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THE SOVIET PIPELINE AND ITS LEGAL IMPLICATIONS FOR UNITED STATES FOREIGN POLICY

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I. INTRODUCTION

The importance of future energy sources for continued global development is indisputable. Many authorities believe that the next major war will be fought over the control of the world's vital energy resources.¹ Presumably, the nation which can claim the best supply of energy will be ultimately victorious.² The Soviet gas pipeline represents a mechanism which may enable the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union) to increase its sphere of influence and power in two distinct ways. First, by providing a significant portion of Europe's energy needs, the Soviet Union will gain increased control over the area. Second, the Soviet Union will also gain revenue and technology which will aid it in the development of oil

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1. Rooney, 1995: *The Year of Reckoning for American and Soviet Energy Policies*, 105 PUB. UTIL. FORT., Jan. 17, 1980, at 21-22.

2. *Id.*

and gas resources for domestic use.³

After the Soviet pipeline is completed, it will measure 3500 miles in length, and is projected to supply 40 to 70 million cubic meters of natural gas per year to various European countries.⁴ The Soviets and Europeans have entered into an interesting financing agreement. The Europeans are financing the construction of the pipeline by providing the necessary equipment and technology. The U.S.S.R. will repay this debt at a 7.75 percent interest rate over a ten-year period by supplying an equal value of natural gas to the European countries.⁵ The estimated cost of the pipeline project to the U.S.S.R. is \$10 billion. This figure includes the amount that European companies will earn from pipeline-related contracts with the Soviet Union.⁶

Authorities project that the Soviet Union would soon be supplying approximately thirty-five percent of western Europe's gas requirements. This raises the unwelcomed probability of the European nations' dependency on the Soviet Union for vital energy resources.⁷ This situation has created friction between East and West and serious disagreement between European and American allies. The Europeans' primary concern is that the pipeline represents an opportunity to alleviate the economic problems of their hard-pressed private sector. The United States, however, is concerned with the increased dependency upon Russia resulting in a concurrent realignment of sympathies. These conflicting interests are vividly demonstrated by President Reagan's 1981 embargo of pipeline-related products to the U.S.S.R. This sanction raised serious transnational legal problems for Europe, the Soviet Union and the United States.

3. *Id.*

4. *Proposed Trans-Siberian Natural Gas Pipeline, 1981: Hearings Before the Senate Comm. on Banking, Housing, & Urban Affairs, 97th Cong., 1st Sess. (1981)* (report by Miriam Karr and Roger W. Robinson, Jr. on *Soviet Gas: Risk or Reward?*) [hereinafter cited as *1981 Hearings*].

5. *A Buyer's Market for Siberian Gas*, THE ECONOMIST, June 6, 1981, at 85. This western-financed pipeline would give the U.S.S.R. the opportunity to pay for most of its debt to the West by the mid-1980's from the hard currency earnings of \$15-22 billion annually. *Id.* See also *1981 Hearings, supra* note 4, at 210 (statement by Anthony H. Cordesman, Fellow of the Woodrow Wilson International Center for Scholars).

6. *Economic Relations with the Soviet Union, 1982: Hearings Before the Subcomm. on Int'l Economic Policy & the Senate Comm. on Foreign Relations, 97th Cong., 2d Sess. 45 (1982)* (statement of Bradley Graham) [hereinafter cited as *1982 Hearings*].

7. *1981 Hearings, supra* note 4, at 5 (statement by Anthony H. Cordesman). West Germany would be dependent on the U.S.S.R. for up to 30% of its gas and 6% of its total energy supplies. The French would be dependent for 25% - 30% of their total gas supplies and 4% of their total energy. The Austrians would be dependent for 18% of their total energy supply; Belgium 8%, Italy 5% and 4% for the Netherlands. *Id.* at 49.

II. BACKGROUND

On December 29, 1981, in retaliation for the Soviet Union's activities in Poland, President Reagan utilized the Export Administration Act of 1979 (E.E.A.)⁸ and imposed an embargo on all exports of oil, gas and other high technology equipment by United States firms to the U.S.S.R. The scope of this Presidential ban was expanded on June 18, 1982, to include foreign subsidiaries of American firms and foreign firms producing oil and gas pursuant to an authorized United States license.⁹ These sanctions were intended to halt or at least delay the continued construction of the Soviet or Yamal pipeline.¹⁰

This embargo encountered vehement opposition in western Europe where its effects were harshest. The rhetoric surrounding this opposition vividly illustrated the predicament in which these United States-affiliated corporations found themselves.¹¹ If a corporation chose to ignore the Presidential embargo, Reagan would be authorized by the E.A.A. to impose civil, criminal or administrative penalties on both the corporation and its board of directors. Conversely, obedience to the Presidential mandate could result in Soviet retaliation in the form of litigation for breach of contract and disqualification from consideration for future contracts.¹² European governments also opposed the embargo for economic reasons. The European economy, which was in a recession,¹³ was highly dependent upon the con-

8. 50 U.S.C. app. §§ 2401-2402 (1976 & Supp. III 1979). See also Sandeis, *Trying to Outbluff Reagan in the Pipeline Poker Game*, Bus. Wk., Aug. 16, 1982, at 42. In West Germany, Chancellor Helmut Schmidt is having political problems based upon a "budget crunch" and major debates over appropriations. French President Mitterrand faces funding problems regarding a 25% increase in social welfare payments. He also has devalued the franc twice and presently needs investment cash to pour into newly nationalized companies. France faces an inflation rate of 14%. In Britain, Prime Minister Thatcher must contend with the banking community, which is a major advocate of the pipeline deal. The community believes that the Soviet Union will be able to repay the debts owed to the West by earning hard currency through use of the pipeline. Yet Britain is not a major partner in the pipeline deal, earning less than 400 million. Italy also faces a grave economic recession. Italy is just beginning to penetrate United States markets; thereby beginning its debt repayment to the United States. *Id.*

9. Amendment of Oil & Gas Controls to the U.S.S.R., 15 C.F.R. §§ 376.12, 379.8, 385.2 (1982). This includes exports of non-United States goods, technical equipment by United States-owned or controlled companies wherever organized or doing business, and foreign-produced products of United States technical data not previously subject to control.

10. 1982 Hearings, *supra* note 6, at 44 (statement of Edward A. Hewett).

11. *Escalating Hostilities Over the Pipeline Ban*, Bus. Wk., Sept. 6, 1982, at 31 [hereinafter cited as *Hostilities*].

12. 15 C.F.R. §§ 387 & 388.3 (1982). The Act imposes a fine up to \$50,000 or five times the involved exports' value, whichever is greater, or imprisonment for not more than five years or both for a knowing violation. 50 U.S.C. app § 2410(a) (1976 & Supp. III 1979). The penalty increases to \$100,000 (\$250,000 for an individual) or five times the involved exports' value or 10 years imprisonment or both for willful violation. *Id.* § 2410(b).

13. *Hostilities*, *supra* note 11, at 31.

tinued well-being of its private sector, and the loss of this pipeline-related revenue would have resulted in serious consequences.

Recognizing this dilemma, the President offered to repeal the embargo in return for specific concessions.¹⁴ Reagan first demanded that the Europeans impose a more restrictive credit policy towards the Soviets and abolish all subsidies on trade with the U.S.S.R.¹⁵ Reagan's demand included a requirement that all credit agreements in excess of \$70,000 had to be submitted to COCOM for approval.¹⁶ Additionally, Reagan asked for a tightening of the COCOM rules which limit the sale or transfer of technology to the U.S.S.R.¹⁷ This restriction was intended to reduce the possibility that technology sold to the Soviet Union would be used on the pipeline for military purposes. The final demand required the Europeans to abandon all plans of helping the Soviet Union build a second, parallel pipeline.¹⁸ All of these demands were soundly rejected by the Europeans.¹⁹

The House of Representatives passed a bill on September 29, 1982, to help alleviate some of the hardships imposed upon United States-affiliated corporations by the President's actions.²⁰ Rather than enact a bill which directly overturned the embargo, the House passed a bill which extended indirect help to these corporations.²¹ This bill would have allowed the President to continue imposing sanctions under the E.A.A. for national security reasons, but not for foreign policy reasons.²² It also would have helped the defendant corporations in their litigation against the United States because of the

14. Maechling, *Siberian Pipe Dream*, 233 EUR. 4, 4-5 (Sept.-Oct. 1982). The Italian government has ordered its companies to honor their contracts. Britain invoked a trade law passed in 1980 which makes it illegal for companies based in Britain to go along with certain foreign laws and sanctions. The French government cited high court rulings proclaiming the supremacy of French law when it conflicts with foreign laws. The French have threatened their companies with heavy fines, jail sentences and seizure of the compressors which the French government would ship independently. *Id.* See also *That Pipeline: Are Retrospective Sanctions Legal?*, THE ECONOMIST, July 31, 1982, at 40 [hereinafter cited as *That Pipeline*].

15. *No Compromise in the Pipeline*, THE ECONOMIST, Sept. 18, 1982, at 45 [hereinafter cited as *No Compromise*]. This would include cheap credits and noncommercial export-credit guarantees. The United States also wants the Soviet Union to make larger down payments to the West, increasing them from the present 15% of the value to 30-40% in the future. *Id.*

16. *Id.* COCOM is an organization of 15 NATO nations plus Japan which collaborated in regulating exports of armaments, strategic materials and military technology of potential use to Communist countries. Maechling, *supra* note 14, at 5.

17. Wall St. J., Sept. 17, 1982, at 1, col. 1. The United States would require a two-thirds majority of COCOM countries to veto any contract provided to them. *Id.*

18. *No Compromise, supra* note 15.

19. *Id.*

20. *Pipeline Sanctions: Revolt Comes Home*, THE ECONOMIST, Oct. 28, 1982, at 30 [hereinafter cited as *Sanctions*].

21. *Id.*

22. *Id.*

difficulty the government would have in proving that the pipeline was a threat to national security. The House chose this form of bill to avoid a Presidential veto which would have met any attempt to directly overturn the embargo. However, the Senate never voted on the bill because the President acted before it could be submitted.

Possibly as a result of the political pressures, President Reagan lifted the embargo on November 13, 1982. Subsequently, he unilaterally imposed a trade agreement.²³ The policy of this agreement purported to be a study of "technology transfers from West to East, the granting of credit to Communist countries, and Western energy imports from the Soviet Union in the future."²⁴ This so-called "agreement" has never been accepted by any European country and therefore has dubious enforceability.

III. EXPORT ADMINISTRATION ACT OF 1979

Any consideration of the controversy surrounding the Soviet pipeline embargo must include a brief examination of the Export Administration Act. The E.A.A. was enacted by Congress in 1979. It authorizes the President to "prohibit the exportation of any articles subject to the jurisdiction of the U.S. or exported by any person subject to the jurisdiction of the U.S."²⁵ The President delegates this authority to the Department of Commerce, which effectuates any such prohibition.²⁶ Congress' articulated goal in enacting this legislation was to use export controls to restrict the export of goods and technology "which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States; and where necessary to further significantly the foreign policy of the U.S. or to fulfill its declared international obligations. . . ."²⁷

The E.A.A. represents a significant boost to the executive's power base. It provides additional justification for unilateral action on problems within the foreign policy realm.²⁸ Congress has designated

23. *Pipeline: A Pipe of Peace as Smoky as War*, THE ECONOMIST, Nov. 20, 1982, at 20, 21. The Europeans referred to this trade agreement as a "non-paper" requiring neither signatures "nor any initialing." No country formally agreed to it, including the United States, and it was never meant to be implemented. *Id.*

24. *Id.*

25. 50 U.S.C. app. § 2401-2402 (1976 & Supp. III 1979).

26. *Id.*

27. *Id.*

28. Maechling, *supra* note 14, at 4. Congress' criteria for implementing the Export Administration Act controls are as follows:

(1) [T]he controls should have a favorable chance of working if they are to be used, (2)

certain criteria as prerequisites to the implementation of the Act, but these have little restrictive effect. The President has no duty to report to Congress before imposing an embargo and has no obligation to consult with our allies.²⁹ The E.A.A. therefore extended explicit authorization to President Reagan to impose the sanctions that he chose.

IV. DRESSER INDUSTRIES

The plight of the United States-affiliated corporations engaged in the production of pipeline products is vividly illustrated by an examination of the litigation and problems faced by one such corporation, Dresser Industries of France. Dresser France is a French corporation with its main office and manufacturing plant in France.³⁰ It is, however, a wholly-owned subsidiary of Dresser Industries, a Dallas-based corporation organized under the laws of Delaware.³¹ On September 28, 1981, Dresser France contracted with Creusot Loire, a company controlled by the French government, and V/O Machinoimport, a Soviet-controlled company.³² Dresser France agreed to make twenty-one gas compressors for the Soviet-West European gas pipeline which was being built in part by Creusot Loire.³³ Dresser France used United States technical data provided by Dresser Industries' Clark Division in New York prior to December 31, 1981, the effective date of the original export controls prohibiting the export of this data from the United States.³⁴ Prior to June 22, 1982, the effective date of the second embargo, Dresser had completed three of the planned twenty-one compressors.³⁵ At the effective date of the second embargo, Dresser France halted production as recommended by its par-

there should be consistency between control policies and other U.S. foreign policies toward the target nation, (3) the reaction of other nations should be considered before imposing controls, (4) the impact of controls on U.S. competitiveness must be evaluated, (5) we should have the ability to enforce the controls, and (6) the consequences of not imposing controls should be considered.

1982 Hearings, *supra* note 6, at 196 (statement of Alexander B. Trowbridge).

29. Maechling, *supra* note 14, at 4.

30. INT'L TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 1, at 25 (Oct. 5, 1982).

31. Dresser Indus., Inc. v. Baldrige, No. 82-2385 (D.D.C. filed Oct. 20, 1982). Dresser France is almost entirely owned by Dresser A.G., a Liechtenstein Corporation. Dresser A. G. is owned by Dresser Industries.

32. *Id.*

33. *Id.*

34. *Id.* See also INT'L TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 1, at 25, 26 (Oct. 5, 1982).

35. Dresser Indus., No. 82-2385.

ent corporation, Dresser Industries.³⁶ On August 23, 1982, the French government ordered Dresser France to comply with the terms of the contract or face sanctions.³⁷ Dresser France sued in the Federal District Court of the District of Columbia for declaratory and injunctive relief against the United States alleging that neither the E.E.A. nor any international legal theories authorized the imposition of penalties for violations of the embargo. Dresser France also contended that the penalties would "deprive them from property without due process."³⁸ The district court denied its motion for a temporary restraining order.³⁹ On August 23, 1982, in defiance of the embargo, Dresser France shipped the three compressors on board a French ship and resumed work on the remaining compressors.⁴⁰ Ultimately the embargo was lifted by President Reagan and all litigation associated with the Dresser France situation was discontinued. However, the district court's denial of Dresser France's motion for a temporary restraining order had serious implications for future litigation in this area and for international legal theory in general. An exploration of the issues raised in this case will help elucidate the conflicting arguments prevailing in this area.

V. INTERNATIONAL LEGAL THEORIES OF JURISDICTION

It appears that President Reagan's imposition of the embargo was squarely within his authority under the E.A.A. However, it is arguable that his actions constitute a violation of customary international law. Four well recognized principles of international law are applicable to this case. The territoriality principle states that "each nation has the right to regulate political, economic and social activities within the confines of its territorial borders."⁴¹ This principle incorporates the notion that a nation state should only regulate those persons and goods situated within its boundaries.⁴² This in turn encompasses the notion that a sovereign has the sole authority to prescribe and enforce laws within its national boundaries.

The nationality principle authorizes the application of a country's laws to a national of the country wherever he is located, when the

36. *Id.*

37. *Id.*

38. INT'L TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 1, at 25, 26 (Oct. 5, 1982).

39. *Id.*

40. *Id.*

41. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 17 (1981) [hereinafter cited as RESTATEMENT (SECOND)].

42. *Id.*

rights of other nations or nationals are not infringed upon.⁴³ This principle is based on the notion that sovereigns possess unlimited power, and limitations on power should not be presumed. Also, the obligations of citizenship justify a retention of jurisdiction even though the person is not physically present.⁴⁴ The nationality of corporations is determined by reference to the place of incorporation and location of the corporation's registered office.⁴⁵

The protective principle is a theory of jurisdiction based on injury to the national interest. This principle holds that a country is justified in prescribing acts committed outside of its territorial borders when those acts threaten either the state's security or the operation of its governmental functions.⁴⁶ This is often the justification used when a country chooses to intercept a ship suspected of carrying drugs before it enters its territorial waters. The acts sought to be prescribed must usually constitute either a crime or tort under the laws of the state seeking to exert jurisdiction for the exertion of authority to be proper.⁴⁷

Finally, the effects doctrine states that conduct which occurs outside the territory may be prescribed if it causes direct foreseeable and substantial effects upon that territory.⁴⁸ This policy is justified by the theory that a sovereign should have power to exert control over activity which results in discernable impact within the sovereign's territory even if the actual activity occurred outside it. Again, the activity concerned must reach the level of a crime or tort in order to qualify under this doctrine.⁴⁹

VI. EXTRATERRITORIALITY-FOREIGN LICENSES

The specific issue raised here is whether the United States has authority under international law theories to exert export control over foreign companies with respect to their re-export of United States-origin goods or technology, or their export of foreign-origin goods incorporating American parts or technology.

The American embargo of Soviet pipeline equipment and technology is unacceptable under international law principles because of its extraterritorial infringement of foreign-based companies. President

43. *Id.*

44. *Id.* Nationality as defined applies to persons and not goods.

45. *Id.* Goods and technology have no nationality.

46. *Id.* § 33.

47. *Id.*

48. *Id.* § 18.

49. *Id.*

Reagan has attempted to regulate non-American companies whose only substantive connection with the United States is the technological data purchased from the United States. The *Dresser* case provides a typical example of the inequity involved in applying the embargo in this type of situation. The only connections between Dresser France and the United States are first, that Dresser France is a subsidiary of an American company, Dresser Industries; and, second, that Dresser France used United States technical data transferred to it in 1976 under a valid export license.⁵⁰ Otherwise, Dresser France has had no contact with the United States. The contract for the compressors for the pipeline was negotiated and executed in France, the compressors were manufactured in France using French materials, the compressors were shipped from France to the U.S.S.R. by a French ship, and none of the parties to the contract were Americans.⁵¹

The courts have generally used two legal theories when deciding whether the government may enforce federal statutes outside United States' boundaries.⁵² The first approach is the "multivariable comity analysis" approach.⁵³ Under this approach, three requirements must be met. First, there has to be an actual or intended effect on American foreign commerce as a result of extraterritorial action.⁵⁴ Second, there must be a substantially large effect resulting in a cognizable injury. Third, the interests of the United States and the defendants' links to the United States must be sufficiently strong in comparison to those of other nations in order to justify the extraterritorial exercise of authority.⁵⁵

Applying this approach, the embargo does not meet any of the elements of the test. The sale by Dresser France of the compressors for the pipeline has a minimal effect, if any, on the United States.⁵⁶

50. Vance, *Recent Developments*, 18 TEX. INT'L L.J. 203, 208 (1982).

51. *Id.* at 208. The parties to the contract were Dresser France, Creusot Loire, and V/O Machinoimport.

52. *Timberlane Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 615 (9th Cir. 1976).

53. *Id.* at 615.

54. *Id.*

55. *Id.*

The elements to be weighed include the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of the effects in the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

56. Vance, *supra* note 50, at 210. The three compressors have a value of less than two

Also, Dresser France has more substantial links with France than it does with America.⁵⁷

The second and more commonly used approach is the "clear congressional intent" approach.⁵⁸ This approach makes clear congressional intent necessary to support the extraterritorial application of United States law.⁵⁹ Courts usually construe federal statutes strictly in this area so as to avoid conflicts with international law theories.⁶⁰ Courts also must give effect to congressional orders regardless of whether they violate international law.⁶¹ But "acts of Congress are presumed to conform to principles of international law in the absence of clear congressional intent to the contrary."⁶² The E.A.A. does not authorize extraterritorial application of any of its statutes or regulations.⁶³ In addition, no authority exists under the Act's definition of persons or statutes to which it applies.⁶⁴ This definition applies only to persons or entities subject to the jurisdiction of the United States.⁶⁵ Thus, Congress has restricted the scope of the Act's enforcement to territorial boundaries of the United States and to extraterritorial activities which significantly affect American foreign commerce.⁶⁶ Dresser France's activities did not occur within United States territorial boundaries and, as stated previously, did not have a significant effect upon American foreign commerce. Thus, the President's inclusion of "all foreign corporations owned or controlled by U.S. nationals" exceeds congressional intent.⁶⁷

Advocates for the extraterritorial application of American law ar-

million dollars. The projected impact upon American businesses from the export controls is approximately two billion dollars. Thus, the three compressors represent less than one-tenth of one percent of the total value of United States exports affected by the export regulation. *Id.*

57. *Id.* As stated before, the only connections between the United States and Dresser France are Dresser France's status as an American company's subsidiary and its use of United States' technical data. Dresser France is a French corporation manufacturing the compressors in France. The compressors never touched United States soil, and the contract and parties are located outside the United States. *Id.*

58. *FTC v. Compaignie de Saint-Gobain-Port-a-Mousson*, 636 F.2d 1300, 1304 (D.C. Cir. 1980); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1032 n.9 (N.D. Ohio 1981).

59. *FTC*, 636 F.2d at 1304.

60. *Id.* at 1323.

61. *Id.*

62. Vance, *supra* note 50, at 211.

63. *Matter of District of Columbia Workmen's Comp. Act.*, 554 F.2d 1075 (D.C. Cir. 1976).

64. *See* 50 U.S.C. app §§ 2401-2420 (1979).

65. Amendment to Oil & Gas Controls to the U.S.S.R., 15 C.F.R. § 385.2(c)(2)(iv) (1982).

66. Vance, *supra* note 50. This is known as the effects doctrine. *FTC*, 636 F.2d at 1316 n.85. *See Timberlane*, 549 F.2d 597 (9th Cir. 1976).

67. Vance, *supra* note 50, at 212.

gue that foreign companies which obtain a validated export license⁶⁸ have agreed to voluntarily submit to United States jurisdiction.⁶⁹ This argument can be countered by acknowledging that in order to obtain American technology, a foreign company must submit itself to American export laws and that this "voluntary" submission should have no effect on international law principles.

In conclusion, the United States may blacklist foreign corporations by preventing them from buying American technology and equipment. However, under international law, the United States lacks enforcement jurisdiction to impose export restrictions upon these companies.⁷⁰

VII. NATIONALITY PRINCIPLE-FOREIGN SUBSIDIARIES

Application of the nationality principle raises the issue of whether the United States can impose export controls upon the export of foreign-origin goods by foreign subsidiaries of American companies under international law. The E.E.A. authorizes the President to "prohibit . . . the exportation . . . of any articles subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."⁷¹ Foreign subsidiaries are encompassed in the statutory definition of a United States person.⁷² But under the E.A.A. the definition of a United States person does not include those of foreign subsidiaries. Thus, it can be argued that the President did not have authority to exert this control over foreign subsidiaries.⁷³

Another doctrine that should be examined is the doctrine of sovereign compulsion developed under antitrust law.⁷⁴ This is a defense

68. *Soviet-European Gas Pipeline, 1982: Hearings Before the Senate Subcomm. on Int'l Economic Policy of the Comm. on Foreign Relations, 97th Cong., 2d Sess. (1982)* (statement of Stanley J. Marcuss, Esq., Partner, Mithbank, Tweed, Hadley & McCloy). There are two types of licenses which now can be obtained under current United States export control laws. The first type is a general license. This is one in which no application is required and no document is issued. Under this type of license, there is no restriction upon re-export. A validated license, which is the type Dresser Industries obtained, is a document which authorizes a specific export in accordance with the terms of the license. *Id.* at 30.

69. The United States' right to sanction them rests upon the companies' contractual commitment or implied consent not to violate these regulations. Butler, *The Extraterritorial Reach of the United States Export Administration Act*, 1983 J. Bus. L. 275, 278 (May).

70. RESTATEMENT (SECOND), *supra* note 41, § 402 (Tent. Draft No. 2, 1981).

71. 50 U.S.C. app §§ 2404(a)(1) & 2406(e)(1) (1982).

72. *Id.* app. § 2415(2).

73. *Id.*

74. Butler, *supra* note 69, at 277. This doctrine has been used as a basis for rejection of an antitrust suit in only one case. *International Ref. Corp. v. Texaco Marracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

to sanctions based upon governmental compulsion under the foreign countries' laws. This would apply in the *Dresser Industries* case since the French government had threatened to apply sanctions and to penalize Dresser France if it complied with the United States embargo.⁷⁵

A method that some courts use is a judicial balancing test.⁷⁶ Courts look at factors including the degree of conflict with foreign law, the nationality of the parties involved, the likelihood of compliance with federal law, and the comparative effects of applying competing laws.⁷⁷ Using a balancing test in the context of the E.A.A., a judicial determination not to exercise jurisdiction does not end litigation. It merely means that the administrative act which is challenged is not overturned.⁷⁸ If the court decides to exercise jurisdiction, then the Restatement (Second) of Foreign Relation Law, section 40, provides an additional balancing test under which a court exercises "good faith consideration" in determining whether international law obligations require the United States to moderate its enforcement jurisdiction.

The Restatement (Second) further provides under section 402 that a state may have jurisdiction to prescribe and apply its law, subject to section 403, to conduct which takes place within its territory, to persons within its territory, to conduct outside its territory which is intended to have an effect within its territory, to conduct or relations of its nationals outside its territory, or to conduct outside its territory by persons not nationals whose conduct is directed against the security of the state or state interests. The exception to section 402 under section 403 is that even though basis for jurisdiction exists under section 402, a state may not apply its law to persons or things which have a connection with the state if the exercise of such jurisdiction is unreasonable.⁷⁹

75. Vance, *supra* note 50, at 210.

76. Butler, *supra* note 69, at 277.

77. *Timberlane*, 549 F.2d at 614. See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

78. Butler, *supra* note 72, at 278.

79. RESTATEMENT (SECOND), *supra* note 41, §§ 402 & 403 (Revised Draft Mar. 27, 1981). Whether the exercise of jurisdiction is unreasonable is judged by examining the following factors:

[T]he extent to which the activity takes place within the regulating state or has direct, foreseeable, and substantial effects upon or in the regulating state, the link between the regulating state and the principals primarily responsible for the activity to be regulated or between that state and those whom the law or regulation is designed to protect, the character and importance of the activity to be regulated, the existence of justified expectations that might be protected or hurt by the regulation to the international political, legal, or economic system, the extent to which the regulation is consistent with the tradi-

Thus, the international law doctrine of nationality would not provide a basis for jurisdiction here.⁸⁰ It cannot be assumed that merely because a foreign company is owned by a United States company or by American shareholders, that the subsidiary is a United States national.⁸¹ Dresser France is an American subsidiary but it is incorporated and has its registered office in France.⁸² All of its business is done outside of the United States. The only contact it has with the United States is the technology it bought from Dresser Industries and the subsidiary status. Thus, the nationality doctrine should not justify asserting control over foreign subsidiaries of United States corporations.⁸³

VIII. RETROACTIVE APPLICATION

Under the Soviet pipeline control sanctions, the United States imposed retroactive restrictions on both foreign companies and unaffiliated foreign companies which had exported goods and technology from the United States at a time when it was permissible to re-export such goods or technology to the Soviet Union without further American consent.⁸⁴ Thus, no legal constraints existed at the time these companies entered into their contracts for the pipeline.⁸⁵ The host government of these companies approved the sale of equipment and technology and were angered by the United States sanctions.⁸⁶ Additionally, the laws in these countries favored the harmony of contractual commitments and disciplined the failure to honor those commitments with penalties.⁸⁷

The federal government lacked authority to impose these restrictions because none of the principles of international law supported

tions of the international system, the extent to which another state may have an interest in regulating the activity and the likelihood of conflict with regulation by other states. And finally, an exercise of jurisdiction may still be unreasonable if it requires a person to take action that would violate a regulation of another state that is not unreasonable under that state's criteria.

Id. § 403.

80. *Id.* § 402 comment.

81. *Id.* § 402(3) comment (d).

82. Most international courts looking at the issue of a corporation's nationality use two criteria: the place of incorporation and the place of the concerned company's registered office. *European Committee Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 INT'L LEGAL MATERIALS 1, 4 (July 1982).

83. Vance, *supra* note 50, at 208.

84. 47 Fed. Reg. 27,250 (1982).

85. Butler, *supra* note 69, at 279.

86. *Embargo: Who Has Reagan's Ear?*, Bus. Wk., Aug. 16, 1982, at 80.

87. Butler, *supra* note 69, at 280.

its action. The nationality principle only justifies the assertion of jurisdiction over a branch or a subsidiary of an American corporation.⁸⁸ The government justified its assertion of jurisdiction on the grounds that the foreign companies originally bought the goods or technology from the United States and, based upon a continuing relationship between the non-American company and the American company, these foreign companies have subjected themselves to United States jurisdiction.⁸⁹ This assertion of jurisdiction is tenuous. No statutory or regulatory precedent establishes United States jurisdiction over previously exported goods or technology. Also, no statutory or regulatory precedent establishes that a non-American corporation becomes subject to the jurisdiction of the United States based upon a license agreement with an American company.⁹⁰ If these companies had agreed to comply with the E.A.A., then results might have been different. Dresser France used United States technical data transferred to it in 1976 under a valid export license.⁹¹ It had built three of the compressors and had prepared them for shipment before the enactment of the sanctions.⁹² After the sanctions were imposed, Dresser France stopped production and shipment but the French government ordered it to comply with its contracts.⁹³ Dresser was left with no other choice but to comply with the government's laws in the place of its incorporation, in the place where the equipment was manufactured and in the place in which the contract was made; namely, France.

Under territoriality principles, the United States lacked jurisdiction. Since goods and technology have no nationality, jurisdiction cannot be asserted on the basis that the goods originated in United States territory.⁹⁴ When a foreign company buys technology or goods from the United States and has no other connection with the United States, the United States is overextending its territorial bounds when it exercises jurisdiction.

IX. CONSTITUTIONALITY-DUE PROCESS CLAUSE

The constitutionality of the federal government's extension of jurisdiction in the pipeline situation rests on two arguments. The first

88. Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues and Policy Lessons of Three Recent Cases*, 15 GEO. L.J. 1, 113 (1983).

89. Butler, *supra* note 69, at 280.

90. *Id.*

91. Vance, *supra* note 50, at 208.

92. *Dresser Indus.*, No. 82-2385 (D.D.C. filed Oct. 20, 1982).

93. *Id.*

94. Moyer & Mabry, *supra* note 88.

argument is that the E.E.A. authorizes the regulation of technology that is "subject to the jurisdiction of the U.S."⁹⁵ However, the Re-statement (Second) and international law principles do not hold that American jurisdiction over United States-origin goods and technology continues indefinitely.⁹⁶

The second argument is that by originally consenting to comply with federal restrictions as to export licenses, the foreign company must comply with all American regulations. Therefore, since the United States has the authority to control the original exports from this country, it also has a right to control the re-export of those goods or technology outside of the United States.⁹⁷ Under *Weaver v. Graham*, the Supreme Court held that "even if a statute merely alters penal provisions accorded by the grade of the legislature, it violates the [ex post facto] clause if it is both retrospective and more onerous than the law in effect on the date of the offense."⁹⁸ The rationale for this policy is that it allows people to rely upon existing law.⁹⁹

Dresser France charged in its complaint that the retroactive effect of the law deprived it of property without due process of law.¹⁰⁰ If the sanctions against Dresser France had been enforced, including suspension of its export license, the United States would have "divested rights which came into concrete existence before . . . the date of [the regulation's] effect," and this would have violated the due process doctrine.¹⁰¹ In order to avoid the United States sanctions, Dresser France would have had to breach its contract and face possible sanctions by both the French and Soviet governments. Dresser France could not have avoided a loss of property rights, and the combination of economic and equitable factors pointed to a finding of a due process violation.¹⁰²

Another due process issue favoring Dresser France's position was that the government could not impose criminal or civil penalties

95. 50 U.S.C. app §§ 2404(a) & 2405(a) (Supp. II 1981).

96. Moyer & Mabry, *supra* note 88.

97. 15 C.F.R. §§ 374.1-374.9, 376.12 & 379.8 (1982).

98. 450 U.S. 17, 24 (1981).

Laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive and . . . the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

Id. See also *Bezell v. Ohio*, 269 U.S. 218 (1925).

99. 450 U.S. at 28-29.

100. *Vance*, *supra* note 50, at 214.

101. *South East Chicago Comm'n*, 448 F.2d 1122 (1978).

102. *Id.* at 1123 n.3 (citing *Thorpe v. Housing Auth.*, 393 U.S. 268, 280 n.35 (1969)).

through administrative procedures.¹⁰³ Court action is required to impose such penalties.¹⁰⁴ The Department of Commerce, which threatened "administrative and other sanctions," may only impose a denial of export privileges and a fine of up to \$10,000, without court action.¹⁰⁵ Dresser France received a letter from the Commerce Department before trial which threatened to impose administrative sanctions and other such sanctions.¹⁰⁶

X. THE EUROPEAN PERSPECTIVE

Aside from the jurisdictional and constitutional problems, tension increased between the Europeans and the United States because of the sanctions.¹⁰⁷ The Europeans contend that the pipeline would provide necessary energy for European countries in need of oil and gas.¹⁰⁸ Few countries other than the U.S.S.R. could supply the necessary quantity of gas.¹⁰⁹ Additionally, the West would be saving western energy resources and while depleting Soviet supplies.¹¹⁰ The Europeans also contend that since they will inevitably become dependent for energy supplies, they should perhaps reduce this dependency by splitting their purchases between the Middle East and the Soviet Union.¹¹¹ Even when gas is flowing in the pipeline in 1990, the estimates are that less than four percent of the European community's total energy consumption will come from the Yamal pipeline.

The Europeans also state that the sanctions will hurt them more than the Soviets.¹¹² First, many European companies are either subsidiaries of a United States company or are using United States tech-

103. *Firestone Tire*, 518 F. Supp. 1021, 1033 (N.D. Ohio 1981).

104. 50 U.S.C. app § 2410(c)(1)(1982); 15 C.F.R. § 387.1(b)(3) (1982).

105. 15 C.F.R. § 387.1(b)(3) (1982).

106. Vance, *supra* note 50, at 214.

107. *That Pipeline: Punctured*, THE ECONOMIST, June 2, 1982, at 52. Four of our major European partners, Britain, France, West Germany and Italy, openly defied Reagan's ban on the pipeline. *Id.* See also Fromm, *Behind Shift to Harder Line in Foreign Policy*, U.S. NEWS & WORLD REP., Aug. 16, 1982, at 21.

108. *Soviet Pipeline Sanctions: The European Perspective, 1982: Hearings Before the Joint Economic Comm.*, 97th Cong., 2d Sess. (1982) (statement of Thierg De Montbal) [hereinafter cited as *Joint Hearings*].

109. *Id.* at 26. The traditional sources of the West are unavailable: Holland's supplies are dwindling, Norway will not export the necessary level and Nigeria has not progressed far enough to become a major exporter. *Id.* The Soviet Union, on the other hand, has become a major source of oil and petroleum products. It is the world's largest producer, averaging 12.5 million barrels per day. It also has the world's largest reserve of natural gas. Wall St. J., June 9, 1983, at 37, col. 2.

110. *Joint Hearings*, *supra* note 108.

111. *Id.* at 46 (statement of Edmund S. Muskie, former Sec'y of State).

112. Fromm, *supra* note 107, at 21.

nology, and these companies have been injured by the ban. Dresser Industries had to turn down \$100 million in orders unrelated to the pipeline.¹¹³ Caterpillar, an American corporation which supplies pipelayers, lost approximately \$90 million because of the sanctions and additional contracts which had to be abandoned.¹¹⁴ The Commerce Department reported that over 224 export licenses, valued at \$130 million, have been suspended as a result of the sanctions. These losses have been spread across a variety of industries which were to supply parts for the pipeline.¹¹⁵ The Europeans argue that these losses will be futile because the United States sanctions will merely encourage the Soviet Union to enlarge its own manufacturing capacity and to accelerate its own turbine and compressor developments, thus becoming less dependent on western sources.¹¹⁶ Europeans, Japanese and other foreign sources will also fill in the gaps, undermining the United States regulations, and this will only serve to injure American producers.¹¹⁷ Europeans will view the United States as an unreliable trading partner and possibly reduce American purchases.¹¹⁸ Foreign companies will be more reluctant to enter into licensing or joint-venture projects with American companies because of the risk of future sanctions by the federal government.¹¹⁹

The Europeans claim that foreign governments will be inclined to guard against the possibility of another United States freeze by enacting new legislation giving them increased supervisory powers over American-owned banks.¹²⁰ Foreign governments may also be inclined in the future to hold American parent companies responsible for the acts of their subsidiaries by applying United States law in reverse.¹²¹ There may also be a drop in foreign investments and countermeasures against state-owned French subsidiaries in the United States.¹²²

As a result of the European losses, the sanctions will have been futile. The sanctions will not delay the completion of the pipeline.¹²³

113. *Joint Hearings, supra* note 108, at 3 (statement of Senator Jepsen, Vice Chairman).

114. *Id.* at 6. Caterpillar's international price competitiveness also diminished as a result of being forced to sacrifice a share of the Soviet market. *Id.*

115. *1982 Hearings, supra* note 6, at 14 (statement of Hon. James L. Buckley, Under Sec'y of Security Assistance, Science & Technology, Dep't of State). Many of the companies which are subcontractors or suppliers of components have made investments in the project. They stand to lose thousands and some will suffer a complete loss of business forcing them into bankruptcy. Maechling, *supra* note 14, at 6.

116. Maechling, *supra* note 14, at 7.

117. *Joint Hearings, supra* note 108.

118. *Wall St. J.*, Aug. 27, 1982, at 21, col. 3.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Joint Hearings, supra* note 108, at 2 (statement of Rep. Reuss, Chairman).

The sanctions will only serve to seriously undermine goodwill among the allies.¹²⁴ Attempts to use sanctions to force changes in Soviet policy usually have not worked and are potentially dangerous.¹²⁵ The Europeans claim that the United States is staging economic warfare against the U.S.S.R. to slow down its already weakened economy and to deny the Soviet Union foreign exchange.¹²⁶ Finally, the Europeans contend that the Soviets will be given the opportunity to pay back debts owed to the West.¹²⁷ The Soviet Union will thus become dependent upon the Europeans because in order for the Soviets to buy grain and industrial goods from the United States and to pay back debts to the West, they will need the capital generated from the export of oil. In addition, when the Soviet economic situation is favorable, the quality of life and the measure of freedom improves in Eastern Bloc countries.¹²⁸ Thus, if the United States really wants the Soviet sanctions upon the Polish people eased, it should prevent bans like the pipeline embargo.¹²⁹

XI. THE UNITED STATES PERSPECTIVE

The United States government's logic in applying sanctions is to moderate Soviet behavior. The United States wants the end of martial law in Poland, the release of all political prisoners, and the reestablishment of dialogue among the government, Solidarity and the Church.¹³⁰ Regardless of events in Poland, the pipeline sanctions are also useful to economically contain the Soviet Union.¹³¹

The main concern of the United States is the risk of western Europeans becoming dependent on the Soviet Union. The Europeans are financing their own dependency by lending the Soviet Union money to build the pipeline and waiting to be repaid with gas from the completed pipeline. If the Middle East decided to stop supplying oil to the Europeans, the Soviet Union could endear itself to the Arabs by adopting a sympathy energy boycott.¹³² It would give the Soviet Union leverage against our allies.¹³³ Europe would become vul-

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 11 (statement of Andre Fontaire, Editor, *LE MONDE*).

128. *Id.*

129. *Id.* at 2 (statement of Rep. Reuss, Chairman).

130. 1982 *Hearings*, *supra* note 6, at 16 (statement of Hon. James L. Buckley).

131. *Sanctions*, *supra* note 20, at 30.

132. *Joint Hearings*, *supra* note 108, at 9 (statement of Sen. Paula Hawkins).

133. 1982 *Hearings*, *supra* note 6, at 164 (article by Stein, *Economics and National Security*, *THE ECONOMIST*, Apr. 1982, at 163).

nerable for a number of reasons. First, gas is an extremely difficult fuel to replace in a short time. Second, certain regions of western Europe will become dependent upon the Soviet supply of gas, and as a result, might apply strong pressure on their governments to avoid actions which might threaten the flow of gas.¹³⁴ Even though Europe itself will be dependent upon the Soviet Union for fifty percent of its total energy consumption, regions like Bavaria will depend upon Soviet gas for approximately thirty percent of their total needs.¹³⁵ Third, residential and commercial customers will become especially dependent upon the pipeline since thirty percent of the gas from the pipeline is expected to be used by these sectors.¹³⁶ The two potential dangers resulting from this vulnerability are: first, that the U.S.S.R. will pressure western countries by exercising gas leverage; and, second, that it will try to manipulate the western commercial and financial systems through its hard currency earnings from the pipeline.¹³⁷ The Soviet Union has a long history of exerting political pressure by cutting off exports to countries.¹³⁸ The U.S.S.R. and its satellites used western technology during the 1970's to achieve major goals which presently threaten the free world.¹³⁹ These include the acceleration by the Soviet Bloc of accumulations of technology to modernize its defense.¹⁴⁰ The Soviet Union has imported technology in the areas of computer semiconductors, chemicals and heavy vehicle manufacturing; increased its political influence in strategic areas of the third world through commercial and diplomatic tracks;¹⁴¹ and finally, used western technology to build up its forces to invade unstable countries, and to support terrorism and revolution in the third world.¹⁴² On the other hand, the Soviet Union has been careful to minimize its vulnerability level by producing its own agricultural products and industrial technologies as quickly as possible.¹⁴³ Thus, the United States is worried; not that the Soviets will cut off the supplies, but that they will increase the supplies, making Europe even more dependent upon them.¹⁴⁴

Detente is another area of conflict between the United States and

134. *Id.* at 165.

135. *Id.*

136. *Id.*

137. 1982 Hearings, *supra* note 6.

138. *Id.* (statement of Hon. James L. Buckley).

139. *Id.* These credits were obtained partly through official credit and partly through western credits.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

Europe. The Europeans argue that detente is a worthy goal. But many Americans think that detente has only improved the standard of living in the Soviet Union and has not lessened Soviet aggression.¹⁴⁵ Historic examples of this result clearly exist. During periods of detente, the Soviet Union invaded Czechoslovakia, increased Soviet defense spending, invaded Afghanistan, and repressed freedom and liberty in Poland.¹⁴⁶ The Soviets have also developed their nuclear arsenal during periods of detente and have tried to keep the United States from developing its arsenal.¹⁴⁷ Western Europe's preoccupation with detente indicates to Americans that Europeans are only interested in economic self-preservation resulting in a dangerous down-grading of security.¹⁴⁸ The prevailing attitude of the western Europeans is that they will have nothing to do with American risks outside Europe.¹⁴⁹

The United States believes that the Soviet Union's goal is to split the alliance by concentrating on the differences between Europe and the United States.¹⁵⁰ The U.S.S.R. is succeeding through the pipeline deal. Through the Soviet strategy of "peace offensives," it has initiated one of the most intensive and comprehensive moves toward world domination.¹⁵¹ The prospect of Finlandization grows nearer.¹⁵² Leaders in the Soviet Union know that to remain a world power, it must develop its resources in Siberia.¹⁵³ Thus, by making the deal look attractive to the Europeans, the Soviet Union will use this leverage from the oil to exert political pressure.¹⁵⁴ By persuading Europe to buy oil from them, the Soviets are keeping Europe from develop-

145. *Joint Hearings*, *supra* note 108, at 8 (statement of Sen. Paula Hawkins).

146. *Id.* at 9. It has also extended its rule over Indochina, Ethiopia, Cuba, Afghanistan and a list of other countries. *Id.* at 12 (statement of Andra Fontaine). It also has attempted to destabilize Angola, Mozambique, Ethiopia and other African nations through Soviet proxies. *Id.*

147. *Id.* at 12.

148. *Joint Hearings*, *supra* note 108, at 16 (statement of Andrew Knight, Editor, THE ECONOMIST).

149. *United States-Western Europe Relations in 1980: Hearings Before the Subcomm. on Europe & the Middle East of the Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 33 (1980) (statement of Simon H. Serfaty, Director, Washington Center of Foreign Policy Research, John Hopkins University) [hereinafter cited as *House Hearings*].

150. Rachwald, *The Soviet Approach to West Europe*, CURRENT HISTORY, Oct. 1983, at 309.

151. *Id.*

152. *House Hearings*, *supra* note 149, at 33 (statement of Simon H. Serfaty). Finlandization means that the Soviet Union uses the strategy of the phase of a peace loving nation in order to maneuver the allies into thinking it wants peace and trusting and becoming dependent upon the Soviets. *Id.*

153. *1981 Hearings*, *supra* note 4, at 122 (statement of Lawrence Brader, Ass't Sec'y, Dep't of Commerce).

154. *Id.*

ing alternative sources of energy in Europe, the United States and Africa.

Besides the reasons already stated, the pipeline would also provide the Soviet Union with foreign exchange earnings, which it desperately needs; it would maintain and enhance its control over Eastern Europe; it would aid the Soviets with their economic problems; and it would expose western European banks to possible financial ruin.¹⁵⁵ Currently, the United States believes that with the help of our allies, the West has a chance to squeeze the Soviets.¹⁵⁶ But a unity of purpose and an alliance of goals is necessary.¹⁵⁷

XII. DO SANCTIONS WORK?

The question of whether sanctions are successful in punishing a target country is a controversial one. Some critics believe that sanctions can never be successful while others believe they can. Three types of benefits or achievements result from sanctions. The first possible result is the end of the target country's offending policy.¹⁵⁸ This is extremely difficult to accomplish and is a remote possibility. The second possible result is that sanctions for the offending policy will impose a high cost upon the target countries' continuation of that policy.¹⁵⁹ The third possible result is the potential indirect impact upon the target country.¹⁶⁰ For example, the sanctions may indicate to the world public disapproval for specific conduct and may further deter such activities. But in order for the sanctions to be effective, there must be cooperation from alternative supply countries, a careful statement of objectives, a focusing upon the specific known dependency of the target country and selective, infrequent impositions.¹⁶¹ A critical element underlying the above criteria is the vulnerability of the target country. Export controls work best against smaller, weak economies because they can be isolated from outside support of another country.¹⁶² This factor also aids executive flexibility in exerting pressure in foreign affairs activities. Economic sanctions accomplish this by offering obvious advantages over the use of

155. *Id.* at 1 (statement of Chairman Garn).

156. Wall St. J., Sept. 17, 1982, at 1, col. 1.

157. *Id.*

158. Doxey, *Economic Sanctions: Benefits and Costs*, 36 THE WORLD TODAY 484, 485 (1980).

159. *Id.* at 485.

160. *Id.* at 486.

161. Moyer & Mabry, *supra* note 88, at 169.

162. 1982 Hearings, *supra* note 6, at 227 (article by Charles Mc C. Mathias, Jr., in Appendix).

military or diplomatic force. Finally, economic sanctions are the most appropriate and least costly vehicle for expressing official outrage and opposition.¹⁶³

On the other hand, sanctions are extremely difficult to enforce.¹⁶⁴ Some critics argue that they treat symptoms and not causes.¹⁶⁵ With a major world power, such as the Soviet Union, economic sanctions alone are seldom sufficient to induce major political changes.¹⁶⁶ The economic effect of export controls on a target country usually is a limited because of the minimal cooperation of other countries willing to supply the same product being withheld.¹⁶⁷ The economic sanctions must totally deprive the target country of some product, technology or commodity crucial to an economically significant project.¹⁶⁸ Sanctions can only do this if either the country imposing the controls has a monopoly on the embargoed items or alternative suppliers join in the sanctions.¹⁶⁹

Another reason why sanctions have a limited impact is because large countries like the Soviet Union are well insulated from economic sanctions.¹⁷⁰ Major countries can insulate themselves from adverse effects of a sanction by having a stable and diversified economy, a centrally-planned economy, a low volume of import trade and thus a low dependency level upon other sources, or by producing most of what is imported or that which is embargoed.¹⁷¹

A target country can also reduce the sanction's damaging effects by obtaining the sanctioned product from other sources. Many countries which have the embargoed technology are willing to replace the product in return for high economic benefits.

In examining whether a sanction is successful, the costs of imposing a sanction is an important consideration. The costs are usually large, long-term and substantially hidden, yet they are inescapable.¹⁷² The economic costs include: budgetary costs, the cost of lost transactions, the cost of damaged business relations, and the cost of lost market shares.¹⁷³ The noneconomic costs are international frictions, national political tensions and the deflated value resulting from re-

163. Miller, *When Sanctions Worked*, 1980 FOREIGN POLICY 118, 126 (Summer).

164. Stevenson, *Toward a More Rational East-West Trade Policy*, 1983 J. LEGIS. 11, 25 (Winter).

165. *1982 Hearings*, *supra* note 6, at 227.

166. Miller, *supra* note 163.

167. Moyer & Mabry, *supra* note 88, at 144.

168. *Id.*

169. *Id.*

170. *Id.* at 146.

171. *Id.*

172. *Id.* at 149.

173. *Id.* at 150.

peatedly using sanctions.¹⁷⁴ Loss is sustained from both economic and noneconomic costs by those countries imposing the sanctions, by third-party countries and by the target country.¹⁷⁵ These losses include an elimination or reduction in trade resulting in the loss of millions of dollars, a limitation in or blockage of tourism and communication, and assistance in the transfer of technology.¹⁷⁶ There can also be an adverse effect upon the entire international economic flow, especially if the target country is a vital link, through the blocking of channels of exchange, the loss of certainty, the loss of confidence, and the deemphasis on trade coupled with an increasing emphasis on self-sufficiency.¹⁷⁷

The United States sanctions relating to the building of the Yamal pipeline have had some effect but it has been limited.¹⁷⁸ They have caused damage to the Soviet Union but have also caused significant damage to both the United States and Europe.¹⁷⁹ In effect, the question is not whether sanctions work, but whether the possible effects are worth the costs to the parties involved.

XIII. SOLUTIONS

In order to prevent problems such as the ones resulting from the pipeline sanctions, the United States must look to future solutions. One such solution is that the United States must insure its own energy independence.¹⁸⁰ Energy in a modern industrialized society is of the essence.¹⁸¹ Many predict the next major war will be fought over control of the world's energy resources.¹⁸² Unless the United States desires to become crippled as a world power, energy is the key.¹⁸³ To accomplish this independence, Americans must change their energy-use pattern; total consumption must decline and greater conservation must increase. Alternative technologies such as coal and nuclear fuel must be aggressively pursued, and other techniques such as solar and wind should be seriously explored and rapidly commercialized.¹⁸⁴ Currently, the United States is doing very little to explore these areas

174. *Id.*

175. *Doxey, supra* note 158, at 486.

176. *Id.*

177. *Id.* at 488.

178. *Joint Hearings, supra* note 108, at 2 (statement of Rep. Reuss, Chairman).

179. *Id.*

180. *Rooney, supra* note 1, at 23.

181. *Id.*

182. *Id.* at 22.

183. *Id.* at 23.

184. *Id.*

of energy.¹⁸⁵ On the other hand, the Soviet Union is the only major super power besides Canada almost exclusively energy independent of the Middle East.¹⁸⁶ The U.S.S.R. also actively explores the multitude of alternative fuel resources for the future.¹⁸⁷

The United States must also encourage its allies to develop their alternative sources of oil and gas. They need to expand their stock reserves, expand North Sea gas developments, integrate their pipeline system to allow maximum flexibility in reallocating gas supplies, and create gas reserves.¹⁸⁸ Another alternative for European oil and gas needs is to develop the resources in Norway and Nigeria.¹⁸⁹ The United States also has the ability to supply energy resources to Europe.¹⁹⁰ It has already decontrolled domestic oil prices and has taken the necessary steps toward the leasing of federal lands.¹⁹¹ To substitute the need for Siberian natural gas, Europe could rely on western coal deposits, synthetic fuel and natural gas supplies within a relatively short period of time.¹⁹²

If the Europeans continue to insist upon the building of the Soviet pipeline, the United States should encourage them to finance the pipeline in a way in which they can retain control of the necessary assets for as long as possible.¹⁹³ This would enable them to not only protect their security but also to prevent unexpected price increases, and would limit other price charges the U.S.S.R. could use to pressure Europe into additional loans and commitments.

XIV. EUROPEAN CORPORATIONS

European corporations adversely affected by a United States embargo also could be compensated by the United States. Price supports or loan rates could be increased.¹⁹⁴ Insurance could also be provided for exports of sensitive items to sensitive locations.¹⁹⁵ Another alternative is an assumption of risk theory; the American government

185. *Id.* at 24. Nuclear power represents only 3.6% of total United States energy consumption and 13% of all electric consumption. *Id.*

186. *Id.*

187. *D/A: Soviets will Meet Energy Targets*, 1981 OIL & GAS J. 94 (Sept. 21).

188. Rooney, *supra* note 1, at 25.

189. 1981 Hearings, *supra* note 4 (statement by Anthony H. Cordesman).

190. *Id.* (testimony of Rubert D. Hormats, Ass't Sec'y of State for Economic & Business Affairs). Norway seems to have the resource potential to supply Europe with more gas than it needs. Nigeria is preparing to export large quantities of liquified natural gas by the late 1980's.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* (statement by Anthony H. Cordesman).

195. *Id.*

would assume liability for its own acts of state for losses incurred by corporations.¹⁹⁶ Either the federal courts or the Foreign Claims Settlement Commission could review the claims.¹⁹⁷

The United States should also encourage NATO and the European Economic Community to intervene in trade transactions with international implications. These agencies should be responsible for tracking the progress of matters such as the Soviet pipeline and for reporting any danger before it occurs.¹⁹⁸ The United States should constantly ensure that the pipeline issue remains before the world and that Europe takes the necessary safeguards to avoid further dependence upon the Soviet Union.¹⁹⁹

Another important consideration is United States negotiation with its allies before imposing sanctions having such an adverse effect upon them. The West should begin discussions on the future strategy of East-West trade relations, to achieve optimum success in the future.²⁰⁰ The United States must pay more attention to building an international consensus and take fewer unilateral actions which generate disharmony.²⁰¹ Consistency is needed in western policy towards the Soviet Union.²⁰²

Finally, and most importantly, Congress should limit the application of the E.A.A. Foreign policy controls should be eliminated or limited so as not to violate international law.²⁰³ The government should be required and not merely encouraged to consult with American industry before imposing economic sanctions.²⁰⁴ A limit upon residential authority in implementing the sanctions is recommended. Sanctions should only be encouraged in times of absolute necessity and not at the mere caprice of the resident.

XV. CONCLUSION

Undoubtedly, the United States will continue to use embargoes as retaliatory weapons or as devices for influencing decision-making abroad. However, the United States should be careful not to overextend its exercise of authority to ensure the efficacy of this embargo.

196. 1982 Hearings, *supra* note 6, at 227 (statement by Charles McC. Mathias, Jr., in Appendix).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 16 (statement of Hon. James L. Buckley).

201. *Id.*

202. *Joint Hearings, supra* note 108 (statement by Thierry De Montbral).

203. 1982 Hearings, *supra* note 6 (statement by Charles McC. Mathias, Jr., in Appendix).

204. *How to Deal with Russia*, U.S. NEWS & WORLD REP., Sept. 6, 1982, at 33, 34.

Such exercise of authority in direct derogation of customary international legal norms could have serious repercussions for the United States in its dealings with other nations. A greater understanding of the limitations inherent within the E.A.A. and the parameters of extraterritorial application of authority should preempt any future attempts by the United States to repeat its behavior with regard to the Soviet pipeline embargo.