756–57; Lowenfeld, *supra* note 9, at 361–68 (discussing the Soviet Pipeline export control dispute and the Cuban embargo); Moyer & Mabry, *supra* note 14, at 2–3. For an article making a clear distinction between U.S. export controls and trade sanctions, see Fitzgerald, *supra* note 5.

31. See *infra* Part II.C.2.

32. See Export Administration Act of 1979, 50 U.S.C. § 2401 (2006) (noting the importance of export promotion to the economic well-being of the United States).

contrast to the trade-restrictive nature of U.S. trade sanctions.³³ That is, while export controls can be used as a tool for implementing particular trade sanctions programs,³⁴ a core purpose of U.S. export controls is to promote trade.³⁵ The governing presumptions are thus poles apart: trade sanctions presumptively prohibit trade, and export controls presumptively permit trade, within certain limits. These presumptions can be overcome, but they set the regulatory tone and focus for each type of program.

The differences between export controls and trade sanctions also play out jurisdictionally: export control jurisdiction is based on the origin of the items regulated, whereas trade sanction jurisdiction generally is based on the parties and countries regulated.³⁶ Trade sanctions also often restrict imports and financial transactions, which are activities outside the scope of export controls.³⁷ The difference in jurisdictional scope has enormous ramifications in terms of extraterritoriality: in response to foreign objections,³⁸ the United States

33. See U.S. Dep't of State: Directorate of Def. Trade Controls, *Country Policies and Embargoes*, STATE.GOV (Oct. 4, 2013), http://pmdtc.state.gov/embargoed_countries/index.html (noting the list of countries that the United States currently has embargoed).

34. The U.S. Export Administration Regulations, 15 C.F.R. §§ 730–774 (2013), provide an “assist” to U.S. trade sanctions programs by applying complementary export prohibitions to those countries, but these provisions are expressly intended as carve-outs to the generally permissive scheme of the Export Administration Regulations (EAR). See *id.* §§ 736.2(b)(6), 746 (“Export or reexport to embargoed destinations” and “Embargoes and Other Special Controls”).

35. See *infra* Part II.C.

36. See, e.g., Sudanese Sanctions Regulations, 31 C.F.R. §§ 538.205, 538.315 (2013) (regarding jurisdiction over “United States person” and defining same); Iranian Transactions and Sanctions Regulations, 31 C.F.R. §§ 560.204, 560.314 (2013) (regarding jurisdiction over “United States person” and defining same).

37. Compare BLACK’S LAW DICTIONARY 598 (9th ed. 2009) (defining “embargo” as the “collective restrictions on the import or export of goods, materials, capital, or services into or from a specific country or group of countries for political or security reasons”), with U.S. Dep’t of State: Directorate of Def. Trade Controls, *Overview of U.S. Export Control System*, STATE.GOV, <http://www.state.gov/strategictrade/overview/> (last visited Jan. 16, 2014) (noting one of the essential elements of an effective export control is a broad international scope rather than a targeting of specific, offensive countries).

38. An exception to this is the “trafficking” restriction contained in the Cuban Liberty and Democratic Solidarity Act. 22 U.S.C. § 6023 (2012). Commonly known as the Helms-Burton Act after its congressional sponsors, Article III of the Act contained provisions to enable U.S. nationals who held claims in expropriated Cuban property to file suit in U.S. federal court for damages against foreign nationals who “trafficked” in that property. See *id.* §§ 6023(13), 6081–6091. While this provision does not per se represent a shift away from person-based jurisdiction, it does use a property-based approach to expand the scope of prohibited activity. In any event, this provision has never come into force: it has been

actually reduced the extraterritorial reach of its trade sanctions programs by adopting a more restrictive definition of “U.S. Persons” (individuals and companies) who are subject to those programs under nationality jurisdiction.³⁹ By contrast, item origin-based jurisdiction under U.S. export controls was expanded in the 1980s and has remained expansive ever since.

B. Jurisdictional Validity Under U.S. Law

While the extraterritoriality of U.S. export controls is of questionable legality under international law, it must be noted that this extraterritorial reach appears valid for U.S. law purposes. Congress intended the primary export control statute, the Export Administration Act of 1979 (EAA of 1979),⁴⁰ to apply extraterritorially, at least with respect to jurisdiction over U.S. persons and companies located abroad⁴¹—which means that the general U.S. law presumption against

suspended by every president since President Clinton, pursuant to presidential discretion as provided for in the Act. *See* Delegation of Authority to Suspend the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 78 Fed. Reg. 9573 (Feb. 8, 2013); Press Release, White House Office of the Press Secretary, Letter from the President Regarding the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Jan. 13, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/13/letter-president-regarding-cuban-liberty-and-democratic-solidarity-liber> (“Consistent with section 306(c)(2) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Public Law 104-114) (the “Act”), I hereby determine and report to the Congress that suspension, for 6 months beyond February 1, 2012, of the right to bring an action under title III of the Act is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.”); Press Release, White House Office of the Press Secretary, Presidential Memorandum—Delegation of Authority to Suspend the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Jan. 31, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/31/presidential-memorandum-delegation-authority-suspend-provisions-title-ii>.

39. RESTATEMENT (THIRD), *supra* note 10, at pt. IV, ch. 1, subch. A, intro. note.

40. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503–536 (codified as amended at 50 U.S.C. app. §§ 2401–20 (2006)). The EAA of 1979 actually expired in 1994, with one brief respite from 2000 to 2001, and the export control regulations promulgated under this statute were kept in force (with minor modifications) during this period of expiry pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07; *see also* Bowman, *supra* note 9, at 331–32. Permanent export control enforcement authority under the EAA of 1979 was finally reestablished in 2010 pursuant to the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 305, 124 Stat. 1312, 1349–50 (codified at 22 U.S.C. § 8544 (2012)).

41. *See* 125 Cong. Rec. 8259–62 (1979); *see also Extraterritorial Application, supra* note 14, at 1312–13. Specifically, the EAA of 1979 amended Section 4(b) of the EAA of 1969 to expand the jurisdictional reach of U.S. export controls by deleting language that unambiguously limited the jurisdictional reach of the act to exports from the United States, its

extraterritoriality is overcome as regards person-based (nationality) jurisdiction.⁴² The statute does not contain express language regarding item origin-based extraterritoriality, but the U.S. Export Administration Regulations (EAR)⁴³ promulgated pursuant to that statute do. The U.S. Department of Commerce's Bureau of Industry and Security, which administers the EAR, has not explained the international law jurisdictional bases for item origin-based export control jurisdiction (perhaps because it is hard to justify legally),⁴⁴ and recent governmental practice has been simply to ignore it.⁴⁵ Still, the Bureau of Industry and Security almost certainly would be given a significant degree of deference regarding its interpretation (through the EAR) of the statute and its purpose—either pursuant to the *Chevron* doctrine⁴⁶ (under

territories, and possessions. Export Administration Act of 1979, Pub. L. No. 96-72, § 5(a), 93 Stat. 503, 506 (codified as amended at 50 U.S.C. app. § 2404 (2006)); Export Administration Act of 1969, Pub. L. No. 91-184, § 4(b), 83 Stat. 841, 842 (codified as amended at 50 U.S.C. app. § 2404 (2006)). The resulting language was as follows:

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

(deleted text is struck through; added text is italicized).

42. As David Koplow has pointed out, from the perspective of international law, the general U.S. presumption against extraterritoriality establishes a default presumption in favor of using subjective territoriality (jurisdiction over acts within U.S. borders) as the basis for U.S. prescriptive jurisdiction. David A. Koplow, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT'L L. 1, 41-42 (1990).

43. Export Administration Regulations, 15 C.F.R. §§ 730-74 (2013).

44. See *id.* § 772.1 (definitions of “Export,” “Reexport,” and “Item”); Marcuss & Mathias, *supra* note 14, at 19.

45. See Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401-20 (2006)); H.R. REP. NO. 95-459, at 21-22 (1977); see also S. REP. NO. 96-169, at 2-3 (1979); David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 285 n.15 (1987). Cf. *Extraterritorial Application*, *supra* note 14, at 1308; *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 292 (1949) (applying a U.S. labor statute to Panama Canal contractors in the “foreign territory” of the Canal Zone, notwithstanding “the canon of construction which teaches [us] that [the] legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,” because the law was “within the usual scope of Congressional concern” (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932))).

46. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Chevron Step Two, as a reasonable interpretation of an unclear statute by the administering agency), or on the basis of deference under *Skidmore v. Swift & Co.*⁴⁷ (because of significant agency knowledge and expertise). Export controls are the quintessence of a technical and policy-driven area of the law, and the agency is in a far better position than generalist courts to be attuned to the export control desires of Congress. It is thus nearly certain that the current extraterritorial scope of the statute, as applied through the EAR,⁴⁸ would withstand any domestic law challenge. In any event, such a legal challenge is unlikely⁴⁹: most U.S. case law regarding extraterritorial prescriptive jurisdiction concerns criminal law and antitrust law matters.⁵⁰ The question, then, is

47. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Jerry Mashaw summarizes the different approaches under *Chevron* and *Skidmore* nicely:

Chevron relies on constitutional structure, Congress's legitimate authority to delegate lawmaking power to administrative agencies, and the political accountability of those agencies to the President and to Congress. *Skidmore* sounds in "capacity" or "expertise" the potential for accurate understanding by agencies immersed in both the politics of congressional enactment and the day-to-day administration of statutory texts.

Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505 (2005). *Skidmore* deference has had a resurgence of sorts in recent U.S. Supreme Court jurisprudence. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); Patrick McKinley Brennan, *Delivering the Goods: Herein of Mead, Delegations, and Authority*, 2009 MICH. ST. L. REV. 307, 327 (2009) ("[The *Mead* Court] held that *Skidmore* deference was alive and well as a possible congressionally-mandated judicial response to agency outputs . . .").

48. See 15 C.F.R. § 736.2 (2013) (defining the scope of EAR export prohibitions—and, by implication, permissible exports—in terms of "exports" and "reexports"); *id.* § 734.2(b)(1), (4) (defining "export" to mean "an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States," and "reexport" to mean "an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States"). The term "release" in the definition refers to the conveyance of software or technology to foreign nationals (either in the United States or elsewhere), which are deemed to be nonphysical "exports or reexports" of such software or technology to the foreign nationals' home country. See *id.* § 734.2(b)(3), (5).

49. See ROSENTHAL & KNIGHTON, *supra* note 14, at 70 ("More than nine out of ten law suits are settled or dismissed well before trial."). The exceptions often have to do with the proper scope of federal versus state power. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); Gregory W. Bowman, *U.S. and Canadian Federalism: Implications for International Trade Regulation*, 114 W. VA. L. REV. 1007, 1026–27 (2012).

50. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (antitrust); *United States v. Dawn*, 129 F.3d 878, 882 (7th Cir. 1997) (criminal law); *United States v. Morton*, 314 F. Supp. 2d 509, 512–13 (D. Md. 2004) (criminal law); *Alcar Grp., Inc. v. Corporate*

the legality of the item origin-based approach under international law. To address that question, however, requires an appreciation of the historical origins and evolution of U.S. export controls.

C. The Historical Context: A Generally Permissive Regime

1. Origins

In light of the explosive growth in U.S. international trade over the past several decades,⁵¹ it is tempting to think of the modern U.S. focus on export promotion as a sea change in American attitudes toward exports. However, the current focus on export promotion is consistent with a longstanding U.S. preference for *permitting* exports, not preventing them. That is, historically the United States has imposed relatively few export controls or trade sanctions. Indeed, for much of the nineteenth century the United States adopted the principle of “free ships, free goods” in international trade, meaning that neutral ships not carrying “contraband”—prohibited or unlawful articles—were to be given free passage and be permitted to trade.⁵² A preference for export promotion is also built into the U.S. Constitution, which permits the taxation of imports but expressly prohibits the taxation of exports.⁵³ Export controls are thus part of an historical U.S. tradition of facilitating, not restricting, trade.

Performance Sys., Ltd., 109 F. Supp. 2d 948, 950 (N.D. Ill. 2000) (antitrust).

51. See Bowman, *supra* note 9, at 321–23.

52. RICHARD T. CUPITT, RELUCTANT CHAMPIONS: U.S. PRESIDENTIAL POLICY AND STRATEGIC EXPORT CONTROLS 35 (2000).

53. U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”). The Export Clause was included at the insistence of export-dependent southern states, and it stands in direct contrast to duties on imports, which are constitutionally permissible. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1186 n.324 (2003) (citing *United States v. Int’l Bus. Mach. Corp.*, 517 U.S. 843, 859–60 (1996)); see also Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United States v. United States Shoe Corp.*, 84 MINN. L. REV. 129, 146 (1999) (discussing Southern desire to avoid taxation of exports as a reason for the Export Clause). While the U.S. Constitution’s preferential treatment of exports is perhaps an embodiment of a late-eighteenth century mercantilistic view of facilitating exports (by prohibiting export taxation) and impeding imports (partly for protective purposes and partly for revenue generation via tariffs), the promotion of exports remains valid economic policy under modern (and less mercantilistic) views of international trade.

2. Impact of the Cold War

The restrictive U.S. export control system that developed during the early Cold War era is thus a significant historical deviation. Yet even the post-war system itself did not start out as a trade-restrictive export regime. Rather, the initial, twofold purpose under the original comprehensive U.S. export control statute, the Export Control Act of 1949 (ECA of 1949),⁵⁴ was (a) to ease U.S. domestic shortages of strategically and economically important goods (in the wake of years of war rationing) and (b) to channel exports toward the reconstruction of Europe.⁵⁵ It was, in other words, initially a re-directional regime, not a restrictive regime. Moreover, while the system evolved in the late 1940s and early 1950s into a comprehensive anticommunist system of controls intended to prevent exports to the Soviet bloc and China⁵⁶—in effect, an anticommunist trade embargo⁵⁷—trade facilitation concerns quickly regained ascendant status. Successor statutes to the ECA of 1949—the Export Administration Act of 1969 (EAA of 1969)⁵⁸ and the EAA of 1979⁵⁹—placed U.S. anticommunist trade restrictions within an overall framework of export controls that were expressly intended to promote U.S. economic growth through the facilitation and promotion of exports, including exports to communist countries.⁶⁰ This structure remains in

54. Export Control Act of 1949, Pub. L. No. 81-11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. app. §§ 2021–32 (1952)).

55. See CUPITT, *supra* note 52, at 64–71. This was undertaken pursuant to broad presidential authority granted by that Act. See Export Control Act of 1949, Pub. L. No. 81-11, 63 Stat. 7 (1949) (codified as amended at 50 U.S.C. app. §§ 2021–32 (1952)) (granting the President broad authority to “prohibit or curtail the exportation from the United States” of articles subject to the Act, “except under such rules [authorizing exports] as he shall prescribe”); see also Harold J. Berman & John R. Garson, *U.S. Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791, 794–95 (1967) (discussing the restrictive nature of the Export Control Act of 1949); Paul H. Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U. PA. L. REV. 331, 332–33 (1959) (same).

56. CUPITT, *supra* note 52, at 70–76. See generally Lowenfeld, *supra* note 9; Silverstone, *supra* note 55, at 343–44.

57. For additional discussion of the distinction between export controls and trade sanctions, see *supra* notes 30–39.

58. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified as amended at 50 U.S.C. § 2404 (2006)).

59. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. § 2404 (2006)).

60. See Donald H. Caldwell, Jr., Note, *The Export Administration Amendments Act of 1985: A Reassessment and Proposals for Further Reform*, 19 VAND. J. TRANSNAT’L L. 811, 819 (1986) (“The EAA of 1969 reflected the view that trade should be encouraged with communist nations as well as with the market economies of Western Europe, Canada, Latin

place to this day: the EAA of 1979 expressly states that exports should be restricted “only after full consideration of the impact on the economy of the United States and only to the extent necessary” to achieve the statute’s goals of protecting national security and furthering U.S. foreign policy.⁶¹

A defining feature of modern U.S. export controls, therefore, is the tension between a strong desire to promote exports (consistent with the United States’ historical preference for trade) and the desire to prevent or oversee problematic transactions.⁶² This tension holds particular importance for the jurisdictional reach of U.S. export controls, because efforts to promote exports (and reduce export licensing requirements) have led to there being more items located outside the United States over which the United States asserts jurisdiction (usually because these items are of U.S. origin or contain U.S. content).⁶³ In this way, the potential for disagreement and conflicts between the United States and its trading partners is increased.⁶⁴

3. Recent U.S. Developments

Efforts by the Obama Administration to double U.S. exports over five years (2009 to 2014)⁶⁵ and to simplify the licensing structure for U.S.

America and Asia.”).

61. 50 U.S.C. app. § 2402(2). For a discussion of the background leading up to the enactment of the EAA of 1979 and its conflicting goals of promoting trade and using trade as a foreign policy tool, see Abbott, *supra* note 4, at 741–45. It is worth pointing out that the EAA of 1979 lists other policy goals as well—namely, preventing the export of items identified as being in short domestic supply and preventing the export of items in support of terrorism—but these goals can be viewed as more specific subsets of the broader national security and foreign policy goals of the statute. Indeed, it has been observed that even the statute’s national security and foreign policy goals are largely interchangeable for practical purposes. See ROOT, LIEBMAN & THOMSEN, *supra* note 29, § 4.1.1; Abbott, *supra* note 4, at 744–47.

62. For further discussion of the difficult balance between export promotion and prevention of problematic export transactions, see generally Bowman, *supra* note 9, at 325.

63. For a detailed discussion of the EAR’s jurisdictional origin requirements, see *infra* text accompanying notes 71–78.

64. The Obama Administration’s current efforts at export promotion also ignore (as have previous efforts at export control reform) central structural deficiencies in the U.S. system of regulating exports. For discussion of those structural problems and suggested solutions, see Bowman, *supra* note 9, at 319; Gregory W. Bowman, *The U.S. Export Control Reforms of 2009–2014: Good Answers to Incomplete Questions*, available at <http://ssrn.com/author=400520>.

65. TRADE PROMOTION COORDINATING COMM., 2011 NATIONAL EXPORT STRATEGY: POWERING THE NATIONAL EXPORT INITIATIVE 3 (2011), available at

export controls⁶⁶ further illustrate the American preference for facilitating outbound trade. The licensing simplification efforts underway are badly needed: the broad consensus within the U.S. government and the private sector is that U.S. export controls are too complex,⁶⁷ too riddled with inconsistencies caused by incremental modifications,⁶⁸ too restrictive of exports of items with military origins but widespread commercial applications,⁶⁹ and too balkanized in terms

<http://trade.gov/publications/pdfs/nes2011FINAL.pdf> (“So tonight, we set a new goal: We will double our exports over the next five years” (quoting Barack Obama, President of the United States, State of the Union Address (January 27, 2010))).

66. Press Release, White House Office of the Press Secretary, Fact Sheet on the President’s Export Control Reform Initiative (Apr. 20, 2010), *available at* <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative> (outlining a streamlined licensing process, clearer export classification scheme, and more clear-cut demarcations of interagency jurisdiction).

67. *See id.* Specifically, the White House’s press release stated as follows:

The assessment found that the current U.S. export control system does not sufficiently reduce national security risk based on the fact that its structure is overly complicated, contains too many redundancies, and tries to protect too much.

The current system is based on two different control lists administered by two different departments, three different primary licensing agencies (none of whom sees the others licenses), a multitude of enforcement agencies with overlapping and duplicative authorities, and a number of separate information technology systems (none of which are accessible to or easily compatible with the other), or agencies with no IT system at all that issue licenses. The fragmented system, combined with the extensive list of controlled items which resulted in almost 130,000 licenses last year, dilutes our ability to adequately control and protect those key items and technologies that must be protected for our national security.

Id.; *see also* Ronald J. Sievert, *Urgent Message to Congress—The Case for Immediate Reform of Our Outdated, Ineffective, and Self-Defeating Export Control System*, 37 TEX. INT’L L.J. 89, 92–93 (2002); Press Release, White House Office of the Press Secretary, President Obama Announces First Steps Toward Implementation of New U.S. Export Control System (Dec. 9, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/09/president-obama-announces-first-steps-toward-implementation-new-us-export> (“Rebuilding the two U.S. export control lists—which currently have completely different structures, take different approaches to defining controlled products, and are administered by two different departments—is the cornerstone of the reform effort because all other aspects of our system are contingent upon what we control.”); Press Release, White House Office of the Press Secretary, White House Chief of Staff Daley Highlights Priority for the President’s Export Control Reform Initiative (Jul. 19, 2011) [hereinafter Press Release, Chief of Staff Daley], *available at* <http://www.whitehouse.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlight-s-priority-presidents-export-cont> (same); *About Export Control Reform*, EXPORT.GOV (Oct. 22, 2012, 1:00 PM), http://export.gov/ecr/eg_main_047329.asp (same).

68. Sievert, *supra* note 67, at 93.

69. *See* Press Release, White House Office of the Press Secretary, Fact Sheet: Release of National Security Report on Revising U.S. Export Controls on Satellites (Apr. 18, 2012),

of which U.S. agencies have jurisdiction over what export activities.⁷⁰ Because of its focus on export promotion, this reform effort further underscores the importance of trying to resolve the issues raised by the extraterritorial scope of U.S. export control laws.

D. The Structure of U.S. Export Controls: Licensing and Jurisdiction

The topic of prescriptive jurisdiction of U.S. export control laws is inextricably intertwined with that of U.S. export licensing, because the United States only takes export control enforcement action against activities over which it claims jurisdiction. A brief summary of the licensing and penalty schemes of U.S. export controls is therefore necessary in order to fully appreciate the impact of the United States' expansive export control jurisdictional claims.

1. U.S. Export Control Licensing Structure and Penalties

A key structural characteristic of U.S. export controls under the EAA of 1979 and EAR is that the primary focus is on the identity and origin of the goods, software, and technologies (again, collectively referred to as “items”)⁷¹ being exported. The EAR apply to the export of civilian and “dual use” items—commercial items that can be used for

available at <http://www.whitehouse.gov/the-press-office/2012/04/18/fact-sheet-release-national-security-report-revising-us-export-controls> (“Over the past 15 years, a substantial number of commercial satellite systems, subsystems, components, and related technologies have become less critical to national security due to the transition from military to predominantly civilian uses As a result, U.S. export controls over these items should reflect their decreased sensitivity while still ensuring that they cannot be used to significantly improve the military capabilities of another country.”); *see also* Sievert, *supra* note 67, at 93; Press Release, White House Office of the Press Secretary, President Obama Lays the Foundation for a New Export Control System to Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors (Aug. 30, 2010) [hereinafter Press Release, Obama Lays the Foundation], available at <http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n> (listing different prospective tiers for items that have dual military and commercial uses).

70. *See* Press Release, Obama Lays the Foundation, *supra* note 69 (outlining the splintering of agencies, control lists, and IT systems involved in the current U.S. export control system); *see also* Sievert, *supra* note 67, at 95–96; Press Release, Chief of Staff Daley, *supra* note 67 (“[T]he current export control system is overly complicated and fragmented . . .”).

71. The term “item” is in fact a defined technical term in the EAR. *See* Export Administration Regulations, 15 C.F.R. § 772.1 (2013) (defining “Item” to mean “commodities, software, and technology”).

civilian uses or sensitive military uses.⁷² These items comprise the vast majority of U.S. and global trade activity.⁷³ The EAR's classification and licensing scheme is generally harmonized (by consensus) with those of the forty other countries that currently participate in the Wassenaar Arrangement.⁷⁴ The result is that while particular licensing decisions will differ to an extent among these countries, this approach to export classification and licensing is broadly shared.⁷⁵ This partially harmonized approach holds important implications for the recommendations made later in this Article.

In terms of licensing mechanics, the EAR contain a classification scheme called the "Commerce Control List," which identifies various "commodities, software, and technology" that may be of concern for U.S. export control purposes.⁷⁶ Depending on how a particular item is classified on this list, what its country of ultimate destination is, and what countries the item may pass through on its way to that destination, the item may or may not require an export license.⁷⁷ Items not listed on

72. *Id.* (defining "Dual Use" to mean "[i]tems that have both commercial and military or proliferation applications").

73. *See id.* § 734.3 (listing "[i]tems [s]ubject to the EAR"); BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, KNOW THE FACTS BEFORE YOU SHIP: A GUIDE TO EXPORT LICENSING REQUIREMENTS 2 (2013), available at http://www.bis.doc.gov/index.php/forms-documents/doc_view/286-licensing-faq (noting that "[t]he EAR regulate the export and reexport of most commercial items").

74. Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *Participating States*, WASSENAAR.ORG, <http://www.wassenaar.org/participants/index.html> (last visited Jan. 12, 2014).

75. Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *supra* note 11.

76. 15 C.F.R. § 772.1. Under current U.S. export control regulations, commodities, software, and technology are commonly referred to collectively as "items." *Id.*; *see also* Bowman, *supra* note 9, at 334. Software did not exist as a commercial article of commerce in 1949 when the ECA of 1949 was enacted, and in fact neither the EAA of 1969 nor the EAA of 1979 mentioned "software" as an article of commerce to be controlled. Rather, these statutes spoke only in terms of "goods" and "technology." The EAA of 1979's language is broad and generalized enough, however, to cover software as either a "good" or "technology." In any event, the current U.S. Export Administration Regulations do expressly cover "software." *See* § 772.1 (defining "Software"). For a more detailed discussion, see Bowman, *supra* note 9, at 334–35.

77. *See* 15 C.F.R. § 732.1; *see also* Bowman, *supra* note 9, at 332–33. The EAR quite literally use a chart to clarify when an export license is required based on an item's classification and its destination, with countries of destination listed as rows, and items' reasons for control (foreign policy, national security, antiterrorism) listed as columns. An "X" at the intersection of a country's row and an item's reasons for control means that a license is required. *See* 15 C.F.R. § 738, Supp. 1 (2013).

the EAR's Commerce Control List do not require U.S. export licenses unless they are (a) exported to destinations subject to U.S. trade sanctions or (b) exported to "end-users" or for "end-uses" identified as problematic under the EAR—that is, to prohibited parties or in support of activities identified as undesirable in the EAR, including nonproliferation activities and missile technology-related activities that pose serious foreign policy or national security concerns.⁷⁸

Both civil and criminal penalties are possible for violations of U.S. export control laws and regulations,⁷⁹ but criminal investigations and criminal penalties are rare.⁸⁰ Fines are common when the party is a U.S. national or party in the United States, but the most common penalty imposed against parties outside the United States is the denial of export privileges and the adding of the party to the EAR's "Denied Persons List," which lists parties who are not permitted to engage in transactions subject to the EAR.⁸¹ This denial of export privileges has important implications for the topic of export control jurisdiction: per section 431(1) of the *Restatement (Third)*, which concerns enforcement jurisdiction, states may use "nonjudicial measures to induce or compel compliance, or punish noncompliance with its laws or regulations"—provided, of course, that prescriptive jurisdiction is lawful.⁸² The key question, therefore, is not about the penalty itself—it is about the

78. *Id.* § 732.1; *see also id.* § 744.1. Until 1995, the presumption was listed the other way around, although broad "general licenses" allowed a good number of exports without further clearance or approval from the U.S. Department of Commerce. This structure was largely driven by the export-restriction focus of the ECA of 1949 and regulations promulgated thereunder. However, "general licenses" had rendered so many exports permissible within this scheme that it was decided to reverse the presumption. *See* Export Administration Regulation: Simplification of Export Administration Regulations, 61 Fed. Reg. 12,714 (Mar. 25, 1996) (providing for reform and simplification of U.S. Export Administration Regulations). In one sense this was a semantic change that had little immediate effect—but in another important sense it was a tacit admission of how far export controls had shifted from presumptively restrictive to presumptively permissive.

79. *See* 15 C.F.R. § 764.3 (setting forth civil and criminal penalties for violations of these regulations).

80. *See* BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2011, at 9 (2011) (only 39 criminal convictions in 2011).

81. *The Denied Persons List*, BUREAU OF INDUSTRY AND SECURITY, <https://www.bis.doc.gov/index.php/the-denied-persons-list> (last visited May 9, 2014); *see also The Denied Persons List Standard Order*, BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/index.php/component/content/article/12-policy-guidance/list-parties-of-concern/321-the-denied-persons-list-standard-order> (last visited Feb. 5, 2014) (setting forth standard terms of denial orders).

82. RESTATEMENT (THIRD), *supra* note 10, § 431(1).

legality of the extraterritorial reach of U.S. export controls. The entire analysis boils down to a question of jurisdictional propriety.

2. The Diminished Importance of the Export Control Licensing Structure

Three primary aspects of this licensing structure are centrally relevant to the expansive jurisdictional reach of U.S. export controls.

- First, *item classification* remains a central, structural aspect of U.S. export controls, as well as of its trading partners (because of harmonization and coordination through the Wassenaar Arrangement), but it has become harder to categorize items as clearly problematic or nonproblematic based on their export classification.

Many items have been “decontrolled” in order to promote exports,⁸³ and in fact the vast majority of items subject to the EAR are not expressly listed on the EAR’s Commerce Control List.⁸⁴ Similar decontrols have been implemented by other countries that participate in the Wassenaar Arrangement.⁸⁵ In addition, the increasing sophistication of commercial articles means that quite ordinary items, such as computers, can be used for problematic purposes.⁸⁶ In short, even though the entire licensing system is built on export classification, export classification is in fact no longer terribly important to the system overall.⁸⁷

- Second, since the end of the Cold War, it has become harder to categorize *export destinations* as clearly problematic or non-problematic.

83. *Id.*

84. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-197R, ANALYSIS OF DATA FOR EXPORTS REGULATED BY THE DEPARTMENT OF COMMERCE 6 (2006) [hereinafter GAO EXPORT DATA ANALYSIS]. One observer noted dryly that “[i]f only \$1 billion of the \$625 billion worth of regulated exports [in 2005] received an ECCN [Export Control Classification Number] while the vast majority receive EAR99 classification, the catchall provision is the standard, and the classification scheme is the exception.” Jordan Collins, *Same Laws, Different Century: The Bureau of Industry & Security’s Role in Global Trade & National Security*, 15 CURRENTS: INT’L TRADE L.J. 108, 120 (2006).

85. See BUREAU FOR INDUS. & SEC., JUNE 2010 AMENDMENTS TO THE ENCRYPTION PROVISIONS OF THE EXPORT ADMINISTRATION REGULATIONS 2 (2010).

86. See Bowman, *supra* note 9, at 320–28.

87. See Export Administration Regulations, 15 C.F.R. §§ 738.2, 774.1 (2013) (listing the control status of personal computers to various destinations, and demonstrating that export licenses are not required to most destinations).

Exports to the Soviet Union during the Cold War were by definition problematic (although sometimes approved); exports to Russia today are not. In like fashion, the export of a personal computer to India (a country generally on good terms with the United States) may or may not be problematic—and the same is true for the export of that computer to Egypt, or the United Kingdom, or almost anywhere else.⁸⁸ Destination is no longer a useful proxy for deciding whether an export transaction is problematic.

- Third—and following directly from the previous two points—the formal structure of item classification and destination has been largely superseded by a focus on *end-use and end-user concerns*.

In the 1990s, the United States implemented the “Enhanced Proliferation Control Initiative” (EPCI), which imposed licensing requirements on all exports (regardless of item classification or destination) that raised concerns about the end-use of the items involved or the foreign end-users of these items.⁸⁹ This end-use/end-user focus carries enormous implications for the jurisdictional reach of U.S. export controls, because the effectiveness of end-use/end-user controls is directly related to the breadth of jurisdictional reach. It is also important because unlike the mechanics of U.S. extraterritorial jurisdiction, nonproliferation is a goal generally shared among trading nations.⁹⁰

To summarize, the modern U.S. export control licensing system consists of end-use and end-user controls that have been grafted onto a preexisting system of export licensing. Through the harmonization efforts of the Wassenaar Arrangement, this licensing system is quite similar in structure to the export licensing systems of other U.S. trading partners.⁹¹ The overall effect is that export compliance determinations (both in the United States and other countries) now largely depend not

88. See *supra* note 17 and accompanying text.

89. Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 HOUS. J. INT'L L. 441, 492 (2003); Daniel H. Joyner, *The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?*, 32 GA. J. INT'L & COMP. L. 107, 109–11 (2004). The EPCI provisions are currently located in §§ 744.1–.6 of the EAR.

90. See e.g., The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Tech., *The Wassenaar Arrangement*, WASSENAAR.ORG, <http://www.wassenaar.org/publicdocuments/whatis.html> (last visited Mar. 6, 2014).

91. *Id.*

on the identity (classification) of an item or on its destination, but rather on ad hoc “end-use” and “end-user” assessments that focus on the purpose of the export.⁹² And the United States claims jurisdiction over activities abroad based on the U.S. origin or U.S. content of the items involved⁹³—a basis that has little to do with the underlying concerns at hand.

Moreover, this U.S. export licensing approach, combined with the United States’ broad jurisdictional reach, makes it far more likely that exports (or reexports) can be undertaken without a U.S. license, only to discover, at some later point in time, that concerns exist about the purpose (end-use or end-user) of the export—and that a U.S. license is therefore required for further activity, or should have been obtained for previous activity. Stated differently, it makes it far more likely that activities abroad could be subject to U.S. export control jurisdiction and enforcement on the basis that the items involved in those activities are—and always have been—subject to U.S. export control jurisdiction.

This is a rather astonishing state of affairs—but as the following discussion clearly illustrates, modern U.S. export controls did not start out with such broad extraterritorial reach. Instead, extraterritoriality became more important as the effectiveness of U.S. export controls diminished in the decades after World War II. The rise of extraterritoriality in U.S. export controls, and the reasons therefor, offer useful insights into the current jurisdictional approach and the possibilities for new approaches.

3. The Expanded Importance of Export Jurisdiction

a. U.S. Export Jurisdiction Immediately Following World War II

At the end of World War II, the United States emerged as the world’s leading economic power and leading provider of technological and commercial innovation.⁹⁴ Europe’s infrastructure had been largely decimated during the war, and the Soviet Union and Japan had suffered enormous losses as well. In addition, China’s global economic clout had not yet developed.⁹⁵ While the United States was not the *sole* source of

92. See *supra* note 17 and accompanying text.

93. See *supra* note 17 and accompanying text.

94. See CUPITT, *supra* note 52, at 47 (discussing the United States’ concern with maintaining its technological superiority in following years).

95. JUSTIN YIFU LIN ET AL., *THE CHINA MIRACLE: DEVELOPMENT STRATEGY AND*

items of strategic concern, it was certainly the largest by far⁹⁶—and that meant that if the United States wanted to prevent the flow of certain sensitive goods and technologies to the Soviet Union or China, it largely could do so by refusing to approve exports of these items from the United States to those destinations.⁹⁷ It was thus feasible for the United States to implement its national security and foreign policy goals through an export control regime that was characterized by relatively little extraterritoriality.

The effectiveness of these direct restrictions on exports to the Sino-Soviet bloc was enhanced by additional U.S. legislation intended to encourage U.S. trading partners to implement similar export restrictions,⁹⁸ as well as by the formation of the seven-member Consultative Group (which included, as a sub-entity, the better-known Coordinating Committee, or COCOM).⁹⁹ The Coordinating Committee coordinated anticommunist export controls among the United States, Belgium, France, Italy, Luxembourg, the Netherlands, and the United Kingdom—with the United States setting much of the tone and policy.¹⁰⁰

ECONOMIC REFORM 25 (2003) (discussing the rapid economic development in China that began in the late 1970s); Marion Chyun-Yang Wang, *Greater China: Powerhouse of East Asian Regional Cooperation*, 21 E. ASIA 38, 39 (2004) (discussing China's economic growth since the late 1970s due to highly regulated international trade and investment).

96. Berman & Garson, *supra* note 55, at 834–35.

97. It is worth noting that diversion concerns (exports diverted from the stated destination to a covert ultimate destination) were as much a concern during that era as they are in modern times, but end-use/end-user controls (which today are used to address diversion concerns) were not formalized as separate elements of the U.S. export control licensing scheme until the 1990s. Instead, diversion concerns were addressed within the license application process for individual transactions: if such concerns were present, the export license application could be denied or issued in a restricted form modified to address these concerns.

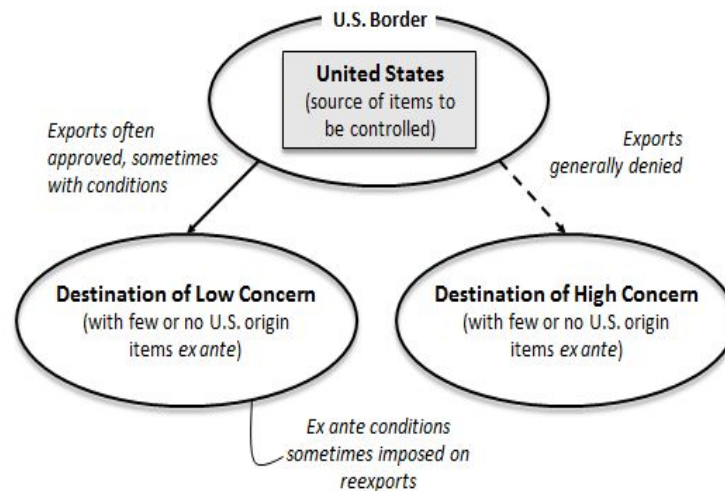
98. *See* Mutual Defense Assistance Control Act of 1951, 22 U.S.C. §§ 1611–13(c) (repealed 1979). This act, popularly known as the Battle Act, set forth the U.S. policy “that no military, economic, or financial assistance shall be supplied to any nation unless it applies an embargo on such shipments to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination.” *Id.* § 1611.

99. Berman & Garson, *supra* note 55, at 834–35. The Consultative Group originally included two committees charged with coordinating these export policies: The Coordinating Committee (COCOM), which focused on the Soviet bloc, and the China Committee, which focused on Mainland China and North Korea. The committees were subsequently merged by disbanding the China Committee and folding its functions into COCOM. *Id.*

100. *Id.*; Silverstone, *supra* note 55, at 343–46. COCOM was disbanded after the end of the Cold War to be replaced by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. *See* HIRSCHHORN, *supra* note

The United States' economic primacy meant that if it wanted to coerce a trading partner to take (or not take) certain actions, it could impose, *ex ante*, stricter export licensing requirements or conditions on certain exports to that country, or ease these controls as a reward for cooperation.¹⁰¹ Such restrictions could preclude certain uses or reexports of the covered items, once they were abroad. Figure 1 illustrates this post-war state of affairs.

Figure 1



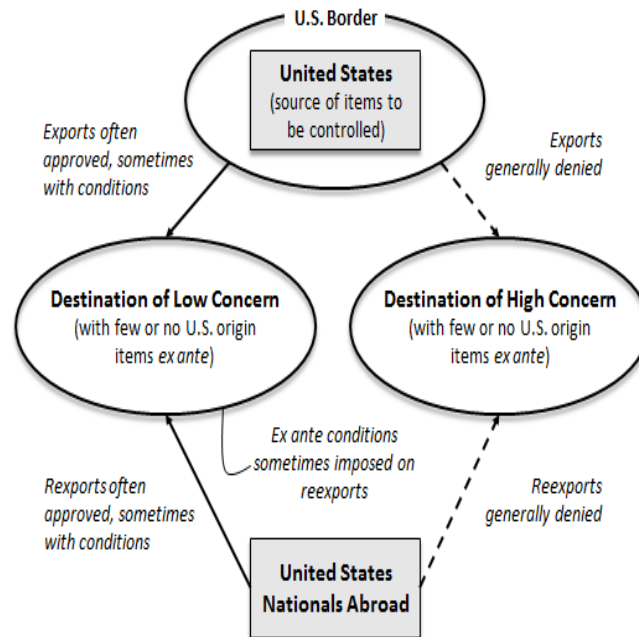
29, at xxiii. For discussions and analyses of the Wassenaar Arrangement, see Gregory Wells Bowman, Carol George, Sunwinder Mann & Alison Stafford Powell, *International Trade Aspects of Information Technology*, in *ENCYCLOPEDIA OF INFORMATION TECHNOLOGY LAW* 4023 (Stephen Saxby ed., 2003); Bowman, *supra* note 9, at 346–47; The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *supra* note 11. Current Wassenaar Arrangement members are Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and the United States. See The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *supra* note 74.

101. Bridge, *supra* note 14, at 3–4 (noting the United States' policy to place trade restrictions, even on its allies, to promote its own political agenda).

With the United States as the primary source of supply for many sensitive goods and technologies, and with some coordination of export controls among key U.S. trading partners, U.S.-led export controls essentially exerted a global effect simply by regulating what was exported physically from the United States and placing *ex ante* restrictions on the use of exported items. The jurisdictional reach of U.S. export controls did not need to extend much beyond the actual borders of the United States. And for “U.S. persons” located abroad (a term of art that includes both natural persons and corporate entities),¹⁰² the United States could impose such restrictions *after* exportation, using the U.S. citizenship of these U.S. persons or entities as justification for such jurisdiction. The effect of nationality jurisdiction on the scope of U.S. export control jurisdiction is shown in Figure 2 below.

102. The definitional scope of “U.S. persons” or “persons subject to the jurisdiction of the United States” has been an enormously contentious issue among the United States and its trading partners, and was indeed an issue in the Trans-Siberian pipeline controversy discussed below. However, assuming that a definition of “U.S. person” could be agreed upon, there was little dispute that the United States could assert nationality jurisdiction over such U.S. persons abroad. In fact, after some definitional disputes between the United States and its European trading partners, the United States did adopt a more limited—and thus less controversial—definition of “U.S. person” in trade sanctions programs implemented pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07 (IEEPA), beginning with the Libyan trade sanctions in 1986. This limited definition made it clear that foreign-owned or -controlled subsidiaries of U.S. companies were *not* U.S. persons subject to these U.S. laws and regulations. See Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.314 (2013); Libyan Sanctions Regulations 31 C.F.R. § 570.313 (2013).

Figure 2



In short, the United States could use these approaches to influence and regulate exports from the United States, and reexports of those items from abroad, in a fairly effective manner. From a legal perspective, these approaches were not controversial, provided that the United States did not define “U.S. Persons” too expansively.¹⁰³ Stated in terms of the *Restatement (Third)*, the United States was exercising export control jurisdiction over exports from the United States under the subjective territorial principle,¹⁰⁴ and exercising jurisdiction over the activities of U.S. persons abroad pursuant to the nationality principle.¹⁰⁵

103. See RESTATEMENT (THIRD), *supra* note 10, at pt. IV, ch. 1, subch. A, intro. note (noting that it has long been “accepted that a state had jurisdiction to exercise its authority within its territory and with respect to its nationals abroad”).

104. See *id.* §§ 402–03.

105. See *id.*

Additionally, broad effect could be achieved through the consensual (if somewhat coerced) cooperation of U.S. trading partners.¹⁰⁶

b. The Declining Effectiveness of Direct U.S. Export Controls: Pandora's Box

Over the decades following the end of World War II, the effectiveness of U.S. export controls fundamentally changed in several important respects. First, U.S. global dominance eroded, as other countries began to catch up to the United States in terms of industrial production and R&D capability.¹⁰⁷ While the United States continued to maintain dominance in many cutting-edge industries, more established industries such as steel production, automotive production and design, and consumer electronics production gradually moved overseas, in whole or in part, as the absolute or comparative advantage balance among countries shifted.¹⁰⁸ This shift of industry overseas meant that direct U.S. export controls were less effective at preventing the flow of sensitive items to the Soviet bloc or China (or other undesired destinations). Not only were more industries located overseas, but in many cases nationality jurisdiction could not readily be extended to cover these activities because no U.S. citizens or companies were involved. Yet these foreign activities in many cases raised significant U.S. national security or foreign policy concerns. While these activities were outside the traditional subjective territorial or nationality jurisdictional scope of U.S. export controls, the United States

106. Some commentators did point out, with concern, that the broad language of the ECA of 1949 and regulations promulgated thereunder could lead to overly broad assertions of extraterritorial jurisdiction by the United States. See Berman & Garson, *supra* note 55, at 850–51. The United States did not expressly make such assertions, however, until 1982. See *infra* notes 125–29 and accompanying text.

107. See William H. Branson et al., *Trends in the United States International Trade and Investment since World War II*, in THE AMERICAN ECONOMY IN TRANSITION 183, 183, 185–86 (Martin Feldstein ed., 1980) (describing how the strength of the post-war economies in other nations reduced the United States' share of economic output in the world); see also TYLER COWEN & ALEX TABARROK, MODERN PRINCIPLES: MACROECONOMICS 118–19 (2010) (discussing how Germany and Japan grew faster than the United States and were highly productive in the period after World War II).

108. Industries might be conceptualized as moving along a spectrum. On the right side, new industries would emerge (often through the result of U.S. R&D), and for a time the United States would enjoy an absolute or comparative advantage in those industries. As these industries became more established, however, they would move further to the left of the spectrum. Other countries would make headway in those industries, and the United States' absolute or comparative advantages would shift to other, newer industries.

nonetheless had a strategic interest in regulating and restricting these activities.

Second, as the digital age dawned in the late 1970s and early 1980s, it became harder to draw a clear line between items that could be used only for generally benign end-uses and dual use items that also could be used for problematic end-uses.¹⁰⁹ The quintessential example is the personal computer, as discussed above;¹¹⁰ other examples abound, including cellular phones and computer operating software.¹¹¹ The blurring of the line between benign items and potentially problematic items meant that it became far more difficult to draw a clear distinction between desirable export transactions and problematic export transactions. One eventual result was a greater focus on end-use and end-user controls, as discussed above; but another result was that as restrictions on exports were lowered—because such items were not clearly “bad” and because a key goal was to promote exports—the need for broader reach to stop unwanted uses of such items once they were abroad became greater.

Thus, the combination of these two factors—multilateralization of supply and the growing preeminence of dual use items—meant that there were more foreign activities that the United States might want to regulate or restrict for national security or foreign policy purposes. Moreover, the determination of whether such foreign activities were desirable depended far less on the nature (classification) of the items involved or the location of the transaction, and far more on the specific end-use to which the items would be put, as well as on the end-users who would be involved in the transactions.

These developments might have mattered less if the United States’ foreign trading partners were fully willing to coordinate their international trade decisions with the strategic concerns of the United States. In the decades that followed World War II, however, the United States’ European trading partners grew less willing to follow the United States’ lead in matters of foreign policy and national security, especially

109. See Bowman, *supra* note 9, at 333–34. The term “dual use” has come to be a synonym for civilian items. *Id.*; see also Export Administration Regulations, 15 C.F.R. § 772.1 (2013) (defining “Dual Use” and acknowledging that the term is regularly used, in general parlance, to refer to civilian items).

110. See *supra* text accompanying notes 83–87.

111. 15 C.F.R. § 772.1 (defining “Dual use” as “[i]tems that have both commercial and military or proliferation applications. While this term is used informally to describe items that are subject to the EAR, purely commercial items are also subject to the EAR.”).

when the choice involved forgoing economic benefit.¹¹² That is not to say there was no cooperation, for clearly there was strong trans-Atlantic coordination of economic controls aimed at communist containment.¹¹³ Yet what might happen when, in a specific export-related transaction, European strategic and economic interests were directly contrary to the economic and strategic interests of the United States (or at least seen as such by European countries)? And what if the transaction in question was one of the many over which the United States could not adequately exercise export control jurisdiction under existing international law principles of territoriality or nationality? The result in one case, the trans-Siberian pipeline controversy of 1981–1982, led the United States to claim unprecedented extraterritoriality over transactions outside the United States.

E. The Trans-Siberian Pipeline Controversy of 1981–1982

By the early 1980s, the stage was set for a crisis in U.S. export controls: either the controls would not work and would have to be forgone in favor of other means of achieving U.S. national security or foreign policy objectives, or the jurisdictional reach of the controls would have to be expanded. In 1981 and 1982, the latter option was chosen by President Ronald Reagan during the trans-Siberian pipeline controversy—an event that ranks as one of the great international trade disputes of the latter twentieth century. Because of the event's complexity and its importance to U.S. export control jurisdiction, it is discussed here in some detail.¹¹⁴

As Andreas Lowenfeld has concisely observed, there were two primary aspects to the dispute: contracts between Western European entities and the Soviet Union for the construction of the pipeline, and a

112. See CUPITT, *supra* note 52, at 96–109. For a discussion of early U.S. trade disputes with other countries regarding extraterritorial export controls, see Kenneth W. Abbott, *Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst*, 17 CORNELL INT'L L.J. 79, 90–91 (1984).

113. This, of course, was a key purpose of COCOM. See Abbott, *supra* note 112.

114. For other expositions of this trade controversy and other trade controversies of the 1970s and 1980s, see Monroe Leigh, *The Long Arm of Uncle Sam—US Controls as Applied to Foreign Persons and Transactions*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 47 (1984); Moyer & Mabry, *supra* note 14; Abbott, *supra* note 112, at 82–90; Bridge, *supra* note 14; see also AM. SOC'Y OF INT'L LAW, PROCEEDINGS OF THE 77TH ANNUAL MEETING 1, 241–70 (Ved P. Nanda ed., 1983) (providing a transcript of a panel discussion on the extraterritorial application of U.S. export controls).

crackdown on Solidarity-led reforms in Poland.¹¹⁵ With respect to the former aspect, in the early 1980s, European natural gas distribution companies signed contracts with the Soviet Union for the construction of a natural gas pipeline from Siberia to Germany.¹¹⁶ The pipeline project was a way for the Soviet Union to earn much-needed hard currency, and also was a way for European countries to reduce dependency on Middle Eastern oil and provide employment for unemployed European steel workers.¹¹⁷ The total value of the project to these West European countries was between U.S. \$11 billion and U.S. \$15 billion.¹¹⁸ The United States, of course, was concerned that the pipeline would provide the Soviet Union with hard Western currency and that reduced European dependency on Middle Eastern oil would mean greater dependency on Soviet natural gas.¹¹⁹

Some U.S. companies were slated to supply technology or equipment in support of this project.¹²⁰ The United States had recently completed its Alaskan pipeline, and U.S. companies involved in that project had developed technology and technological know-how that would be highly useful on the trans-Siberian pipeline project.¹²¹ As a result, several European corporations serving as sub-contractors or contractors for the trans-Siberian pipeline project had signed agreements to purchase equipment and license relevant technology from these U.S. companies.¹²² Some European subsidiaries of U.S. companies were also providing support of various types to the trans-Siberian

115. Lowenfeld, *supra* note 9, at 361; *see also* Moyer & Mabry, *supra* note 14; Eric S. O'Malley, *Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations*, 43 VA. J. INT'L L. 319, 351–52 (2003).

116. Lowenfeld, *supra* note 9, at 361.

117. *Id.*; *see also* Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 619 n.227 (1999).

118. ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* 819 (2d ed. 1999); Patrizio Merciai, *The Euro-Siberian Gas Pipeline Dispute—A Compelling Case for the Adoption of Jurisdictional Codes of Conduct*, 8 MD. J. INT'L L. & TRADE 1, 2 (1984) (“The whole project represents a \$15 billion investment . . .”).

119. Lowenfeld, *supra* note 9, at 361; Morse & Powers, *supra* note 14, at 538; Moyer & Mabry, *supra* note 14, at 70.

120. Lowenfeld, *supra* note 9, at 361 (noting that General, Electric, Caterpillar Tractor, and other companies had entered into contracts with several European companies that were helping to build the pipeline).

121. *Id.*

122. *See supra* note 117.

pipeline project.¹²³ These European subsidiaries of U.S. companies were in the possession of relevant U.S. origin pipeline-related technology that previously had been lawfully exported from the United States.¹²⁴

With respect to the latter aspect of this trade dispute—the Solidarity Movement in Poland—in late 1981, martial law was declared in Poland as a means to stifle the Solidarity Movement.¹²⁵ Up to that point, Solidarity had enjoyed remarkable success in weakening the Communist Party’s grip on government in Poland and achieving some semblance of democratic reform.¹²⁶ Western European countries decried the situation in Poland but took little action; in contrast, U.S. President Reagan implemented stricter export controls against Poland and the Soviet Union (which was believed to be behind the imposition of martial law in Poland).¹²⁷ The restrictions imposed by the United States were implemented in two phases—one in December 1981 and one in June 1982—and they took three general forms: (a) territory-based restrictions on exports from the United States, directly or indirectly (i.e., via third countries), in support of the pipeline project; (b) nationality-based restrictions on “persons subject to the jurisdiction of the United States”; and (c) *ex post* restrictions on reexports or use abroad of U.S.-origin or -content items previously *lawfully* exported from the United States.¹²⁸ The first two types of restrictions were consistent with prior U.S. practice and with international law; the third was newer and controversial.¹²⁹

123. Lowenfeld, *supra* note 9, at 361 (“[A] number of European subsidiaries of American companies were engaged in portions of the project.”).

124. *Id.*

125. *Id.* at 361–62.

126. *Id.* at 361 (“For sixteen months, freedom in Poland seemed to grow day by day. Close to ten million people joined Solidarity, a related movement arose among Poland’s farmers, and even the Central Committee of the Communist Party held free elections by secret ballot, with the result that only one-tenth of the membership was reelected.”).

127. Abbott, *supra* note 112, at 82–84.

128. Marcuss & Mathias, *supra* note 14, at 11.

129. It is important to point out that these U.S. actions were trade-restrictive, and thus very much like an embargo. That is especially the case with the nationality-based restrictions imposed on U.S. parties. This illustrates that, as discussed earlier in this Article, there is overlap between export controls and trade sanctions (embargoes)—but the point to bear in mind is that item origin-based restrictions were imposed through the EAR, then lifted. They were, in other words, a case of embargo activity being channeled through the EAR, which does happen, and not a case of the overall trade-promotion focus of the EAR being subverted. See Export Administration Regulations, 15 C.F.R. § 746 (2013) (Embargoes and Other Special Controls); see also *supra* text accompanying notes 78–81.

1. The December 1981 Restrictions

The December 1981 phase restrictions contained several elements. First, the United States prohibited the export from the United States of all items for use on the pipeline project.¹³⁰ This was done by implementing stricter export licensing requirements for the export of oil and natural gas transmission and refining equipment and technology to the Soviet Union, and by suspending the review and issuance of any such licenses.¹³¹ Second, the U.S. Department of Commerce announced that previously issued licenses for exports to the Soviet Union could be reviewed and suspended, and this exerted a strong chilling effect on exports under those licenses.¹³²

Third, the December 1981 phase conditioned all exports (to anywhere) of oil and gas transmission technology upon an *ex ante* “written assurance” by the foreign recipient that it would not reexport or otherwise provide either this technology or any “direct products” of this technology (that is, goods manufactured abroad directly from this technology) to the Soviet Union.¹³³ Failure to provide such a written assurance would mean an export license would be required for the export (which likely would not be granted).¹³⁴ In essence, this restriction was intended to prevent any indirect exports in support of the pipeline project, as well as prevent the export of technology that, while not for export to the Soviet Union, would be used to produce certain foreign-origin items that would be used on the pipeline project.¹³⁵

Finally, although it is not readily apparent from the language of the December 1981 phase restrictions, these controls in fact also restricted the *reexport* from abroad of goods and technology that previously had been lawfully exported from the United States.¹³⁶ This was so because the EAR permitted (and in fact still generally permit) reexports from abroad of items that would not require a license for export directly from

130. See Abbott, *supra* note 112, at 82–84; Lowenfeld, *supra* note 9, at 362.

131. Abbott, *supra* note 112, at 82–83.

132. *Id.* at 83–84.

133. *Id.* at 85–86; Leigh, *supra* note 114, at 50 (“In accordance with this broad policy, the Commerce Department in December 1981 announced regulations which barred all exports or re-exports to the Soviet Union of US-origin commodities and technical data for transmission or refinement of petroleum or natural gas for energy usage.”).

134. Abbott, *supra* note 112, at 85–86.

135. See *id.*

136. *Id.* at 84–85.

the United States.¹³⁷ However, because the December 1981 phase restrictions imposed an export license requirement on exports from the United States of oil and natural gas transmission and refining equipment and technology, that also meant that foreign *reexports* of these items would require an export license, regardless of the fact that originally these items had been lawfully exported from the United States.¹³⁸ This was, in other words, an *ex post* or retroactive restriction on reexports. As Stanley Marcuss and Eric Richard have observed, the broad statutory language of the EAA of 1979 did not clearly *prohibit* such retroactive application of U.S. export controls, but it was certainly out of the ordinary.¹³⁹ Historically, reexport restrictions under the EAR had been applied by the United States on an *ex ante*, not *ex post*, basis.¹⁴⁰ Harold Berman and John Garson made the same observation in 1967 concerning the ECA of 1949 and export controls promulgated thereunder.¹⁴¹ The upshot is that prior to the Soviet pipeline controversy, application of U.S. export control restrictions to items previously exported lawfully from the United States had never been attempted, or even envisioned. Since 1981 and 1982, however, this approach has become a permanent and prevalent feature of U.S. export controls.

The December 1981 phase restrictions were generally unpopular with the United States' European trading partners (as well as with adversely affected U.S. companies), but they did not lead to an international relations crisis between the United States and its Western European trading partners.¹⁴² Indeed, France and Great Britain

137. Export Administration Regulations, 15 C.F.R. § 736.2 (2013) (defining the scope of EAR export prohibitions—and, by implication, permissible exports—in terms of “exports” and “reexports”).

138. Abbott, *supra* note 112, at 84–85.

139. Stanley J. Marcuss & Eric L. Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 475–76 (1981).

140. *See id.* at 439.

141. *See generally* Berman & Garson, *supra* note 55.

142. *See* Steven Rattner, *Britain Defying U.S. Restriction in Soviet Project*, N.Y. TIMES, Aug. 3, 1982, at A1 (“The embargo in the terms in which it has been imposed is an attempt to interfere with existing contracts and is an unacceptable extension of American extraterritorial jurisdiction in a way which is repugnant in international law.” (quoting Lord Cockfield, Trade Secretary) (internal quotation marks omitted)); *Compressors Leave Le Havre for Soviet*, N.Y. TIMES, Aug. 27, 1982, at D1 (discussing France’s response).

generally—albeit somewhat reluctantly—supported the restrictions.¹⁴³ This phase’s *ex ante* restrictions on exports, future reexports, and foreign use of items exported from the United States were lawful exercises of territorial jurisdiction by the United States,¹⁴⁴ and the *ex post* reexport restrictions, troubling though they may have been, appear not to have had enough impact to lead to a serious escalation in trans-Atlantic trade tensions.

2. The June 1982 Restrictions

In contrast, the export control restrictions imposed by the United States in June 1982 did draw the ire of Western European states. The June 1982 phase restrictions were put in place unilaterally by the United States, after the United States’ December 1981 phase restrictions proved insufficient, and after U.S. efforts to implement multilateral trade restrictions against the Soviet Union failed due to a divergence of U.S. and European interests and concerns over the pipeline project.¹⁴⁵ The June 1982 phase restrictions expanded the December 1981 phase restrictions in two important ways.

- First, the United States prohibited the use on the trans-Siberian pipeline project of equipment manufactured by foreign subsidiaries of U.S. companies.¹⁴⁶

This move, while unpopular, was not *per se* inconsistent with international law: depending on how the term “U.S. subsidiary” was defined, this was an exercise of nationality jurisdiction.¹⁴⁷

143. Abbott, *supra* note 112, at 87–88.

144. Lowenfeld, *supra* note 9, at 362.

145. Abbott, *supra* note 112, at 86–87.

146. *Id.*, at 86–87; Moyer & Mabry, *supra* note 14, at 70; Leigh, *supra* note 114, at 50–51.

147. Lowenfeld, *supra* note 9, at 362–63. Lowenfeld has observed that this:

[A]ssertion of jurisdiction . . . was not new; it had been asserted by the United States in the past in order to frustrate evasion of U.S. embargoes against China, Cuba, and other countries designated under the Trading with the Enemy Act [a U.S. trade sanctions statute] and its successor statute, though not under export controls.

Id. at 363. Lowenfeld’s observation is that the subject of export control restrictions on foreign subsidiaries was “a subject of continuing controversy between the United States and its allies, neither clearly supported by nor clearly contrary to international law.” *Id.*

This particular controversy has been largely resolved in the export control context by the United States’ adoption of a definition of “U.S. person” that effectively narrows the scope of nationality jurisdiction asserted. See Export Administration Regulations, 15 C.F.R. § 772.1 (2013) (defining “U.S. person”). A similar approach has been taken under U.S. trade

- Second, the United States prohibited the use on the pipeline project of equipment manufactured abroad by non-U.S. companies or subsidiaries using U.S. technology that previously had been licensed from U.S. companies.¹⁴⁸

At the time the June 1982 phase restrictions were implemented, several foreign companies (including some foreign subsidiaries of U.S. companies) had contracts with the Soviet Union for the manufacture and delivery of equipment for the trans-Siberian pipeline project, and already had licensed U.S.-origin technology for the production of this equipment from U.S. companies.¹⁴⁹ The June 1982 phase restrictions, therefore, effectively prohibited these foreign companies from performing under their supply contracts with the Soviet Union.¹⁵⁰ In response, Britain and France ordered companies within their borders to disregard these U.S. restrictions and continue working on the pipeline project.¹⁵¹

This second restriction may seem at first blush to be problematic but ultimately narrow. In fact, it was a radical expansion of the jurisdictional scope of U.S. export controls, and one that has become an increasingly central feature of these controls. At its core, the restriction was a retroactive restriction on the use abroad of technology that previously had been lawfully exported from the United States and

sanctions programs since the 1980s. *See supra* note 102.

In the case of U.S. export controls on encryption items (which are considered particularly sensitive), the definition is somewhat broader, but still canalized sufficiently to avoid major transnational disputes. This definition also includes foreign subsidiaries in which a U.S. person owns a substantial minority stake or over which it exercises effective control via the board of directors or a management contract. § 772.1 (defining “U.S. subsidiary”). This definition is analogous, in a broad sense, to piercing the corporate veil: what matters is not the form of ownership or control, but the substance. While this approach can be difficult in application, in principle it is not inconsistent with international law principles of prescriptive jurisdiction.

148. Abbott, *supra* note 112, at 86; Leigh, *supra* note 114, at 50–51; Lowenfeld, *supra* note 9, at 362.

149. Abbott, *supra* note 112, at 85.

150. Leigh, *supra* note 114, at 51; Abbott, *supra* note 112, at 87, 89. In fact, several U.S. exporters asked the relevant U.S. export authorities, *before* they exported the technology in question, whether any export/reexport control restrictions would apply to these products. They were informed that no such restrictions would apply. *See Extraterritorial Application*, *supra* note 14, at 1308; *see also* *Compagnie Européenne des Pétroles S.A. V. Sensor Nederland B.V.*, No. 82/716 (Dist. Ct. The Hague Sept. 17, 1982).

151. *See* INTERNATIONAL LEGAL MATERIALS 834, 851 (1982) (Britain); Rattner, *supra* note 142 (discussing Britain’s response); *Compressors Leave Le Havre for Soviet*, *supra* note 142 (discussing France’s response).

licensed for use for a lawful purpose.¹⁵² In other words, it imposed *end-use* restrictions, even when there was no reexport of the technology. That meant this prohibition had broad impact on foreign licensees of the U.S. technology in question.¹⁵³

3. The Foreign Response to the June 1982 Restrictions

The foreign reaction to this unprecedented assertion of U.S. extraterritoriality was “sharp and hostile.”¹⁵⁴ European states, joined by Japan, publicly denounced the new restrictions and filed diplomatic protests with the United States.¹⁵⁵ European governments encouraged companies located within their borders to continue performance under pipeline project-related contracts, and in certain cases these governments actually issued formal orders mandating continued performance, thus imposing on affected companies a stark Hobson’s choice.¹⁵⁶ The United States’ response was to “blacklist” companies that defied these U.S. end-use restrictions by placing them on a “temporary denial” list.¹⁵⁷ This meant that those companies were prohibited from participating, in any manner, in any transactions (Soviet-related or otherwise) involving U.S.-origin oil and natural gas products and technology.¹⁵⁸ This blacklisting adversely affected those companies’ overall business activities.¹⁵⁹ Yet despite the blacklisting, European companies involved in the trans-Siberian pipeline project continued to perform on their pipeline contracts, both by manufacturing products using the licensed U.S.-origin technology in question and by exporting those products to the Soviet Union.¹⁶⁰

152. See Marcuss & Mathias, *supra* note 14, at 1. Marcuss and Mathias note that these restrictions in the 1982 Trans-Pipeline controversy were “the first example of retroactivity of [U.S.] foreign policy export controls in the foreign-product context.” *Id.* at 15.

153. See *supra* text accompanying notes 114–29; see also Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (June 22, 1982). In an important sense, then, these end-use-focused licensing restrictions presaged the EPCI end-use/end-user controls explicitly added to U.S. export regulations in the 1990s. See *supra* text accompanying notes 71–82.

154. Abbott, *supra* note 112, at 88.

155. *Id.*

156. Moyer & Mabry, *supra* note 14, at 71.

157. Abbott, *supra* note 112, at 89.

158. *Id.*; Leigh, *supra* note 114, at 51–52 (summarizing in detail the terms of these temporary denial orders).

159. Abbott, *supra* note 112, at 89.

160. Moyer & Mabry, *supra* note 14, at 72.

High-profile challenges also ensued in U.S. federal courts, where the denials of export (and reexport) privileges were challenged as violations of due process.¹⁶¹ Administrative petitions were filed by affected companies with the Department of Commerce,¹⁶² and legislation was introduced in Congress to require rescission of the December 1981 phase and June 1982 phase export control restrictions.¹⁶³ These legislative efforts were far from mere exercises in rhetoric and political grandstanding: one of the bills was defeated in the House of Representatives by a mere three-vote margin (206 to 203).¹⁶⁴

Most important of all, perhaps, was the fact that the trans-Siberian pipeline controversy caused a rapid deterioration of relations between the United States and its European trading partners.¹⁶⁵ Instead of being a narrow—albeit important—dispute over the trans-Siberian pipeline project, the controversy began to affect the United States' overall economic and defense-related relations with major trading partners.

4. The United States Backs Down

Because of the adverse foreign reaction, by late 1982 the U.S. government was “looking for a graceful way out” of the pipeline controversy.¹⁶⁶ In November 1982, President Reagan announced that because the U.S. and its Western European allies had reached an agreement on a cooperative policy approach toward the Soviet Union, the United States would lift the December 1981 and June 1982 restrictions on the trans-Siberian pipeline project.¹⁶⁷ Accordingly, the U.S. export control restrictions on exports to the Soviet Union of oil and natural gas transmission and refining equipment were lifted; the suspension on processing export licenses for the Soviet Union was also lifted; and the Department of Commerce announced that henceforth such license applications would be reviewed under a general policy of approval, subject to certain exceptions.¹⁶⁸ The United States also lifted the temporary denial orders issued against European companies that

161. *Id.* at 72–73. Another case was litigated in Europe, see Lowenfeld, *supra* note 9, at 364.

162. Moyer & Mabry, *supra* note 14, at 72–73.

163. *Id.* at 73.

164. *Id.*

165. Abbott, *supra* note 112, at 88.

166. Lowenfeld, *supra* note 9, at 364.

167. *Id.*; Moyer & Mabry, *supra* note 14, at 83–84.

168. Moyer & Mabry, *supra* note 14, at 84 nn.541–42.

had continued to supply goods and technology for the pipeline project after the retroactive and extraterritorial June 1982 phase restrictions were put in place.¹⁶⁹

Despite the United States' announcement, it is not entirely clear what the terms of this agreement were.¹⁷⁰ The United States claimed that its European trading partners had agreed to jointly conduct, with the United States, an "urgent study" of western dependence on Soviet oil and natural gas and of possible alternative energy sources, and that pending the study's completion these nations would harmonize and further tighten their controls on exports of certain strategic items to the Soviet Union, as well as forgo signing new contracts for Soviet natural gas.¹⁷¹ European states, however, claimed that the agreement was limited only to conducting the study, with no commitments to coordinate export control provisions.¹⁷² France's President Mitterrand went so far as to state publicly that "la France is not a party to what is perhaps not even an agreement."¹⁷³

Regardless of what was or was not agreed to, what is clear (aside from Mitterrand's panache) is that the lifting of these export control restrictions "was an awkward withdrawal" by the United States "from a misconceived and divisive policy."¹⁷⁴ The United States was trying to save face. Whether it succeeded in doing so is less relevant than the fact that, in the face of strong European opposition to the June 1982 phase restrictions, the United States rescinded those restrictions and the denial orders relating to them.

F. The Pipeline Dispute's Legacy: Exponentially Expansive Jurisdiction

When the export control restrictions imposed by the United States in the trans-Siberian pipeline controversy are boiled down to their essence, it becomes apparent that European (and Japanese) concerns centered largely on the retroactive, *ex post* restrictions the United States imposed

169. *Id.* at 84–85; Abbott, *supra* note 112, at 90; Lowenfeld, *supra* note 9, at 364.

170. Leigh, *supra* note 114, at 52.

171. Moyer & Mabry *supra* note 14, at 85; Leigh, *supra* note 114, at 52–53.

172. See Leigh, *supra* note 114, at 52 (detailing the lack of information concerning the terms of any agreement, France's refutation of any such agreement, and subsequent U.S. admissions consistent with France's position); Moyer & Mabry, *supra* note 14, at 85 (reporting European denials of the agreement's scope).

173. Leigh, *supra* note 114, at 52.

174. *Id.* at 53.

on the use abroad of technologies already lawfully exported.¹⁷⁵ It is also clear that these U.S. assertions of jurisdiction were based on the U.S. origin of the technologies involved. To paraphrase the words of two observers in 1982, the U.S. position was that the United States could restrict or control the technologies' use at all times after they left the United States, solely due to their U.S. origin—that is, that “U.S. law [jurisdiction] runs with the [technologies].”¹⁷⁶

What is centrally important to understand is that while the United States backed down in the Soviet pipeline controversy—Congress even amended the EAA of 1979 to address the retroactivity issue¹⁷⁷—this does not mean the United States ceased asserting item origin-based jurisdiction in its export controls. Far from it.¹⁷⁸ Since 1982, item origin-based jurisdiction has become a central feature of post-Cold War U.S. export controls.¹⁷⁹ Thus, instead of controls based on direct exports or express *ex ante* restrictions placed on specific reexports, or the regulation of U.S. persons (including U.S. business operations) abroad, the jurisdictional reach of U.S. export controls now rests squarely on the origin of exported and reexported items—regardless of where such items are located, or who is involved, or even how long such items have been abroad.¹⁸⁰

This means that while retroactivity (a central feature of the pipeline dispute) has become less central, the underlying jurisdictional problem remains. The United States might choose, as a matter of comity or commercial prudence, not to undertake an *enforcement action* regarding

175. The “U.S. person-based restrictions” on foreign subsidiaries of U.S. companies was also a source of significant friction and dispute, but the definitional boundaries of such claims of nationality jurisdiction were later resolved and are thus not focused on here. See *supra* note 147 and text accompanying notes 120–24.

176. ROSENTHAL & KNIGHTON, *supra* note 14, at 54 (“Here the claim seems to be that because the goods or technology are of US origin, US law can continue to govern their disposal to others, even after they have left the United States, or passed through the hands of more than one buyer: i.e., that US law runs with the goods.”).

177. See Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985); Abbott, *supra* note 14, at 146.

178. See Abbott, *supra* note 14, at 147.

179. See *infra* notes 183–85 (discussing the United States’ percentage-based approach to determining and asserting jurisdiction over foreign-made items containing U.S. content).

180. See Export Administration Regulations, 15 C.F.R. § 772.1 (2013) (defining “Export” as “an actual shipment or transmission of items out of the United States,” and “Reexport” as “an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country”).

a particular foreign activity involving U.S.-origin items¹⁸¹—but that is a very different thing than acknowledging a lack of *jurisdiction*, then later changing one’s mind. This means that U.S. trading partners might, at any time, find that transactions previously subject to a U.S. policy of benign neglect (i.e., “the United States has jurisdiction, but we are not going to pursue enforcement actions over your activities because we are not concerned about them”) are now being paid attention to (i.e., “the United States has jurisdiction, and we are going to use it”)—because all along, prescriptive jurisdiction was asserted. This is, in a very important sense, what President Reagan did in 1982: he backed off regarding the prohibition of activities, but he did not back off regarding the assertion of jurisdiction over those foreign activities in support of the pipeline project.

The broad scope of this jurisdictional reach is now further expanded by how the United States determines what items are covered. In addition to *U.S.-origin items*, the United States also currently uses its item origin-based approach to assert extraterritorial jurisdiction over *foreign-origin items* that contain certain levels of U.S. content (for example, components or sub-systems), as well as over “foreign-made commodities that are ‘bundled’ with controlled U.S.-origin software.”¹⁸² That is, U.S. content can taint foreign-origin items, so as to bring those foreign-origin items within the jurisdictional scope of U.S. export controls. The standard U.S. content threshold is 25% by value,¹⁸³ but for certain problematic destinations the threshold is only 10%¹⁸⁴—and for a few problematic items, the threshold is any percentage greater than zero.¹⁸⁵ To say that this is an expansive application of item origin-based jurisdiction is a supreme understatement: not only is it conceptually aggressive,¹⁸⁶ but it also poses practical challenges because it can be

181. See Abbott, *supra* note 14, at 147 (noting that “[t]he Reagan Administration’s approach has been to moderate the exercise of extraterritorial jurisdiction, out of comity or concern for U.S. commercial interests . . . without yielding any of its jurisdictional claims”).

182. 15 C.F.R. § 734.3(a)(3) (2013).

183. *Id.* § 734.4(d).

184. *Id.* § 734.4(c).

185. *Id.* § 734.3 (defining “[i]tems subject to the EAR”); *id.* § 734.4(a) (“Items for which there is no *de minimis* [U.S. content].”). For a discussion of the historical origins of these *de minimis* rules, see Abbott, *supra* note 14, at 144–46.

186. See Peter L. Flanagan & Eric D. Brown, *Foreign Trade Controls, in E-COMMERCE LAW & BUSINESS* 12–39 (Mark E. Plotkin et al. eds., 2003) (noting, with respect to foreign-origin software, that “[a]s a practical matter, these controls potentially are applicable to many export transactions originating outside the United States because of the leading market

difficult to determine what a foreign-origin item's U.S. content percentage is—especially when an item is software or technology.¹⁸⁷ Origin determinations, and thus jurisdiction, end up hinging on accounting methodologies.¹⁸⁸ And because U.S. export controls regulate not just trans-border shipments (based on item classification and ultimate destination), but also end-uses and in-country transfers to other parties (i.e., end-users), the counterintuitive result is that U.S. export (and reexport) controls over U.S.-origin and non-*de minimis* U.S.-content items apply to transactions and activities overseas that do not involve exports or reexports at all.¹⁸⁹

The jurisdictional expansiveness does not end there. The United States also asserts extraterritorial jurisdiction over some *wholly* non-U.S. origin items that are the “direct products” of certain U.S.-origin technologies subject to “national security” controls under the EAR (that is, certain sensitive technologies)¹⁹⁰—controls that mirror the June 1982 restrictions discussed above.¹⁹¹ Defenders of this sort of jurisdiction might argue that such jurisdiction only covers a narrow swath of products controlled for “national security” reasons under the EAR,¹⁹² but being narrow is not the same thing as being permissible in all cases. It certainly was not sufficient to avoid a firestorm of controversy in 1982.

Moreover, the United States' assertion of extraterritorial jurisdiction does not appear to be premised on a foreign party's knowledge or on notice. The D.C. Circuit Court of Appeals has interpreted the EAA of 1979 and the EAR as establishing “strict liability” for violations, which means that a violation occurs even when a foreign party does not know or have reason to know that a particular item is controlled.¹⁹³ This would seem to mean, by logical extension, that lack of knowledge that

position of many U.S. software applications”).

187. The rules for determining U.S. content of foreign-made software are set forth in a supplement to Part 734 of the EAR. Export Administration Regulations, 15 C.F.R. § 734 Supp. No. 2(a)(3)(ii) (2013).

188. *See supra* notes 183–85 and accompanying text (discussing the percentage-based system that the United States uses to exercise jurisdiction over an item).

189. It is, in fact, possible to violate U.S. export control laws without any export having occurred. *See, e.g.*, 15 C.F.R. §§ 744.1–4 (end-use and end-user controls).

190. *Id.* § 734.3(a)(4) (regarding “[c]ertain foreign-made direct products of U.S. origin technology or software”); *id.* § 736.2(b)(3) (regarding export restrictions on such items).

191. *See supra* Part II.E.2.

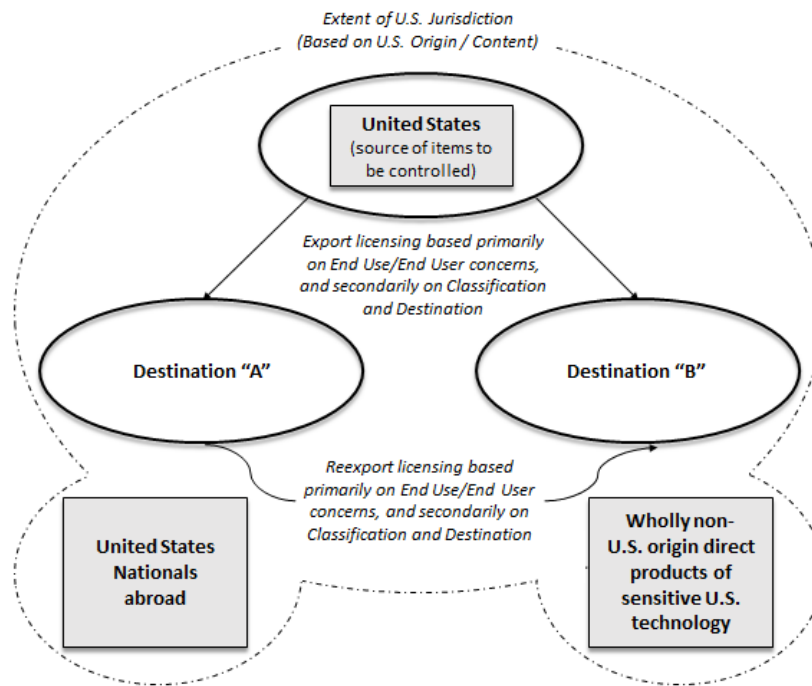
192. 15 C.F.R. § 736.2(b)(3)(ii)(A)(2) (regarding “national security controls” requirement for such items); § 742.4 (regarding EAR “national security” controls).

193. *Iran Air v. Kugelman*, 996 F.2d 1253, 1257–59 (D.C. Cir. 1993).

an item is subject to U.S. export controls does not thwart U.S. jurisdiction as a matter of U.S. law.

As the volume of exports has grown in recent years, and as more and more multimodal sourcing occurs in foreign manufacturing, there has been an exponential increase in the extraterritorial reach of U.S. export controls.¹⁹⁴ This current state of affairs is illustrated in Figure 3. It is a useful (and sobering) exercise to compare Figure 3's expansive scope to the more limited (and conventional) scope of U.S. export control prescriptive jurisdiction in Figure 2, above.

Figure 3



194. This can lead to inconsistent origin determinations within and among U.S. international trade laws. For example, under U.S. customs law, U.S.-origin components that are incorporated into complex equipment abroad can be considered to become foreign-origin, even if that equipment is later disassembled. See U.S. Customs Serv. Ltr. Rul. HQ 559703 (Aug. 23, 1996), available at <http://rulings.cbp.gov/detail.asp?ru=559703&ac=pr> (ruling that aircraft engine parts produced in various countries but assembled into aircraft engines in another country were substantially transformed during engine manufacture and became products of the country of engine assembly, and retained that origin even when the engines were later disassembled for maintenance and repair). The same result, of course, is not true under U.S. export controls.

The combined effect of these jurisdictional assertions is extraordinary enough to warrant repeating: the United States claims the right to tell (a) wholly non-U.S. parties, (b) who are located outside the United States and who possess lawfully obtained U.S. origin items, lawfully produced foreign-origin items with non-*de minimis* U.S. content, or certain wholly non-U.S. origin items, (c) not only where and to whom they may provide these items, but also (d) what may not be done with these items in-country, and (e) to do so in perpetuity. The United States may have conceded defeat in the 1982 battle over the trans-Siberian pipeline controversy, but it did not back down from a key jurisdictional assertion that was at the very heart of that controversy.¹⁹⁵ Since then, that key jurisdictional assertion has become a cornerstone of modern U.S. export controls. What is more, the United States has recast the restrictions imposed in 1982, which were quite obviously retroactive, into a system of jurisdiction that is not based on retroactivity, but rather on item origin and concerns over item end-uses and end-users.

The reason for this broad jurisdictional reach is clear: the United States wants to prevent unwanted transactions and activities, no matter where they occur. With the passage of three decades since 1982, however, is such expansive jurisdictional reach more justifiable now than it was in the early 1980s? The next Part addresses that question under the prescriptive jurisdictional principles of international law as set forth in the *Restatement (Third)*.

G. Consensual Multilateral Cooperation

Before addressing the application of the *Restatement (Third)*, however, it is important to address current multilateral export control efforts and explain why they do not help address or resolve the jurisdictional challenges of U.S. export controls. There are more export-related international organizations and agreements in existence today than in 1981 and 1982, but the effect of these efforts on jurisdictional reach is indirect.¹⁹⁶ COCOM was disbanded in 1994 and

195. See *supra* Part II.E.2; *supra* notes 177–79 and accompanying text.

196. See *infra* notes 197–203 and accompanying text (discussing the Wassenaar Arrangement, the Australia Group, the Nuclear Group, and the Missile Technology Control Regime); Part II.E.4 (concluding that jurisdictional authority did not change as a result of the trans-Siberian pipeline episode).

replaced by the Wassenaar Arrangement.¹⁹⁷ The Wassenaar Arrangement's forty-one participants work to coordinate their export classification schemes and provide notice to one another regarding the export of certain sensitive items,¹⁹⁸ but the regime is weaker than its predecessor, because participating countries cannot veto other countries' exports of sensitive items as they could under COCOM.¹⁹⁹ The Wassenaar Arrangement is, therefore, a less restrictive and more consensus-based organization than COCOM.

Other multilateral export control-related organizations and agreements are even more voluntary and consensual, and they also are more narrowly limited to specific types of export activities. The result is that unilateral jurisdictional rules are not curtailed. The Chemical Weapons Convention is limited to chemical weapons matters, including regulation of exports.²⁰⁰ The Australia Group Chemical and Biological Weapons Nonproliferation Control Regime (Australia Group) is an "informal forum of countries" that "seeks to ensure that exports do not contribute to the development of chemical or biological weapons."²⁰¹ The Nuclear Suppliers Group is an informal group of countries that seeks to prevent nuclear weapons proliferation through consensual guidelines concerning nuclear item exports and reexports.²⁰² The Missile Technology Control Regime is an "informal and voluntary association of countries [dedicated to] non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction."²⁰³

These are all worthy organizations or agreements, and the United States participates in each, but the point for current purposes is that while they address exports from common perspectives—concerns about proliferation and missile technology—as currently structured they do

197. See Bowman, *supra* note 9, at 345–47; The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *Genesis of the Wassenaar Arrangement*, WASSENAAR.ORG, <http://www.wassenaar.org/introduction/origins.html> (last visited Feb. 6, 2014).

198. The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *supra* note 90.

199. See Corr, *supra* note 89, at 450–58.

200. See Urs A. Cipolat, *The New Chemical Weapons Convention and Export Controls: Towards Greater Multilateralism?*, 21 MICH. J. INT'L L. 393, 413–14 (2000).

201. AUSTRALIAGROUP.NET, <http://www.australiagroup.net/en/index.html> (last visited Feb. 6, 2014).

202. See NUCLEARSUPPLIERSGROUP.ORG, <http://www.nuclearsuppliersgroup.org/Leng/default.htm> (last visited Feb. 6, 2014).

203. Missile Technology Control Regime, *supra* note 11.

not address, much less restrict, extraterritorial jurisdiction.²⁰⁴ Thus, while these efforts do help reduce frictions in the areas they address, which likely reduces the risk of high-profile jurisdictional disputes in those areas, many activities over which the United States claims export jurisdiction still fall outside the scope of these organizations and agreements. In fact, the 1982 trans-Siberian pipeline dispute concerned *none* of the areas covered by Chemical Weapons Convention, Australia Group, Nuclear Suppliers Group, or Missile Technology Control Regime. These cooperative efforts therefore do not eliminate the problem presented by U.S. extraterritorial export control jurisdiction.

III. ANALYSIS OF U.S. EXTRATERRITORIAL EXPORT CONTROLS UNDER THE *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES*

The prescriptive jurisdiction provisions of the *Restatement (Third)* were revised significantly from the *Restatement (Second) of Foreign Relations Law of the United States*: by the 1980s, changing global trade and international relations patterns clearly required a more nuanced treatment of prescriptive jurisdiction than the *Restatement (Second)*'s principles of territoriality and nationality allowed.²⁰⁵ The *Restatement (Third)*'s prescriptive jurisdictional principles therefore are characterized by deliberate and significant overlaps among the various bases for prescriptive jurisdiction,²⁰⁶ and also by overarching considerations of "reasonableness and fairness" that are intended to limit overly expansive assertions of jurisdiction.²⁰⁷ An interesting temporal parallel therefore exists between the *Restatement (Third)*'s move from territorial and nationality jurisdiction and the growing extraterritoriality of U.S. export controls.

This is not a coincidence—updates to restatements are intended to reflect changes in the law—but what is particularly interesting to consider is whether the full scope of U.S. item origin-based export

204. See *supra* Part II.E.2 and accompanying text (noting that President Reagan, while ultimately backing down during the pipeline dispute, did not disclaim the authority behind the actions he took).

205. RESTATEMENT (THIRD), *supra* note 10, at pt. IV, ch. 1, subch. A, intro. note. The *Restatement (Second)*'s provisions regarding territorial and nationality jurisdiction are set forth in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17–20, 30 (1965).

206. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. b.

207. *Id.* § 403 cmt. a.

control jurisdiction can fit, doctrinally speaking, into the *Restatement (Third)*'s expanded and reworked jurisdictional principles. Originally, the scholarly consensus was “No”—and despite changes in international trade over the past thirty years, this answer probably has not changed.²⁰⁸ While it is possible now to justify *more* of the jurisdictional reach of U.S. export controls than it was in 1982, it is still not possible to justify all of it. Moreover, as the following discussion reveals in stark clarity, even when the reach of item origin-based extraterritoriality is justifiable under international law principles of prescriptive jurisdiction, the item origin-based approach is unsatisfyingly, and indeed almost hopelessly, awkward.

A. References (and Omissions) in the Restatement (Third) Concerning Extraterritoriality and Export Controls

The *Restatement (Third)* does address the modern U.S. penchant for extraterritoriality, but it does not specifically address item origin-based jurisdiction.²⁰⁹ Instead, the focus is on nationality jurisdiction over foreign subsidiaries.²¹⁰ The Introductory Note to Part IV of the *Restatement (Third)* states as follows:

Attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law. Relations with Canada, and also with several states in Western Europe, have at times been strained by efforts of the United States to implement economic sanctions—against China, the Soviet Union, Cuba, and other states—through restraints on foreign subsidiaries of corporations based in the United States.²¹¹

This Introductory Note continues by observing that “[p]artly in response to the reactions of other states, the United States has modified its assertions of jurisdiction in some areas.”²¹² However—and of particular relevance here—a review of the relevant provisions and commentaries of the *Restatement (Third)* (including the one quoted above), as well as of U.S. case law, clearly shows that U.S. self-restraint

208. See *supra* note 14.

209. RESTATEMENT (THIRD), *supra* note 10, at pt. IV, ch. 1, subch. A, intro. note.

210. *Id.*

211. *Id.*

212. *Id.*

concerning prescriptive jurisdiction has been in three areas—namely, (a) control over foreign subsidiaries in trade sanction matters (that is, addressing the question of how broad the definition of “U.S. Person” can be for nationality jurisdiction purposes);²¹³ (b) the extraterritorial reach of antitrust law;²¹⁴ and (c) criminal law matters²¹⁵—and that of these, restraint has been greatest concerning U.S. control over foreign subsidiaries.²¹⁶

213. *Id.* § 402.

214. *Id.* § 402 cmt. d. This Comment states as follows:

Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out. This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403.

Id.; see also *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004); *United Phosphorous Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961 (7th Cir. 2003); *United States v. Nippon Paper Indust. Co.*, 109 F.3d 1, 3 (1st Cir. 1997). In fact, two areas of U.S. law that are consistently cited as examples of extreme U.S. extraterritoriality are antitrust law and export controls. See, e.g., Small, *supra* note 45, at 284 (“Conflict over [U.S.] extraterritorial jurisdiction has occurred in a variety of areas in recent years: antitrust, export controls, and law enforcement.”). For a discussion of the antitrust case law origins of the *Restatement (Third)*’s prescriptive jurisdictional principles, see Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C.J. INT’L L. & COM. REG. 393, 427–33 (1994).

215. *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842–43 (D.C. Cir. 2009) (refraining from applying U.S. law where defendant was not an American national); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 195–96, 214 (S.D.N.Y. 2000) (noting that international law limited extraterritorial reach of jurisdiction because the United States did not have exclusive or concurrent extraterritorial jurisdiction over its embassy).

216. The restrictions on jurisdiction over foreign subsidiaries is quite clearly stated in most U.S. trade sanction programs, such as the Iranian Transactions Regulations and Sudanese Sanctions Regulations. See *Iranian Transactions and Sanctions Regulations*, 31 C.F.R. § 560.314 (2013) (excluding foreign-incorporated subsidiaries of U.S. companies from the definition of “U.S. Persons” subject to the regulations); *Sudanese Sanctions Regulations*, 31 C.F.R. § 538.315 (2013) (same). By contrast, U.S. federal courts often (but certainly not always) apply U.S. criminal and antitrust laws extraterritorially. See, e.g., *United States v. Bowman*, 260 U.S. 94, 98 (1922) (applying criminal conspiracy statute to U.S. and British citizens on U.S. ship on the high seas, on the basis that there are “criminal statutes which are, as a class, not logically dependent on . . . locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend itself”); *Minn-Chem, Inc., v. Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012) (applying U.S. antitrust law to international potash price fixing); *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) (applying a U.S. racketeering statute to a murder in Mexico in furtherance of organized criminal activity, despite all parties being Mexican citizens); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (applying U.S. conviction statute extraterritorially to foreign citizens attempting to bring illegal aliens into the United States); *Nippon Paper Indust. Co.*, 109 F.3d

In addition, while Reporters' Note 3 to section 431 of the *Restatement (Third)* does mention item origin-based jurisdiction in the context of enforcement jurisdiction, it does not delve into the distinction between control of exports and control of reexports and end-use abroad.²¹⁷ That note simply describes the nature of a principal tool of U.S. export control enforcement—namely, the denial of export privileges for parties found to have violated U.S. export control provisions.²¹⁸

In other words, whether by design or omission, the *Restatement (Third)* accurately reflects the fact that, as a matter of U.S. law, the United States has *not* backed down from its assertion of broad, item origin-based, prescriptive extraterritorial jurisdiction under U.S. export control laws.²¹⁹ The next question is the extent to which item origin-

at 4, 6 (applying Sherman Act to “wholly foreign” criminal antitrust actions with “intended and substantial” U.S. effects); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921–22 (D.C. Cir. 1984) (applying antitrust laws to IATA’s efforts to target airline with predatory pricing).

217. RESTATEMENT (THIRD), *supra* note 10, § 431 rep. note 3 (“The Department of Commerce has developed an elaborate system of classification of strategic commodities and of countries eligible for exports of these commodities when they are of United States origin.”).

218. *Id.* For discussion of these enforcement measures, see *supra* text accompanying notes 157–60.

219. It is somewhat puzzling to consider that the question of jurisdiction over foreign subsidiaries in U.S. trade control law has received more attention than the question of item nationality, and that tensions concerning U.S. jurisdiction over foreign subsidiaries have even achieved a measure of resolution. RESTATEMENT (THIRD), *supra* note 10, at pt. IV, ch. 1, subch. A, intro. note. This does not seem to be because item origin-based jurisdiction is not an important issue. The lack of consensus concerning item origin-based jurisdiction would seem to be important enough to acknowledge in the commentaries or reporters' notes to the *Restatement (Third)*—although this clarity could be (at least in part) a matter of hindsight. Still, the onset of U.S. claims of item origin-based jurisdiction occurred early enough (1982) to allow discussion of this claim in the *Restatement (Third)*. Perhaps the silence was intentional. Perhaps it was because scholars and policymakers (and thus the *Restatement (Third)*) often treat trade sanctions (which rely on person-based nationality) and export controls (which rely on item origin-based nationality) as two sides of the same coin—a view that tends to mask some important, fundamental distinctions between the two types of programs. See, e.g., Lowenfeld, *supra* note 9, at 361–68 (discussing the trans-Pipeline export control dispute and the Cuban embargo); Moyer & Mabry, *supra* note 14; see also *supra* notes 29–30 (discussing this distinction). Perhaps this is because item origin-based assertions of extraterritoriality are less intuitively obvious than person-based claims, despite the fact that item origin-based claims are ongoing. Perhaps the matter simply was not considered worthy of being singled out for attention. Or perhaps more than one (or even all) of these factors was in play. Abbott surmised, in 1987, that “[t]he lack of a fuller or more definite treatment [of reexport controls in the *Restatement (Third)*] is disappointing, but it probably indicates that the law on the subject is too unsettled for restatement” Abbott, *supra* note 14, at 138.

based extraterritorial jurisdiction can be justified under the *Restatement (Third)*'s prescriptive jurisdictional principles. As noted above and explained below, the twofold answer is "Not entirely" and "Unsatisfactorily."

B. Analysis Under the Restatement (Third) and Previous Scholarship

The *Restatement (Third)* lists several well-accepted bases of jurisdiction, namely traditional (subjective) territorial jurisdiction, nationality jurisdiction, objective territorial jurisdiction (including to an extent the effects doctrine), protective jurisdiction, passive personality jurisdiction, and universal jurisdiction.²²⁰ All but universal jurisdiction (which itself is quite limited in scope) are limited by a requirement of reasonableness, which is set forth in section 403 of the *Restatement (Third)*.²²¹

Because the asserted scope of U.S. export control jurisdiction is so broadly extraterritorial, the reasonableness considerations embodied in section 403 of the *Restatement (Third)* are of central importance. Section 403 is therefore discussed first below. The various jurisdictional bases set forth in sections 402 and 404 are then discussed, with particular emphasis on whether, and to what extent, any of these bases might now, three decades after the 1982 Soviet pipeline controversy, justify the extreme extraterritorial reach of U.S. export controls. This Article contends that these jurisdictional bases, when considered collectively, are sufficient to justify much, but not all, of the extraterritorial reach of U.S. controls, but that they do so extremely awkwardly. The strategic (un)desirability of continuing to employ an item origin-based approach to extraterritorial jurisdiction is then addressed in Part IV.

1. Reasonableness

Section 403 of the *Restatement (Third)* provides that even when one or more of the prescriptive jurisdictional bases of section 402 are present (that is, any jurisdictional basis other than universal jurisdiction), "a state may not exercise jurisdiction to prescribe law with respect to a

220. The *Restatement (Third)* has as a predecessor, the 1935 *Harvard Research*, which spelled out these bases in the criminal law context. See Edwin D. Dickinson, *Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) [hereinafter *Harvard Research on International Law*].

221. The reasonableness limitation evolved from U.S. antitrust case law. See Marcuss & Mathias, *supra* note 14, at 17-20.

person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”²²² Section 403 further provides that determinations of reasonableness are to be made on a case-by-case basis “by evaluating all relevant factors.”²²³

When two states might reasonably exercise prescriptive jurisdiction over the same activity (an outcome that sections 402 and 403 recognize as likely),²²⁴ and it is not possible for the party in question to comply with both states’ laws or regulations, section 403 establishes an obligation for each state to evaluate its interests in comparison to the interests of the other state in question, and to defer if the interests of the other state are greater.²²⁵ This balancing analysis does not need to be undertaken, however, when the party in question can comply with both states’ assertions of jurisdiction.²²⁶ Other relevant considerations of reasonableness include whether the jurisdiction asserted is civil or criminal (with criminal jurisdiction held to a much higher standard for reasonableness)²²⁷ and the governmental level at which the jurisdictional assertion is made.²²⁸

A congressional or presidential determination, for example, might be accorded greater weight than one by an agency pursuant to broad statutory mandate.²²⁹ The latter consideration may cut somewhat in

222. RESTATEMENT (THIRD), *supra* note 10, § 403(1), cmt. a.

223. *Id.* § 403(2). Such factors include, but are not limited to, the following: the extent to which the activity to be regulated takes place in the state’s territory or has “substantial, direct, and foreseeable effect upon or in the territory”; “the character of the activity to be regulated” and its importance to the regulating state; “the extent to which other states regulate such activities” and “the degree to which the desirability of such regulation is generally accepted”; the regulation’s “importance . . . to the international political, legal, or economic system”; consistency of the regulation with “traditions of the international system”; whether, and to what extent, other states “may have an interest in regulating the activity”; and “the likelihood of conflict with regulation by another state.” *Id.*

224. *See, e.g., id.* § 403 cmt. d.

225. *Id.* § 403(3) & cmt. e.

226. *Id.* This language in section 403 is written in the context of two states but would apply to conflicts among three or more states as well.

227. *Id.* § 403(3) cmt. f. & rep. note 8.

228. *See id.* § 403(2) & cmt. c.

229. *See id.* § 403(2). The presumptive reason for this latter consideration is that agency decisions are not as fully representative as those made by elected officials—although as a matter of U.S. law this closer reasonableness scrutiny seems to be in some tension with general principles of deference to agency decisions, such as under the *Chevron* doctrine. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also* Alex O. Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine*, 20 EMORY INT’L L. REV. 591,

favor of U.S. export control extraterritoriality: the original measures in the trans-Siberian pipeline dispute were imposed by President Reagan, and they have continued as part of agency regulations through subsequent administrations.²³⁰

Section 403 thus provides a useful framework for analysis that recognizes the ambiguous nature of modern extraterritorial jurisdiction and allows for changes in the jurisdictional calculus over time. What was not considered reasonable in 1982 might be considered reasonable three decades later. The application of these reasonableness factors is considered below in the discussion of each jurisdictional basis.

2. Subjective (Traditional) Territorial Jurisdiction

Subjective territorial jurisdiction, the power of a state to prescribe laws for its territories, has been aptly described as the “least-problematic source of prescriptive rules.”²³¹ The *Restatement (Third)* provides that “a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory.”²³² Subjective territorial jurisdiction is presumptively considered reasonable.²³³

However, subjective territorial jurisdiction is quite clearly insufficient to justify the full jurisdictional reach of U.S. export controls (see Figure 3).²³⁴ While it certainly can be used to justify jurisdiction over an export transaction that originates from the United States, or jurisdiction over activities in the United States that are in support of reexports from abroad (e.g., management support, supplying advice, financing, or the like), much of the reexport activity over which the United States claims prescriptive jurisdiction would not be covered by this basis of prescriptive jurisdiction. It is probably true, as noted by former U.S. Deputy Chief Counsel for Export Administration Cecil Hunt,²³⁵ that “[t]he jurisdictional core of [U.S.] export controls is in a

593–95 (2006) (attempting to reconcile the *Charming Betsy* decision with the *Chevron* doctrine, examining how courts have treated the two).

230. See *supra* Part II.E.2; *supra* notes 177–79 and accompanying text.

231. Koplów, *supra* note 42, at 37.

232. RESTATEMENT (THIRD), *supra* note 10, § 402(1)(a).

233. See *id.* § 403(2)(a).

234. See Figure 3, *supra*.

235. Cecil Hunt, WILTSHIREGRANNIS.COM, <http://www.wiltshiregrannis.com/sitecontent.cfm?pageid=9&itemid=11086> (last visited Feb. 6, 2014).

sense territorial,”²³⁶ but core jurisdictional coverage is, by definition, not full jurisdictional coverage. The most contentious aspects of U.S. export control jurisdiction fall far outside this jurisdictional basis.

3. Nationality Jurisdiction

a. Over Persons

Much of the scholarly discussion of U.S. export control extraterritoriality has been focused on nationality jurisdiction.²³⁷ Under the *Restatement (Third)*, prescriptive jurisdiction may be exercised over “the activities, interests, status, or relations of [a state’s] nationals outside as well as within its territory.”²³⁸

As a general proposition, a state’s exercise of prescriptive jurisdiction over its nationals abroad, both natural persons and juridical ones, is not controversial.²³⁹ Controversies have arisen when the United States has broadly defined the term “nationals” for trade sanction purposes to include not just majority-owned foreign subsidiaries, but also other foreign entities controlled in other ways, such as through ownership of a large minority share of a company, placement of members on a foreign company’s board of directors, management contracts, and so on.²⁴⁰ Such assertions of jurisdiction have led to conflicts with the regulatory regimes of other states and have raised concerns about reasonableness.²⁴¹ Yet for the most part, the United States has scaled back such assertions of broad nationality jurisdiction,²⁴² and the remaining U.S. trade sanction program based on this expansive application of nationality jurisdiction, the Cuban sanctions program, is best characterized as being in its twilight years.²⁴³

236. Hunt, *supra* note 14, at 23.

237. See Koplow, *supra* note 42, at 37–38; Marcuss & Mathias, *supra* note 14, at 18.

238. RESTATEMENT (THIRD), *supra* note 10, § 402(2).

239. See Koplow, *supra* note 42, at 37.

240. See Marcuss & Mathias, *supra* note 14, at 18.

241. See Small, *supra* note 45, at 284–86 (explaining conflicts); David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT’L L. 419, 428 (1997) (referencing international protests that the exercise of jurisdiction was “exorbitant,” leading to a reasonableness requirement) (citing RESTATEMENT (THIRD), *supra* note 10, § 403 rep. note 1).

242. See *supra* note 147.

243. Matias F. Travieso-Diaz, *Actions Needed for Lifting the U.S. Trade Embargo Against Cuba*, 3 U. MIAMI Y.B. INT’L L. 53, 80 (1995) (noting that conditions required for the

More to the point here is the fact that jurisdiction based on the nationality of natural and juridical persons is, like subjective territorial jurisdiction, simply not sufficient to justify the current expansive jurisdictional scope of U.S. export controls, and this has not changed since 1982. In fact, the insufficiency of this jurisdictional basis is what led to the assertion of item origin-based jurisdiction in the first place: it was when prohibitions leveled against foreign subsidiaries of U.S. companies did not quell undesired foreign activity that the United States adopted the item origin-based jurisdictional scheme.²⁴⁴ The next question, therefore, is whether jurisdiction based on the nationality of *items*—goods, software or technology—is now a sufficient and reasonable basis for extraterritorial prescriptive jurisdiction, when it was considered not sufficient or reasonable when first asserted in the early 1980s.

b. Over Items

David Koplow, writing in 1990, aptly characterized the assertion of item origin-based nationality jurisdiction as “controversial.”²⁴⁵ Several years before that, Stanley Marcuss and D. Stephen Mathias noted that “the nationality principle has not traditionally been viewed as applying to property.”²⁴⁶ Another writer was less circumspect and bluntly described as “preposterous” the U.S. assertion of permanent jurisdiction over goods based on their nationality, “regardless of how many times they change hands.”²⁴⁷

Regardless of phrasing, item origin-based nationality jurisdiction generally has been rejected by commentators as a basis for prescriptive jurisdiction. While limited exceptions have been recognized for some physical items—namely, marine vessels, aircraft, and spacecraft—the *Restatement (Third)* notes that jurisdiction in those cases is more appropriately viewed as a *sui generis* rule.²⁴⁸ Exceptions also have been

U.S. to enact the LIBERTAD Act program to lift the Cuban trade sanctions “have become more numerous”).

244. See *supra* text accompanying notes 166–74.

245. Koplow, *supra* note 44, at 38.

246. Marcuss & Mathias, *supra* note 14, at 21 (citing L. OPPENHEIM, INTERNATIONAL LAW § 145 (H. Lauterpacht ed., 8th ed. 1955)).

247. *Predictability and Comity*, *supra* note 14, at 1317–18.

248. RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. h. This Comment to *Restatement (Third)* section 402 actually characterizes jurisdiction for marine vessels, aircraft, and spacecraft as an extension of territorial jurisdiction, but my point is that these vessels and

made for jurisdiction over cultural property: a state might permissibly and reasonably exercise prescriptive jurisdiction over property of important cultural value, based on the property's national origin.²⁴⁹ However, that rule also seems best viewed as a *sui generis* rule that is based on cultural heritage concerns.²⁵⁰

In other words, in certain very limited situations we might be comfortable with item origin-based nationality-based jurisdiction, pursuant to which a state's "law runs with the goods,"²⁵¹ but these are narrow exceptions, not a general rule. Vessels and other craft can be viewed as extensions of territory in a way that ordinary, simple goods cannot be—you cannot physically travel on a computer as you can on a vessel or aircraft, and the heritage-based justifications for jurisdiction over items of cultural value do not apply to ordinary (and often fungible) items. Moreover, a strong basis for nationality jurisdiction is the idea of allegiance to the state²⁵²—something that requires sentience, residence, and territoriality.²⁵³ Goods, software, and technology cannot

craft are "items," as opposed to natural or artificial persons, so it is possible to consider jurisdiction over them from a territorial perspective as well. Marcuss and Mathias characterized them as such in 1984, before finalization of the *Restatement (Third)*. See Marcuss & Mathias, *supra* note 14, at 21.

249. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. c (describing assertion of jurisdiction based on an item's origin); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 415 (6th ed. 2003) ("The recognition and enforcement by a municipal court of foreign legislation protecting the cultural heritage of the state concerned raises problems of jurisdiction but such legislation may be presumed to be in accordance with the public policy of the forum."); see also Daniel W. Eck & Patty Gerstenblith, *Cultural Property*, 38 INT'L LAW. 469, 471 (2004) (explaining country of origin measures to protect cultural property under the UNESCO Convention); Marilyn E. Phelan, *Cultural Property: Who Owns It and What Laws Protect It?*, 74 TEX. B.J. 202, 203–04 (2011) (warning that countries where cultural property originated can bring suit to recover such illegally exported items).

250. See Phelan, *supra* note 249, at 204–05 (acknowledging the common law development of international conventions to protect countries' respective cultural property); see also Eck & Gerstenblith, *supra* note 249, at 469–70 (noting individual countries' and United Nations' efforts to protect looted material from the National Museum in Baghdad).

251. ROSENTHAL & KNIGHTON, *supra* note 14, at 54.

252. *Extraterritorial Application*, *supra* note 14, at 1325 (citing *Blackmer v. United States*, 284 U.S. 421, 436 (1932)) (noting that a U.S. national located abroad and called to testify in a lawsuit was bound to obey this summons because he was "a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country."); *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6) (stating that as a matter of international law, "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties").

253. *Extraterritorial Application*, *supra* note 14, at 1326. This observation is reinforced

owe allegiance, they do not have residence, and (at least for the time being) they are not self-aware.²⁵⁴

Furthermore, nowhere else in U.S. international trade law is there a rule that items maintain their nationality permanently.²⁵⁵ In fact, rules regarding origin generally run to the contrary.²⁵⁶ Taxation cases, for example, have developed a “comes to rest” theory, under which a good ceases to be subject to the exporting country’s prescriptive jurisdiction once the good falls out of the stream of commerce abroad (such as by reaching its ultimate destination).²⁵⁷ Under U.S. customs law, the nationality of a good is considered extinguished when it is “substantially transformed” into another good of a “different name, character or use”—such as by processing (e.g., iron processed into steel) or by complex manufacture (e.g., incorporation of components into complex machinery).²⁵⁸ It is hard to justify as reasonable a broadly

by the fact that Comment c. to section 402 of the *Restatement (Third)* discusses item origin-based jurisdiction in the context of territoriality. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. c (noting that “in some circumstances there may be controversy as to whether . . . the territorial principle can be satisfied without the physical presence of the person or thing being subjected to jurisdiction”) (emphasis added).

254. It is interesting (and perhaps a bit unnerving) to consider how the emergence of sentient machines might alter this calculus.

255. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. c.

256. *Predictability and Comity*, *supra* note 14, at 1317–18. It also has been rejected by at least two foreign courts, one in Hong Kong in 1953, and one in Belgium in 1965. See *Extraterritorial Application*, *supra* note 14, at 1324.

257. See Abbott, *supra* note 112, at 134–35.

258. This rule of U.S. customs law is known as the “substantial transformation” rule. See U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN 9 (2004); see also Michael P. Maxwell, *Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test*, 23 GEO. WASH. J. INT’L L. & ECON. 669 (1990); C. Edward Galfand, Comment, *Heeding the Call for a Predictable Rule of Origin*, 11 U. PA. J. INT’L BUS. L. 469, 472–73 (1989); World Trade Org., *Technical Information on Rules of Origin*, WTO.ORG, http://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (last visited Feb. 6, 2014) (describing the substantial transformation test for origin as “universally recognized”).

There is a movement to replace the substantial transformation rule with a “tariff-shift” rule, pursuant to which an item’s origin changes if its classification for customs purposes changes in certain ways. This is the rule being advanced by the World Customs Organization as a new global standard, and it is used, in modified form, in the North American Free Trade Agreement and other regional trade agreements. See North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301–473 (2012); North American Free Trade Agreement, Dec. 8–17, 1992, 32 ILM 289, 299–303; World Customs Org., *Comparative Study on Preferential Rules of Origin*, WCOOMD.ORG, <http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin.aspx> (last visited Feb. 6, 2014) (examples of tariff-shift rules); *Article 401*, NAFTA SECRETARIAT, <https://www.nafta->

extraterritorial rule based on permanent item nationality when the same approach is rejected in other international trade-related areas of U.S. law. It also must be noted that this was the case in 1982, when item origin-based nationality came to the fore in U.S. export controls, and it remains the case today.²⁵⁹

It is perhaps possible to argue that the lack of strong objection to U.S. item origin-based jurisdiction over the past several decades is a form of acquiescence by U.S. trading partners that suggests acceptance, and is thus an evolution of customary international law with respect to extraterritoriality.²⁶⁰ However, the United States' item origin-based jurisdictional approach has not been adopted by other countries in a way that would suggest acceptance of this approach. Moreover, to the extent that U.S. trading partners do not object when certain non-U.S. nationals abroad are added to the U.S. "Denied Persons List" and thus prohibited from dealing in items subject to U.S. export controls, this lack of objection just as likely represents (and probably more likely represents) a lack of objection to those specific parties being listed as it does a lack of objection to the item origin-based jurisdiction being asserted. Stated differently, the fact that U.S. trading partners do not object to a particular party being barred from transactions involving U.S.-origin and U.S.-content items is not the same thing as acquiescence to a broad U.S. claim of jurisdiction over *all* parties (barred and otherwise), wherever located, who deal in items subject to U.S. export controls.

sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=feb541cc-bfc2-4240-829f-b5a7ec26a08a&language=en-US (last visited Feb. 6, 2014) (tariff-shift rules in the North American Free Trade Agreement); *see also* United States–Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, § 201, 125 Stat. 462, 466–67 (2011) (approved under 19 U.S.C. § 3805 (2012)). The tariff-shift approach, however, is largely a change in mechanism from a subjective approach to a more objective one: the underlying goal of allowing origin changes for significant alterations or processing remains the same as under the substantial transformation rule.

259. *See* Part II.E.2 (discussing the June 1982 export control restrictions).

260. RESTATEMENT (THIRD), *supra* note 10, §§ 101–02; Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; *see also* Cleveland, *supra* note 24, at 6–7 (citing Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 100 (1995–1996)).

4. Objective Territorial Jurisdiction (and the Effects Doctrine)

Under the objective territorial principle of jurisdiction, prescriptive jurisdiction may be asserted over acts that occur outside the United States but have adverse or detrimental “substantial effect within” the United States.²⁶¹ This sort of territorial jurisdiction thus differs profoundly from subjective (traditional) territorial jurisdiction, which pertains to acts that occur within the territory of a state.²⁶² In U.S. law there is also the effects doctrine, which plays a large role in U.S. antitrust law, securities regulation, and criminal law.²⁶³ There has been significant discussion regarding the distinction between objective territorial jurisdiction and the effects doctrine,²⁶⁴ but this Article eschews that debate and includes the potentially broader view of the effects doctrine within this discussion—not because of any latent superiority of the effects doctrine, but rather because U.S. item origin-based export control jurisdiction is problematic even under that potentially more permissive approach.

Objective territorial jurisdiction is both generally accepted and controversial, depending on the context of its application. It is generally

261. See *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994); RESTATEMENT (THIRD), *supra* note 10, § 402(1)(c) & cmt. d. The leading international case on objective territorial jurisdiction, the Permanent Court of International Justice’s decision in the *S.S. Lotus* case, stated it thusly (and perhaps more narrowly): “[O]ffences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.” S. S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7).

262. Because of these large differences, it is sometimes viewed as an entirely separate jurisdictional category. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. d.

263. See SPENCER WEBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 22.15 (3d ed. 2001); HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *2 SECURITIES LAW HANDBOOK* § 37:2.10 (2013); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.9 (2d ed. 1986); see also *Extraterritorial Application*, *supra* note 14, at 1327.

264. See, e.g., Mika Hayashi, *Objective Territorial Principle or Effects Doctrine? Jurisdiction and Cyberspace*, 6 IN. LAW 284, 288–90 (2006); J. Troy Lavers, *Extraterritorial Offenses and International Law: The Argument for the Use of Comity in Jurisdictional Claims*, 14 SW. J. L. & TRADE AM. 1, 6 n.30 (2007) (“The effects doctrine justifies jurisdiction of an extraterritorial act based on the effects it produces within the state, which is distinct from the objective territorial principle where jurisdiction is based on certain element(s) of the offense being completed in the territory.”); Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 511 (1998) (“Countless law journal articles have dealt with the differences between the principle of objective territorial jurisdiction described in the *Lotus* decision and the ‘effects doctrine’ announced in the *Alcoa* [antitrust] decision.” (footnotes omitted)).

accepted when the act outside the territory of a state involves a harmful action that begins outside the state but ends with direct harm inside the state²⁶⁵—classic examples include a cross-border shooting and foreign products placed into another state’s stream of commerce.²⁶⁶ Yet analysis of jurisdictional claims under this principle can be an exercise in navigating a slippery slope.²⁶⁷ The classic examples are clear, and at least partial acceptance of the effects doctrine in the antitrust context (within the realm of reasonableness) shows that consensus is possible,²⁶⁸ but beyond those contexts the analysis quickly devolves into a normative exercise based on subjective values. This can be particularly true in the context of extraterritorial export control jurisdiction.²⁶⁹ For example, Marcuss and Richard suggested in 1982 that jurisdiction over reexport activity under the effects doctrine might be warranted “in cases in which the reexport was expected to permit a foreign state to create undesirable effects within the territory of the United States.”²⁷⁰ Their observation was an aside that they did not further elaborate on, but it is easy to see how one’s definition of “undesirable direct effects” (to combine their language with the language of sections 402 and 403 of the *Restatement (Third)*) might lead to expansive jurisdictional claims.²⁷¹ Are such

265. See RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. d.

266. See *id.* In this regard, there is parallelism with the outbound reach of jurisdiction under U.S. tax law’s stream of commerce analysis of jurisdiction over items abroad. See *supra* notes 255–57.

267. See *Extraterritorial Application*, *supra* note 14, at 1327–28.

268. RESTATEMENT (THIRD), *supra* note 10, § 402 rep. note 2 (“The effects [doctrine] has been a major source of controversy when invoked to support regulation of activities abroad by foreign nationals because of the economic impact of those activities in the regulating state. This basis for jurisdiction is increasingly accepted for regulation of restrictive business practices . . .”).

269. See, e.g., Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145, 154 (1972–1973).

270. Marcuss & Richard, *supra* note 139, at 480 n.154. An interesting side note to this claim is that, for reasons that do not entirely hold up to scrutiny, Marcuss and Richard drew a distinction between items controlled under U.S. export controls for “foreign policy” reasons and items controlled for “national security reasons.” *Id. passim*. This distinction is also made by another article co-authored by Marcuss. See Marcuss & Mathias, *supra* note 14 *passim*. Yet as discussed in Part II.C.3.b. of this Article, this distinction is largely illusory: U.S. regulators generally have discretion to classify an item as subject to stricter national security controls or more permissive foreign policy controls as they see fit. See *supra* notes 109–11; *infra* text accompanying notes 292–93.

271. See Marcuss & Richard, *supra* note 139, at 480 n.154; RESTATEMENT (THIRD), *supra* note 10, § 402(3) (allowing for jurisdiction concerning “certain conduct outside its territory by persons not its nationals that is directed against the security of the state”); *id.* § 403(2)(a) (describing a factor of the reasonableness analysis as a consideration of the

effects economic? Security-related? Foreign policy-related? How direct do they need to be? How undesirable do they need to be? The slope is slippery indeed.

The objective territorial principle or effects doctrine thus might be a valid basis for extraterritorial jurisdiction in some situations, but they fall short as a complete justification for the extraterritorial scope of U.S. export controls for at least two reasons. First, the jurisdictional scope of U.S. export controls is based on item nationality, not on effect of the transactions on the United States.²⁷² The fact that items are of U.S. origin does not mean their further sale abroad will always have any effect within or on the United States, economic or otherwise. If an item is reexported from France to Germany for commercial use, this likely will have no security impact on the United States, and at most an indirect economic impact on the United States. This is even more true for items that have been located abroad for several years or more. The point is that while jurisdiction over *some* of these transactions might be justified, jurisdiction over all of them cannot be.²⁷³ As a blanket authorization for export control extraterritoriality, the objective territorial principle falls short.

Second, analogizing extraterritorial export control jurisdiction to extraterritorial antitrust jurisdiction (where the effects doctrine comes into direct play in U.S. law) is problematic because these two areas of regulatory control differ significantly in their goals and effects. While on one level both export controls and antitrust laws are intended to have positive economic effects—a core goal of U.S. export control law is to *promote* exports and prevent unwanted export activity,²⁷⁴ and a core goal of antitrust law is to promote beneficial economic activity by preventing anticompetitive practices²⁷⁵—they differ in terms of the activities they are intended to prohibit. The justification for antitrust laws is that monopoly behavior can have an *anticompetitive* effect, and that a lack of competition results in gains by the few (monopolists) at the greater expense of the many (U.S. consumers).²⁷⁶ In other words, there is an

“substantial, direct, and foreseeable effect upon or in the territory”).

272. See *supra* notes 181–82 and accompanying text.

273. See RESTATEMENT (THIRD), *supra* note 10, § 402(1)(c) & cmt. d.

274. Export Administration Act of 1979, 50 U.S.C. app. § 2402(2) (2006).

275. BRENT A. OLSON & LISA C. THOMPSON, BUSINESS LAW DESKBOOK, ADVANCED TOPICS IN BUSINESS LAW § 23:1 (2011–2012 ed. 2011).

276. LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, & MONOPOLIES § 4:3 (4th ed. 2013).

overall economic gain to be achieved by restricting anticompetitive monopoly behavior.²⁷⁷ In contrast, restrictions on exports and reexports do not have a direct economic benefit. To the contrary, they may have an adverse economic impact on the United States by restricting some transactions in order to promote *noneconomic* national security and foreign policy goals of the United States²⁷⁸—goals that do concern the state, but do not always have direct and substantial effects on U.S. territory.²⁷⁹ As the importance of international trade has grown over the past several decades—resulting in increased U.S. export control jurisdiction—this difference between antitrust law and export controls is stronger than ever.²⁸⁰

The result, therefore, is that objective territorial jurisdiction might be used to justify U.S. jurisdiction over some transactions over which the United States claims item origin-based jurisdiction, but, like the other bases discussed so far, it cannot be used to justify the full reach of jurisdiction asserted by the United States.

5. Passive Personality Jurisdiction

Under the passive personality principle, states may apply their law to acts committed outside their territory by a nonnational when the victim of the act is a national of the country seeking to assert jurisdiction.²⁸¹ As noted in the comments to section 402 of the *Restatement (Third)*, this principle is to be narrowly applied: its use has not been generally accepted for prosecution of crimes or for actions in tort, but it has been accepted as a jurisdictional basis for actions against terrorist attacks on a state's nationals or attacks on a state's diplomatic personnel.²⁸²

277. *Id.*

278. Lowenfeld has argued that this is a way to justify U.S. trade sanctions: they may restrict economic activity, but unlike restrictive import actions (antidumping, countervailing duty, and safeguard actions) trade sanctions also directly harm the United States economically. Lowenfeld, *supra* note 9, at 355.

279. See Marcuss & Mathias, *supra* note 14, at 12; *Extraterritorial Application*, *supra* note 14, at 1328. *But see* Lunine, *supra* note 14, at 668–69 (arguing that the effects doctrine is sufficient basis for extraterritorial control over foreign subsidiaries of U.S. firms).

280. Lowenfeld has suggested that this could be used as a basis for justifying U.S. trade sanctions, which, unlike inbound trade protective measures (such as quotas and trade remedy measures like antidumping, countervailing duty, and safeguard measures), do not protect or support the implementing state's economic activity. See Lowenfeld, *supra* note 9, at 369.

281. RESTATEMENT (THIRD), *supra* note 10, § 402(1)(c).

282. *Id.* § 402 cmt. g & rep. note 3.

For purposes of the extraterritoriality of U.S. export controls, the passive personality principle is of little help. The jurisdictional reach of export controls is based on items, and extraterritorial jurisdiction over non-U.S. nationals for certain serious harm caused to U.S. nationals does not provide a solid jurisdictional base for such claims. Some acts committed by non-U.S. nationals against U.S. nationals that involve U.S. items might be covered by passive personality jurisdiction, but the scope of covered activities is likely too limited to be of much use in the export control context.

6. Protective Jurisdiction

Restatement (Third) section 402(3) states that, subject to the requirement of reasonableness, prescriptive jurisdiction may be permissible over “certain conduct outside [a state’s] territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”²⁸³ Protective jurisdiction is often asserted when non-U.S. nationals have committed an act outside the United States that is “directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes”—acts such as espionage, conspiracy to violate immigration or customs laws, and the like.²⁸⁴ The harm being avoided must be more than a “potential generalized effect”;²⁸⁵ it must be clear and demonstrable.²⁸⁶ Protective jurisdiction thus is intended to help shield a state from harm to “fundamental national interests” through application of the state’s laws to activities abroad,²⁸⁷ and it has its origins in a state’s right to self-defense and self-preservation.²⁸⁸

Protective jurisdiction does have the potential to serve as a justification for much of the extraterritorial reach of U.S. export controls, in a way that the other jurisdictional bases discussed above

283. *Id.* § 402(3); *see also* United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994); United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000); United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981).

284. RESTATEMENT (THIRD), *supra* note 10, § 402(3) & cmt. f.

285. *Extraterritorial Application*, *supra* note 14, at 1330–31.

286. *Id.*

287. Marcuss & Richard, *supra* note 139, at 446–47; SWAN & MURPHY, *supra* note 118, at 772. Swan and Murphy’s phraseology improves upon the original exposition of these principles in *Harvard Research on International Law*, *supra* note 220.

288. *See* OPPENHEIM, *supra* note 247, § 144a. Protective jurisdiction can be viewed as a “special application” of the effects doctrine, although it is generally categorized separately. RESTATEMENT (THIRD), *supra* note 10, § 402 cmt. f.

cannot. The Cold War era did present the very real threat of destructive large-scale warfare, but it also had a stability to it that the current era of asymmetrical threats does not. Indeed, the peace and prosperity of the Cold War era was built on the doctrine of “Mutually Assured Destruction,”²⁸⁹ which held that balance was the key to peaceful coexistence, but the two decades since the end of the Cold War have been characterized by global instability.²⁹⁰ If threats are harder to spot, and if broad jurisdictional scope is a widely cast net that is suited to regulating “certain conduct outside [a state’s] territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests,”²⁹¹ then at least some of the broad scope of extraterritorial U.S. export controls might be justified.

Protective jurisdiction, however, presents the danger of overly aggressive application. Its use could infringe significantly upon traditional “notions of territorial integrity” and sovereignty,²⁹² and like objective territorial jurisdiction it certainly presents a slippery slope of application. Moreover, protective jurisdiction only justifies jurisdiction over items abroad when national security-level interests are at stake. It does not justify blanket item origin-based jurisdiction. And the fact that other states do not assert a similarly extraterritorial reach in their export controls suggests that liberal application of this factor would not satisfy the reasonable requirements of *Restatement (Third)* section 403.²⁹³

In addition, there is also the fact that protective jurisdiction is often limited to conduct that civilized nations universally consider criminal.²⁹⁴

289. Nuclear Age Peace Found., *Mutual Assured Destruction*, NUCLEARFILES.ORG, <http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/history/cold-war/strategy/strategy-mutual-assured-destruction.htm> (last visited Jan. 1, 2014).

290. *See id.*

291. RESTATEMENT (THIRD), *supra* note 10, § 402(3); *see also* United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994); United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000); United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981).

292. *Extraterritorial Application*, *supra* note 14, at 1330–31 (“As suggested in the preceding discussion of the objective territorial principle, recognition of extraterritorial jurisdiction to protect national security interests raises fears that such a doctrine has the potential to emasculate notions of territorial integrity. The breadth of contemporary perceptions of threats to national security interests aggravates these apprehensions.”).

293. RESTATEMENT (THIRD), *supra* note 10, § 403(2)(c).

294. *Id.* § 404 & cmt. a; *Extraterritorial Application*, *supra* note 14, at 1330 n.131 (“It would be abusive if a State invoked the protective principle without due regard to the importance of the offense. In all cases, here as elsewhere, the standard is supplied solely by international law, *i.e.*, by the general practice of civilized states.” (footnote omitted) (quoting F. MANN, *STUDIES IN INTERNATIONAL LAW* 80 (1973))).

Not all activity that might be caught by U.S. export control jurisdiction is criminal activity, and as most enforcement actions under U.S. export controls are civil²⁹⁵—in part because some of the activity may not be criminal (just unwanted for export control reasons), and in part to avoid the higher procedural and substantive due process implications of criminal proceedings.²⁹⁶ All in all, protective jurisdiction provides broader jurisdictional reach for U.S. extraterritorial export controls than the other bases discussed above, but it too is not broad enough to encompass the whole.²⁹⁷

295. See also *supra* Part II.D.

296. See Jordan Stapley, *The Art of Export Control and Enforcement*, 17 CURRENTS: INT'L TRADE L.J. 46, 47–48 (2008).

297. There is an interesting side note to the application of protective jurisdiction to U.S. export controls. Marcuss and Richard, writing in 1982, drew a sharp distinction between items subject to “foreign policy” export/reexport controls under the EAR, and those subject to more stringent “national security” export/reexport controls under the EAR. They concluded that while protective jurisdiction could not be justified for items controlled under the EAR for “foreign policy” reasons, it might be justified for items covered by the EAR’s “national security” controls:

[N]ot every export, even to a long-time adversary, necessarily has any appreciable effect on the security of the United States. . . .

. . . If national security controls are carried out in a cautious spirit respectful of the sovereignty of others, they appear to have the potential to comply fully with international legal considerations as articulated in the protective principle.

Marcuss & Richard, *supra* note 139, at 479.

This statement is interesting for two reasons. First, while it is true that the EAA of 1979 does list “national security” and “foreign policy” as two separate reasons for control of exports, 50 U.S.C. app. §§ 2404, 2405 (1976), Marcuss and Richard placed inflated importance on the distinction between these two bases for control under the EAA of 1979 and the EAR. In practice, the two categories are largely interchangeable, despite their intended differences. ROOT, LIEBMAN & THOMSEN, *supra* note 29, § 4.1.1. Kenneth Abbott noted in 1984 (just two years after Marcuss and Richard) that eliminating extraterritoriality for foreign policy-controlled items but permitting extraterritoriality for national security-controlled items simply would lead the president to classify more items as controlled for national security purposes—much in the same way that Justice Jackson noted, in his concurrence in *Youngstown Sheet & Tube v. Sawyer*, that in national security matters the founders may well have “suspected that emergency [presidential] powers would tend to kindle emergencies.” Abbott, *supra* note 112, at 108–09; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Thus, while the foreign policy/national security distinction was fairly prominent in earlier scholarship, it is deemphasized in this Article’s analysis because it is, in the end, a distinction without much difference.

7. Universal Jurisdiction

Pursuant to section 404 of the *Restatement (Third)*, a state may exercise prescriptive jurisdiction over offenses considered to be of “universal concern” to the community of nations, even if that state could not exercise prescriptive jurisdiction under one of the other bases discussed above.²⁹⁸ Thus, on the one hand, universal jurisdiction offers extremely broad reach, and unlike the other bases of prescriptive jurisdiction, it is not limited by a requirement of reasonableness.²⁹⁹ As Eugene Kontorovich has stated, universal jurisdiction “is not premised on notions of sovereignty [and thus on the basis of territoriality or nationality] or state consent. Rather, it is intended to override them.”³⁰⁰ On the other hand, its scope is quite narrow: it traditionally has been limited to “actions such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”³⁰¹

While there is some disagreement as to whether universal jurisdiction applies outside the criminal law context,³⁰² universal jurisdiction has most commonly been sought in criminal law matters.³⁰³ The recent *Princeton Principles on Universal Jurisdiction*, in fact, focused exclusively on universal jurisdiction in the context of prosecutions for certain “serious crimes.”³⁰⁴ Even assuming that

298. RESTATEMENT (THIRD), *supra* note 10, § 404 & cmt. a.

299. *Id.* § 404.

300. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 184–86 (2004) (warning of universal jurisdiction's “dangerous consequences” in its potential to create conflict among sovereigns).

301. RESTATEMENT (THIRD), *supra* note 10, § 404.

302. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring) (acknowledging the possibility of universal jurisdiction in civil actions); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 347–48 (2001) (arguing against universal jurisdiction in civil litigation, on the basis that plaintiffs and courts cannot balance the foreign policy concerns present in human rights lawsuits); M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1133 (1999) (arguing against universal jurisdiction in civil cases). *But see* K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1 (2004) (asserting that use of universal jurisdiction in certain civil contexts, in particular the human rights context, is warranted and not inconsistent with separation of powers).

303. RESTATEMENT (THIRD), *supra* note 10, § 404; Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 175 (2006) (“[S]tates’ domestic laws facilitating universal jurisdiction flow routinely from the criminalization of the conduct in question at the level of international conventional law.”); James J. Friedberg, *The Wane in Spain (of Universal Jurisdiction): Spain's Forgetful Democratic Transition and the Prosecution of Tyrants*, 114 W. VA. L. REV. 825, 866 (2012).

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universal jurisdiction is proper in the noncriminal context, any civil assertions of universal jurisdiction still would need to be over actions qualifying as “universal concerns.”³⁰⁵ The result is that any such noncriminal proceedings likely would be tort or restitution cases that were essentially in lieu of (or in addition to) criminal proceedings.³⁰⁶

The focus on conduct traditionally viewed as criminal, or on civil actions that are in lieu of criminal proceedings, narrows the export control relevance of universal jurisdiction considerably. Some of what the end-use controls of U.S. export controls might apply to—actions, for example, in support of chemical, biological, and nuclear weapons proliferation—might qualify as criminal activity under U.S. law, but not all of it would be. Then there is also the fact that most export enforcement actions taken by the United States are civil, even when they might qualify for criminal treatment.³⁰⁷ In addition, even chemical or biological weapons proliferation do not, at the present time, qualify as activities of “universal concern” that warrant universal jurisdiction. In short, universal jurisdiction, as currently understood, is not a viable basis for extraterritorial prescriptive export control jurisdiction.

8. Consent

Consent to U.S. extraterritorial prescriptive jurisdiction by foreign parties is not listed as a jurisdictional basis under the *Restatement (Third)*, but it has been advanced by several commentators as a justification for extraterritorial jurisdiction under U.S. export control laws. Marcuss and Richard argued in favor of it in 1982, asserting that parties in foreign countries that deal in items subject to U.S. export controls are generally aware of U.S. extraterritorial jurisdiction claims, due to the fact that documents for such transactions include “destination control” language that notifies parties that those items are subject to

ed., 2001). The Princeton Principles list certain “Serious Crimes Under International Law” to which universal jurisdiction could be applied, which include “(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.” *Id.* at 29.

305. RESTATEMENT (THIRD), *supra* note 10, § 404 cmt. b.

306. See Boyd, *supra* note 303, at 3. For an overview of the general view of universal jurisdiction and an alternative (and narrower perspective on universal jurisdiction), see Kontorovich, *supra* note 300, at 183.

307. See *supra* text accompanying notes 79–80.

U.S. jurisdiction and export licensing requirements,³⁰⁸ and that by proceeding with these transactions (instead of abandoning them), the parties essentially are agreeing to be bound by and adhere to U.S. export control laws.³⁰⁹ Marcuss and Richard also pointed out that the United States has the power to completely deny parties the power to export—exportation is a privilege, not a right³¹⁰—and that as a matter of logic, this greater power also must include the lesser power to restrict exports and reexports.³¹¹

This reasoning certainly has its appeal, but it does not work as well in the modern, e-commerce world as it did in decades past. First, it is not entirely clear how often the destination control language requirements of U.S. export controls are adhered to. A transaction is still subject to U.S. jurisdiction even when the parties do not receive such notice—and per the D.C. Circuit’s decision in *Iran Air v. Kugelman*, even good-faith violators of U.S. export control laws might face civil penalties.³¹² Moreover, U.S. export controls apply not just to goods, but to software and technology as well—and not just to reexports, but also to in-country uses abroad that raise end-use concerns.³¹³ This raises the likelihood that the destination control notice statements will not be given in electronic transactions or in-country transactions, and that in turn increases the risk of inadvertent (and good-faith) violations. While it may well be true that the United States would be less likely to pursue an enforcement action against good-faith violators, that is a very different thing than saying that the United States does not have jurisdiction to do so.

A third problem is that publication of these reexport requirements and jurisdictional claims in the *Federal Register* and *Code of Federal Regulations*³¹⁴ is at least somewhat questionable as a matter of public

308. Marcuss & Richard, *supra* note 139, at 476–77.

309. *Id.* at 478. For a discussion of consent as a justification for extraterritoriality in a different context, see Bowman, *supra* note 16, at 224–42 (discussing consent as a justification for extraterritorial reach of U.S. cargo security programs).

310. Export Administration Regulations, 15 C.F.R. § 764.3 (2013).

311. See Abbott, *supra* note 112, at 103 n.132; Marcuss & Richard, *supra* note 139, at 439.

312. *Iran Air v. Kugelman*, 996 F.2d 1253 (D.C. Cir. 1993); see also *supra* text accompanying note 193.

313. See *supra* text accompanying notes 51, 62–64.

314. See, e.g., 15 C.F.R. § 734.5 (discussing some of the activities of the United States and other nations that are controlled by the EAR); *id.* § 740.16 (discussing requirements for certain permissive reexports).

notice. It is one thing to consider domestic U.S. persons and companies (and those that regularly do business with the U.S.) as being given public notice in this manner—such parties can be considered to know, or have reason to know, to be alert for such notices³¹⁵—but what about parties that are far removed from the United States, or who may not speak English, or who have not engaged in any previous transactions over which the United States asserts jurisdiction? One can imagine the outcry if a U.S. company were considered by the Spanish Government to be subject to Spanish jurisdiction, based on a Spanish-language notice published in a Spanish government publication. Moreover, pursuant to the statutory authority for U.S. export control laws, advance notice of changes to these rules is not required.³¹⁶ The latter point is more relevant to concerns over retroactivity, which as explained above is not really the gist of the concerns being addressed in this Article,³¹⁷ but it does further call into question the efficacy of the consent argument.

Perhaps an even more fundamental concern with consent as a basis for jurisdiction, however, is that consent to not reexport (or transfer to impermissible end-uses or end-users) is not necessarily the same thing as consent to U.S. jurisdiction.³¹⁸ Much in the same way that parties cannot waive a lack of subject matter jurisdiction in U.S. federal court,³¹⁹ the consent of a party to U.S. extraterritorial export control jurisdiction may be a derogation of the foreign state's sovereignty.³²⁰ The nature of sovereignty is a complex and nuanced topic; suffice it to say here that, in addition to the problems listed above, consent to jurisdiction may be problematic from this perspective as well.

C. Concluding Thoughts Regarding the Restatement (Third)

Based on the discussion above of the *Restatement (Third)*'s bases for prescriptive jurisdiction, four key themes emerge.

315. See *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439, 443, 449 (1966).

316. See Export Administration Act of 1979, 50 U.S.C. app. § 2403(f) (2000) (requiring only notice of rule changes as they are implemented, not in advance).

317. See *supra* text accompanying notes 151–53.

318. *Extraterritorial Application*, *supra* note 14, at 1325–26.

319. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3522 (3d ed. 2008).

320. *Extraterritorial Application*, *supra* note 14, at 1326.

- First, the doctrinal bases of prescriptive jurisdiction under international law, as set forth in the *Restatement (Third)*, continue to work quite well in addressing areas of jurisdictional conflict and overlap.

The provisions of sections 402 through 404 of the *Restatement (Third)* show admirable adaptability to an era characterized by far greater international linkages than when they were drafted. The drafters were correct to move away from strict territoriality and nationality and toward principles that reflect the overlapping and amorphous nature of jurisdictional assertions of lawmaking power.

- Second, even with such flexible jurisdictional principles, it remains difficult, and in fact probably not possible, to justify the full reach of current U.S. extraterritorial export controls.

Some of the *Restatement (Third)*'s bases, such as subjective territorial jurisdiction and nationality jurisdiction, can be used to justify much, but not all, of the reach of U.S. export controls. Of the remainder, objective territoriality (and the effects doctrine), passive personality, and especially protective jurisdiction may justify some of the reach, and consent might justify even more, but gaps in coverage remain. And looming above all of this is the specter of reasonableness as a limiting factor.³²¹

- Third, item origin-based extraterritorial jurisdiction raises the potential for jurisdictional disputes between the United States and its trading partners in a world where the potential for dispute, and the ramifications of such disputes, are larger than they were in 1982.³²²

Multilateral trade controls work far better in a world (such as today's world) that is characterized by multiple sources of supply for goods, software, and technology—and effective multilateralism requires agreement of some sort. Rather than running the risk of future disputes, which might or might not be taken to the WTO for dispute settlement, it

321. RESTATEMENT (THIRD), *supra* note 10, § 403.

322. The showdown between the United States and European Union regarding the Helms-Burton Act is a more recent example of the potential for high-stakes international trade disputes between the United States and some of its major trading partners. WTO dispute settlement proceedings in that dispute were only narrowly avoided. See Spanogle, *supra* note 5, at 1313–15. That dispute was a trade sanctions dispute, not an export control dispute, but it hinged on a quite aggressive assertion of U.S. extraterritorial jurisdiction over foreign parties.

would be preferable to identify a solution now, rather than continue with a unilateral approach.

- Fourth, even if one could successfully justify the full scope of the jurisdictional reach asserted by the United States, the item origin-based jurisdictional approach is, as the saying goes, “a hell of a way to run a railroad.”³²³

The item origin-based approach does not work well, or predictably, or cleanly. When it does work, it does so by forcing the analysis to jump awkwardly through an item origin hoop, rather than simply basing the analysis on the actual underlying national security and foreign policy concerns.³²⁴ The approach is cumbersome, misleading, and a vestige of a bygone era. It would be preferable to scrap the approach in favor of something based more directly on the underlying concerns.

IV. NEW CONCEPTUALIZATIONS OF EXPORT CONTROL EXTRA-TERRITORIALITY

The United States has not backed down in its assertion of the right to assert item origin-based extraterritorial export control jurisdiction, and instead appears to have relied on enforcement discretion to avoid

323. The origin of this saying (as with many popular catchphrases) is in some dispute. One claimed reference, which characterizes the saying as referring to “organized chaos,” is a 1920 cartoon in *Ballyhoo* magazine that depicted a signalman commenting on an impending collision of trains, instead of trying to do something about it. ERIC PARTRIDGE, *DICTIONARY OF CATCH PHRASES: AMERICAN AND BRITISH FROM THE SIXTEENTH CENTURY TO THE PRESENT DAY* 510 (Paul Beal ed., 2d ed. 1992). It has also been attributed to a 1956 *New Yorker* cartoon in which a wealthy middle-aged man on a train holds up a martini glass to two train conductors and complains, “This is a hell of a way to run a railroad! You call that a dry martini?” *March 1, 2013, THIS DAY IN QUOTES*, <http://www.thisdayinquotes.com/2010/03/back-to-old-drawing-board.html> (last visited Feb. 7, 2014) (referring to *THE NEW YORKER*, Feb. 25, 1956, at 31). The latter seems a less likely original source (although perhaps a funnier cartoon).

324. By way of analogy, university educators would have serious concerns if universities decided to forgo examinations and instead base class grades, and thus student graduation, solely on class attendance. Under this approach, students who attended class more regularly would get higher grades than those who missed class for whatever reason. Certainly class attendance is often related to learning outcomes, just as item origin is sometimes (but not always) related to U.S. interest in regulating a foreign transaction, but attendance is not the real, underlying concern—learning is. Using class attendance as a direct proxy for actual learning would not fully capture and reward important learning outside the classroom; and while the system could be made to work somewhat better with certain adjustments and exceptions, it is still not the best approach, and it unnecessarily complicates matters. We would want to reform such a system, both to simplify it and make it more effective—and so it also should be with export control jurisdiction.

the ire of its trading partners. This is certainly better than indiscriminate enforcement efforts, but risk of future crises like the 1982 pipeline crisis remains. Just as importantly, the development of clearer jurisdictional standards is impaired by the current status quo. While international law is characterized by indeterminacy in many respects, in a world characterized by increasing globalization of trade and jurisdictional overlaps it would be enormously beneficial to achieve greater clarity regarding jurisdictional reach for export controls.

The discussion thus far starkly illustrates that the current U.S. approach to export control jurisdiction is legally problematic and not terribly effective from a practical perspective, both in terms of how it is administered and how well it supports and advances desired U.S. policy goals. Can a new approach be devised that is superior to the current U.S. jurisdictional scheme, both in terms of compliance with international law prescriptive jurisdiction principles and in terms of furtherance of U.S. national security and foreign policy goals? That is, can a solution be devised that conforms to international law standards and is realistically viable as a policy matter? And from what other perspectives can we analyze the longstanding, problematic issue of extraterritorial U.S. export control jurisdiction in seeking to answer these questions?

Recent scholarship on central aspects of globalization and international trade provides useful lenses through which to view the topic of extraterritorial export control laws. Unlike relevant scholarship from the 1980s, this scholarship is not directly focused on the topic of extraterritorial export controls. Rather, the relevance of this newer scholarship derives from the fact that each approach, in its own way, seeks to grapple with and explain the interconnectedness of modern international or transnational trade regulation. These approaches thus help reframe the issue of export control extraterritoriality and point to possible, and even realistically viable, solutions for this longstanding problem. Collectively, they point to a need for greater focus on the already agreed-upon nonproliferation and missile technology restriction *purposes* of export controls as the basis for prescriptive extraterritoriality.

A. Network Theory

Network theory has claimed a dominant position in international legal scholarship in the past decade, with Anne-Marie Slaughter's influential book *A New World Order* perhaps being the highest profile example.³²⁵ Slaughter asserts that governments, like businesses and terrorists, operate through global networks, and her work offers a useful perspective from which to analyze export control extraterritoriality.³²⁶

Slaughter's approach to globalization and transnational government interactions rests on the concept of the disaggregated state, as opposed to the traditional conception of the unitary state.³²⁷ Starting from the premise that "national governments are losing their ability to formulate and implement national public policy within territorial borders rendered increasingly porous by the forces of globalization, immigration, and the information revolution"—an observation that jibes nicely with the prescriptive jurisdictional principles of the *Restatement (Third)*—Slaughter concludes that some transnational cooperation is necessary in order to make regulatory efforts effective.³²⁸ She taxonomizes transnational networks into several categories based on the formality of their structure: formal frameworks, such as the WTO or NAFTA;³²⁹ informal frameworks that work on a consensual basis, such as the Asia-Pacific Economic Cooperation Forum (APEC)³³⁰ or the G8 (or G20),³³¹ or like some of the multilateral export control organizations discussed earlier;³³² and spontaneous networks of communication and cooperation between or among bureaucrats in different countries.³³³ Slaughter further categorizes networks by their functions: "information exchange networks," through which information is shared transnationally; "harmonization networks," which work to harmonize national laws in a

325. See generally SLAUGHTER, *supra* note 22.

326. Other network scholarship includes, *inter alia*, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

327. SLAUGHTER, *supra* note 22, at 5–6, 12–15.

328. *Id.* at 262–63; accord MEGHAN L. O'SULLIVAN, SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM (2003).

329. See SLAUGHTER, *supra* note 22, at 144–48.

330. See *id.* at 140–42.

331. See *id.* at 144.

332. See *supra* Part II.G.

333. See SLAUGHTER, *supra* note 22, at 132, 139–40.

particular area; and “enforcement networks,” through which participants work to coordinate transnational enforcement of laws.³³⁴ A single network can perform one or more of these functions.³³⁵ The result is that transnational networks can take a variety of forms, serve different functions, and serve more than one function, depending on the desires and needs of the participants.

Network theory is directly relevant to the area of export controls and export jurisdiction. There currently are several trans-governmental export control networks in existence, of differing degrees of formality—namely the Wassenaar Arrangement, Chemical Weapons Convention, Australia Group, Nuclear Suppliers Group, and Missile Technology Control Regime.³³⁶ Much of this multilateral coordination has focused on nonproliferation efforts, but these coordinative efforts have not addressed jurisdiction. A more deliberate application of network theory to the matter of extraterritorial export controls yields interesting insights.

First, the existing export control organizations discussed above are horizontal networks that largely work as transnational harmonization networks (to coordinate and harmonize national export control laws, with particular focus on harmonization of national export classification schemes), and also as information networks (to share information among participating states regarding their export control and licensing decisions), but their use as enforcement networks has been quite limited. The Wassenaar Arrangement—the most robust and developed network of these four networks—currently serves as an enforcement network in a limited fashion, but this is largely limited to transnational coordination of export licensing and restrictions.³³⁷ For example, for certain U.S.-origin or -content goods located in certain (but not all) foreign countries (depending on the export classification of these items), the United States will allow reexports that otherwise would require a U.S. license to go forward under the supervision and export control authority of that foreign country, on the grounds that the United States trusts these foreign governments as regulatory authorities.³³⁸ Technically

334. *Id.* at 131–33.

335. *Id.*

336. *See supra* Part II.G.

337. *See* The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *supra* note 11; *see also supra* Part II.G.

338. Export Administration Regulations, 15 C.F.R. § 740.16 (2013) (providing

speaking, this is not a renunciation of extraterritorial jurisdiction by the United States—it is a transfer of licensing authority to the foreign government without a waiver of jurisdiction—but a next logical step would be waiver of jurisdiction in such circumstances. The point made here is that the existing export control networks, with the Wassenaar Arrangement in the lead, could be used more robustly as networks to coordinate, harmonize, and facilitate (as well as limit) the extraterritorial reach of national export control laws.

To date, of course, this has not happened. It is interesting and disheartening to realize that for as long as they have existed, all multilateral export control organizations have relied on—and in the case of the Wassenaar Arrangement (and its predecessor COCOM) actively reinforced—the existing and highly problematic item-based classification and licensing schemes of national export controls.³³⁹ The system is built on this very scheme of classifying items as a first step toward determining what export licensing requirements might apply—but it reinforces an approach that is, increasingly, woefully out of date. And that, in turn, reinforces the United States' item origin-based jurisdictional scheme and its insistence on problematic jurisdictional assertions.

This sort of blind inertia does not help avert any future jurisdictional crises in an increasingly interconnected and transnational world. A deliberate, conscious effort by participating states to harness these existing networks to engage in a conversation about export control jurisdiction could prove highly beneficial. These organizations exist because of consensus about the need for transnational coordination and cooperation on various aspects of export controls. If we accept (as this Article argues) that extraterritoriality is a crisis waiting to happen (again), then these already-existing networks can and should be used as venues to address and try to resolve this long outstanding problem.

“Additional permissive reexports” (APR) license exception).

339. See The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *How Does the Wassenaar Arrangement Work?*, WASSENAAR.ORG <http://www.wassenaar.org/introduction/howitworks.html> (discussing how the Wassenaar Arrangement participating countries have “agreed to maintain national export controls on listed items”); IAN F. FERGUSSON, CONG. RESEARCH SERV., RL31832, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE 10, 22 (2009) (discussing the lists controlled by multilateral export controls regimes, and how these groups use a “common control list” based on the classifications of items).

B. Mutual Recognition Arrangements

A related but somewhat different approach to examination of transnational regulation by governments is the “mutual recognition agreement” (MRA). MRAs have a long history within the European Union³⁴⁰ and are most effective where “strong, pre-existing supranational institutions” exist,³⁴¹ but they also can prove valuable in areas of governance and regulation that are dominated by multilateral concerns and different regulatory standards.³⁴² A key feature of MRAs is that they offer a way for governments to jointly manage activity in a particular regulatory area by recognizing and giving credence to each other’s different approaches, without the need to fully harmonize different national regulations.³⁴³ Central to this is that each state treats the relevant regulations of the other state(s) as equivalent.³⁴⁴ The result is a consensual overlapping of jurisdiction (potentially of both prescriptive and enforcement jurisdiction) in a particular subject area.

Bilateral or regional MRAs regarding financial markets are prime example of MRAs.³⁴⁵ Securities laws and the regulation of financial markets are historically territorially bound, and in that regard they have grown less suited to regulation of modern transnational business.³⁴⁶ MRAs may help avoid the difficult technical and political challenges of harmonizing different regulatory regimes in the same subject area,³⁴⁷ and

340. Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT’L L.J. 55, 56 (2011).

341. *Id.*

342. Nicolaïdis & Shaffer, *supra* note 23, at 265–66; *see also* Americo Beviglia Zampetti, *Mutual Recognition in the Transatlantic Context: Some Reflections on Future Negotiations*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 303 (Thomas Cottier & Petros C. Mavroidis eds., 2000) (discussing mutual recognition in the context of WTO non-discrimination principles); Kalypso Nicolaïdis, *Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon?*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 267 (Thomas Cottier & Petros C. Mavroidis eds., 2000) (same).

343. Verdier, *supra* note 340, at 63 (“[M]utual recognition may be defined as an understanding among two or more states under which each recognizes the adequacy of the other’s regulation or supervision of an activity or institution as a substitute for its own.”).

344. *Id.*

345. *Id.* at 56; *see also* Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Next Steps for Implementation of Mutual Recognition Concept (Mar. 24, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-49.htm>.

346. Verdier, *supra* note 340, at 71–92.

347. *Id.* at 62 (“Outside Europe, commentators are increasingly advocating mutual recognition agreements as a substitute for substantive harmonization.”).

may help avoid disputes about extraterritorial scope, because the applicability of a national regime is less dependent on traditional notions of territoriality and nationality.³⁴⁸

The longstanding problem of U.S. export control jurisdiction can benefit from analysis through an MRA lens. There are important similarities between the regulation of exports and the regulation of financial markets in terms of their extraterritoriality and transnational coordination with other regimes. Both the U.S. export control system and U.S. financial regulatory system, for example, are based on early or mid-twentieth century statutory schemes and were designed with a far less multilateral and interconnected world in mind.³⁴⁹ The effectiveness of the U.S. export control and financial market regimes as closed regulatory systems—based on territoriality and nationality—has been reduced significantly by globalization. Both areas of regulation also are characterized by some measure of transnational cooperation.

They differ, however, in terms of transnational cooperation regarding treatment of extraterritorial reach. The U.S.-EU Securities regulation MRA is a system of “managed ‘joint governance’ of extraterritoriality”,³⁵⁰ in contrast, extraterritoriality in the area of export controls currently is a system characterized by non-agreement on extraterritoriality.³⁵¹ These areas of transnational importance also differ in terms of just how different the national systems of regulation are. Interestingly, that difference cuts the other way, with export control regimes of the United States and its trading partners (jurisdictional considerations excluded) being far more harmonized through the Wassenaar Arrangement and other multilateral agreements and organizations discussed above than their financial regulatory systems.³⁵²

348. See Nicolaïdis & Shaffer, *supra* note 23.

349. See *supra* notes 17–18 and accompanying text (discussing the change from designating items as problematic based on the end-location to designating items as problematic based on the end-use of the item from the end of WWII to the present); *supra* note 31 and accompanying text (“[C]urrent U.S. export controls originated as a post-World War II trade-restrictive regime.”); *supra* notes 65–70 (discussing how the current licensing simplification reform enacted by President Obama is a necessary change because export controls are too prohibitive of dual-use items that have a broad commercial appeal).

350. Nicolaïdis & Shaffer, *supra* note 23, at 268.

351. Bridge, *supra* note 14, at 2, 4 (discussing how the European community has expressed views that they do not agree with the US extraterritoriality in export controls).

352. Compare The Wassenaar Arrangement on Exp. Controls for Conventional Arms and Dual-Use Goods and Techs., *Guidelines & Procedures, Including the Initial Elements*, WASSENAAR.ORG, <http://www.wassenaar.org/guidelines/index.html> (last visited Feb. 7, 2014),

The export control regimes of the United States and its trading partners are also driven by common concerns about nonproliferation. The nonproliferation controls in particular are products of the post-Cold War era that reflect deep multilateral concerns about rogue regimes and the acquisition of weapons of mass destruction by smaller states.³⁵³ The difficulty in successfully employing a mutual recognition approach, however, is to reach agreement not just on common principles, but also on the applicability and acceptability of specific (and often technical) rules. In that sense, export control coordination through mutual recognition may actually have an advantage over financial regulation, because technical rules regarding item classification are already transnationally harmonized among many developed countries through the Wassenaar Arrangement.

It is thus worth exploring whether consensus might be achieved about mutual recognition of the jurisdictional reach of the export control regimes of the United States and its trading partners. These could be bilateral, as with the United States' financial regulation MRA with Australia,³⁵⁴ but preferably would be multilateral, at least to some extent, and perhaps could be implemented under the auspices of existing multilateral export control agreements, such as the Wassenaar Arrangement. An MRA that addressed extraterritoriality would be, in essence, a negotiated solution, as was proposed by Abbott in 1984.³⁵⁵ U.S. assertions of jurisdiction could be acknowledged as legitimate by other participating states, in return for U.S. reciprocation—either in full or in part—that would permit foreign regulation of activities of similar concern in the United States. That is to say, in return for foreign acceptance of U.S. extraterritorial export control jurisdiction, the United States might allow for some foreign regulation of activity within the United States and its territories for the same export control purposes of nonproliferation and control of missile technology.

Of course, mutuality might not result in full symmetry. U.S. trading partners may not be as interested in extraterritorially regulating activity as the United States is. It is also possible (and perhaps likely) that the United States might use its economic and political clout to achieve

with Verdier, *supra* note 340, at 82–88 (discussing implementation of MRA approach with Australia).

353. See *supra* Part II.C.2.

354. See Verdier, *supra* note 340, at 56; see also Press Release, *supra* note 345.

355. See Abbott, *supra* note 112, at 119–20.

asymmetry: the United States might work to convince its trading partners to accept greater U.S. extraterritorial reach, in return for less expansive foreign jurisdictional reach into the United States. That sort of power imbalance permeates international negotiations and the development of international law generally, and it is not per se more problematic in the area of export controls than it is in any other area of international law and international trade regulation.³⁵⁶ If consensus is reached and adhered to, that consensus would not be automatically rendered invalid by unequal bargaining power of the parties involved.³⁵⁷

C. Unilateralism and Norm Development

Sarah Cleveland's work on the intersection of international human rights law and international trade has been deeply influential,³⁵⁸ but much of its influence has remained confined to the area of international human rights. Yet her work on unilateral trade sanctions and norm development offers useful insights in other areas of international trade regulation, including export controls.

Cleveland has argued that unilateral trade sanctions can be a means to spark international dialogue on important subjects, and indeed push the development of new international law norms.³⁵⁹ Specifically, she has observed that multilateral (and regional) promotion and enforcement of international human and labor rights is relatively weak, and that national laws are thus more important for promoting these rights.³⁶⁰

356. Paul Schiff Berman asserts that waiving or self-limiting jurisdiction does not raise sovereignty concerns. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1183 (2007) (“[I]t is no threat to sovereignty for a nation-state to decide that its sovereign interests are advanced overall by making agreements with other nations that limit what it can otherwise do.”).

357. This can be contrasted to U.S. cargo security efforts developed after the 9/11 attacks, which presented countries wishing to export products to the United States with a difficult choice of either (a) accepting additional U.S. regulation and supervision of foreign supply chains or (b) facing greater import processing times into the United States, and in some cases even rejection of shipments. Bowman, *supra* note 16, at 203–16, 226 (summarizing the U.S. cargo security efforts developed after the 9/11 attacks). Such is not the case here. It is difficult to imagine the United States imposing new, broad import restrictions in order to force its trading partners to accept extraterritorial export control jurisdiction—and even if the United States decided to do that, it is hard to imagine that it would not be challenged as a violation of the United States' WTO obligations.

358. See Cleveland, *supra* note 5, at 133; Cleveland, *supra* note 24, at 3.

359. Cleveland, *supra* note 24, at 7.

360. *Id.* at 3.

The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have consolidated an international free trade regime, but multilateral efforts to use international trade to encourage compliance with labor and human rights norms have been consistently rejected by developing countries, which criticize such efforts as protectionist and imperialist. Regional trade regimes such as the North American Free Trade Agreement (NAFTA) and the European Union (EU) have proven more receptive to incorporating labor and environmental concerns into their trading systems. With the notable exception of the EU, however, enforcement mechanisms in regional trade regimes also remain weak.

In light of the limited possibilities for multilateral enforcement of international norms, domestic law mechanisms for this purpose have become [more] important.³⁶¹

Cleveland also discusses how the United States uses unilateral trade sanctions—both limited sanctions such as investment restrictions and full embargoes—“to encourage foreign states to comply with international [law] norms.”³⁶² Whereas the traditional discussion of trade sanctions focuses on their use to “punish and alter” certain behavior by other states, Cleveland considers how unilateral trade sanctions can “assist[] in the international definition, promulgation, recognition, and domestic internalization of human rights norms.”³⁶³ She observes that unilateral trade sanctions might be imposed in violation of international law, but that the reaction of other states to these trade sanctions—that is, the acceptance of these sanctions—might indicate evolutionary development of the international law norms at play.³⁶⁴ Such sanctions also might help define the boundaries of these norms, as well as promote these norms by helping to internalize them into the domestic legal systems of the states implementing the sanctions.³⁶⁵ Unilateral sanctions, Cleveland asserts, also can help bring international attention to bear on certain human rights and labor rights violations of international law, and might lead to the stronger development of international law norms by both strengthening multilateral support and

361. *Id.*

362. *Id.* at 4.

363. *Id.* at 6.

364. *Id.* at 6–7 (citing Weisburd, *supra* note 272).

365. *Id.* at 6 (citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997)).

encouraging states to implement domestic law measures to promote those international rights.³⁶⁶

Cleveland's analysis translates well to an analysis of U.S. export control extraterritoriality. As has been discussed in this Article, the United States' assertion of extraterritorial jurisdiction in perpetuity, based on the U.S. origin or content of items located abroad, is a unilateral claim that is unmatched in its scope. However, there are important international norms and values underlying this U.S. assertion of extraterritorial jurisdiction—namely nonproliferation and missile technology. A shift from extraterritorial jurisdiction based on item origin to extraterritorial jurisdiction based on these reasons for concern and control might render broad U.S. assertions of export control prescriptive jurisdiction less objectionable to other states, might lead to greater discussion of this approach, and even might lead to overt acceptance of (and perhaps even adoption of) this jurisdictional approach by other countries.

Such a change would require a subtle, but critically important, shift in position by the United States. The position no longer would be that the United States *always* has prescriptive extraterritorial jurisdiction based on item origin but chooses, in its discretion, not to take enforcement actions in all cases. Rather, the position would be that the United States has extraterritorial jurisdiction over activities outside the United States that raise certain nonproliferation and missile technology concerns about which there is general multilateral consensus, but not over nonproblematic activities outside the United States. The enforcement focus of the United States would be largely the same—namely, on these problematic activities—but jurisdiction would not be based on an item origin-based approach pursuant to which “U.S. law [always] runs with the goods.”³⁶⁷ Instead, assertions of jurisdiction would be based on concerns for which there is a great deal of commonality among the United States and its trading partners. Such an approach would cut to the heart of the matter, instead of requiring assertions of jurisdiction to jump awkwardly through an item origin hoop.

This shift in jurisdictional focus could make a significant difference, depending on how aggressively (and unilaterally) or conservatively (and

366. *Id.* at 7.

367. ROSENTHAL & KNIGHTON, *supra* note 14, at 54.

consensually) the United States decided to interpret the nonproliferation and missile technology concerns in question. Highly aggressive interpretations based solely on U.S. concerns not shared by other countries might lead to little real change from the current state of affairs, because little or no more consensus about the scope of U.S. jurisdiction would be reached. However, an approach based on shared principles could go a long way to rendering much of the extraterritoriality of the U.S. export control regime not only less objectionable, but also more permissible as a matter of international law—either because it fits within the existing jurisdictional bases or because international consensus evolves to accept these assertions of prescriptive jurisdiction.

Moreover, to the extent that the United States has strongly held concerns that fall under the categories of nonproliferation or missile technology, a unilateral assertion of jurisdiction by the United States might result, in some cases at least, in greater dialogue about such claims, and perhaps even acceptance of such assertions of jurisdiction, along the lines that Cleveland addresses in the context of international human and labor rights.³⁶⁸ There certainly is no guaranty of that happening, and it would be naïve to suggest that it always (or even often) will occur. But if the past thirty years have taught us anything about U.S. export control jurisdiction, it is that the current U.S. approach to extraterritorial export controls is a dead end in terms of international consensus and the development of international law. It is a crisis waiting to happen—or to use Cleveland’s words, the current item origin-based approach is not “consistent with broader principles of the international community, such as principles of international jurisdiction, nonintervention, and free trade.”³⁶⁹ In contrast, basing jurisdiction on underlying reasons for control that are more generally accepted would offer, at the very least, the possibility that such unilateral assertions of U.S. jurisdiction, if reasonably tailored, might actually encourage further dialogue, reduce the risk of serious trade disputes, and lead to greater jurisdictional consensus regarding outbound trade.

368. *See generally* Cleveland, *supra* note 24.

369. *Id.* at 7.

V. A MODERN APPROACH TO EXPORT CONTROL
EXTRATERRITORIALITY: THE NEED FOR MULTILATERAL
JURISDICTIONAL CONSENSUS

With these insights from network theory, MRA scholarship, and unilateral action/norm development scholarship in mind, what changes might we recommend for the jurisdictional reach of the U.S. export control regime and for jurisdiction within the multilateral export control system generally? This Article posits four main steps and principles: (a) U.S. abandonment of item-based export control jurisdiction in favor of a purpose-based approach that rests on the existing multilateral consensus about the underlying purposes of export controls; (b) greater focus on enforcement considerations; (c) a willingness to engage in a “regional” approach to extraterritorial jurisdiction, as opposed to a uniform assertion of extraterritorial jurisdiction; and (d) greater tolerance for asymmetry.

A. U.S. Abandonment of Item-Based Export Control Jurisdiction

This first step is a clear one. If this Article has accomplished nothing else, it should at least compellingly illustrate the fatally flawed nature of extraterritorial jurisdiction based on item origin. In its place, jurisdiction—both by the United States and its trading partners—should be premised, to the extent possible, on mutually shared policy goals. Happily, strong multilateral consensus already exists regarding key policy goals of export control regimes—namely, proliferation and missile technology concerns, and the U.S. export control regime is infused with these goals.³⁷⁰ An expressly renewed focus by the United States on these areas of multilateral consensus can help avoid the most extreme assertions of extraterritorial jurisdiction, while at the same time maintaining rigorous attention on core concerns that have driven these broad assertions of jurisdiction in the first place.

To be sure, there would be cases in which the United States (and other countries) would be tempted to assert jurisdiction over external activities that do not fall within the scope of nonproliferation or missile technology concerns. “National security” is largely a self-defined concept. And it is true, in fact, that the 1982 Soviet pipeline dispute did not involve proliferation or missile technology concerns—although it perhaps did indirectly, at least for the United States, because much of

370. See *supra* Part II.D.2.

the concern was about preventing Soviet access to hard currency that might benefit Soviet military development. The argument made here, however, is that such instances would be better addressed on a case-by-case basis and treated as exceptions to the general approach, rather than as instances that define jurisdictional reach as a general matter. To treat such cases as exceptions would help keep the central focus on the areas of multilateral *consensus*—which are fairly well developed through the existing multilateral export control agreements and organizations discussed above—and in turn help define the boundaries of this multilateral consensus in an iterative fashion going forward. That is, the justifications and needs for specific unilateral assertions of jurisdiction could be addressed on their own merits; and perhaps, in some cases, unilateral assertions of jurisdiction that exceeded the bounds of this consensus might lead to modifications of the accepted boundaries of prescriptive extraterritoriality. In contrast, not to treat such cases as exceptions would keep the jurisdictional analysis centered on unilateral self-interest, which would prevent such clarification or evolution, and thus leave the boundaries of acceptable extraterritorial jurisdiction vague and ill-suited to clear consensus. That is the current status quo—the sadly unhelpful legacy of the 1982 Soviet pipeline dispute. It is a legacy that should be put to rest.

B. Greater Focus on Enforcement Considerations

The second step, greater focus on enforcement considerations, would be an important step in the development of the existing transnational export control regime. As previously discussed, the current multilateral regime is comprised of various agreements and organizations³⁷¹ that serve largely as horizontal *harmonization* networks for national export control regimes, and also as *information* networks for the sharing of export licensing decisions.³⁷² While there is some multilateral coordination of *enforcement* matters—such as via the United States’ current “License Exception APR” that permits reexports from certain countries, provided that those reexports are permissible under those foreign countries’ export control laws³⁷³—these exceptions are ad hoc carve-outs, not systemic adjustments. Certainly from the

371. See *supra* Part II.G.

372. See *supra* text accompanying notes 325–36.

373. See Export Administration Regulations, 15 C.F.R. § 740.16 (2013) (License Exception “APR”).

United States' perspective, such enforcement coordination has not been used to address or define the jurisdictional reach of export controls.

Changing from the current approach to one that places greater attention on harmonizing the relationship between export control enforcement and export control jurisdictional reach could result in a multilateral export control regime that is more robust and effective. Efforts to better define (consensually) what is and is not an acceptable extraterritorial application of national export control laws would help avoid controversy in future matters, and also would promote cooperation in terms of coordinated assistance in enforcement. Greater U.S. confidence in the enforcement efforts of its trading partners would make forgoing extraterritorial assertions of jurisdiction more feasible, which in turn would make it easier to achieve consensus on the acceptable prescriptive reach of national export control laws.

Moreover, nothing in this approach would prevent the reassertion of prescriptive extraterritorial jurisdiction in the future if concern emerged about the effectiveness of coordinated enforcement efforts. That is, a country's consensual agreement to limits on its prescriptive export control jurisdiction would go hand in hand with confidence about its trading partners' nonproliferation and missile technology export control enforcement efforts—and legitimate concerns about a trading partner's enforcement efforts could justify renewed extraterritorial jurisdiction in order to address the underlying nonproliferation and missile technology goals.

Finally, such assertions of extraterritorial jurisdiction would have the strong advantage of being justified under the existing prescriptive jurisdictional principles of international law, in a way that the current U.S. item-based approach to jurisdiction is not. There is potentially much upside, and little downside, in seeking to foster greater coordination and harmonization of enforcement efforts, and to do so in a way that helps define the acceptable scope of extraterritorial prescriptive jurisdiction. In contrast, failure to achieve better definition would leave the boundaries of extraterritorial prescriptive jurisdiction grey, which would impair the ability to develop a stronger transnational export control enforcement network. And it is clear that a central part of fostering greater multilateral consensus about extraterritorial prescriptive jurisdiction, and thus facilitating greater coordination and cooperation regarding enforcement efforts, is the United States' abandonment of item-based export control jurisdiction.

C. A Willingness to Engage in a “Regional” Approach

The revised approach to extraterritorial jurisdiction advocated here would not need to be implemented wholesale or all at once, in fully multilateral fashion. Indeed, insistence on full multilateralism likely would guarantee little or no positive progress—much in the same way that the current Doha Round of WTO negotiations has ground to a halt.³⁷⁴ In many respects, the significant developments in supranational international trade regulation are taking place at the sub-global level.³⁷⁵

Instead, the revised approach to extraterritorial jurisdiction advocated in this Article could be implemented at first on a bilateral basis or among a small number of countries, and subsequently be scaled up as circumstances permit. The approach could proceed along the lines of the regional integration of Europe following World War II, by starting with a core of countries that can achieve consensus and broadening to include more over time. Implementation could be through the multilateral export control organizations and agreements that currently exist—either informally through their member states, or more formally as modifications to the organizations’ express goals or official agreements (for those such as the Wassenaar Arrangement that do have such agreements in place). This non-multilateral approach also might be implemented through current and future preferential trade agreements (PTAs) to which the United States is a party³⁷⁶—again, either as informal arrangements or as more official side agreements or

374. See DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 5 (2009) (describing preferential trade agreements as “the [current] darling of international trade negotiators” due in part to “frustration with the stalled Doha Round”); see also Amiti Sen, *Year-End Doha Round Meeting in Bali Likely to Yield Results: Lamy*, HINDU BUS. LINE (Jan. 30, 2013), http://www.thehindubusinessline.com/economy/yearend-doha-round-meeting-in-bali-likely-to-yield-results-lamy/%20article4361461.ece?homepage=true&ref=wl_home (noting a lack of progress in the WTO Doha Round since 2001); *Multilateralism Dying? China’s Rise Raises Questions for World Trade*, BUS. STANDARD (Feb. 17, 2013), http://www.business-standard.com/article/opinion/multilateralism-dying-11302700529_1.html (discussing the impact of China’s economic rise on multilateralism in international trade regulation).

375. See Gantz, *supra* note 374, at 5.

376. This Article uses the term “preferential trade agreement,” as opposed to “free trade agreement” or “regional trade agreement” because it more accurately describes the nature of these agreements as (a) not always being “free trade agreements” in the traditional sense, and (b) not always being focused on regional integration. See Gregory W. Bowman, *The Domestic and International Policy Implications of “Deep” Versus “Broad” Preferential Trade Agreements*, 19 IND. INT’L & COMP. L. REV. 497 (2009).

modifications to PTAs (such as the North American Free Trade Agreement and the U.S.-Korea Free Trade Agreement³⁷⁷).

As David Gantz has noted in the context of regional trade liberalization, there is a growing sense that “it may be possible to accomplish a degree of trade liberalization on a sub-global level that is impossible or at least much more difficult to achieve globally.”³⁷⁸ The same observation holds true for the harmonization of export controls generally, and for coordination of export control extraterritorial jurisdictional reach specifically.

D. Tolerance for Asymmetry

Consensus regarding the proper scope of extraterritorial prescriptive jurisdiction would not have to lead to symmetry, either in terms of the breadth of extraterritoriality asserted by participating countries or the nature of export control laws that are applied extraterritorially. With respect to the reach of prescriptive jurisdiction, it might well be that some of the United States’ trading partners would not have the same degree of interest in asserting extraterritorial prescriptive jurisdiction as the United States does. That sort of waiver or self-limiting of jurisdiction is permissible—and the fact that such decisions might be influenced by other factors, such as power imbalances between countries or in return for other benefits gained through negotiations with other countries (such as, for example, favorable bilateral investment treaty provisions) would not render those decisions less permissible or legitimate.³⁷⁹ It is thus entirely likely, perhaps even probable, that the United States would assert broader extraterritorial prescriptive jurisdiction than many of its trading partners. Moreover, with respect to the laws for which prescriptive jurisdiction would be asserted, it is entirely possible, and again probably likely, that there would be differences in national export control rules, even when there was not a difference in the breadth of reach. That is to say, the underlying policies of these different national export control laws would need to be the same, but the mechanics of these laws and the decisions reached under them likely would be somewhat different. This sort of MRA approach to export jurisdiction and export control decision-making would help to

377. See Office of the U.S. Trade Representative, *Free Trade Agreements*, USTR.GOV, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Feb. 6, 2014).

378. Gantz, *supra* note 374, at 5.

379. See Berman, *supra* note 356, at 1183.

facilitate consensus about the appropriate scope of extraterritorial jurisdiction, and also make cooperation more feasible by allowing for the coexistence of regimes that have similar goals but different regulatory mechanisms and which might sometimes reach different decisions regarding particular transactions.

To posit one hypothetical example, the United Kingdom currently sees itself as more internationally interconnected than the United States but less directly threatened by external forces than the United States.³⁸⁰ With respect to the reach of jurisdiction, one might reasonably predict that the United Kingdom might be more willing than the United States to forgo the assertion of extraterritorial export control jurisdiction over activities abroad—and in fact, it has not asserted extraterritorial export control jurisdiction as broadly as the United States.³⁸¹ One also might posit that, to the extent the United Kingdom was interested in broader extraterritorial application of its export controls, it might be willing to forgo such assertions of jurisdiction in return for trade or investment concessions (or other concessions for that matter) from the United States. We might posit further that the United States might be willing to give such concessions, both in order to ensure that its assertions of extraterritorial prescriptive jurisdiction within the United Kingdom were accepted by the United Kingdom, and to preclude similar U.K. assertions of extraterritorial jurisdiction within the United States.

Continuing with this same example, we could expect that, with respect to the nature of U.S. and U.K. export control laws themselves,

380. *Compare* A STRONG BRITAIN IN AN AGE OF UNCERTAINTY: THE NATIONAL SECURITY STRATEGY 3 (2010) (“Britain today is both more secure and more vulnerable than in most of her long history. More secure, in the sense that we do not currently face, as we have so often in our past, a conventional threat of attack on our territory by a hostile power. But more vulnerable, because we are one of the most open societies, in a world that is more networked than ever before.”), *with* THE WHITE HOUSE, *supra* note 20, at foreword (“For nearly a decade, our Nation has been at war with a far-reaching network of violence and hatred.”).

381. The United Kingdom’s export control regime relies on export licenses and end-user statements (“undertaking forms”) as a means to prevent diversion at the front end, much in the same way that U.S. export controls did in the decades following World War II. There is no general U.K. assertion of jurisdiction over items outside the United Kingdom. *See* Dep’t for Bus. Innovation & Skills, *End-User and Stockist Undertakings for SIELs and Consignee Undertakings for OIELs*, GOV.UK, <https://www.gov.uk/end-user-and-consignee-undertakings-for-siels-and-oiels> (last updated Sept. 21, 2012); *see also* Dep’t for Business Innovation & Skills, *Export Controls: An Introductory Guide*, GOV.UK, <https://www.gov.uk/beginners-guide-to-export-controls> (last updated Sept. 19, 2013) (providing general guidance regarding U.K. export controls).

the transaction review and licensing mechanisms of the U.S. and U.K. export control regimes likely would be somewhat different, and it also is likely that the export licensing determinations of the U.S. and U.K. export control regimes might differ in some respects. To the extent that both national export control regimes applied to a transaction, there would need to be coordination regarding which national export control regime would take priority, and how conflicting licensing determinations would be resolved. It is common in international trade for the international trade laws of multiple countries to apply to a single transaction, so this is not an original or novel matter—and indeed overlapping prescriptive jurisdiction is a hallmark feature of modern international law generally.³⁸² The point made here is that such overlaps are not per se problematic, are to be anticipated, and can be better managed if the boundaries of permissible export control jurisdiction are more clearly defined than they are today.

VI. CONCLUDING THOUGHTS: THE MECHANICS OF IMPLEMENTATION

The purpose of the changes recommended in this Article is to reduce the likelihood of future international trade disputes concerning export control jurisdiction, and to facilitate changes that ensure greater consistency of the U.S. export control regime with international law prescriptive jurisdictional principles. This Article therefore has focused squarely on assessing the current state of doctrine and recommending practical steps for meaningful and successful change. While the topic itself is complex and policy-laden, the resolution of the matter as a matter of U.S. law is in fact strikingly, indeed stunningly, simple and straightforward.

First, alteration of the jurisdictional scope of U.S. export controls would not require statutory amendments or enactment of new federal legislation, because the current U.S. export control regime largely consists of agency regulations promulgated under broad statutory mandate.³⁸³ Regardless of one's concerns about the antidemocratic nature of such implementation³⁸⁴ or the wisdom of broad congressional delegations to the executive under American constitutional law, such broad delegation clearly is permissible under current U.S. constitutional

382. See RESTATEMENT (THIRD), *supra* note 10, § 403 cmt. d.

383. See *supra* text accompanying notes 40–50.

384. See SLAUGHTER, *supra* note 22, at 184.

doctrine,³⁸⁵ and indeed represents the U.S. norm in matters of international trade regulation, due to the technical and policy-driven nature of the field.³⁸⁶

Second, the regulatory changes required are modest in the extreme. The overall classification and licensing scheme of U.S. export controls could stay in place. While the current classification and licensing scheme suffers from its own very serious problems, as discussed elsewhere,³⁸⁷ resolving the jurisdictional issues of the U.S. export control regime does not require tackling that thorny but separate issue. In other words, jurisdiction can be fixed without requiring a full rebuild of the regulatory structure of U.S. export controls.³⁸⁸

In fact, solving the vexing jurisdictional problem of U.S. export controls boils down, amazingly, to just a single regulatory definition—namely the definition of “Items subject to the EAR.” The current definition, which is set forth in its entirety below, clearly demonstrates the EAR’s reliance on item origin as the core basis for jurisdiction.

§ 734.3 ITEMS SUBJECT TO THE EAR

(a) Except for items excluded in paragraph (b) of this section [which pertains to items subject to the export jurisdiction of other U.S. government agencies; certain informational materials such as magazines and newspapers; and publicly available non-encryption technology and software (which is generally non-commercial)], the following items are subject to the EAR:

- (1) All items in the United States, including in a U.S. Foreign Trade Zone or moving intransit through the United States from one foreign country to another;
- (2) All U.S. origin items wherever located;

385. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30 (2002).

386. Of course, statutory resolution is possible—Congress can and does involve itself directly in trade regulatory matters—and Abbott suggested congressional resolution of the matter in the 1980s. See Abbott, *supra* note 112, at 113. The point made here is that it is not necessary, due to existing broad delegations to the executive.

387. For further discussion, see Bowman, *supra* note 9, at 340–43; Bowman, *supra* note 64.

388. The express language of the EAR in fact supports this bifurcated approach: Section 734.2(a)(3) of the EAR admonishes that “[t]he term ‘subject to the EAR’ should not be confused with licensing or other requirements.” Export Administration Regulations, 15 C.F.R. § 734.2(a)(3) (2013).

(3) Foreign-made commodities that incorporate controlled U.S.-origin commodities, foreign-made commodities that are ‘bundled’ with controlled U.S.-origin software, foreign-made software that is commingled with controlled U.S.-origin software, and foreign-made technology that is commingled with controlled U.S.-origin technology:

(i) In any quantity, as described in § 734.4(a) of this part; or

(ii) In quantities exceeding the *de minimis* levels, as described in § 734.4(c) or § 734.4(d) of this part;

(4) Certain foreign-made direct products of U.S. origin technology or software, as described in § 736.2(b)(3) of the EAR. The term “direct product” means the immediate product (including processes and services) produced directly by the use of technology or software; and

NOTE TO PARAGRAPH (A)(4): Certain foreign-manufactured items developed or produced from U.S.-origin encryption items exported pursuant to License Exception ENC are subject to the EAR. See sections 740.17(a) and 740.17(b)(4)(ii) of the EAR.

(5) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software, as described in § 736.2(b)(3) of the EAR.³⁸⁹

If we were to delete subsections (2) through (5) of this provision, and tweak the existing language to focus on *transactions* rather than items, we would transform the jurisdictional reach of U.S. export controls from being item-based to being purpose-based. A modified Section 734.3 could read as follows:

§ 734.3 TRANSACTIONS SUBJECT TO THE EAR

(a) Except for items excluded in paragraph (b) of this section [which pertains to items subject to the export jurisdiction of other U.S. government agencies; certain informational materials such as magazines and newspapers; and publicly available non-encryption technology and software (which is generally non-commercial)], *transactions in* the following items are subject to the EAR:

389. *Id.* § 734.3.

- (1) All items in the United States, including in a U.S. Foreign Trade Zone;
- (2) All items moving intransit through the United States from one foreign country to another.

Jurisdiction over foreign activities that raise proliferation or missile technology concerns—that is, items for which section 734.3(a)'s territorial jurisdiction is not sufficient—are already captured by the current language of section 734.5(a) of the EAR, which *does not* rely on item origin for the assertion of jurisdiction. That section, which would not need to be revised, reads as follows:

§ 734.5 ACTIVITIES OF U.S. AND FOREIGN PERSONS SUBJECT TO THE EAR

The following kinds of activities are subject to the EAR:

- (a) Certain activities of U.S. persons related to the proliferation of nuclear explosive devices, chemical or biological weapons, missile technology as described in § 744.6 of the EAR, and the proliferation of chemical weapons as described in part 745 of the EAR.
- (b) Activities of U.S. or foreign persons prohibited by any order issued under the EAR, including a Denial Order issued pursuant to part 766 of the EAR.

By moving away from item-based jurisdiction and toward “purpose-based” jurisdiction that centers jurisdiction on mutual (and serious) concerns, U.S. export controls could move away from the current problematic jurisdictional scheme, but still maintain sufficiently broad jurisdictional reach based on existing end-use and end-user concerns set forth in the EAR. The core problem of the current approach would be eliminated, and future U.S. export control efforts would be placed in greater harmony with the approaches of the United States’ trading partners. And the rest of the U.S. export control edifice could remain intact.

This solution may seem anticlimactic, especially after 90-plus pages of build-up. It is admittedly odd that resolving a three decades-old quandary could boil down to changes to a single regulatory definition. Or perhaps it is not odd at all. Perhaps it is simply a matter of not having focused on the right issue, of not having asked the right question in recent years. Current U.S. efforts at export control reform—with

their focus on simplifying the item classification scheme of U.S. export controls—suggest that this may indeed be so.

Regardless of the reason, it is unfortunate that the expansive item-based jurisdictional approach has remained in place for so very long. The 1982 expansion of U.S. export control jurisdiction was not an insignificant change, and it did not go unnoticed—and yet it is still with us. The world has changed dramatically since then, in ways that make item-based jurisdiction increasingly awkward and insufficient—and yet this remains the basis for U.S. export control jurisdiction. This approach simply has become a feature of the regulatory terrain to be navigated, and it has ceased to be questioned.

This Article has sought to counter that implicit assumption by showing that item-based jurisdiction is not a foreordained necessity, and that it presents serious and unnecessary difficulties. The benefits of resolution are great, and the administrative cost of resolution is low. Something should be done to fix it—and it is clear what that “something” is. The change may be subtle, but it is far from merely semantic.

In the final analysis, the will to act may be the greatest bar to fixing the jurisdictional inadequacy of U.S. export controls. Will U.S. officials pay enough attention to this issue, for a brief moment at least, to appreciate the potential risks of inaction and the potential benefits (and lack of risk) involved in action? Predicting the future can be difficult, so perhaps the best answer we can give is “Hopefully yes.” Or more precisely, “Hopefully yes, and hopefully soon.” It is quite possible that we are in a window of shrinking opportunity for the jurisdictional reform advocated for in this Article—both because sooner or later another large export trade dispute will emerge, and because the United States’ time as a global hegemon may be drawing to a close.³⁹⁰ Future U.S. success in international trade matters likely will be based on more multilateral approaches—and it is axiomatic that negotiating preferred outcomes multilaterally is easier when one’s power is greater. The longer the United States waits to address the problematic nature of its item-based extraterritorial export control jurisdiction, the less leverage

390. See N. INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2030: ALTERNATIVE WORLDS*, at ii, x (2012) (stating that “[t]here will not be any hegemonic power. Power will shift to networks and coalitions in a multipolar world,” and that “[t]he U.S. most likely will remain ‘first among equals.’”).

and maneuvering room it may have to achieve the (asymmetric) results that satisfy it.

In cases such as this where the payoff is large, the risks are low, the action is simple, and delay is harmful, the answer to the question “Should we do this?” is almost always “Yes.” What now remains to be seen is whether, in this matter of export jurisdiction, logic or inertia prevails.