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# Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo

by Gary H. Perlow\*

## I. INTRODUCTION

Many Poles awoke before dawn on December 13, 1981 to hear their prime minister beseech them not to erect barricades where bridges were needed.<sup>1</sup> Mere hours before, tanks encircled the Polish capital and Solidarity officials were imprisoned. Martial law had become fact. It is an irony of sorts that the events set in motion that night by General Jaruzelski soon had Atlanticists borrowing his urgent entreaty — for the resultant political and legal controversy over the American use of extraterritorial economic sanctions dangerously strained relations among the allies and, further, marked a breakdown in Western consensus on managing economic relations with Eastern Europe and the Soviet Union.

In his 1981 Christmas address, President Reagan announced a series of economic sanctions against Poland as a means of advancing reconciliation and obtaining the lifting of martial law.<sup>2</sup> Days later, as evidence of Soviet complicity in the Polish crackdown became clear, sanctions were announced against the Soviet Union “in response to the Soviet Union’s heavy and direct responsibility for the repression in Poland.”<sup>3</sup> One of these measures had been percolating awhile in some quarters of the U.S. Congress: cessation of American participation in the construction of the 3,500 mile long Yamal natural gas pipeline linking the Urengoi gasfields in northern Siberia with Western Europe.<sup>4</sup> Acting under Section 6 of the

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\* Associate, Skadden, Arps, Slate, Meagher & Flom; J.D., Columbia (1977); B.A., Cornell (1974). The research for this article was completed in December 1982.

<sup>1</sup> THE ECONOMIST, Dec. 19, 1981, at 19, col. 1.

<sup>2</sup> President’s Christmas Address and Statement on the Situation in Poland, 17 WEEKLY COMP. PRES. DOC. 1404 (Dec. 23, 1981). The sanctions included curtailment of high-technology trade and export credits as well as restrictions on fishing and aircraft landing rights. *Id.* at 1406.

<sup>3</sup> 47 Fed. Reg. 141 (1982) (to be codified at 15 C.F.R. §§ 379.4, 385.2, 399.1-2).

<sup>4</sup> *Id.* The natural gas pipeline project had been under discussion for a number of years. The key West European participant, West Germany, had approved the project in July 1980. President Carter voiced no objection at the time. However, the Reagan Administration from its outset was against it for a number of political, economic and military reasons. Opposition

Export Administration Act of 1979 (the EAA),<sup>5</sup> the U.S. government, for the first time, embargoed U.S. products and technology for oil and gas transmission equipment destined for the Soviet Union.<sup>6</sup>

The shipment of General Electric rotors to European turbine manufacturers was halted.<sup>7</sup> Given the limited supply of the rotors in Europe delivered prior to the December sanctions, the pipeline project faced serious, though not fatal, delay. Other sources for rotors and turbines could be found. Tellingly, the Soviet Union itself was reported developing a rotor manufacturing capability in a Leningrad plant.<sup>8</sup>

Debate on the pipeline sanctions intensified as the winter lengthened. The Administration's dominant concern shifted from the lifting of martial law to one affecting the very nature of East-West economic relations. Proponents of a more coordinated and harmonious policy with the Europeans lost ground to those who sought an opportunity to exploit the perceived Soviet economic vulnerability by restricting Soviet hard currency earnings and thus forcing the Russians to make even harder choices regarding the allocation of resources to their military.<sup>9</sup>

was expressed at the July 1981 economic summit conference in Ottawa. The West Germans, though, found Reagan's proposals for alternate energy sources inadequate. Contracts for the supply of pipeline equipment were signed by European and American concerns prior to the December pipeline sanctions.

<sup>5</sup> The Export Administration Act of 1979, Pub. L. No. 96072, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401-2420) [hereinafter cited as EAA]. Section 6, entitled "Foreign Policy Controls" authorizes the President to prohibit exports for foreign policy purposes. See *infra* notes 25 and 26 and accompanying text.

<sup>6</sup> 47 Fed. Reg. 141 (1982) (to be codified at 15 C.F.R. §§ 379.4, 385.2, 399.1-2). Previously, President Carter had prohibited the export of oil and gas exploration and production equipment destined for the Soviet Union as a consequence of its invasion of Afghanistan. See 43 Fed. Reg. 33699 (1978) (to be codified at 15 C.F.R. §§ 379.4, 399).

<sup>7</sup> The American-manufactured rotors were a key component in the gas turbines that drive compressors which pump the natural gas from one compressor station to the next along the length of the pipeline. Turbines were being manufactured in Europe under license from General Electric.

<sup>8</sup> THE ECONOMIST, June 26, 1982, at 52, col. 3.

During the Kennedy Administration there was an episode where the United States sought to block a Soviet-West German pipeline venture by forcing cancellation of West German contracts for the supply of wide-diameter pipe. The effort succeeded in Bundestag, but only by a whisker. George Ball, Under Secretary of State at the time, relates that the Soviet Ambassador to Washington, Anatoly Dobrynin, told him a year or two later, "I wish to thank you on behalf of my Government. When you got the Germans to renege on their contracts, you forced my country to do what we should have done long before — build facilities to make wide-diameter pipe. Now we're independent of the world. So we're grateful to you." Ball, *The Case Against Sanctions*, N.Y. Times, Sept. 12, 1983, § 6 (magazine), at 120, col. 3.

<sup>9</sup> Though policy makers were split on the issue of sanctions, the rift was not total. All sides were troubled by certain elements of the pipeline project. The below market financing terms arranged for the sale of pipeline equipment to the Soviet Union were viewed as thor-

Despite European assurances to the contrary,<sup>10</sup> concern grew in Washington that the Europeans would seek to by-pass the pipeline sanctions. Since some General Electric rotors had already been delivered to John Brown Engineering Co. in the United Kingdom and Nuovo Pignone S.P.A. in Italy prior to the President's December order, those companies were capable of assembling at least a portion of the turbines that their contracts required. Moreover, remaining rotors could well have been eventually supplied by the newly nationalized Alsthom-Atlantique S.A. of France, which had had a license from General Electric to manufacture rotors. French policy on handling the pipeline supply contracts at first seemed confused, though it soon hardened into one of furthering the consummation of all deals in which French companies were participants.<sup>11</sup>

On June 18, 1982, President Reagan sought to plug the loopholes in the December sanctions by a dramatic and far-reaching expansion of the embargo: export controls were to be extended to foreign subsidiaries of U.S. corporations and to equipment manufactured abroad by foreign companies under license from U.S. firms even if supply contracts had been signed with the Soviet Union prior to the imposition of the initial December sanctions.<sup>12</sup> European indignation exploded. In their view, legitimate American opposition to the pipeline project had now become outright interference in their sovereign affairs. Moreover, the potential economic cost being imposed by the Americans was significant, particularly in the midst of a severe recession.<sup>13</sup> Not surprisingly, European determi-

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ously unwarranted. There was also concern, of course, for the longer term political and strategic implications of European reliance on the Soviet Union as an energy supplier. Nevertheless, there was a good deal of discord within the Administration. The handling of the pipeline issue was later to become a cause contributing to the resignation of the Administration's foremost Atlanticist, Alexander Haig.

<sup>10</sup> Western European nations had been either unable or unwilling to formulate a strong, unified response to the Polish and Soviet actions; no economic sanctions with bite were imposed individually or collectively within the framework of the European Communities (EC). Foreign ministers of the ten EC countries did meet on January 4, 1982 and issue a communique censuring Poland and the Soviet Union and stating an intention not to undermine the American sanctions. EC Communique (Jan. 4, 1982). A week later, foreign ministers of NATO countries meeting in Brussels agreed to consider specific diplomatic, scientific and economic sanctions. NATO Communique (Jan. 11, 1982). No sanctions were adopted at the NATO meeting, but the foreign ministers affirmed the intention not to undermine the sanctions of others. *Id.*

<sup>11</sup> THE ECONOMIST, Jan. 16, 1982, at 34, col. 1.

<sup>12</sup> President's Statement on Extension of United States Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982). The official purpose of the new measures was, as with the December sanctions, to force a reconciliation in Poland. *Id.* The Department of Commerce published its implementing regulations, 47 Fed. Reg. 27250 (1982) (to be codified at 15 C.F.R. §§ 376, 379, 385).

<sup>13</sup> The U.S. Commerce Department estimated that the June restrictions affected about 13 licensees and 7 foreign subsidiaries of U.S. companies. Alsthom-Atlantique faced a loss of

nation to see the pipeline deal through stiffened.<sup>14</sup>

Companies soon found themselves caught between the conflicting directives of determined sovereigns. Penalties for violation were potentially severe. Dresser (France) S.A. (Dresser-France), a French subsidiary of the Dallas-based Dresser Industries Inc. (Dresser), was the first to feel the squeeze as it had the earliest delivery schedule for pipeline equipment. In a formal requisition order,<sup>15</sup> Dresser-France was directed by the French government to complete the manufacture and delivery of compressors pursuant to its contract with the Soviet Union, despite contrary instructions issued indirectly by the United States government through Dresser.

The U.S. Commerce Department reacted swiftly. During the afternoon of August 26th, the day Dresser-France's compressors were loaded aboard a ship bound for the Soviet Union under tight supervision by the French police, an "Order Temporarily Denying Export Privileges" (hereinafter, a temporary denial order) was issued revoking all export licenses with Dresser-France and denying "all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States. . . ."<sup>16</sup> Soon thereafter, as other companies prepared to ship equipment to the

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about \$70 million on a contract to supply General Electric rotor kits. AEG-Kanis Turbinenfabrik (AEG-Kanis), a division of the seriously ailing AEG-Telefunken, stood to lose DM 650 million on its contract to supply 47 turbines, and over 1,000 jobs were thus threatened. John Brown's turbine contract was worth \$104 million, and Nuovo Pignone's contract, \$700 million. Other companies, including secondary suppliers, faced financial loss. *THE ECONOMIST*, July 10, 1982, at 59-60.

<sup>14</sup> A communique issued by the French Prime Minister's office on July 22 stated: The Government wishes to make it clear that the Ourengoi gas pipeline construction contracts concluded by French companies must be honored.

The deliveries scheduled for 1982 will therefore have to be effected at the appropriate time. The Government cannot accept the unilateral measures taken by the United States on 18 June. It recalls that this is also the view of its European Community Partners. Such measures cause the European companies undue commercial prejudice. They are also harmful to the cooperation between the United States and their allies.

Quoted in Motion to Vacate Temporary Denial of Export Privileges and Memorandum in Support, Aug. 27, 1982, at 7 n.1. In the Matter of Dresser (France) S. A., Case No. 632, before the U.S. Dep't of Comm., Int'l Trade Administration. Italy also made a formal announcement, and Britain and West Germany expressed objections to the unilateral actions of the United States which affected their economies. *N.Y. Times*, July 25, 1982, at 1, col. 3. On August 10, 1982, the EC delivered a diplomatic note and filed a protest with the Commerce Department. See European Communities, "Gas Pipeline - Comments of the European Community As Regards the Measures Taken By The US Government," Brussels, Aug. 12, 1982, Rev. 4-10.08.1982 [hereinafter cited as European Communities Comments].

<sup>15</sup> République Française, Ministère de la Recherche et de l'Industrie, *Ordre De Requisition De Services*, Aug. 23, 1982.

<sup>16</sup> 47 Fed. Reg. 38170 (1982). Temporary denial orders are issued under the Department of Commerce regulation, 15 C.F.R. § 388.19 (1982).

Soviet Union, President Reagan sought to contain potential political damage by limiting all temporary denial orders to only oil and gas equipment and technology.<sup>17</sup> In any case, Commerce Secretary Baldrige estimated that the denial orders would cost each of Dresser-France, Creusot-Loire, John Brown and Nuovo Pignone between \$75 million and \$600 million in lost sales over three years, while costing U.S. companies some \$600 million.<sup>18</sup>

Lawsuits were initiated and administrative proceedings were begun in U.S. fora,<sup>19</sup> but with virtually no chance of a swift or adequate resolution. Diplomatic patchwork was the only effective way out of the deadlock that had been proving politically and economically counterproductive. The Americans indicated their willingness to abandon the pipeline sanctions if European commitments could be obtained respecting a tighter trade and credit policy with the Eastern-bloc. Talks were conducted. Finally, an agreement was reached, or so it seemed. In a radio address on November 13, 1981, President Reagan announced the dropping of the sanctions and the achieving of a "substantial agreement" with the Europeans to curb credits to the Soviets and to forgo new purchases of Soviet natural gas while studying alternative energy sources.<sup>20</sup> Not surprisingly, even this announcement stirred some controversy between France and the United States.<sup>21</sup>

Though the immediate legal issues have been rendered moot by the lifting of the sanctions, concern does remain that far-reaching extraterritorial

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<sup>17</sup> 47 Fed Reg. 39708 (1982). Administration officials were particularly concerned that the broad temporary denial orders as applied to Dresser-France and Creusot-Loire S.A. would severely damage the financially troubled John Brown. Such an occurrence would have caused considerable embarrassment to one of the President's most valued allies, Prime Minister Thatcher.

<sup>18</sup> Wall St. J. Sept. 10, 1982, at 15, col. 1.

<sup>19</sup> See *Dresser Industries, Inc., et al. v. Baldrige*, 549 F. Supp. 108 (D.D.C. 1982). In the Matter of Dresser (France) S.A., Case No. 632 (U.S. Dept. of Comm., Int'l Trade Admin., filed Aug. 27, 1982); *Creusot-Loire S.A. v. Baldrige*, No. 82-2787 (D.D.C. filed Sept. 29, 1982); In the matter of Creusot-Loire S.A., Case No. 633 (U.S. Dept. of Comm., Int'l Trade Admin., filed Sept. 9, 1982); In the Matter of John Brown Engineering Ltd., Case No. 635 (U.S. Dept. of Comm., Int'l Trade Admin., filed Oct. 1, 1982).

<sup>20</sup> President's Radio Address on East-West Trade Relations and the Soviet Pipeline Sanctions, 18 WEEKLY COMP PRES. DOC. 14 (Nov. 13, 1982); 47 Fed. Reg. 51858 (1982).

<sup>21</sup> Three hours after President Reagan's address, the French Foreign Ministry declared that France was "not a party" to the agreement, much to the embarrassment of Reagan. The French were angry that the President announced the lifting of the sanctions and the European agreement in the same message, thus creating the appearance of linkage between the two. France's public position had been that the sanctions were illegal and were to be abandoned unilaterally regardless of the achievement of any broader agreement. Reagan's interest was otherwise — he needed to show a *quid pro quo* to save face. The White House, needless to say, was angered that France sought to dissociate itself from the accord after seeming to endorse it throughout the prior week.

torial sanctions may become an "ordinary" tool of American foreign policy. Awareness of their underlying legal support, or lack thereof, may be beneficial to law and policy makers in connection with future invocations of such coercive measures. Toward this end, the remainder of this article selectively explores some of the issues relating to the legitimacy of the pipeline sanctions as amended in June.

## II. THE JUNE AMENDMENTS AND DOMESTIC LAW

At the direction of President Reagan, the Department of Commerce amended the December pipeline sanctions on June 22, 1982.<sup>22</sup> These controversial amendments expanded prior controls on the export of equipment and technology used for petroleum and natural gas exploration, production, transmission and refinement so as to include, among other things, the export and reexport of: (1) non-U.S.-origin goods and technical data by foreign subsidiaries of United States corporations; (2) U.S.-origin goods and technical data by any foreign corporation; and (3) foreign-produced direct products of U.S. technical data by any foreign corporation, regardless of when the data were exported from the United States, provided that the data were subject to a licensing or other royalty arrangement.<sup>23</sup> Thus, even export arrangements entered into by foreign companies with the Soviet Union prior to the announcement of any American pipeline sanctions were adversely affected.

Amidst the international outcry occasioned by the June sanctions, concern was expressed<sup>24</sup> that the far-reaching application of the Reagan Administration's sanctions exceeded the bounds of the authority conferred by the enabling law, Section 6 of the EAA.<sup>25</sup> That provision governs export controls for purposes of foreign policy, as opposed to national security.<sup>26</sup>

The question of legitimacy of the June sanctions under domestic law is initially one of statutory construction. The two principal issues in this regard are whether, in peacetime, nonemergency situations and for rea-

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<sup>22</sup> 47 Fed. Reg. 27251 (1982) (to be codified at 15 C.F.R. §§ 376.12, 379.8, 385.2).

<sup>23</sup> *Id.* at 27251-52.

<sup>24</sup> *See, e.g.*, European Communities Comments, *supra* note 14, at 11-12.

<sup>25</sup> 50 U.S.C. app. § 2405 (1976 & Supp. IV 1980). That section provides, *inter alia*, that: [T]he President may prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by an person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States.

<sup>26</sup> Foreign Policy and national security based export controls are treated separately by the EAA. Section 5 of the EAA, which was not relied upon as authority for the pipeline sanctions, concerns export controls for national security purposes. Sections 5 and 6 establish separate substantive and procedural rules. *Compare* 50 U.S.C. app. §§ 2404 and 2405 (1976 & Supp. IV 1980).

sons of foreign policy alone: (1) a foreign company controlled by a U.S. corporation is a person "subject to the jurisdiction of the United States," so that the executive branch of government is competent to prohibit that foreign company from exporting even foreign-origin goods and technology, and (2) a foreign licensee of technology "subject to the jurisdiction of the United States" may be prohibited from exporting foreign-origin products of such technology regardless of when, and under what circumstances, that technology was transmitted to the foreign licensee. An understanding of what Section 6 contemplates by persons "subject to the jurisdiction of the United States is necessary to resolve the first issue." The phrase is not defined in that provision or in section 16,<sup>27</sup> the general definitional provision of the EAA, nor, for that matter, did Congress give it definitive meaning in the Trading With the Enemy Act of 1917 (TWEA),<sup>28</sup> the International Emergency Economic Powers Act of 1977 (IEEPA),<sup>29</sup> or any other statute in which it is found.<sup>30</sup> The executive branch, though, has promulgated regulations under the national emergency authority of the TWEA and the IEEPA specifically defining persons subject to U.S. jurisdiction as including foreign subsidiaries of U.S. corporations,<sup>31</sup> while in other instances it has not.<sup>32</sup>

Prior to 1977, nonemergency export restraints did not purport to reach overseas.<sup>33</sup> In December of that year, Congress undertook a major overhaul of the statutory framework for financial and trade controls.<sup>34</sup>

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<sup>27</sup> 50 U.S.C. app. § 2415 (1980). Section 16 (2) defines "United States person" to be "any United States resident or national . . . any domestic concern . . . and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined by regulations of the President." The phrase "person" rather than "United States person" is curiously used in Section 6. The latter is used in the anti-boycott provisions of Section 8.

<sup>28</sup> Trading With the Enemy Act of 1917, § 5(b) (1), 50 U.S.C. app. § 5(b) (1) (1976) [hereinafter cited as TWEA].

<sup>29</sup> International Emergency Economic Powers Act of 1977, § 203(a)(1), 50 U.S.C. § 1702(a)(1)(supp.V 1981) [hereinafter cited as IEEPA].

<sup>30</sup> See Bretton Woods Agreement Amendments Act, Pub. L. No. 95-435, § 5(d), 92 Stat. 1051, 1052 (1978) (repealed 1979); United Nations Participation Act of 1945, § 5, 22 U.S.C. § 287c (1979).

<sup>31</sup> For an early example, see U.S. Treasury Public Circular No. 18 of March 30, 1942, 7 Fed. Reg. 2503 (1942), which defined the term to include "any corporation or other entity, wherever organized or doing business, owned or controlled by" U.S. citizens and corporations, among others.

<sup>32</sup> See, e.g., the Rhodesian Sanctions Regulations, 31 C.F.R. § 530.404 (1979)(repealed 1979). See *infra* note 58. See generally *infra* notes 49-58 and accompanying text.

<sup>33</sup> The EAA's predecessor statute, The Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (expired 1979) [hereinafter cited as the 1969 EAA] had authorized the Executive only to "prohibit or curtail . . . exportation from the United States, its territories and possessions." 50 U.S.C. app. § 2403(b) (1976)(expired 1979).

<sup>34</sup> War or National Emergency Presidential Powers Act of 1977, Pub. L. No. 95-223,



The TWEA was restricted to wartime emergency application and the IEEPA was enacted to pick up the slack by covering peacetime emergency export restraints.<sup>35</sup> Moreover, the 1969 EAA<sup>36</sup> was amended, in part, by authorizing extraterritorial controls over persons "subject to the jurisdiction of the United States."<sup>37</sup> Yet Congressional intent with respect to the full scope of peacetime extraterritorial controls was not made clear.<sup>38</sup> One investigator has noted that "the amendment was intended simply to supplement the newly restricted TWEA by allowing the President to continue exercising the authority over foreign subsidiaries he had previously exercised under that Act."<sup>39</sup> Yet the very controls Congress sought to preserve by amending the 1969 EAA were grandfathered by the 1977 legislation and have since been renewed annually independent of any authority under the EAA.<sup>40</sup> Without expressing any clear intention to do so, Congress left the EAA open to an interpretation, however questionable, expanding extraterritorial export controls to include peacetime, non-emergency foreign policy application.

Adding to the uncertainty was the introduction of the term "United States person" to section 8 of the EAA,<sup>41</sup> the anti-boycott provision, in 1977.<sup>42</sup> That term broadened the definition of "person"<sup>43</sup> to include U.S. residents, nationals and concerns, and *any foreign subsidiary or affiliate*

Tit. III, 91 Stat. 1625 (1977).

<sup>35</sup> The meaning given "emergency" by the IEEPA is an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States." IEEPA, *supra* note 29, at 31701.

<sup>36</sup> See *supra* note 33.

<sup>37</sup> Act of Dec. 28, 1977, Pub. L. No. 95-223, Tit. III, § 301(a), 91 Stat. 1625 (1977) (expired 1979). See S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977) (the amendment to the 1969 EAA would "confer nonemergency authority under that act to control non-U.S.-origin exports by foreign subsidiaries of U.S. concerns. Such authority has been exercised under the emergency authority of section 5(b) of the Trading with the Enemy Act"); *Revision of Trading with the Enemy Act: Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 7-10 (1977)(statement of Representative Bingham).

<sup>38</sup> See Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739, 846 (1981)("The legislative history of this amendment seems to reveal confusion among the responsible members of Congress." *Id.*)

<sup>39</sup> *Id.* at 846 n. 639.

<sup>40</sup> See Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(a)-(c), 91 Stat. 1625. These controls included the Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101 - 500.809 (1981), the Transaction Control Regulations, 31 C.F.R. §§ 505.01 - 505.60 (1981), and the Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101 - 515.809 (1981). They have since been extended four times and are currently in effect.

<sup>41</sup> 50 U.S.C. app. § 2407 (1980).

<sup>42</sup> See The Export Administration Amendments of 1977, Pub. L. 95-52, 91 Stat. 235 (1977).

<sup>43</sup> "Person" is defined to include "any individual, partnership, corporation, or other form of association. . . ." 50 U.S.C. app. § 2415 (1) (Supp. IV 1980).

of any domestic concern which is controlled in fact by the domestic concern as determined under regulations of the President.<sup>44</sup> However, Congress chose not to use this clear grant of extraterritorial authority when drafting Section 6.

Two years later, in 1979, the Senate Committee on Banking, Housing and Urban Affairs had an opportunity to clear the confusion, but failed to do so adequately. In considering the bill that ultimately was to be enacted as the current EAA, the Committee "withdrew for further study" a proposal that would have prohibited the imposition of new controls on non-U.S.-origin exports of foreign subsidiaries of U.S. companies, except in international economic emergencies declared pursuant to the IEEPA.<sup>45</sup> In so doing, though, the Committee expressed doubt that the application of extraterritorial controls to nonemergency situations had been "considered adequately" by Congress in 1977.<sup>46</sup> Certainly, no consideration had been given to nonemergency, foreign policy-based export restraints.<sup>47</sup> This shortcoming is all the more conspicuous because controls maintained for foreign policy purposes had been the most sharply criticized aspect of United States export control policy.<sup>48</sup>

Situations in which the executive branch has instituted economic controls over foreign subsidiaries of American companies as persons "subject to the jurisdiction of the United States" have typically been of an "emergency" nature and based, at least in part, on national security considerations. Regulatory examples include the Foreign Assets Controls

<sup>44</sup> See *id.* § 2415(2). For a detailed definition of "United States person" by the Department of Commerce, see also 15 C.F.R. § 369.1 (1980).

<sup>45</sup> S. REP. No. 169, 95th Cong., 1st Sess. 4-5 (1979). The committee took note of a letter from the Department of State, which stated:

This [provision] could prevent controlling exports from subsidiaries in order to increase the effectiveness of other controls, as was done at the behest of the Congress in the case of Uganda. New situations may arise where the United States would wish to distance itself from especially abhorrent acts of other Governments which would not, however, constitute emergencies for the United States. While controls on exports of subsidiaries have not been imposed pursuant to this Act, we believe it would be desirable for the President to retain flexibility in the current legislation.

*Id.* at 5. With regard to the case of Uganda, see *infra* notes 60-64 and accompanying text.

<sup>46</sup> S. REP. No. 169, 95th Cong., 1st Sess. 5 (1979).

<sup>47</sup> Indeed, even in 1979, the Senate Committee did not distinguish between the national security and foreign policy bases for nonemergency controls as the Senate bill itself did not separate the two. See S.737, 96th Cong., 1st Sess. (1979); but see the final House version, H.R. 4034, 96th Cong., 1st Sess., §§ 5, 6 (1979). When two distinct provisions were later adopted in the conference committee, no indication was given whether one would support a broader extraterritorial reach than the other — other than use of the language "subject to the jurisdiction of the United States" in both provisions. See H.R. CONF. REP. No. 482, 96th Cong., 1st Sess. 5, 12 (1979).

<sup>48</sup> See S. REP. No. 169, 95th Cong., 1st Sess. 6-7 (1979).

Regulations and the Transactions Control Regulations,<sup>49</sup> both instituted under the TWEA. More recently, the Iranian Assets Controls Regulations<sup>50</sup> were instituted under the IEPA in response to President Carter's order seeking to freeze Iranian assets<sup>51</sup> to protect, in part, national security interests.<sup>52</sup> The freeze extended to official Iranian property "subject to the jurisdiction of the United States or which is in the possession or control of persons subject to the jurisdiction of the United States. . . ."<sup>53</sup> As with the Foreign Assets Control Regulations and the Transactions Control Regulations,<sup>54</sup> this language was defined to include foreign subsidiaries of U.S. corporations. It should be noted that, in addition to the asset freeze, a general trade embargo was instituted against Iran under the IEPA.<sup>55</sup> The implementing regulations thereof expressly excluded from coverage foreign nonbanking subsidiaries.<sup>56</sup>

In contrast to emergency, national security based regulations, not all of which have sought to reach overseas,<sup>57</sup> nonemergency, foreign policy-based export controls have typically been limited territorially — at least until the June pipeline sanctions. The Rhodesian sanctions, for example, did not reach overseas subsidiaries.<sup>58</sup> Nor have foreign policy controls in-

<sup>49</sup> 31 C.F.R. §§ 500 and 505 (1982) respectively. The Foreign Assets Control Regulations prohibit a range of commercial activity with specified hostile countries, currently North Korea, Cambodia and Vietnam. 31 C.F.R. § 500.201 (1982). The Transactions Control Regulations prohibit the export of strategic goods with countries that are potential or actual adversaries. 31 C.F.R. § 505.10(b) (1982). Both regulations define "person subject to the jurisdiction of the United States" to include "[a]ny partnership, association, corporation, or other organization, wheresoever organized or doing business, which is owned or controlled by" any United States corporation or by any person who is a citizen or resident of the United States or actually within the United States. See 31 C.F.R. § 500.329 (1982) and 31 C.F.R. § 505.20 (1982), respectively.

<sup>50</sup> 31 C.F.R. § 535 (1982).

<sup>51</sup> Exec. Order No. 12170, 44 Fed. Reg. 65729 (1979).

<sup>52</sup> The disorder in that nation represented "an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." *Id.*

<sup>53</sup> *Id.*; 31 C.F.R. § 535.201 (1982).

<sup>54</sup> See *supra* note 49.

<sup>55</sup> Exec. Order No. 12205, 45 Fed. Reg. 24099 (1980), revoked by Exec. Order No. 12282, 46 Fed. Reg. 7925 (1981).

<sup>56</sup> 31 C.F.R. § 535.207(b) (1980) (repealed 1981).

<sup>57</sup> See, e.g., the Cuban Assets Controls Regulations, 31 C.F.R. Pt. 515. Foreign affiliates of U.S. corporations were permitted to trade with Cuba provided no U.S. citizens or residents of U.S.-origin goods were involved. 31 C.F.R. § 515.541 (1963)(modified 1975). These controls were loosened in 1975, though maintained and justified on foreign policy grounds, as concern over the placement of Soviet offensive weaponry in Cuba waned. See 31 C.F.R. § 515.559 (1981) and 15 C.F.R. § 385.1 (1981).

<sup>58</sup> See The Rhodesian Sanctions Regulations, 31 C.F.R. § 530.404 (1979)(repealed 1979). Although foreign subsidiaries were not included within the definition of persons "subject to the jurisdiction of the United States," the regulations did apply to U.S.-controlled entities in Rhodesia itself. *Id.* Citizens and residents of, and persons actually within, the

stituted under section 6 of the EAA covered exports of non-U.S.-origin goods by foreign subsidiaries.<sup>59</sup> Only in one instance were regulations proposed that would have reached exports of non-U.S.-origin goods by foreign subsidiaries on strictly foreign policy grounds. This was the 1978 embargo on exports to Uganda instituted in reaction to the gross abuse of human rights then taking place there. Congress, by statute, authorized the embargo, which was implemented by Commerce Department regulations.<sup>60</sup> Two months later, President Carter proposed more extensive regulations<sup>61</sup> that would have reached foreign subsidiaries, affiliates and other foreign establishments "controlled in fact" by U.S. concerns.<sup>62</sup> However, Idi Amin was overthrown before the proposed regulations took effect, and thus they were withdrawn<sup>63</sup> and the special statute repealed.<sup>64</sup>

The June pipeline sanctions also sought to regulate exports and re-exports from one foreign country to another of U.S.-origin goods and technology as well as foreign-produced goods based on U.S. technology.<sup>65</sup> No prior notice for the sanctions had been given. About a dozen foreign companies thus found themselves faced with new American directives, non-existent at the time license agreements with American companies and supply contracts with the Soviet Union were signed.<sup>66</sup>

The Administration based these controls on the language of Section 6 of the EAA which permits the President to prohibit the exportation of "goods [or] technology . . . subject to the jurisdiction of the United States."<sup>67</sup> It is clear then that under U.S. law a jurisdictional nexus is established merely by the geographic origin of goods and technology. The position taken by the executive branch has been that this nexus is not broken once exportation from the United States has occurred, or even

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United States could not participate in the transactions of foreign subsidiaries with Rhodesia. *Id.* at § 530.307 (1979)(repealed 1979).

<sup>59</sup> See, e.g., 15 C.F.R. 385.2(c) (1981)(exports of oil and gas equipment and technology to the U.S.S.R.); *id.* 385.2(d)(exports of goods and technology for use in the 1980 Summer Olympic Games in Moscow); *id.* 385.2(e)(phosphates to the U.S.S.R.); *id.* 385.2(f)(truck engine assembly line equipment to the U.S.S.R.); *id.* 385.4(a)(limited embargo of South Africa and Namibia); *id.* 385.4(d)(crime control and certain other equipment to Libya, Iraq, Southern Yemen and Syria); and *id.*, 385.4(f)(various equipment and technology to Afghanistan).

<sup>60</sup> Bretton Woods Agreement Amendments Act, Pub. L. No. 95-435, 92 Stat. 1051 (1978)(repealed 1979). For the temporary regulations implementing the embargo, see 43 Fed. Reg. 49304 (1978)(repealed 44 Fed. Reg. 31010 (1979)).

<sup>61</sup> 43 Fed. Reg. 58571 (1978).

<sup>62</sup> See 43 Fed. Reg. 58573 (1978). See 15 C.F.R. § 369.1(c) (1981) for a definition of "controlled in fact."

<sup>63</sup> See 44 Fed. Reg. 31010 (1979).

<sup>64</sup> See Act of Sept. 21, 1979, Pub. L. No. 96-97, §2, 93 Stat. 415 (1979).

<sup>65</sup> See 47 Fed. Reg. 27251(1982)(to be codified at 15 C.F.R. § 379.8).

<sup>66</sup> See *supra* note 13.

<sup>67</sup> 50 U.S.C. app. § 2405(a)(1) (1981).

upon subsequent reexportation. Thus, even though Section 6 does not authorize controls over the *reexport* of goods and technology subject to U.S. jurisdiction, the President acted as if it had.<sup>68</sup> The government's position is similar with respect to the regulation of foreign-produced goods based on technology. The manner in which the June sanctions impose these types of regulation differs from previous instances where "prior notice" in the form of requests for written assurances of compliance with U.S. regulations were given by U.S. exporters to the foreign importers.<sup>69</sup> Even the December 1981 pipeline sanctions,<sup>70</sup> as applicable to foreign licensees, were premised upon written assurances and did not apply to technology transmitted prior to the effective date of the regulations.<sup>71</sup>

In the *Dresser* litigation,<sup>72</sup> argument focused on the nature of an "exportation of technology" that could be subject to regulation under Section 6. The particular point at issue was whether the President could curtail the export from France of compressors produced by Dresser (France) using technology supplied from the United States. The government's brief<sup>73</sup> claimed, somewhat equivocally, that an exportation of technology for pur-

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<sup>68</sup> The regulations enacting the June sanctions stated: "As authorized by Section 6 of the Export Administration Act of 1979, prior written authorization by the Office of Export Administration is required for foreign policy reasons for the export or *reexport* to the U.S.S.R. of oil or gas exploration, production, transmission or refinement goods of U.S. origin. . . ." [emphasis added]. 47 Fed. Reg. 27252 (1982).

<sup>69</sup> The Export Administration Regulations, 15 C.F.R. § 368-399 (1981), which regulate reexports of exported commodities and technical data, prohibit, unless otherwise authorized, the export to target countries of certain foreign produced direct products of U.S. technical data, as well as commodities produced by a plant, or containing a major component, which is a direct product of U.S. technical data — but only in cases where the products are of the type for which the Export Administration Regulations require written assurances from prospective importers of the technical data. See 15 C.F.R. §§ 379.8(a)(3), 379.4(f), and 379.5(e)(1)-(2) (1981). Failure to obtain a written assurance will not necessarily defeat a license application. See *id.* § 379.5(e)(2). These assurances, whether found in license agreements or in some other writing, evidence the obligation of the importer not to ship the technical data or its direct products to the target countries in contravention of U.S. legal requirements. The control is thus prospective and contractual in nature. By not requiring prior assurances or otherwise giving importers prior notice of restrictions, the June pipeline sanctions were quite extraordinary. In at least one instance, the Department of Commerce has imposed prohibitions on the reexport of U.S.-origin goods after the goods had been exported from the U.S. See 46 Fed. Reg. 44803 (1981) (prohibiting foreign persons from transferring any U.S.-origin goods or technology to United African Airlines, a Libyan airline).

<sup>70</sup> President's Statement of U.S. Measures Taken Against the Soviet Union Concerning its Involvement in Poland, 1981 PUBLIC PAPERS OF THE PRESIDENTS 1209 (Dec. 29, 1981).

<sup>71</sup> See also 43 Fed. Reg. 33699 (1978); 43 Fed. Reg. 7311 (1978).

<sup>72</sup> See *supra* notes 14-20 and accompanying text.

<sup>73</sup> Memorandum of Points and Authorities in Opposition to Plaintiff's Motion For a Preliminary Injunction, *Dresser Industries, Inc. v. Baldrige*, 549 F. Supp. 108 (D.C. Cir. 1982) [hereinafter cited as Memorandum of Points].

poses of Section 6 occurs as long as the foreign firm in question is licensed to use the technology — ergo, “the June regulations curtail the exportation of technology by barring foreign licensees of U.S. technology from shipping products of that technology to the USSR.”<sup>74</sup> The theory underlying the government’s argument was not made explicit. Presumably, it was either that use of U.S. technology by a foreign licensee or that the export from abroad of the foreign-made products of that technology, is tantamount to an exportation of technology from the United States and thus prohibitable.

Either rationale for the government’s position is weakened by a straightforward definitional analysis. “Technical data,” as defined in administrative regulations, means: “. . . information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials.”<sup>75</sup> The “export of technical data” has been defined as: “(i) an actual shipment or transmission of technical data out of the United States; (ii) any release of technical data in the United States with the knowledge or intent that the data will be shipped or transmitted from the United States to a foreign country; or (iii) any release of technical data of U.S.-origin in a foreign country.”<sup>76</sup> Exportation of technical data is thus seen as an event that occurs upon the transmission or release of information,<sup>77</sup> rather than a continuous state existing for the duration of a licensing agreement. It would also be difficult to argue that the export of foreign-made products of U.S. technology from a foreign country is an export of U.S. technology given the meaning of the statute and the distinct statutory definitions for products and technology in the EAA.<sup>78</sup> Nor could a case be persuasively made that such action is a reexport of U.S. technical data.<sup>79</sup>

Should the more controversial reaches of the June pipeline sanctions be deemed unsupportable under the EAA, they might seek their legitimation under the President’s independent foreign affairs authority rooted in the Constitution. The United States Supreme Court has recognized and described this authority as:

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<sup>74</sup> *Id.* at 48.

<sup>75</sup> 15 C.F.R. § 379.1(a) (1982). Though used in the June regulations, the term is not defined in the EAA. The EAA does define “technology,” similarly, as: “[T]he information and know-how that can used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves.” 50 U.S.C. app. § 2415(4) (1981).

<sup>76</sup> 15 C.F.R. 379.1(b).

<sup>77</sup> A release of technical data occurs upon visual inspections, oral exchanges of information or the application abroad of personal knowledge or technical experience acquired in the United States. See 15 C.F.R. § 379.1(b)(2) (1982).

<sup>78</sup> 50 U.S.C. app. § 2415(3)-(4) (1981).

<sup>79</sup> See 15 C.F.R. 379.1(c) for a definition of “reexport of technical data.”

[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.<sup>80</sup>

This “sole organ” power implies a legal authority in the President to assert a variety of actions, not explicitly granted by the Constitution, in the conduct of U.S. foreign policy.<sup>81</sup> As such, it may be said to support a President’s making of foreign policy by asserting rights and assuming duties on behalf of the United States, by responding to the claims of others, by announcing U.S. attitudes, intentions and doctrines and even in some situations by domestic legislation.

Nevertheless, the President’s power as “sole organ” is viewed, in principle, as being limited by exclusive constitutional grants of power to Congress.<sup>82</sup> And Congress does have the power “[t]o regulate Commerce with foreign Nations . . . .”<sup>83</sup> The question then arises whether Congress’ clear grant is an exclusive one. Professor Louis Henkin has suggested that:

[I]n principle, it would be difficult for a President to dispute that by vesting in Congress all legislative powers herein granted and granting it a comprehensive array of specific powers, the Constitution barred the President from exercising these powers even as regards foreign affairs [footnote omitted]. Whatever then he can do by treaty or other international agreement . . . he cannot unilaterally regulate Commerce with foreign nations. . . . [footnote omitted].<sup>84</sup>

However, in its August 1982 report recommending that the EAA be amended to terminate both the December and June pipeline sanctions,<sup>85</sup>

<sup>80</sup> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936). The government made this argument in the *Dresser* litigation. See, Memorandum of Points, *supra* note 72, at 49-50. See generally, HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 45-50 (1972) [hereinafter cited as HENKIN].

<sup>81</sup> HENKIN, *supra* note 80, at 49-50.

<sup>82</sup> The dividing line between Executive and Congressional competence in foreign affairs is an unresolved issue of constitutional law - having rarely been passed upon by the courts. There are views that all foreign affairs powers may be exercised by both branches concurrently. More extreme is Theodore Roosevelt’s “stewardship theory” that all executive power is limited only by express restrictions found in the Constitution or imposed by Congress acting under its constitutional powers.

<sup>83</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>84</sup> HENKIN, *supra* note 80, at 95.

<sup>85</sup> HOUSE COMM. ON FOREIGN AFFAIRS, EXPORT ADMINISTRATION ACT AMENDMENT, H.R. REP. No. 762, 97th Cong., 2d Sess. (1982). The report concerned the Committee’s recommendation that the EAA be amended to terminate both the December and June pipeline sanctions.

the House Committee on Foreign Affairs stated that, "[t]he committee does not challenge such Presidential authority [to impose extraterritorial controls], although it is not explicit in the [EAA]."<sup>86</sup> It would be wrong to imply an admission of non-exclusive Congressional authority from this statement, but it is nonetheless surprising that the House committee did not choose to question the President's authority much less decry a usurpation of "exclusive authority" in the context of a report highly critical of the pipeline sanctions. Taken in conjunction with overall Congressional silence on the matter, it could reasonably be inferred from the circumstances that Congress either "tacitly delegated" the controversial authority to the President or "tacitly acknowledged" the President's "sole organ" authority.<sup>87</sup>

### III. INTERNATIONAL LAW

As a matter of national judicial practice, whenever a law of the United States lends itself to one interpretation consistent with international law and another violative, the law is interpreted in a manner consistent with international law.<sup>88</sup> In the words of Chief Justice Marshall, "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."<sup>89</sup> In considering vague or general statutory language, U.S. courts ordinarily presume that Congress intended the regulation in question to apply within the parameters of international law unless, of course, a clear Congressional intent is evident that the law be applied otherwise.<sup>90</sup>

The language and legislative history of Section 6 of the EAA are sufficiently ambiguous as to create doubt whether Congress desired the law to be applied regardless of international legal limitations. Whether the argument that Congress did intend the EAA to be upheld in contravention of international law could prevail over the judicial presumption of

<sup>86</sup> *Id.* at 6.

<sup>87</sup> Regarding the view that Congressional silence authorizes the states to regulate interstate commerce in certain cases, see, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945), citing Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); HENKIN, *supra* note 80, at 235.

<sup>88</sup> RESTATEMENT (SECOND) OF FOREIGN REL. § 3(3) (1965) [hereinafter cited as RESTATEMENT (SECOND)].

<sup>89</sup> *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>90</sup> There is no provision in the U.S. Constitution prohibiting Congress or the President from violating international law. On the other hand, there are no Supreme Court opinions, or explicit dicta, upholding the power of the President to violate international law. See HENKIN, *supra* note 80, at 460 n.61. Courts have enforced the precepts of international law against lower executive officials when they had not been directed by the President to disregard international law. *Id.* at 222. See also *The Paquete Habana*, 175 U.S. 677 (1900).



international legality is not clear.<sup>91</sup> If it could not prevail, the June sanctions might be invalidated on the domestic plane if they violated international law, unless they could rest on the President's elusive foreign policy power as "sole organ."<sup>92</sup> If the presumption were overcome, or if the sanctions were deemed a legitimate exercise of Presidential power, and a U.S. court ruled that the regulations were valid as a matter of domestic law, regardless of any violation of international law, the United States would still be responsible on the international plane for any of its transgressions.<sup>93</sup> Accordingly, in either case, an examination of the June sanctions in light of public international law would be in order. At the heart of such an examination lies the issue of jurisdiction.

According to the *Restatement (Second) of Foreign Relations Law*, "Action taken by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law . . . ."<sup>94</sup> A state's assertion of jurisdiction should at the very least rest on one of the several recognized bases on which jurisdiction can be founded under international law. These bases are commonly understood to be the territoriality,<sup>95</sup> nationality<sup>96</sup> and protective principles.<sup>97</sup> The territoriality principle is the most widely accepted jurisdictional base as it is a natural consequence of territorial sovereignty. It holds that a state has jurisdiction with respect to conduct that occurs

<sup>91</sup> The American Law Institute suggests that the application of U.S. law to foreign subsidiaries, "being exceptional in character, is not to be presumed in the absence of clear intent by Congress expressed or fairly implied. Such 'intent will not' be presumed on the basis of general legislation or of such phrases as 'the interstate and foreign commerce of the United States.'" *RESTATEMENT (SECOND) OF FOREIGN REL.* § 418 comment g (Tent. Draft No. 2, 1981) [hereinafter cited as Tent. Draft No. 2].

<sup>92</sup> See *supra* notes 80-83 and accompanying text.

<sup>93</sup> See generally, BROWNLIE, *PRINCIPLES OF PUBLIC INTEREST LAW* at 36-38 (2d ed. 1973).

<sup>94</sup> *RESTATEMENT (SECOND)*, *supra* note 88, at § 8. See also Case of the S.S. "Lotus," (France v. Turkey) 1927 P.C.I.J. Sec. A., No. 10.

The *RESTATEMENT (SECOND)* distinguishes two types of jurisdiction: prescriptive and enforcement. Jurisdiction to prescribe is "the capacity of a state under international law to make a rule of law." *RESTATEMENT (SECOND)* *supra* note 88, at § 6, comment a. Jurisdiction to enforce is the "capacity of a state under international law to enforce a rule of law." *Id.* A third type of jurisdiction articulated in the *RESTATEMENT (REVISED) OF FOREIGN REL.* §401 (2)(Tent. Draft No. 3, 1983) [hereinafter cited as Tent. Draft No. 3], is the concept of adjudicatory jurisdiction which relates to a state's authority to make particular things or persons (or classes of persons or things) amenable to its judicial process, whether on governmental or private initiative, and whether for 'enforcement' or for other purposes. Tent. Draft No. 3, Pt. IV, Ch. 1, Introductory Note, at 88. It should be noted that as of this writing, neither Tent. Draft No. 3 nor No. 2 has been finally approved by the American Law Institute.

<sup>95</sup> *RESTATEMENT (SECOND)*, *supra* note 88, at §§ 10-19.

<sup>96</sup> *Id.* at §§ 26-32.

<sup>97</sup> *Id.* at § 33.

within its territory and to things located within its territory.<sup>98</sup> An expansive view of this principle embraces the theory of objective territoriality, which confers jurisdiction when a constituent element of proscribed conduct occurs within the proscriber's territory.<sup>99</sup> In line with this objective theory, U.S. courts have applied the "effects" doctrine in order to justify regulations, particularly in the antitrust<sup>100</sup> and securities<sup>101</sup> areas, which attach legal consequences to extraterritorial conduct that causes a direct, foreseeable and substantial effect within U.S. territory.<sup>102</sup> The nationality principle also provides a basis for jurisdiction over extraterritorial acts. In this case the connection is allegiance to the sovereign by virtue of nationality.<sup>103</sup> A special exception to the requirement of a territorial or nationality basis for jurisdiction is created by the protective principle. This principle supports jurisdiction over aliens whose conduct outside the territory threatens state security.<sup>104</sup> Such conduct could include violations of a state's political, economic, currency or immigration laws. The *Restatement (Second)* adds the proviso that such conduct should be "generally recognized as a crime under the law of states that have reasonably developed legal systems."<sup>105</sup>

A subjective principle of territoriality clearly has no relevance to the extraterritorial application of the pipeline sanctions. Moreover, an objective theory, such as the "effects" doctrine, cannot be relied upon here because the prohibited conduct does not have the necessary direct, substantial and foreseeable effect within U.S. territory. Resort to the protective principle would seem precluded, since the June sanctions were based expressly on foreign policy considerations. One might still argue from the

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<sup>98</sup> *Id.* at §§ 10, 17.

<sup>99</sup> *Id.* at § 18.

<sup>100</sup> *See, e.g.,* *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. (1981), *cert. denied*, 102 S. Ct. 1634 (1981); Note, *Extraterritorial Application of the Anti-Trust Laws*, 69 HARV. L. REV. 1452 (1956); Oliver, *Extra-territorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 AM. J. INT'L L. 380 (1957).

<sup>101</sup> *See, e.g.,* *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), *cert. denied sub nom. Bersch v. Arthur Anderson & Co.*, 423 U.S. 1018 (1975); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

<sup>102</sup> The "effects" doctrine is not universally accepted. In fact, past assertions of extraterritorial jurisdiction on the basis of the doctrine have caused considerable friction between the United States and its European allies. In some instances, countries have passed legislation counteracting perceived overreaching by U.S. regulations.

<sup>103</sup> RESTATEMENT (SECOND), *supra* note 88, at § 26. In some private law matters the connection has been deemed established by domicile and residency. The nationality principle does not grant a state jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that such conduct affects its nationals. *Id.* at § 30(2).

<sup>104</sup> *Id.* at § 33(1).

<sup>105</sup> *Id.*

standpoint of a broad conception of the protection needed to ensure state security. Yet even so, supplying pipeline and related equipment and technology for the development of a potential adversary's energy resources during peacetime is not a generally recognized criminal offense of the sort contemplated by the *Restatement (Second)*'s formulation of the protective principle. The nationality principle then would seem to be the most appropriate jurisdictional basis upon which certain aspects of the extra-territorial application of the June sanctions could be justified.

Determination of corporate nationality differs under the European and U.S. legal systems. U.S. domestic law generally assigns nationality to a corporation on the basis of its place of incorporation. European nations tend to favor the view that the place from which a corporation is managed or directed (the *siege social*) determines nationality. In wartime or when national security is at issue, however, both the United States and the Europeans look to the *siege social* or the nationality of the corporation's stockholders.<sup>106</sup>

In general, the law of corporate nationality has been developing to allow a broader regulation based on nationality analogues. This is reflected in *Tentative Draft No. 2* to the *Restatement* which comments that "states may treat as the equivalent of nationality, a) that the shares of a corporation are substantially owned by nationals of the state; b) that the corporation is managed from an office within the state, or c) that the corporation has a principal place of business in the state."<sup>107</sup> Apparently then, in recent years, the overseas regulation of foreign subsidiaries has been enjoying an increasing legitimacy. Indeed, *Tentative Draft No. 2* recognizes that "the United States has jurisdiction to apply its law to corporations (or similar judicial entities) organized under the laws of a foreign state that are substantially owned or controlled by nationals of the United States (including corporations organized under the laws of the United States)."<sup>108</sup> This authority, however, is made subject to a strict limitation based on reasonableness.<sup>109</sup>

*Tentative Draft No. 2* in effect codifies the limiting principle of reasonableness with respect to the exercise of jurisdiction over foreign subsidiaries (or any type of extraterritorial assertion of jurisdiction, for that matter). This marks a development in the law of foreign relations that departs significantly from the *Restatement (Second)*.<sup>110</sup> As reflected in

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<sup>106</sup> See *Tent. Draft No. 2, supra* note 91, at § 216, Reporter's Notes No. 5.

<sup>107</sup> *Id.* comment d.

<sup>108</sup> *Tent. Draft No. 2, supra* note 91, at § 418(2).

<sup>109</sup> *Id.*

<sup>110</sup> Underlying this "reasonableness" limitation is the realization that states often have concurrent jurisdiction to prescribe or enforce rules. Concurrent assertions of jurisdiction may yield jurisdictional conflict since rules may be prescribed that require mutually incompatible conduct on the part of the same party.

the *Restatement (Second)*, the question U.S. courts typically have addressed in the face of jurisdictional conflict has not been one of lack of jurisdiction, but rather the desirability of exercising that jurisdiction when considerations of hardship or comity were paramount.<sup>111</sup> Instead of separating the issues of jurisdictional authority and propriety, *Tentative Draft No. 2* links them, thereby demonstrating that an exercise of jurisdiction founded on a generally accepted jurisdictional basis may nonetheless be unlawful if it breaches the principle of reasonableness.<sup>112</sup>

The primary factual connections supporting a claim of jurisdictional authority lie with the state in which the corporation in question is doing business.<sup>113</sup> An attempt by a country to regulate the activity of a foreign subsidiary by internationally unpopular and untraditional means and for

<sup>111</sup> RESTATEMENT (SECOND), *supra* note 88, at § 40, Reporter's Note 1.

At the time the RESTATEMENT (SECOND) was drafted in 1965 there was no rule of international law for choosing among competing claims of jurisdiction. *Id.* at § 37 comment a. Under the RESTATEMENT (SECOND), jurisdictional conflict per se does not preclude a state from exercising jurisdiction when a basis exists under international law. *Id.* at § 39. Instead, states are required to consider moderating, in good faith, the exercise of their enforcement jurisdiction in the light of certain factors whenever a jurisdictional clash produces conflicting directives. These moderating factors include the vital national interests of each of the states, the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person affected, the extent to which the required conduct is to take place in the territory of the other state, the nationality of the person affected, and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. *Id.* at § 40.

Well-known U.S. cases applying a "balancing of interests" test to jurisdiction conflict resolution include, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) and *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d. Cir. 1979). See generally, Maier, *Extraterritorial Jurisdiction At a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 291-300 (1982).

<sup>112</sup> Tent. Draft No. 2, *supra* note 91, at § 403 sets forth the following as factors to be considered in determining reasonableness:

(a) The extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the links such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation 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;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

(h) the likelihood of conflict with regulation by other states.

<sup>113</sup> Tent. Draft No. 2, *supra* note 91, at § 418, comment c.

reasons less pressing than national security and in the face of vigorous opposition by the state in which the corporation is incorporated and doing business<sup>114</sup> cannot be but unreasonable within the meaning of *Tentative Draft No. 2*.<sup>115</sup> By modern standards then, that portion of the June pipeline regulations dealing with overseas subsidiaries is invalid as a matter of international law.

Little has been said thus far about jurisdictional claims based on the origin of goods and technical data because there is little that can be said. There is no accepted jurisdictional basis supporting such controls. In a creative spirit, goods and technical data could be analogized to nationals, or perhaps even bits of territory; but no matter how the imagination is turned, these measures are truly extraordinary. As such, they too could not survive a test of reasonableness given the facts and circumstances surrounding the pipeline embargo.

#### IV. CONCLUSION

The President's authority to institute the wide-ranging pipeline sanctions of June 1981 rests on questionable legal grounds. The relevant statute, the EAA, neither expressly authorizes some of the more controversial controls, nor does it deny them. Legislative history and past experience with the statute cloud as well as illuminate. One could imagine, however, a domestic court finding the sum of Presidential authority derived from the EAA and the more elusive foreign affairs power as "sole organ" (and further supported by Congressional acquiescence) sufficient to confer legitimacy to the June pipeline sanctions — at least under domestic law. Under international law, there is little doubt as to the illegality of the measures as applied to foreign companies in France, Italy, West Germany and the United Kingdom.

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<sup>114</sup> See *supra* notes 14-15 and accompanying text.

<sup>115</sup> Even if an exercise of jurisdiction is reasonable, it can be rendered unreasonable "if it requires a person to take action that would violate a regulation of another state which is not unreasonable. . . ." § 403(3) Tent. Draft No. 2, *supra* note 96 (the reasonableness of all states' regulations being measured by the section 403(2) factors).