

Spring 1984

## In the Wake of the Pipeline Embargo: European-United States Dialogue

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### Recommended Citation

Sarah J. Cogswell, *In the Wake of the Pipeline Embargo: European-United States Dialogue*, 12 Fla. St. U. L. Rev. 73 (2017) .  
<http://ir.law.fsu.edu/lr/vol12/iss1/4>

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## COMMENTS

### IN THE WAKE OF THE PIPELINE EMBARGO: EUROPEAN-UNITED STATES DIALOGUE

SARAH J. COGSWELL

#### I. INTRODUCTION

In June of 1982, President Reagan extended controls restricting the export to the Soviet Union of oil and gas equipment manufactured in the United States or by licensees or subsidiaries of United States companies.<sup>1</sup> The President's action caused a major crisis in relations between the United States and its Western European allies. The crisis brought into sharp focus the differences between the United States and its allies in attitudes toward East-West relations. The export controls (the so-called "pipeline embargo") were imposed under authority of the Export Administration Act (EAA) of 1979.<sup>2</sup> The Act gives the President power to control exports for foreign policy reasons. Although the legality of the President's action was challenged at home and abroad, the lifting of the sanctions in November of 1982 curtailed any attempt to resolve the legal question by action in the courts.<sup>3</sup>

The EAA of 1979 expired on September 30, 1983.<sup>4</sup> Coming on the heels of the oil and gas equipment embargo, the necessity for renewal of the Act sparked heated debate within the United States and abroad. Discussions within the United States focused largely on the political and economic effects of the embargo and the wisdom or unwisdom of giving the President unrestrained discretion in the imposition of controls.<sup>5</sup> International debates centered on

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1. N.Y. Times, June 19, 1982, at 1, col. 2.

2. Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979)).

3. N.Y. Times, Nov. 14, 1982, at 1, col. 6.

4. However, the EAA has been extended into the future, and will continue to be extended until a new bill is passed. At the time of printing, the House bill, H.R. 3231, 98th Cong., 1st Sess. (1983), awaits action in the Senate; and the Senate bill, S. 927, 98th Cong., 1st Sess. (1983), is in conference committee.

5. This discussion raises two important issues recurring in United States political debates: the effectiveness of presidential embargoes, and the constitutional balance between the executive and legislative branches in the area of foreign trade. For a thorough discussion of the former issue, see Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739 (1981). On the latter point, see the

legal questions and international comity, although analysis of economic cost-effectiveness formed a strong basis for the protest. European countries objected vehemently to President Reagan's attempt to apply the controls extraterritorially, to extend the sanctions not only to the reexport of United States products and technology, but also to non-United States products exported by overseas subsidiaries and licensees of United States companies. The objections were also directed at the extension of controls to interrupt contracts already in force.

This comment traces the international debate from the imposition of controls to the proposals for revision of the EAA in 1983-84. Beginning with a discussion of the 1979 EAA provisions, the comment examines President Reagan's use of the EAA in the pipeline embargo, the European protest and accusations of illegality, the concern over the extension of the EAA, and the American response to domestic and international pressures in presidential and congressional proposals for the EAA amendments.

## II. THE EAA OF 1979

The Export Administration Act of 1979 was an amended version of a law passed shortly after World War II.<sup>6</sup> The original purpose of the postwar law was to give the President certain powers over the control of exports in the interest of national security. The original law was passed at a time when American foreign policy, facing the reality of a Europe divided between East and West, was overshadowed by a growing fear of Soviet power and influence. Initially, the President was granted full discretion in deciding when to impose controls.

In 1979, the EAA was divided into two main parts. The foreign policy control provisions for the first time were separated from the

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excellent analysis by J.H. Jackson in *United States—EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453 (1979). See also Jackson, Louis, & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267 (1982) for a discussion of constitutional constraints in the context of trade negotiation and implementation of trade agreements.

6. For a brief history of the EAA, see OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, TECHNOLOGY AND EAST-WEST TRADE: AN UPDATE 17 (May 1983) [hereinafter cited as OTA REPORT]; see also Berman, *The Export Administration Act International Aspects*, 74 AM. SOC'Y INT'L L. PROC. 82 (1980). The first continuous peacetime export control authorized by Congress was the Export Control Act of 1949. This act was superseded by the Export Administration Act of 1969, which in turn was replaced by the Export Administration Act of 1979.

provisions safeguarding national security.<sup>7</sup> Section 6 of the EAA, the foreign policy provision, contained several restrictions on the executive power.<sup>8</sup> Among these was a set of criteria to be used by the President in considering whether to impose trade restrictions. Also included was a requirement that the President justify to Congress the imposition of restrictions in any particular circumstance. The criteria, which played a central role in the pipeline controversy, covered a wide range of concerns and were specified in the act as follows:

(b) Criteria—When imposing, expanding, or extending export controls under this section, the President shall consider—

(1) the probability that such controls will achieve the intended foreign policy purpose . . . ;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States . . . ;

(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effects of the proposed controls on the export performance . . . the competitive position . . . the international reputation of the United States as a supplier of goods and technology, and on individual United States companies . . . ;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.<sup>9</sup>

Further procedures were also specified. The Secretary of Commerce was required to consult with industries which might be affected “as the Secretary considers appropriate.” The President was also required to seek alternative means of achieving the foreign policy objective. As for consultation with Congress, the President “in every possible instance” was to consult Congress before sanctions were imposed, and otherwise had to notify Congress immediately afterwards. Moreover, the President was required to submit a report to Congress discussing his consideration of the criteria, his attempt to use alternative means or why none were available, and his evaluation of how the sanctions would further United States interests and international obligations. The President was also re-

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7. OTA REPORT, *supra* note 6, at 18.

8. 50 U.S.C. § 2405 (Supp. III 1979).

9. *Id.* § 2405(b).

quired to take "all feasible steps" to negotiate with other countries and gain international support for the control measures.<sup>10</sup>

These rather weak provisions were viewed as at least some curb on formerly unrestrained presidential discretion in the imposition of export controls.<sup>11</sup> Nevertheless, the President was granted a broad range of authority. The empowering clause of the Act read as follows:

The 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 any person subject to the jurisdiction of the United States*, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.<sup>12</sup>

The key words in this clause are "subject to the jurisdiction of." The extent of the United States' jurisdiction beyond its territorial borders was the central dispute of much of the subsequent debate. Note that the clause includes goods, technology, information, and persons "subject to the jurisdiction of the United States."

It seems clear that Congress intended the EAA of 1979 to have extraterritorial application.<sup>13</sup> Congressional discussion before passage of the bill and the intentional use of the phrase "any person subject to the jurisdiction of the United States" in defining the limit of presidential powers demonstrate that Congress intended the President to have the power to control the United States' interests beyond the United States' territorial borders.<sup>14</sup> The EAA defines "United States person"<sup>15</sup> as (1) a resident or national, (2) a domestic concern (including any *permanent domestic* establishment of any foreign concern), and (3) any foreign subsidiary or affiliate (including any *permanent foreign* establishment) controlled in fact by a domestic concern.<sup>16</sup> Thus, when President Reagan ex-

10. *Id.* § 2405(c)-(e), (g).

11. Berman, *supra* note 6, at 83.

12. 50 U.S.C. § 2405(a)(1) (Supp. III 1979) (emphasis added).

13. For a clear and convincing argument that Congress intended the EAA to have extraterritorial application, see Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983).

14. *Id.* at 1313-14.

15. 50 U.S.C. § 2415(2) (Supp. III 1979).

16. A certain contradiction appears on the face of the statute in defining a United States person to include foreign concerns established in the United States while, at the same time, including United States concerns established in another country. This contradictory assertion of the United States' jurisdiction was pointed out by the Europeans in their response to

tended the embargo on equipment bound for use on the Soviet Siberian pipeline to include United States subsidiaries and licensees abroad, he was fully within the powers delegated to him by Congress as he understood them and, arguably, as Congress had intended.

### III. THE PIPELINE SANCTIONS

On December 30, 1981, President Reagan imposed certain controls on oil and gas equipment and technology bound for use on the Siberian pipeline.<sup>17</sup> These controls required a validated license for the export from the United States or the reexport from another country of products or technology of United States origin. Since validated licenses were not being issued by the Department of Commerce, this regulation amounted to an embargo. In practical terms, under these regulations a company in Britain, Italy, France, or West Germany could not, for example, export a gas turbine to be used in the Soviet Union if the gas turbine contained rotors and blades made by General Electric.<sup>18</sup> This type of reexport control is used fairly frequently by the United States in an attempt to prevent certain United States-origin materials from reaching the Soviet Union.<sup>19</sup>

The extension of the controls appeared to come, at least in part, in reaction to a lack of agreement among the allies on the appropriate sanctions to be levied against the Soviet Union. In June 1982, at the close of the summit at Versailles, the North Atlantic Treaty Organization (NATO) countries signed a joint declaration of policy regarding East-West trade.<sup>20</sup> Soon thereafter, a disagreement arose over the effect of the declaration:

[French] President Mitterrand denied that the declaration would affect France's credit policy vis-a-vis the U.S.S.R. This action effectively eliminated any impression of a unified Western commercial policy on East-West trade. The fact that the U.S. administration had publicly heralded the statement as just such a development made Mitterrand's announcement all the more

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the sanctions. See *infra* notes 30-47 and accompanying text.

17. See the regulations reproduced in 21 INT'L LEGAL MATERIALS 864 (1982), as reprinted from 47 Fed. Reg. 27,250-52 (1982). The controls were imposed as a reaction to the declaration of martial law in Poland. OTA REPORT, *supra* note 6, at 4.

18. OTA REPORT, *supra* note 6, at 31.

19. See, e.g., Note, *supra* note 13, at 1314 n.38.

20. OTA REPORT, *supra* note 6, at 64.

disturbing. . . .<sup>21</sup>

On June 18, 1982, President Reagan extended the pipeline sanctions to include goods or technology exported by United States subsidiaries and licensees abroad even if they were not of United States origin.<sup>22</sup> The regulation again specified the definition of "person subject to the jurisdiction of the United States"<sup>23</sup> as:

- (i) Any person, wherever located, who is a citizen or resident of the United States;
- (ii) Any person actually within the United States;
- (iii) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; or
- (iv) Any partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (i), (ii), or (iii) of this section.<sup>24</sup>

The wide sweep of the sanctions was emphasized by the inclusion of all companies subject to a licensing agreement or payment of royalties or other compensation to a person subject to United States jurisdiction.<sup>25</sup> The sanctions included all foreign companies importing American goods and owing payment to American corporations. In addition to this broad claim of United States jurisdiction, the controls were made retroactive. That is, the controls were applied to contracts already entered into and in process, and not only to those subject to future validated licenses. This retroactivity meant that companies were forbidden to honor binding contracts with the Soviet Union, even though production of equipment had begun and the company would have to pay damages to the Soviet Union for failure to deliver.<sup>26</sup>

21. *Id.* at 64-65.

22. 21 INT'L LEGAL MATERIALS 864 (1982).

23. 50 U.S.C. § 2405(a)(1) (Supp. III. 1979).

24. 21 INT'L LEGAL MATERIALS at 866. Note again the apparent contradictory assertions of jurisdiction in categories (iii) and (iv). Moreover, under (ii) a French national owner of a French corporation, for example, on vacation in the United States would be subject to the regulations, as would the corporation under category (iv). This tenuous assertion is buttressed by the claim to jurisdiction over any company receiving American goods, or owing Americans money, a category which would seem to include most European international trading companies.

25. *Id.* at 864.

26. The effects of these provisions on particular companies is discussed further below. See sources cited *infra* note 108.

Thus, under the June 1982 extensions, the President was attempting to block the export of goods by United States subsidiaries, incorporated under the laws of other countries, and by European companies who held licenses from United States companies for the production of certain components of gas and pipeline equipment, and of goods and technology purchased from the United States regardless of location or ownership. The sanctions for violation of the President's order were severe and included both criminal and civil sanctions.<sup>27</sup> As the most effective sanction, the President could ban all trade between the United States and a foreign violator.<sup>28</sup>

The reaction from Europe was swift and strong. Britain and France ordered their companies to ignore President Reagan's order and threat of sanctions and to continue production and shipment of pipeline equipment.<sup>29</sup> The European Economic Community (EEC) sent a formal protest to the President, enumerating the grievances of its member countries in legal and diplomatic terms.<sup>30</sup> European editorials decried the attempt at extraterritorial control, thus adding to the list of laws and generally accepted principles of international relations violated by the unilateral American action.<sup>31</sup> The arguments grounded in law and principle will be explored in the next section. The dilemma faced by the corporations will be taken up in a later section.

#### IV. EUROPEAN PROTEST

In a memorandum sent to President Reagan in August of 1982, the Commission of the EEC outlined its political and legal argument against the extension of the pipeline embargo.<sup>32</sup> Of the persons and goods affected by the restrictions, the EEC objected to the inclusion of three categories: (1) export of certain equipment of United States origin by any person within a third country; (2) export of goods and technology of non-United States origin by any "person subject to United States jurisdiction;" (3) export by any

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27. See OTA REPORT, *supra* note 6, at 43. See also generally 50 U.S.C. § 2410 (Supp. III 1979).

28. OTA REPORT, *supra* note 6, at 31.

29. See *Between Reagan and a hard place*, ECONOMIST, Aug. 7, 1982, at 55; see also *Europe drives a hole through those American sanctions*, ECONOMIST, Aug. 28, 1982, at 47.

30. EEC memo, reprinted in *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 INT'L LEGAL MATERIALS 891 (1982).

31. See, e.g., Editorial Comments, *Does Mr. Reagan's writ run in Europe?*, 19 COMMON MKT. L. REV. 497 (1982); see also *Pipelines Asunder*, ECONOMIST, Sept. 4, 1982, at 13.

32. EEC memo, *supra* note 30.



person of products derived from United States technology or produced in "plants based on such U.S. technical data."<sup>33</sup> In addition, the EEC protested that the regulations encouraged others not covered by these restrictions to voluntarily submit to the controls.<sup>34</sup> The EEC based its objections to the extraterritorial provisions on both international and United States domestic law.

### A. *International Principles*

In arguing the United States had no jurisdiction to prescribe controls to the three categories of persons and goods outlined above, the Commission cited two principles generally accepted internationally as bases for jurisdiction.<sup>35</sup> The "territoriality principle," which recognizes a nation's jurisdiction over the territory within its boundaries, was obviously not applicable to the extraterritorial application at issue. The "nationality principle" was a more plausible basis as applied to two aspects of the regulations: the attempt to control United States subsidiaries and licensees, and the assertion of jurisdiction over United States goods and technology. In the case of corporations, whether subsidiaries or licensees, the "generally accepted" criteria for determination of nationality were said to be the state of incorporation and the place of the registered office. The EEC memorandum cited a case from the International Court of Justice which declared these criteria to be "confirmed by long practice and by numerous international instruments."<sup>36</sup> "The Court also scrutinized other tests of corporate nationality, but concluded that these had not found general acceptance."<sup>37</sup> Since the companies at issue were incorporated and registered in Europe, the United States' claim of jurisdiction on the basis of corporate nationality was without merit. The idea that commodities and technology can have a nationality was dismissed as well. "[T]here are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them."<sup>38</sup> In support of this proposition, the Commission cited cases from Hong Kong and Antwerp disallowing United States jurisdiction over goods of United States origin that

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33. *Id.* at 891-92.

34. *Id.* at 895.

35. *Id.* at 893.

36. *Id.* at 894. (The case cited is the Barcelona Traction case, reported in 1970 I.C.J. 3, 43.)

37. EEC memo, *supra* note 30, at 894.

38. *Id.*

were in another country.<sup>39</sup>

The memorandum went on to discuss and reject two further possible bases for assertion of jurisdiction. The first basis was the "protective principle" which may be used only when national security is at stake, which was not claimed by the Reagan administration. The second basis was the "effects doctrine" which may be used when actions abroad are perceived to have "direct, foreseeable and substantial effects" in the form of a crime or tort within the territory of the state asserting jurisdiction.<sup>40</sup> The memorandum asserted that this basis of jurisdiction could not "conceivably be argued" in this case.<sup>41</sup>

Under United States law, the EEC Commission pointed out that a similar effort by a foreign country to control United States companies would not be honored in the United States, and companies honoring a foreign boycott might be subject to United States sanctions. The paper cited the anti-foreign boycott provisions of the EAA which forbid any United States company to support a boycott by a foreign country against a country friendly to the United States. Any company violating these provisions would be subject to prosecution and sanctioning.<sup>42</sup>

Furthermore, in the case of a conflict of enforcement jurisdiction between nations, United States courts usually endeavor to balance the interests of the conflicting nations and the entities to be controlled. Several factors are considered by the courts: nationality of the entity, place of business of the corporations, feasibility of enforcement, relative effects on the entity, harm to American commerce, and the location of the proscribed conduct. These factors were cited as similar to those in section 40 of the Restatement (Second) of Foreign Relations Law which also includes "the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person."<sup>43</sup> The Commission pointed out that the third draft of the Restatement contains similar crite-

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39. *Id.* at 894 n.2. *But see* Note, *supra* note 13, at 1314 n.38. (The author points out that the United States has a long history of attempting to control exported goods. Although the control is usually contained in agreements on reexporting signed before the goods leave the United States, "this fact alone is not dispositive.")

40. EEC memo, *supra* note 30, at 896. For a discussion of extraterritoriality through the use of the effects doctrine in the areas of antitrust, securities, federal criminal law, and products liability, see Feinberg, *Economic Coercion And Economic Sanctions: The Expansion Of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323 (1981).

41. EEC memo, *supra* note 30, at 896-97.

42. 50 U.S.C. § 2407 (Supp. III. 1979).

43. EEC memo, *supra* note 30, at 899.

ria. The memorandum suggested that the administration should have applied these criteria in making its foreign policy control decisions.<sup>44</sup>

### B. *United States Law*

The EEC Commission also pointed out in its memorandum that the procedures to be followed by the President as required by section 6 of the EAA indicate the President's action was contrary to United States law. Particularly, the memorandum alleged that the requirements concerning consideration of the reaction of other countries, pursuance of alternative means, and assurance of cooperation from other countries were not satisfied by the President before imposing the controls.<sup>45</sup> In addition, the paper stated that, in light of clear indications that the Soviet Union intended and was able to complete the pipeline without United States equipment, criterion 1 of section 6(b), requiring that the purpose of the sanctions be achievable, was not satisfied. Criteria 3, requiring foreign state reaction be taken into account, and 4, requiring consideration of the effects of the controls on United States export performance, were also inadequately assessed.<sup>46</sup>

Finally, the EEC turned to the United States law concerning taking without compensation.<sup>47</sup> It argued that the sanctions imposed by the government would have serious consequences on the companies affected, forcing layoffs and perhaps bankruptcy and forfeiture of contracts. These consequences would be the practical equivalent of confiscation, and the taking of property by the government without compensation, which is against United States law.

### C. *Analysis*

The arguments of the EEC in regard to international and domestic United States law have a good deal of force. The arguments of international law seem especially convincing since they are congruent with the interpretation of international law as applied by the United States courts. The decision of the United States Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano*<sup>48</sup> was

44. *Id.* at 900.

45. *Id.* at 900-01.

46. *Id.* at 901-02.

47. See discussion in EEC memo, *supra* note 30, at 902.

48. 457 U.S. 176 (1982).

handed down in June of 1982, the same month in which the controls were extended. In that case, the Court held that a wholly owned subsidiary of a Japanese firm, incorporated in the United States, was a United States citizen and subject to United States domestic law. The Court found that the place-of-incorporation rule (and not the "control test") was agreed to by both the Japanese and United States' governments and that the use of the rule was "consistent with prior treaty practice."<sup>49</sup> In addition, the Restatement of Foreign Relations Law<sup>50</sup> establishes, in section 216, the nationality of a corporation as that of "the state that creates it," that is, the place of incorporation. Section 418, entitled "Jurisdiction to Control Foreign Subsidiaries of U.S. Corporations," provides that the United States may apply its law to subsidiaries organized under the laws of a foreign state if it is "substantially owned or controlled by nationals of the United States."<sup>51</sup> This provision, however, is subject to two caveats which are important here: (1) the United States may not exercise this jurisdiction "to require conduct that is prohibited, or to prohibit conduct that is required, in the state where the branch or corporation is organized or is doing business";<sup>52</sup> and (2) the entire section 418 is subject to section 403, which prohibits the United States from applying its law abroad when it is "unreasonable." "Unreasonable" is defined by the consideration of eight factors,<sup>53</sup> which are very similar to the "balance of interest" factors quoted in the EEC memorandum. Thus the Restatement and recent case law support the Commission's proposition that, under generally accepted international law, the United States subsidiaries incorporated in foreign states would not properly be subject to United States jurisdiction, especially when there is conflict with the laws of the incorporating state.<sup>54</sup>

The argument from the standpoint of domestic law is less clear, except as to the requirements within the EAA itself. Although the regulations state that the administration had considered the criteria and completed the required process,<sup>55</sup> Congressional leaders, as well as the EEC Commission, felt that the consideration given was

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49. 457 U.S. at 183, 185 n.11.

50. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 2, 1981).

51. *Id.* § 418(2).

52. *Id.* § 418(4)(a).

53. *Id.* § 403(2).

54. For a discussion of Congress' vacillation in the application of laws extraterritorially, see Feinberg, *supra* note 40, at 336.

55. EEC memo, *supra* note 30, at 864.

inadequate, and that the President had not fulfilled the requirements of the Act.<sup>56</sup> In addition, the foreign boycotts section<sup>57</sup> of the Act makes it clear that the United States legal system will not enforce a boycott imposed by a foreign state with which the United States did not agree. The President's action therefore appears to have lacked adequate foundation under the EAA and to have resulted in an inequitable application of United States law.

## V. UNITED STATES RESPONSE

### A. *The Administration*

The reaction of the State Department to the general international uproar, and the protest inside the United States, was reflected in a speech given before the American Society of International Law by Kenneth Dam, Deputy Secretary of State.<sup>58</sup> The speech indicated that although the government recognized the problem, and perhaps tacitly admitted questionable legality under international law,<sup>59</sup> the State Department took the position that "administration after administration and Congress after Congress" had asserted jurisdiction over American subsidiaries and licensees "when substantial American interests" were at stake.<sup>60</sup> Dam indicated that the government viewed the problem as one of conflicting foreign policies with a diplomatic, and not a legal, solution. In this vein, Mr. Dam listed measures the government was prepared to take to avoid future disputes.<sup>61</sup> The measures bearing on export controls included harmonization of foreign policies through con-

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56. H.R. REP. No. 257, part 1, 98th Cong., 1st Sess. 20 (1983). The report from the House Committee on Foreign Affairs on the Export Administration Amendments Act of 1983 states:

[T]he committee finds that the executive branch process for deciding to employ controls has been deficient. The executive branch has generally failed to consult with other countries. . . . The Congress has generally not been consulted prior to the imposition of control, but merely has been notified after the controls were imposed.

57. 50 U.S.C. § 2407 (Supp. III 1979).

58. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, U.S. DEPT. OF STATE BULLETIN, June 1983, at 48.

59. This admission seems evident from the overall tone of the speech and the proposition that the basic problem was conflict in policy and that, once the policy dispute was solved, the legal problems became less significant. The administration took the position that the issue was primarily diplomatic. *Id.* at 50-51.

60. *Id.* at 50. *But see* EEC memo, *supra* note 30, at 903. The memo discusses several recent instances of United States controls which were not applied extraterritorially or retroactively.

61. Dam, *supra* note 58, at 51.

sensus within the Western alliance, more consultation and cooperation with foreign governments when the possibility of conflict arises, and new efforts not to interfere with existing contractual obligations. However, the government did not fully accept the "balancing of competing state interests" test urged by the EEC memorandum and included in the third draft of the Restatement of Foreign Relations Law. Presumably, this test would require giving somewhat equivalent weight to the interests of a foreign country and the interests of the United States, a proposition not wholly compatible with the position of the State Department. In light of the provisions for consultation with foreign governments already in the EAA of 1979, the traditional view of the importance of honoring contracts,<sup>62</sup> and the continuing diplomatic efforts on both sides of the Atlantic to encourage mutual understanding and consensus in relation to the Eastern bloc, the measures outlined by Mr. Dam are not likely to impress the European governments or the critics within the United States.

Mr. Dam also summarized the administration's proposals for the 1983 amendments to the EAA.<sup>63</sup> A new statement of policy emphasizes a commitment "to minimize the impact on preexisting contracts and on business activities in allied or other friendly countries," qualified by the phrase, "to the extent consistent with the underlying purpose of the controls." More precisely, the proposals include an exemption for any contract in force at the time of imposition of the controls which requires delivery within 270 days of the date of the sanction. This exemption is in effect already for agricultural contracts.<sup>64</sup> The exemption is qualified by an exception if the President determines that immediate interruption of contracts is necessitated by an "overriding national interest."<sup>65</sup> In the national security provisions of the Act, the administration's bill would allow the government to restrict the imports from foreign corporations that are not complying with United States national security controls.

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62. This is also the view of many within the administration as indicated by Secretary of State Schultz's comment when he was the president of Bechtel Group, Inc.: "[M]ajor commercial relationships [overseas] cannot be turned on and off like a light switch." Wash. Post, Jan. 15, 1983, at A2, col. 1.

63. Dam, *supra* note 58, at 51.

64. *Id.* The 270-day provision for agricultural products was part of the Futures Trading Act of 1982, Pub. L. No. 97-444, § 238, 96 Stat. 2294, 2326 (1983). See explanation in OTA REPORT, *supra* note 6, at 44.

65. Dam, *supra* note 58, at 51.

A detailed analysis of the President's 1983 proposals<sup>66</sup> for the EAA indicates that only two substantive changes were made to section 6, the foreign policy control section.<sup>67</sup> A new subsection added the qualified 270-day exemption for existing contracts indicated by Mr. Dam. This provision and an exemption for "donations of articles . . . used to relieve human suffering"<sup>68</sup> are the only significant changes made in this section. The major focus of the President's proposals was on the national security provisions of the Act. Changes to the "Findings" and "Declaration of Policy" sections<sup>69</sup> indicate a new emphasis on the control of the reexport of United States goods from foreign countries to the Soviet Union and on persuading other countries to limit exports of goods and technology comparable to those the United States is seeking to control. Reworking the list of controlled goods, loosening the foreign availability criterion, and adding the import sanctions as proposed by the President would toughen the national security provisions of the Act.

The President's proposals thus show little accommodation to the charges of illegality. They do, however, give qualified protection for a limited group of contracts. On the other hand, they would allow the President more discretion in evaluating foreign availability and grant him a new power to block imports.

Once again the EEC lodged a formal protest with the State Department.<sup>70</sup> The memorandum, delivered just before the Williamsburg summit in May 1983, used "unusually strong language" in objecting to the President's bill. Approved by the Council of Ministers, the highest level of government in the EEC, the document was personally delivered to Richard T. McCormack, Assistant Secretary of State for Economic and Business Affairs, by the EEC Head of Delegation in Washington and to the German Ambassador.<sup>71</sup> The memorandum adhered to the legal arguments set forth in the earlier memorandum and added arguments pertaining to comity and diplomacy. Referring to the EAA proposals, the document unequivocally stated:

66. COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO AMEND AND REAUTHORIZE THE EXPORT ADMINISTRATION ACT OF 1979, H.R. DOC. NO. 40, 98th Cong., 1st Sess. (1983).

67. *Id.* at 12.

68. *Id.* at 13.

69. *Id.* at 3-6.

70. N.Y. Times, Apr. 29, 1983, at A1, col. 5.

71. *Id.* See also Morris, *E.T. go home*, EUROPE, July-Aug. 1983, at 22.

It is not justifiable nor acceptable that Section 6 of the Export Administration Act be used to impose U.S. law and policy on other friendly countries which will have their own policy views and will wish to take their own decisions on what restrictions, if any, can be imposed on trade with third countries.<sup>72</sup>

The letter warned that the pipeline controversy has shown that "considerable political disruption and commercial damage can ensue" in disputes over export controls. "The correct course . . . is to seek a consensus with . . . trading partners on the trade controls to be adopted and not to try to extend controls unilaterally. . . ."<sup>73</sup> The EEC also intimated that the President's proposed import restrictions might be contrary to the General Agreement on Tariffs and Trade (GATT).<sup>74</sup>

Making little headway with the President's proposals, some European organizations began to take active steps toward persuading Congress. The British Government, in an unusual lobbying effort, called on the Senate<sup>75</sup> to strike a provision of an East-West trade bill that would extend the reach of the United States' laws to foreign countries.<sup>76</sup> There were also hints that the Europeans might feel compelled to pass retaliatory legislation if no changes were made.<sup>77</sup>

## B. The Congress

### 1. OTA Report

Congress proved more responsive to the international objections, although undoubtedly pressures from domestic sources played a large part in the proposed reformations of the foreign policy provisions of the EAA. In May of 1983, the Office of Technological Assessment (OTA) published a report for Congress on the impact of the pipeline embargo.<sup>78</sup> The results of the study were welcomed by many Europeans who saw them as a presage of a change of mind

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72. Morris, *supra* note 71, at 23.

73. *Id.*

74. N.Y. Times, Apr. 29, 1983, at D9, col. 1. The General Agreement on Tariffs and Trade is the primary forum for trade agreements and negotiations between the United States and Western Europe.

75. N.Y. Times, May 28, 1983, at 45, col. 1.

76. N.Y. Times, Apr. 28, 1983, at D2, col. 5.

77. Wash. Post, Apr. 21, 1983, at D11, col. 5.

78. OTA REPORT, *supra* note 6, at 72.



by Congress as to the wisdom of extraterritorial use of the EAA.<sup>79</sup> The OTA report contained a thorough study of the history and application of the EAA and an excellent analysis of the political and economic results of Presidential imposition of export controls under the Carter and Reagan administrations. The gist of the study was that the attempts to hurt the Soviet economy through grain and equipment embargoes were largely ineffective.<sup>80</sup> In reference to United States-European disputes over the pipeline embargo, the report stated, "In the short term, alliance relations appear to have been damaged while the U.S.S.R. seems little affected."<sup>81</sup> Long-term effects were difficult to predict, but the difference in viewpoints between the United States and the Europeans on trade with the Soviet Union seemed unlikely to change.

## 2. *The House of Representatives*

The report from the House Committee on Foreign Affairs of its proposed amendments to the EAA was published in July 1983.<sup>82</sup> The report contained a preamble which showed the concern among legislators with the use of executive discretion in imposing foreign policy controls:

The committee's review of the implementation of the Export Administrative [sic] Act over the past 4 years, and the impact of the act upon U.S. export trade, leads to the conclusion that actions taken under the act, particularly for the purposes of furthering U.S. foreign policy goals, may be the single greatest hindrance to U.S. exports, costing significant loss of U.S. jobs. Although imposed for good and even noble purposes, . . . these controls have created a pervasive belief in world markets that U.S. firms cannot be relied upon as suppliers particularly for larger projects which require long-term servicing, spare parts, and the like.

This crisis of confidence in the reliability of U.S. suppliers has not been confined to products and projects that have actually been disrupted by the imposition of U.S. foreign policy export controls, but by extension to virtually all U.S. products. It has

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79. See, e.g., *Congress plays Europe's tune*, *ECONOMIST*, May 14, 1983, at 65.

80. OTA REPORT, *supra* note 6, at 8. "Although both embargoes were directed at vulnerable areas of the Soviet economy, their results were inconclusive at best. U.S. sanctions and embargoes may well have hurt the U.S.S.R., but it is unlikely that they have hurt enough to make a real economic difference." *Id.*

81. *Id.* at 72.

82. H.R. REP. No. 257, part 1, 98th Cong., 1st Sess. (1983).

been fueled by the reactions of foreign governments, business executives, and workers who have resented the imposition of these controls extraterritorially upon products previously exported from the United States and firms affiliated with U.S. companies but located abroad and regarded as subject primarily to foreign laws. No other country attempts to impose export controls extraterritorially to the extent that the United States does. . . .<sup>83</sup>

The primary concern of the committee was the effect of the executive actions on United States business and trade. The committee also recognized, however, the force of the foreign arguments as to the questionable nature of extraterritorial application of the pipeline sanctions, and made a somewhat surprising admission in the statement that the United States attempts to extend controls extraterritorially more than other countries.<sup>84</sup> The bottom line, however, was obviously American jobs and American business. The preamble went on to state: "The loss resulting from the controls on the export of gas transmission equipment for the Yamal pipeline alone was estimated to exceed \$850 million in export sales and a minimum of 25,000 jobs. The indirect costs of such controls are probably at least as great as the direct effects."<sup>85</sup>

Congruent with this protrade, anticontrol attitude, the committee made several changes to the Act. The provisions proposed by the administration to strengthen the President's ability to control foreign availability were not included, and several provisions making it easier to remove export controls on the basis of foreign availability were added.<sup>86</sup> The power of the President to impose foreign policy controls extraterritorially was removed,<sup>87</sup> except with the express authorization of Congress by law.<sup>88</sup> Existing contracts were

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83. *Id.* at 6-7.

84. *Cf. Dam, supra* note 58, at 49 (discussion of extraterritorial applications of law by other countries); also, Secretary of State Schultz's rather defensive statement in the context of the pipeline controversy, "Nobody wants us to interfere in their internal affairs. But as is traditional, everybody interferes in ours." *N.Y. Times*, May 28, 1983, at 45, col. 5.

85. H.R. REP. No. 257, part 1, 98th Cong., 1st Sess. 7 (1983).

86. *Id.* at 18-19.

87. *Id.* at 48. The committee removed the language in the authority-granting paragraph of § 6 which referred to goods or persons "subject to the jurisdiction of the United States." The new language in subsection (a) limits the President's control over "exportation from the United States of any goods, technology, or other information produced in the United States. . . ." (emphasis added). (This language affects the President's authority over reexports, since only goods actually leaving the United States could be affected.)

88. The new subsection (n) requires Congress to grant specific authority to the President if he determines that controls should be imposed outside of the authority granted in subsection (a). These extraordinary controls may be imposed "only if a law is enacted authorizing

made immune to controls except in certain extraordinary circumstances.<sup>89</sup> A separate requirement for consultation with other countries was added,<sup>90</sup> and the necessity for consideration of foreign availability emphasized.<sup>91</sup> The President would be required to consult with and report to Congress before imposing, expanding or extending any export controls.<sup>92</sup> In addition, the authority to restrict imports from countries violating controls, as requested by the President, was not included in the committee's bill.<sup>93</sup>

### 3. *The Senate*

The Senate, however, was not as responsive to the European demands for curbs on extraterritoriality and retroactive application to existing contracts. The Senate Committee on Banking, Housing and Urban Affairs consolidated the various proposals for amendments to the EAA.<sup>94</sup> The changes to the foreign policy sections were few. The amendments to section 6(a) gave the President the authority he requested to restrict imports from a sanctioned country.<sup>95</sup> The amendments deleted the Presidential power to interrupt existing contracts, but amended the International Emergency Economics Powers Act (IEEPA) to grant such power.<sup>96</sup> The committee realized that the inclusion in the IEEPA of the power to break contracts in the national interest "implies a somewhat broader concept of 'emergency' than may heretofore have been the case.

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the imposition of those controls." H.R. REP. No. 257, part 1, 98th Cong., 1st Sess. 54 (1983).

Discussing the constitutionality of this provision after *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983) (invalidating the legislative veto), the House Committee on Rules concluded that requiring an affirmative enactment of law is constitutional. H.R. REP. No. 257, part 3, 98th Cong., 1st Sess. (1983).

89. The new provision allows retroactive controls if they "relate directly, immediately, and significantly to actual or imminent acts of aggression or of international terrorism, . . . human rights . . . or nuclear weapons tests." H.R. REP. No. 257, part 1, 98th Cong., 1st Sess. 54 (1983). The caveat raises the question of how effective the restraint will be on Presidential action. Presumably the grain embargo, in response to the invasion of Afghanistan, and the pipeline embargo, in response to martial law in Poland, could be applied retroactively under this caveat. Indeed, it is hard to imagine a situation in which the President might attempt to apply retroactive controls which would not be in reaction to one of these exceptional circumstances.

90. *Id.* § 6(d) at 50.

91. *Id.* § 6(b)(7) at 50.

92. *Id.* § 6(f) at 51.

93. See discussion *id.* at 79 (Additional Views of Hon. Olympia J. Snowe).

94. S. REP. No. 170, 98th Cong., 1st Sess. (1983).

95. *Id.* at 48.

96. *Id.* at 79.

The Committee accepts that implication. . . ."<sup>97</sup> Thus the amendments had no effect on the executive power to apply export controls retroactively.

Another provision deemed important by the committee was the language change in section (b). This section sets out the criteria to be considered by the President prior to imposing controls. The new language replaces "consider" with "determine," deletes old criterion 6, and adds, rather ineffectively, "such controls will not have an extraterritorial effect on countries friendly to the United States adverse to overall United States foreign policy interest."<sup>98</sup> The committee felt that the word "determine" would have more of a "binding" effect on the President. The amendments also require the President to submit a report to Congress before the controls could take effect.<sup>99</sup>

#### 4. Analysis

The Senate committee, while somewhat sensitive to the problems, was not as receptive to the protests and demands of the United States subsidiaries and European organization. The proposed Senate amendments retained the presidential authority to impose controls extraterritorially or retroactively and strengthened presidential power and discretion by giving him import restriction authority. On the other hand, the proposed amendments from the House Committee on Foreign Affairs took into consideration the primary concerns of both United States and foreign critics. The interruption of existing contracts was of great concern as it drastically affected the perceived reliability of United States suppliers on the world market<sup>100</sup> and encouraged foreign importers to seek alternative suppliers.<sup>101</sup> Although it does not comfort companies in the process of bidding on contracts whose future possibilities could be abruptly curtailed, the House provision may allow companies to fulfill prior commitments, if the rule is not swallowed by the exception for extraordinary circumstances.

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97. *Id.* at 24.

98. *Id.* at 49.

99. *Id.* at 50.

100. See *supra* note 83 and accompanying text. See also OTA REPORT, *supra* note 6, at 59.

101. See OTA REPORT, *supra* note 6, at 4. The Soviet Union "seems to have succeeded in replacing the United States as its principal agricultural supplier." See also *id.* at 58. Caterpillar Inc. claims that before the first oil and gas equipment controls in 1978, it had 85% of the Soviet Union market. Now it claims only 15% while a Japanese firm takes care of the other 85%.

The House bill also addressed the foreign concern with extraterritoriality, although again only partially comforting the critics. Controls might still be applied beyond the United States borders, but only with the express consent of Congress. The practical possibility of such controls being approved after consideration in a legislature listening to the protest of corporations at home and abroad seems remote.<sup>102</sup> Thus, the House committee, at any rate, was apparently "playing Europe's tune."<sup>103</sup>

## VI. RESIDUE OF BITTERNESS

This comment has examined the reactions, protests, and demands of foreign governments after the imposition of the oil and gas equipment export controls in 1982 and the response, or lack thereof, by the American side. Consideration of the legal arguments of both domestic and international scope is important and must underlie any action taken by Congress in redrafting the EAA and any consideration by the executive branch of future controls. Much of the pressure brought to bear in the final resolution of these problems, however, arises in the political and economic spheres,<sup>104</sup> which are beyond the scope of this comment. The pipeline embargo and the increased tension between the United States and the Soviet Union have left the Western world sharply focused on the need for cooperation in both of these spheres. In the political sphere, some authorities in the United States have become aware that the United States can no longer act unilaterally and expect the rest of the world to follow.<sup>105</sup> American technology is no longer so unique that it possesses the leverage in the world market that it once did.<sup>106</sup> The suggestion has been made, and underlined

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102. Under the House provisions, Congress would have up to 60 days to pass a law authorizing the controls. Section 6(n)(1). H.R. REP. NO. 257, part 1, 98th Cong., 1st Sess. 54 (1983).

103. *Congress plays Europe's tune*, *ECONOMIST*, May 14, 1983, at 65.

104. *OTA REPORT*, *supra* note 6, gives an excellent analysis of the embargo and its political and economic ramifications.

105. *See, e.g.*, Berman, *supra* note 6, at 88:

It is time for the United States to step down from its position as "leader of the free world," and to step into a position of joint leadership with such other nations as West Germany, Japan, France, and England. . . . Unfortunately or fortunately, the United States is no longer in a position to make unilateral decisions and then to seek the backing of its allies.

106. *See Remarks By Edward L. Goldman*, 74 *AM. SOC'Y INT'L L. PROC.* 94 (1980). In relation to export controls and licensing, Mr. Goldman said: "Much of the licensing process demonstrates the lack of awareness that the United States is no longer in a technologically leading position. . . . Admittedly, there may be a few areas where the United States still

by the European protest, that the United States must take its place as an equal member of an allied group of nations, conscious of the need for consultation and cooperation.<sup>107</sup>

In the economic sphere, the growing number and unique needs of multinational corporations necessitate a quick and peaceful resolution to the problems of jurisdiction and government control. The plight of multinationals stretched between conflicting assertions of control and prohibition was dramatically illustrated by the pipeline controversy.<sup>108</sup> Now accusations of extraterritoriality are being made by United States corporations toward new EEC proposals concerning labor laws.<sup>109</sup> In the future the governments on both sides of the Atlantic should recognize the necessity for clear equitable rules of international jurisdiction and control if business corporations are to continue to thrive.

The passing of the pipeline controversy has left a "residue of bitterness" in its wake.<sup>110</sup> The pipeline embargo, added to past actions of presidents in controlling exports, has spawned a wariness of United States "jerkiness" in foreign policy implementation,<sup>111</sup> with resulting damage to the United States' image for dependability—economically, politically,<sup>112</sup> and legally. Whatever solution is worked out by the United States Congress and the executive branch in dealing with the possibility of future embargo situations, any action should be taken with an awareness of foreign concerns and expectations and a respect for the legal implications, as well as the political and economic effects, of such action.

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holds the lead, . . . but the United States is not the leader by much." See also Berman, *supra* note 6, at 86.

107. See *supra* note 105.

108. See, e.g., *Between Reagan and a hard place*, *ECONOMIST*, Aug. 7, 1982, at 55; *Europe drives a hole through those American sanctions*, *ECONOMIST*, Aug. 28, 1982, at 47. See also OTA REPORT, *supra* note 6, at 58.

109. *A Turnabout In Extraterritoriality*, 76 *AM. J. INT'L L.* 591 (1982).

110. *N.Y. Times*, May 28, 1983, at 45, col. 4.

111. *Rows do make people think*, *ECONOMIST*, Nov. 20, 1982, at 11. "For America's president has also behaved so jerkily over the pipeline as to lose the confidence of France, and to a lesser extent of West Germany, Britain, and Italy." *Id.*

112. See, e.g., OTA REPORT, *supra* note 6, at 7:

In this case the U.S. Government's evaluation of what is best for West European security differs from that of the West Europeans themselves. Should the United States use its foreign policy controls [on exports] to the U.S.S.R. as much to inconvenience and modify the policies of its allies as to inconvenience or exact concessions from the Soviet Union?

