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Dresser Industries: the Failure of Foreign Policy Trade Controls Under the Export Administration Act

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NOTES AND COMMENTS

DRESSER INDUSTRIES: THE FAILURE OF FOREIGN POLICY TRADE CONTROLS UNDER THE EXPORT ADMINISTRATION ACT[1]

I. INTRODUCTION

On December 30, 1981, in response to the perceived role of the Soviet Union in the repression of the Polish trade union Solidarity,[2] the Reagan Administration strengthened already existing controls on trade with the USSR.[3] The stated goal of these sanctions was to prevent the USSR from acquiring equipment and technology that the Soviets required to complete a natural gas pipeline connecting Western Europe with the gas fields of Siberia.[4] The trade controls were promulgated under the Export Administration Act of 1979 (E.A.A.), and were intended to prevent U.S. firms, and foreign firms using U.S. goods and technology, from delivering pipeline equipment to the Soviets.[5]

Dresser (France), a French subsidiary of Dresser Industries of Dallas, Texas,[6] defied the extraterritorial reach of the U.S. trade controls. Dresser

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1. 50 U.S.C. app. §§2401-2420 (1982). The Export Administration Act expired on March 30, 1984. It was extended by Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984).

2. On December 12, 1981, in response to union activities, Polish authorities imposed martial law in order "to prevent national castastrophe." Smith, *Crackdown on Solidarity,* TIME, Dec. 21, 1981, at 36.

3. President Reagan imposed sanctions on the Soviet Union as a "response to the Soviet Union's heavy and direct responsibility for the repression in Poland." 47 Fed. Reg. 141 (Jan. 5, 1982).

This regulation placed oil and gas transmission equipment under export controls. Oil and gas exploration equipment had been under export controls since August 1, 1978. *See* 43 Fed. Reg. 33,699 (Aug. 1, 1978).

4. 47 Fed. Reg. 141 (Jan. 5, 1982).

5. The December 1981 sanctions forbade exportation of oil and gas goods and technology by U.S. firms to the Soviet Union, as well as to third parties without written assurance that the goods and technology would not be transferred to the USSR. *See* 47 Fed. Reg. 141 (Jan. 5, 1982).

On June 18, 1982, President Reagan extended these sanctions "to include equipment produced by the subsidiaries of U.S. companies abroad as well as equipment produced under licenses issued by U.S. companies." Statement on Extension of U.S. Sanctions, 18 WEEKLY COMP. PRES. DOC. 820 (June 18, 1982).

The expanded export controls were published in 47 Fed. Reg. 27,251 (June 24, 1982) (Codified at 15 C.F.R. §§376, 379, 385). *See* Merciai, *The Euro-Siberian Gas Pipeline Dispute—A Compelling Case For the Adoption of Jurisdictional Codes of Conduct,* 8 MD. J. INT'L L. & TRADE 1, 12 (1984).

6. "Dresser (France) is a French corporation with its main office and manufacturing

(France) was to supply pipeline contractors with 21 natural gas compressors,[7] the manufacture of which involved technology licensed to Dresser (France) by its U.S. parent.[8] Dresser (France) violated the trade controls by shipping three compressors to the USSR on August 26, 1982.[9]

This Note will examine the issues raised in the ensuing legal battle between Dresser Industries and Dresser (France) on the one hand, and the United States Department of Commerce on the other. The vehicle for the trade controls, the Export Administration Act of 1979, will be examined, as will be principles of international law justifying extraterritorial trade controls. Finally, the overwhelming failure of the E.A.A. controls will be examined in light of relevant political factors.

Discussion of the E.A.A. will be limited to its role in furthering U.S. foreign policy interests. Particular attention will be given to the issues surrounding the extent to which the United States government may exercise legal jurisdiction over foreign corporations manufacturing goods under a license[10] from a U.S. corporation and the extent to which U.S. denial of export licenses under the E.A.A. will succeed in effectuating U.S. foreign policy interests.

II. *Dresser Industries:* PROCEDURAL ASPECTS

On August 26, 1982, Dresser (France), in violation of the President's

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plant in France." Brief of Plaintiffs at 3, Dresser Industries, Inc. v. Malcolm Baldrige, No. 82-2385 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction) (D.D.C. Oct. 12, 1982). Its major products include compressors and pumps for the oil and gas industry. Dresser (France) "is almost entirely owned by Dresser A.G. (Valduz), a Liechtenstein corporation which in turn is wholly owned by Dresser [Industries], a Delaware corporation with headquarters in Dallas, Texas." *Id.*

The Soviet pipeline project, its participants and the nature of the conflict are discussed in Merciai, *supra* note 5, at 1-18.

7. Brief for the Movant at 4, In the Matter of Dresser (France), S.A., Case No. 632 (Motion to Vacate Temporary Denial of Export Privileges and Memorandum in Support), U.S. Department of Commerce I.T.A., (Aug. 27, 1982).

A prime contractor for the pipeline is the French firm Creusot-Loire S.A. Creusot-Loire and Machino-import, a Soviet purchasing agency, undertook to purchase the 21 compressors from Dresser (France). *Id.*

8. *Id.* Dresser (France) licensed the technology from Dresser Industries in 1976.

9. *See* Oberdorfer, *Equipment is Shipped to Soviets,* Wash. Post, Aug. 27, 1982, at A1, col. 6.

10. Readers should be aware that the term "license" will be used in this paper in two different senses. "License" may refer to a permit issued by the U.S. government to export U.S. goods or technology, or it may refer to an agreement between a U.S. corporation and a foreign firm, enabling the foreign firm to manufacture or make use of U.S. goods and technology abroad.

December 1981 and June 1982 trade controls, shipped three natural gas compressors to Riga, a city-port in Latvia, USSR.[11] Two hours after the Soviet ship *Borodine* set sail, the United States Department of Commerce responded by petitioning the Hearing Commission for the International Trade Administration for an order temporarily denying all export privileges to Dresser (France).[12] The order was granted that same day, and all of Dresser (France)'s outstanding U.S. export licenses were thereby revoked. This denied Dresser (France) the privilege of participating "in any transaction involving commodities or technical data exported from the U.S." under any validated, qualified, or general export license.[13] Twelve days later, the order was modified so that only licenses pertaining to "oil and gas exploration, production, transmission, or refinement" were affected.[14]

In September and October of 1982, orders temporarily denying the export privileges of several other European firms were issued.[15] These firms were also using U.S. goods and technology for the manufacture of merchan-

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11. Oberdorfer, *supra* note 9, at A1, col. 6.

12. The petition was made pursuant to 15 C.F.R. §368 (1981).

13. In the Matter of Dresser (France), S.A., Case No. 632, Order Temporarily Denying Export Privileges, U.S. Department of Commerce, I.T.A., (Aug. 26, 1983).

Another French firm, Creusot-Loire, S.A. was also denied export privileges for its part in the shipment of the three turbines. *See* In the Matter of Creusot-Loire, S.A., Case No. 633, Order Temporarily Denying Export Privileges, U.S. Department of Commerce, I.T.A., Aug. 26, 1982.

14. In the Matter of Dresser (France), S.A., Case No. 632, Order Modifying Temporary Denial of Export Privileges, U.S. Department of Commerce, I.T.A. (Sept. 7, 1983), at 3.

This decision was upheld by the Assistant Secretary of Commerce for Trade Administration on November 1, 1982. *See* Dresser Industries v. Malcolm Baldrige, No. 82-2385 (D.D.C. Nov. 4, 1982), for a complete history of the Commerce Department's administrative decisions.

15. Thomas W. Hoya, Hearing Commissioner for the International Trade Administration of the Department of Commerce, issued Orders Temporarily Denying Export Privileges against:

1. Nuovo Pignone S.p.A. Industrie Meccaniche E Fonderia (of Italy), Case No. 634, Sept. 4, 1982. This order was in response to the export of two gas turbines containing General Electric rotors.

2. John Brown Engineering, Ltd. (of Scotland), Case No. 635, Sept. 9, 1982. In response to the export of six gas turbines with General Electric rotors.

3. AEG-Kanis Turbinenfabrik GmbH (of Germany), Case No. 637, Oct. 5, 1982. In response to the export to the Soviet Union of two gas turbines built with rotors manufactured under General Electric license.

4. Mannesmann Anlagenbau Aktiengesellschaft (of Germany), Case No. 638, Oct. 5, 1982. In response to the export of the same two turbines that AEG-Kanis shipped to the USSR.

For additional details on the above orders, see the case numbers referred to above (U.S. Department of Commerce, I.T.A.), or the following issues of the *United States Department of Commerce, Commerce News:* G82-34 (Sept. 4, 1982) — Nuovo Pignone; G82-35 (Sept. 9, 1982) — John Brown; G82-41 (Sept. 5, 1982) — AEG-Kanis and Mannesmann Anlagenbau.

dise for the Soviet pipeline. During this same period Dresser Industries and Dresser (France) filed motions for a temporary restraining order and a preliminary injunction in an attempt to block the Commerce Department's denial of export privileges to the Dresser firms. These motions were both denied.[16]

The conflict came to an abrupt end on November 13, 1982, when the Commerce Department, under presidential instructions, "removed its regulations governing the export of [oil and gas] equipment and technology to the Soviet Union and Poland issued in December 1981 and June 1982," and implemented new licensing regulations.[17] The newly modified licensing regulations permit the export of oil and gas transmission equipment, including compressors and turbines, under general license. The intent of the policy is to permit the export of equipment for exploration and production, while controlling the export of manufacturing equipment and new technologies.[18]

III. Legal Aspects: Jurisdiction under the Export Administration Act

The distinction between legal and political arguments is somewhat artificial in foreign policy and trade matters. The pertinent laws are designed to accomodate both legal considerations such as due process and fundamental fairness, and political interests such as furthering the foreign policy of the United States.[19] It is nevertheless useful to examine the legal aspects of instituting trade controls separately from the political issues, because it is possible for the legal mechanism to function without achieving the desired political results.

Historically, foreign policy and foreign affairs have been managed by the Executive Branch.[20] The President's present statutory authority to im-

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16. Dresser Industries, Inc. v. Malcolm Baldrige, 549 F. Supp. 108 (D.D.C. 1982); and Dresser Industries, Inc. v. Malcolm Baldrige, No. 82-2385 (D.D.C. Nov. 4, 1982).

17. *U.S. Department of Commerce, Commerce News*, ITA 82-155, Nov. 16, 1982.

18. *Id. See* 15 C.F.R. §§ 379, 385, 390, 399 (Nov. 16, 1982), for the revisions.

19. 50 U.S.C. §2402(2)(B) is a good example of the political interests furthered by the E.A.A. The protection of due process rights is best seen in the hearing procedures established by the Department of Commerce for firms whose export licenses have been revoked or denied. *See supra* note 12 and accompanying text.

20. The President's authority to act in foreign affairs is said to come from the Article 11 clauses of the Constitution making the President Commander-in-Chief, vesting executive power in the President, giving the President the power to appoint ambassadors, public ministers and other consuls, and the Article 11 clause that compels him to faithfully execute the laws.

The President's exclusive power in the foreign policy field was established in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). This power is said to be at its

plement foreign trade sanctions is the Export Administration Act of 1979. The Act grants the President the authority to "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States . . . to the extent necessary to further significantly the foreign policy of the United States. . . ."[21]

Because the President's foreign policy powers are expansive, Congress designed the Export Administration Act to give the President guidelines within which to act in the foreign policy realm. Specifically, the Export Administration Act establishes as United States policy the control of exports in order to minimize uncertainty in export policy, encourage trade, protect the domestic economy, promote national security, fulfill international obligations, further economic growth, further foreign policy objectives, oppose restrictive trade practices, and oppose terrorism.[22]

In the *Dresser* controversy, the parties viewed the sanctions as "foreign policy" controls.[23] Among Dresser's arguments in its request for a preliminary injunction was the claim that foreign policy controls under the E.A.A. cannot be extended to Dresser (France) because the United States lacks jurisdiction.[24] Dresser contended that because the trade controls are for foreign policy and not for national security purposes, Dresser (France) as a foreign subsidiary is beyond the jurisdiction of the Department of Com-

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maximum when Congress and the President are acting in accord. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *But see* Dames & Moore v. Regan, 453 U.S. 654 (1981).

21. 50 U.S.C. App. §2405(a)(1).

President Carter delegated many of his responsibilities under the E.A.A. to the Secretary of Commerce and the Secretary of State. *See* Exec. Order No. 12214, 45 C.F.R. 29783 (1980), *reprinted in* 50 U.S.C. app. 32403 (1982).

22. 50 U.S.C. app. §2402.

23. Brief for the Defendants at 14-15, Dresser Industries v. Malcolm Baldrige, No. 82-2385, (D.D.C. Oct. 1982) (Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for a Preliminary Injunction) Brief of Plaintiffs, *supra* note 6, at 73.

In order to implement trade controls for foreign policy purposes, the President should consider criteria specified in §2405(b), (c), and (d) of the E.A.A. *See infra* text accompanying notes 78-109.

24. That regulation [the denial order] represented an unprecedented administrative effort to impose U.S. foreign policy controls on persons and transactions previously considered outside United States jurisdiction for such purposes. There is no explicit statutory authorization for this extension, and it runs counter to past practice under similar statutory language in predecessor statutes. Moreover, any ambiguities in the statutory language must be resolved in favor of a construction that is consistent with international law. Dresser (France) is a French company, and the conduct in question is centered in France. The United States has no authority under international law to regulate French economic affairs when that regulation would conflict with the laws and policies of the government of France.

Brief of Plaintiffs, *supra* note 6, at 18-19.

merce and the U.S. courts. The argument was predicated on three premises: (1) jurisdiction under the E.A.A. is narrower when the Act is being used to achieve foreign policy as opposed to national security objectives,[25] (2) controls affecting foreign subsidiaries are impermissible because of their "extraterritorial" impact,[26] and (3) controls affecting foreign subsidiaries are impermissible because of their retroactive effect.[27]

A. *Narrow Jurisdiction*

With the exception of the controls that President Carter placed on Soviet oil and gas technology in 1978,[28] extraterritorial foreign policy controls based on the E.A.A. have never been applied to foreign subsidiaries of

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25. *Id.* at 53-54. "In the area of trade controls, a distinction has always been drawn between national-security controls, where jurisdiction is relatively broad, and foreign policy controls, where jurisdiction is relatively narrow. International law recognizes this same distinction." *Id.*

26. *Id.* at 62. "Yet the language and history of the 1979 statute show no evidence of congressional intent to reverse this history and to authorize sweeping extraterritorial and retroactive controls of foreign policy purposes." *See* Brief of Plaintiffs, *supra* note 6, at 62-66.

27. *Id.* at 54. "[N]ever before on *any* ground has the United States attempted to regulate the exports by foreign persons of products of U.S. technology where that technology has been exported prior to the imposition of controls and without any agreement by the recipient to abide by any controls that might thereafter be imposed." *Id.*

Dresser Industries further contended that Dresser (France) was compelled by the French government to ship the compressors to the Soviet Union. Dresser asserted that, under the doctrine of foreign sovereign compulsion, Dresser (France) should not be punished for matters beyond its control, especially when Dresser (France) employees faced civil and penal penalties if they violated the terms of the French order. *Id.* at 35-41.

Dresser buttressed its position by citing §25 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), for the proposition that the United States could acquire jurisdiction over Dresser (France) only through an agreement with France. This proposition is in conflict, however, with the purpose of the E.A.A. as interpreted by the Administration. *See infra* text accompanying notes 36-38. The proposition is also contrary to §418(2) of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Rev. Draft No. 2, Mar. 27, 1981). *See infra* note 38 and accompanying text.

Responding to the foreign sovereign compulsion argument, the Administration averred that Dresser (France) failed to satisfy its extraordinary burden of demonstrating that it sought to be relieved from the French order, and further that Dresser (France) acted in bad faith by encouraging the French government to issue the order requisitioning the compressors. Brief for the Defendants, *supra* note 23, at 30.

The justness and propriety of penalizing a foreign subsidiary because it sought support from its host government can be debated, but this is not the real issue. The question is actually one of choice of law; more particularly, to what extent a foreign subsidiary should be bound by the laws of the nation in which its parent company is incorporated. *See infra* text accompanying notes 39-69.

28. *See supra* note 2.

American firms,[29] and even in the case of the Carter controls, while shipments of oil and gas technology were scrutinized more closely, licenses were eventually granted.[30] Usually, when the U.S. has sought to impose extraterritorial controls, Congressional acts other than the E.A.A. were employed. For example, under the Trading with the Enemy Act (TWEA),[31] regulations were issued to embargo certain Communist nations, and prohibit the sale by U.S. firms and their foreign subsidiaries of strategic commodities to other Communist countries.[32]

The enabling jurisdictional language of the E.A.A., "persons subject to the jurisdiction of the United States," is found both in the national security section[33] and in the foreign policy section of the Act.[34] This phrase is not defined, however, within the E.A.A.; therefore, it is necessary to look for guidance to definitions in other Congressional acts regulating international trade. The Trading with the Enemy Act (TWEA) provides such a definition.

The TWEA defines "person" as "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation

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29. Abbott, *Linking Trade Controls to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's,* 65 MINN. L. REV. 739, 792-793.

30. *Id.*

31. 50 U.S.C. app. §§ 1-44 (1982).

32. The Foreign Assets Control Regulations, 31 C.F.R. §500 (1981), and the Transaction Control Regulations, 31 C.F.R. §505 (1981), placed a partial trade embargo on certain Communist nations. These regulations extend to persons "subject to the jurisdiction of the United States." Person is defined as:

> 1. Any person, wherever located, who is a citizen or resident of the United States;
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> 2. Any person actually within the United States;
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> 3. Any corporation under the laws of the United States or any State, territory, possession, or district of the United States; and
>
> 4. Any partnership, association, corporation, or other organization, wheresoever organized or doing business; which is owned, or controlled by persons specified in paragraphs . . . (1), (2), or (3) of this section.

31 C.F.R. §500.329 (1981); 31 C.F.R. §505.20 (1981). *See* Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory,* 20 COLUM. J. OF TRANSNAT'L L. 439, 462-64 (1981).

Also, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (Supp. III, 1979), was used in the Iranian crisis to prohibit transactions between the target nation (Iran) and the foreign subsidiaries of U.S. banks. *See* 31 C.F.R. §535.329 (1980). The enabling jurisdictional language in the IEEPA, 50 U.S.C. §1701, is similar to that found in the TWEA; however, the IEEPA is a mechanism for dealing with the economic aspects of extraordinary international crises, and is therefore less commonly used. *See generally* Marcuss & Richard, at 460-62.

33. 50 U.S.C. app. §2402(a).

34. 50 U.S.C. app. §2405(a).

or body politic."[35] This definition forms the basis for an argument by inference. In the *Dresser* case, the Administration persuasively argued that the legislative history of the E.A.A. supports the view that jurisdiction under the E.A.A. was meant to be as broad as jurisdiction under the TWEA.[36] Assuming legislative history was not on the Administration's side, support for the argument that the E.A.A. was meant to give a broad, extraterritorial jurisdiction can be found in international law, which allows a State to seize extraterritorial jurisdiction for certain national security purposes.[37] Extending the argument to its extreme, it is possible to infer that, because both the foreign policy and national security sections of the E.A.A. use the same jurisdictional language, Congress intended jurisdiction in foreign policy matters to be as broad as jurisdiction in national security affairs, thus giving the President the widest possible jurisdiction in the foreign policy realm.[38]

B. *Extraterritorial Impact*

If indeed Congress has authorized the President to implement extraterritorial foreign policy trade controls, that authority may yet be invalid under international law. An exercise of extraterritorial jurisdiction by one State may violate the sovereignty of another State, in the absence of consent. The question is, when, if ever, should extraterritorial jurisdiction be permitted in international law?

International law recognizes that a State may exercise extraterritorial jurisdiction in order to protect its national security.[39] This exercise of extraterritorial jurisdiction is justified under the "protective or security principle."[40] While the protective principle is readily acknowledged as a justifica-

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35. 50 U.S.C. app. § 2(c) and § 31 C.F.R. § 500.329 (1981) quoted *supra* note 32.

36. Brief for the Defendants, *supra* note 23, at 46-49.

37. *See infra* text accompanying notes 39-45.

38. Such an interpretation of the scope of the E.A.A. is supported by §418 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Rev. Draft No. 2, Mar. 27, 1981). If enacted, §418(2) would provide that the United States has "jurisdiction to apply its laws to corporations (or similar entities) organized under the laws of a foreign state that are substantially owned or controlled by nationals of the United States (including corporations organized under the laws of the United States.)"

The Official Comments to §418 predicate this jurisdiction on the nationality principle and define ownership in terms of actual corporate control and nationality of the owning individuals. This is a doubtful position. *See infra* text accompanying notes 52-57; *see also* Merciai, *supra* note 5, at 26-31.

39. Marcuss & Richard, *supra* note 32, at 445-447.

40. *Id.* at 445-447. See also J. STEINER & F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS MATERIALS AND TEXT 856 (1976), in which the protective principle is defined as "determining jurisdiction by reference to the national interest injured by the offense."

tion for protecting the national security of a nation, strong concerns are expressed when nations seek to justify their exercise of extraterritorial jurisdiction on foreign policy grounds.[41] This problem is complicated by the fact that depending upon how one defines national security, the protective principle may have a limitless reach.[42]

Use of the protective principle as a basis for extraterritorial jurisdiction, whether for national security or foreign policy purposes, can impinge upon another nation's sovereignty. While it is a given fact that all nations will protect their national security, controversy remains as to whether a nation should be able to advance its foreign policy interests through reliance on the protective principle.

Limits to the application of the protective principle have been suggested, such as allowing the doctrine to be invoked only when there is a "real necessity for the action," or when the "primary effect of the crime is to threaten" the state.[43] These limitations are vague. More helpful is the ruling in the *Case Concerning Barcelona Traction, Light, and Power Company, Ltd.*[44] There the International Court of Justice decided that the protective principle should not be invoked for purely economic harm.[45]

Dresser took the analysis one step further by arguing that the protective principle does not justify any extraterritorial foreign policy trade controls.[46] In support of this proposition Dresser cited *Compagnie Européene des Petroles S.A. v. Sensor Nederland B.V.*,[47] a Dutch case holding that the protective principle cannot be applied by the United States in cases involving American subsidiaries unless national security or national credit worthiness is at stake.[48] This holding seems to impose realistic limits on the

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41. *Id.* at 445-447.

42. *Id.* at 445. *But see id.* at 459 for an example of the grey area between foreign policy and national security. *See also* Elliot, *The Export Administration Act of 1979: Latest Statutory Resolution of the Right to Export Versus National Security and Foreign Policy Controls,* 19 COLUM. J. TRANSNAT'L L. 255, 290 (1981), for the proposition that increasingly the Executive is classifying routine foreign policy conflicts as national security matters.

43. Marcuss & Richard, *supra* note 32, at 445, 446.

44. Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), 1970 I.C.J. 4 (1970). This case can also be found in J. STEINER & F. VAGTS, *supra* note 40, at 222.

45. 1970 I.C.J. 4, at para. 46. *See* Marcuss & Richard, *supra* note 32, at 446.

46. Brief of Plaintiffs, *supra* note 6, at 73.

47. Compagnie Européene des Petroles S.A. v. Sensor Nederland B.V., No. 82/716 (Hague D.C.)(Sept. 17, 1982).

48. *Id.* at para. 7.3.3. *Compagnie Européene* is cited in Brief of Plaintiffs, *supra* note 6, at 72, 73. The case itself is translated from the Dutch and is appended to the Brief of Plaintiffs. Of course, as a Dutch case, the decision in *Compagnie Européen* does not bind American courts.

extent to which the protective principle should be used to justify extraterritorial jurisdiction.

The overall helpfulness of doctrines such as the protective principle has been challenged. Commentators suggest that use of doctrines may actually work to divert attention from important underlying considerations.[49] Perhaps the better approach, therefore, to problems of extraterritorial jurisdiction is to concentrate instead on the relevant statutes, international law, and policies and interests of concerned governments.[50]

The Administration seems to have partially adopted this approach in the *Dresser* case. The Administration argued that while international law is part of the law of the United States, Congressional acts such as the E.A.A. must take precedence when they conflict with or supercede international law.[51]

Unfortunately, the District Court never reached the interesting international law questions presented in the *Dresser* controversy. If Congress had been found to have authorized extraterritorial foreign policy trade controls under the E.A.A., which was the Administration's contention and the preliminary issue, it would have been particularly interesting to see that authority reconciled with the following principles of United States and international law:

1. The fundamental principle of international law that "each state has a duty to refrain from intervention in the internal or external affairs of other states."[52]
2. The territorial principle of international law as modified by the effects doctrine, which would require the United States to explain its use of extraterritorial jurisdiction in a situation in which it is not experiencing substantial (negative) effects as a "direct and foreseeable result" of the European allies shipping natural gas related goods and technology to the Soviets.[53]
3. The recent holding in *Sumitomo Shoji America, Inc. v. Avagliano*,[54] in which the Supreme Court held that a wholly owned Japanese subsid-

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49. J. STEINER & F. VAGTS, *supra* note 40, at 880-881.

50. *Id.* at 881.

51. Brief for the Defendants, *supra* note 23, at 51-52. In support of contention, the Government cites among others: Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), and the Head Money Cases, 112 U.S. 580 (1884).

52. Marcuss & Richards, *supra* note 32, at 440.

53. On the territorial principle and the effects doctrine generally, see Merciai, *supra* note 5, at 25; Marcuss & Richard, *supra* note 32, at 441-43; and RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §18(b) (1965).

54. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

iary, located in New York, is an American company because it is incorporated under the laws of New York, and further that as an American company it must comply with Title VII of the Civil Rights Act.[55]

4. The long respected *Charming Betsy*[56] dictum:

> It has always been observed, that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, farther than is warranted by the law of nations as understood in this country.[57]

The Administration did not abandon all principles of international law. It argued in the alternative that the United States could assert jurisdiction over Dresser (France) based on the nationality principle.[58] Under the nationality principle, each State has jurisdiction "to prescribe rules of conduct for its nationals even if they are outside their home country."[59] The principle works well with respect to individuals, but problems occur when the principle is used to establish jurisdiction over foreign subsidiaries.

> Unless foreign subsidiaries of U.S. corporations may themselves be considered nationals of the United States, the nationality principle would offer little basis for prescribing rules for their activities. By contrast, if such subsidiaries *can* be characterized as U.S. nationals, the legitimacy of the exercise of extraterritorial jurisdiction by the U.S. government is greatly strengthened, since it is "indisputable. . . that nothing in international law precludes a State from punishing one of its juristic persons for a crime committed outside its territory."[60]

If a corporation and its subsidiaries can be considered nationals, there is still the question of what nation can claim them as its own. There are at least four proposed tests in international law: (1) place of incorporation; (2)

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55. *Id.* at 2381. *See also* Lewin, *Cloudy Legal Picture on Export Ban,* N.Y. Times, June 26, 1982, at 31, 32, col. 2.

56. 2 Cranch 64 (1804).

57. *Id.* at 118.

58. Brief for the Defendants, *supra* note 23, at 52.

59. Marcuss & Richard, *supra* note 32, at 443.

60. *Id.* at 444. "In allocating corporate entities States for the purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy governing the nationality of individuals." *Barcelona Traction, supra* note 44, at para. 70.

location of the main office; (3) locus of ownership and control; and (4) factors such as where the majority of corporate activity will occur.[61]

In the *Dresser* controversy, the Administration applied the location of ownership and control test.[62] The Administration's approach was to emphasize "substance over mere formality," and "the realities of actual control."[63] Because Dresser (France) is owned and controlled by Dresser Industries, a company located and incorporated in the United States, the Administration contended that the nationality principle would permit the United States to assert jurisdiction over Dresser (France).[64]

The issue of corporate nationality came before the International Court of Justice in *Barcelona Traction.* In that case, the International Court of Justice weighed the different factors linking a company to either Canada or Belguim, looking particularly for a "close and permanent connection" with one government or the other.[65] *Barcelona Traction* can be read as casting doubt on the locus of ownership and control test.[66] Indeed, Dresser argued that *Barcelona Traction* favors the place of incorporation test.[67] However, the case itself says that "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have to be weighed against those of another."[68] Thus, while emphasis was placed on the State of incorporation, it was not the sole determinative factor.

It is clear that neither the protective principle nor the nationality principle provide concrete guidance on the issue of the extent to which the United States may assert extraterritorial jurisdiction. Both doctrines, but particularly the nationality principle, are in constant flux, and did not meet the needs of either party in this conflict. Settlement of the issue must await not only another case, but perhaps also a more consistent theory on which the United States can base its claim of extraterritorial jurisdiction under

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61. *Id.* at 455-56. *See also* Merciai, *supra* note 5, at 29.

62. Brief for the Defendants, *supra* note 23, at 53.

63. *Id.*

64. *Id.* The Administration believed that its position with regard to jurisdiction was particularly reasonable in this situation. A deposition from the president of the Dresser Compressor Group (of which Dresser (France) is a subdivision) shows that this individual had the authority to order Dresser (France) to obey or disobey the requisition order. He chose to disregard the American controls. The Dresser Compressor Group is controlled by Dresser Industries of Texas. *Id.*

65. *Barcelona Traction, supra* note 44, at para. 71.

66. Marcuss & Richard, *supra* note 32, at 457.

67. Brief of Plaintiffs, *supra* note 6, at 71 n.1.

68. *Barcelona Traction, supra* note 44, at para. 70.

the E.A.A.[69]

C. *Retroactive Application of Controls*

Dresser Industries argued that the President of the United States lacks the authority to impose trade controls retroactively, thus affecting goods and technology licensed or contracted for before the announcement of the trade sanctions. Hence, according to Dresser, goods and technology involved in the pipeline project were beyond the United States' jurisdiction.[70]

With regard to licensed technology, the Administration maintained that retroactive controls are permissible because technology owned by U.S. corporations is subject to the jurisdiction of the United States under section 2405 of the E.A.A.[71] A licensing agreement does not transfer ownership; therefore, U.S. jurisdiction continues throughout the licensing period. More generally, the Administration suggested that it requires flexibility to pursue its foreign policy objectives,[72] and that private parties cannot by contract limit the Government's regulatory authority.[73]

There is little legal authority to support the arguments raised by either party. Moreover, while there may be merit in the Administration's contentions, particularly with regard to licensed technology, the practical effect of retroactive trade controls is to foster the impression that the U.S. is an unreliable trading partner.[74]

D. *Jurisdiction Under the E.A.A.: An Uncertain Conclusion*

In determining that Dresser Industries and Dresser (France) were not to be granted injunctive relief from the temporary denial order, the District Court did not reach the jurisdictional issues.[75] The suits for injunctive relief were denied on the basis of the test for injunctive relief set forth in *Wash-*

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69. On the need for a consistent and unified theory on which to base extraterritorial jurisdiction, see generally Marcuss & Richard, *supra* note 32.

70. Brief of Plaintiffs, *supra* note 6, at 62. *See generally* the entire discussion in Brief of Plaintiffs, at 54-66.

71. *See* Brief of Defendants, *supra* note 223, at 48.

72. *Id.* at 47-49.

73. *Id.* at 49.

74. This point is made here because, again, in the *Dresser* conflict the legal and political issues were interdependent. The legal question of extraterritorial jurisdiction probably would not have arisen had the political implications of the trade controls been more carefully considered in December 1981 and January 1982. *See infra* text accompanying notes 115-18.

75. Neither of the two District Court orders upholding the controls discussed the jurisdictional questions. *See* Dresser Industries, Inc. v. Malcolm Baldrige, 549 F. Supp. 108 (D.D.C. 1982); and Dresser Industries, Inc. v. Malcolm Baldrige, No. 82-2385 (D.D.C. Nov. 4, 1982).

ington Metropolitan Area Transit Authority v. Holiday Tours, Inc.[76] This test permitted the United States District Court for the District of Columbia to side-step the merits of the case — the difficult foreign policy and jurisdiction questions. The implication is that the court expected to confront the entire case at a later date. The issues in *Dresser* became moot with the withdrawal of the sanctions in November 1982, but it is likely that many of the jurisdiction questions concerning the E.A.A. and multinational corporations may arise in future cases.

IV. Application of the E.A.A.: Economic and Political Aspects

The 1982 pipeline sanctions were both an instrumentality and a symbol of United States foreign policy. The purpose of the sanctions was to deny economic benefits to the Soviet Union in retaliation for activities contrary to U.S. policies. The sanctions were used as well as a vehicle for the expression of U.S. indignation at the Soviet role in Poland.

The 1982 sanctions were also an overwhelming failure. In order to determine why, the facts and circumstances surrounding the trade controls will be examined in the light of broader economic and political theories.

A. *The Instrumental Rationale*

The denial of economic and political benefits to influence U.S. foreign policy interests has been dubbed the "Instrumental Rationale" for foreign policy trade controls.[77] The underlying theory of the instrumental rationale is that foreign behavior can be coerced into conforming to U.S. objectives by manipulating the economic and political costs of acquiring foreign goods and technology.

Three essential requirements must be met, according to this theory, for trade controls to achieve their intended result. First, the controls must prevent the controlled item or technology from reaching the target country.[78] No embargo will be successful if the controls are circumvented.

This requirement is paralleled in the Export Administration Act of 1979. Section 2405(b)(5) of the E.A.A. requires the President to consider "the ability of the United States to enforce the proposed controls effec-

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76. 559 F.2d 841, 843 (D.C. Cir. 1977). Under this standard the court must consider (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party has demonstrated irreparable injury; (3) whether the issuance of an injunction would substantially harm other parties; and (4) where the public interest lies. *See Dresser*, 549 F. Supp. at 109 and No. 82-2385 (D.D.C. Nov. 4, 1982) at 4.

77. *See* Abbott, *supra* note 29, at 798-99.

78. *Id.*

tively." Yet, in 1982, the Reagan Administration enacted regulations to prevent the delivery of equipment and technology necessary for the transport of natural gas in the Soviet pipeline, without adequate means of enforcement. The controls proved ineffective against foreign licensees of U.S. technology, such as Dresser (France), which proceeded to ship embargoed equipment, thereby defeating the Administration's foreign policy objectives. The status of Dresser (France) as a foreign subsidiary of a U.S. corporation was of little benefit.[79] This problem will persist in future trade controls until the United States is assured of jurisdiction over foreign subsidiaries and licensees, or until U.S. licensors and parent companies are given reason to pressure their subsidiaries and licensees into complying with U.S. laws.

Second, the trade controls will not succeed if the target nation is able "easily and economically [to] obtain from other sources goods and technology comparable to those denied by the United States."[80] Section 2405(b)(1) of the E.A.A. requires the President to consider the probability that controls will achieve the intended results in light of other factors such as foreign availability. If the President ascertains that foreign availability of the embargoed product exists, he is not barred from enacting controls, but it is an important factor to consider — one that will most certainly have an impact on the success of the controls.

There are problems with establishing a standard of foreign availability. Determining whether a product is available from another source requires an analysis of whether the alternative product is comparable and can be substituted economically, and whether the foreign source will sell the product to the target nation.[81] Target nations such as the USSR are secretive as to what they are able to procure overseas,[82] and it is difficult to assess to what degree Western nations will move to fill the commercial void resulting from

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79. *See supra* text accompanying notes 39-69.

The inability of the Government to enforce the controls was recognized by Presidential advisors as well as by the corporations violating the controls. "A number of other Administration legal experts, however, maintained that the President was entering a legal quagmire with few, if any, precedents, and with the end results very much in doubt. . . . Beyond that, they added that foreign governments could block the regulations from applying to companies within their jurisdiction and thus protect these companies against American legal action." Gelb, *U.S. Hardens Curbs on Soviet Gas Line*, N.Y. Times, June 19, 1982, at 32, col. 4.

80. Abbott, *supra* note 29, at 800-801. Related to this is §2405(g) of the E.A.A., which reads: "In applying export controls under this section, the President shall take all feasible steps to initiate and conclude negotiations with appropriate foreign governments for the purpose of securing the cooperation of such foreign governments in controlling the export to countries and consignees to which the United States export controls apply of any goods or technology comparable to goods or technology controlled under this section."

81. Abbott, *supra* note 29, at 803. *See also* Marcuss & Richard, *supra* note 32, at 478.

82. Abbott, *supra* note 29, at 805.

U.S. controls.[83] Predicting which allies will violate U.S. controls by reselling U.S. goods and technology poses further problems.

In 1978, one commentator observed that "for many elements of oil and gas technology the United States [either] has a virtual monopoly" or the equipment is manufactured under U.S. license and is subject to U.S. export controls.[84] This statement assumes that licensees will abide by U.S. export controls and that foreign produced goods are not substitutable. In fact, it is now apparent that not all foreign licensees of U.S. technology will obey U.S. export laws, and it is questionable whether foreign geophysical equipment is not of the same quality as U.S. equipment.[85] A Library of Congress study concludes that most of the equipment required for the pipeline could be purchased from "non-U.S. sources," but at "different levels of quality and terms of sales," because of the "wide availability of energy technology and [the] underutilized capacity" of West European and Japanese plants.[86]

From the inception of the ban on the export of oil and gas technology and equipment to the Soviet Union, there has been controversy on the foreign availability of the requisite technology and goods. Events subsequent to the enactment of the 1982 trade controls, however, showed that such foreign availability was drastically underestimated.[87] It is quite possible that the pipeline construction would not have been much impeded even if the extraterritorial sanctions had been successful.

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83. *Id.* at 808. Abbott observes that other nations usually pick up contracts that American corporations are unable to fulfill due to export controls. An example of this in the pipeline controversy is the contract of the Caterpillar Tractor Co., a U.S. corporation, for the sale of pipelaying machinery to the Soviet Union. This $90 million contract was picked up by Komatsu of Japan after the Reagan Administration announced its controls. *See* Stern, *Specters and Pipe Dreams,* 48 FOREIGN POL'Y 21 (1982), at 31.

84. Huntington, *Trade, Technology and Leverage: Economic Diplomacy,* 32 FOREIGN POL'Y 63, 73-76 (1978).

85. Abbott, *supra* note 29, at 804-805. This is actually Abbott's reaction to the Huntington analysis. *See* Huntington, *supra* note 84. Abbott is relying on a statement of James Giffen before the Subcommittee on International Economic Policy and Trade (House Committee on Foreign Affairs), 96th Congress, 1st Session 89 (1979), in which Giffen said that industry representatives claimed that all geophysical equipment in use by American companies is "available overseas with no reduction in quality."

86. J. HARDT & K. TOMLINSON, SOVIET GAS PIPELINE: U.S. OPTIONS, 1 (1982) (Library of Congress, Congressional Research Service Major Issue System, Issue Brief No. IB8 2020, 1982). *See U.S. Sanctions Unlikely To Cause Lengthy Pipeline Delay, Economist Says,* U.S. EXPORT WEEKLY, No. 418 at 621 (1982) (hereinafter cited as *U.S. Sanctions*).

87. For example, although there was some dispute, Dresser (France) claimed that it already had "all of the U.S. origin technology needed for its Soviet contract and [did] not need to acquire U.S. origin commodities for the Soviet contract so that the denial order [could] not serve an enforcement purpose." *Agreement With Allies on Economic Relations With the East May Be Close,* 18 U.S. EXPORT WEEKLY, No. 6, at 200 (1982).

The third factor to consider in applying export controls is whether the target nation is able to substitute domestically produced equipment for United States goods and technology.[88] A successful embargo could encourage embargoed nations that are technologically advanced to develop their own domestic industries for the embargoed goods. Not only would this have an adverse affect on American business, but most likely it would also be detrimental to U.S. foreign policy objectives.

Section 2405(b) of the E.A.A. requires the President to consider "the probability that such controls will achieve the intended foreign policy purpose, in light of other factors. . . ."[89] One of these factors should be the probability that the target nation will divert resources in order to develop its own industries in embargoed areas. This interpretation is in accord with §2405(b)(4), which requires the President to consider the effect of trade controls on the "export performance of the United States."

Had President Reagan considered more carefully the possibility of the Soviet Union substituting domestic technology and goods for the embargoed items, as well as the Soviet Union's past success in coping with embargoes, he might not have imposed this trade embargo. There is ample evidence that the Soviets could cope with an embargo on gas pipeline goods, particularly natural gas compressors, with only a minimum delay in the completion of the pipeline.[90]

Over the last 25 years, several U.S. imposed embargoes have spurred technological development in the USSR. The result has been a loss of markets for U.S. firms. For example, in 1962-1963, shortly after the Cuban Missile Crisis, the United States embargoed large diameter steel pipes that the Soviets needed for an oil pipeline.[91] In 1961 the Soviets manufactured no 40 inch steel pipe; by 1965, just two years after the embargo, the Soviets were producing 600,000 tons of 40 inch pipe a year.[92]

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88. Abbott, *supra* note 29, at 810.

89. Also relevant is §2405(b)(2) and (3). Section 2405(b)(2) requires the President to consider the compatibility of the proposed controls with U.S. foreign policy objectives. Section 2405(b)(3) requires the President to consider the reaction of other countries to the imposition or expansion of export controls.

90. Jonathan Stern, an international energy consultant, believes that the pipeline could have been "started up with as many compressor stations as the West Europeans can deliver bolstered by the Soviet units with smaller capacity." Stern, *supra* note 83, at 33. The Soviet Union produces natural gas compressors smaller than those produced in the West. While Soviet compressors are 10-16 megawatts (MW), Western compressors are 25 MW's—significantly larger. Even given that Soviet compressors are smaller, they are adequate for this project if used in "clusters." *Id. See also* Hardt, *supra* note 86, at 7.

91. Mufson, *U.S. Effort to Block Soviet Pipeline Recalls Failed Embargo of 20 Years Ago*, Wall St. J., July 14, 1982, at 32, col. 1.

92. *Id.* A similar instance of an embargo spurring technological development is the U.S.

With regard to the pipeline project, it is important to remember that the Soviet Union is currently constructing five domestic pipelines, in addition to the transnational Urengoy pipeline.[93] Moreover, the element of Soviet national pride should not be belittled.[94] Had the 1982 gas and oil embargo been successful, the Soviets could have diverted existing compressors and turbines earmarked for the domestic pipelines to the Urengoy pipeline so that it would be completed on time, or with only a minimum delay.[95]

B. *Symbolic Uses of Trade Controls*

Regardless of whether export controls prevent the acquisition of goods and technology by the target nation, such controls may be enacted for symbolic purposes.[96] Those who advocate their use for symbolic reasons hold that the controls are successful if they communicate to the target nation and to the world the political sentiments and policies of the nation employing the controls.[97] There are several reasons for employing symbolic controls. They work to disassociate the U.S. from the target nation; they

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denial of industrial diamonds to the Soviets in the 1950's. Industrial diamonds, necessary for many precision industries, were embargoed during the Cold War when the Soviets did not possess the technology to manufacture them. By the 1970's, industrial diamonds were the third largest industrial export of the Soviets. *See* Kiser, *What Gap? Which Gap?*, 32 FOREIGN POL'Y 90, 91 (1978).

93. See Stern, *supra* note 83, at 33.

94. Because national pride is at stake the Soviets will be very unwilling to accept delays in the completion of the pipeline. Stern says that the Soviets have an impressive reputation as reliable suppliers and that they would be unwilling to sacrifice this. *Id.*

95. The experts seem to agree that the Reagan embargo would delay the pipeline by only months and not years, and would not result in massive inconvenience to the Soviets. *See U.S. Sanctions, supra* note 86; *Text of Common Market Statement on Embargo,* N.Y. Times, Aug. 13, 1982, at A4, col. 1; and Schmemann, *American Pipe Supplies Unneeded, Soviet Says,* N.Y. Times, June 26, 1982, at A6, col. 5.

96. Abbott, *supra* note 29, at 822.

97. Against these objectives, advocates of employing export controls for foreign policy purposes contend that in certain cases it may be immaterial that embargoed products and technologies are available to the target country from other sources. It may be more important, they argue, to set an example, to make a moral statement, even if other countries choose not to join in imposing trade restrictions. The United States, they note, would not want to export thumbscrews, for example, even if other countries were doing so. In this view, some issues simply can't be determined through an economic cost-benefit analysis. American Enterprise Institute Legislative Analysis, *Proposals for Reform of Export Controls for Advanced Technology* 25 (1979) (footnotes omitted) (hereinafter cited as A.E.I. Legislative Analysis). *See* Mufson, *supra* note 91, for an example of how trade denial symbolizing moral disproval has been a part of U.S. foreign policy toward the Soviet Union for many years. *See also* Elliot, *supra* note 42, at 293-297, for a criticism of using foreign policy controls as a signaling device.

demonstrate U.S. opposition to "abhorrent behavior"; and they build national "self respect."[98] Therefore, while symbolic controls may be detrimental to U.S. economic interests, they may have desirable political results.

The Reagan Administration did not succeed in convincing the European allies to stop shipment of goods to the Soviet Union, but U.S. actions effectively communicated to the world U.S. concern over Soviet activities. Moreover, the export controls also provided administration officials with an opportunity for increased publicity and media coverage.[99] Such coverage was used effectively by the Reagan Administration, and consequently made the Administration appear, at first, decisive. It can be argued that the intense media coverage also permitted the Administration to score propaganda points in its war of words with the USSR.

These symbolic gains were extracted at a very high price, one which many would argue is too high. The stated objective of the embargo was to advance reconciliation in Poland. When the embargo was lifted, not only was martial law in Poland still in force, but Soviet behavior in Afghanistan and throughout the world had shown no sign of moderation.[100] While the status quo with the USSR was maintained the embargo had a damaging effect on the Western alliance. No member of the alliance supported the embargo, and many openly defied it.[101] The European Common Market officially criticized the embargo and said that the consequences of the embargo could "call in question the usefulness of the technological links between European and American firms"[102] and that the use of such retroactive measures applied without proper consultation "are unquestionably and seriously damaging."[103] The Common Market nations further claimed that "the ban was an unacceptable interference in European Community Affairs."[104]

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98. Abbott, *supra* note 29, at 822-824.

99. There are many examples of how the Reagan Administration took advantage of the publicity opportunities offered by the embargo. Among the most effective devices to win public support for the pipeline sanctions were the repeated allegations that the Soviet Union is using slave labor to build the pipeline. *See* Mufson, *Allegations Soviets Using 'Slave Labor' Heat Up Debate Over Pipelines to Europe,* Wall St. J. Aug. 17, 1982, at 32, col. 1; and *Commerce Department Modifies Temporary Export Denial Order for Creusot-Loire,* U.S. EXPORT WEEKLY, No. 426, at 948 (1982).

100. *See* Merciai, *supra* note 5, at 17.

101. *See id.* at 13-17, for an analysis of European reaction to the pipeline embargo.

102. *Text of Common Market Statement, supra* note 95.

103. *Id.*

104. *Europe Protests Bans by Reagan on Gas Pipeline,* N.Y. Times, Aug. 13, 1982, at A1, col. 2.

C. *Other Considerations*

Trade controls, whether for symbolic or for other reasons, can have long lasting detrimental effects within the United States, as well as abroad. Section 2405(c) of the E.A.A. requires the President to consult with industry before imposing trade controls. While this consultation with American industry is not binding, it is another factor a President should consider when imposing trade controls, especially controls for symbolic purposes. The symbolic gains of the export controls should be balanced against costs to domestic industry.

The American business community strongly opposed the imposition of the 1982 trade controls.[105] Had it been successful, the pipeline embargo would have cost U.S. industry somewhere between $300 to $800 million in direct and indirect exports.[106] Foreign subsidiaries and licensees were expected to lose up to $1.6 billion.[107] Other costs are not easily measured.[108] Sanctions such as those imposed in 1982 are likely to make European businesses more reluctant to enter into agreements with the U.S., and may spur the investment of European firms in high technology industries of their own.[109]

Other reasons are advanced in opposition to export controls for foreign policy purposes. Opponents view such controls as essentially unilateral; whereas the United States has on several occasions linked controls to foreign policy objectives,[110] other nations generally do not take the same approach. Because the United States is one of the few nations to use export controls for foreign policy purposes, and evokes much criticism thereby, use of controls is seen as strengthening the position of aggressive, anti-U.S. leaders.[111]

The symbolic use of export controls is a powerful tool for communicating U.S. policies to the world. Unfortunately, the adverse effects of symbolic controls may vastly outweigh their advantages. Taken to their greatest extreme, as was done in 1982, Foreign policy export controls penalize American industry and create ill-will among trading partners, in order that

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105. *See U.S. Sanctions, supra* note 86, at 622.

106. *Id.*

107. This statistic may be conservative. *Id.*

108. "Among the salutory influences that can be expected from accelerated expansion in foreign purchases of U.S. products are stronger economic growth, higher levels of employment and lower rates of unemployment, quickened capital formation, and abated inflationary pressures." S.H. RHINE, THE IMPACT OF REGULATIONS ON U.S. EXPORTS 111 (1981) (quoting Kenneth A. Randall).

109. *U.S. Sanctions, supra* note 86, at 622.

110. A.E.I. Legislative Analysis, *supra* note 97, at 24.

111. *Id.* at 25.

the target nation and the world may know the Executive Branch's viewpoint on activities that are beyond the United States' ability to control.

V. CONCLUSION

The *Dresser* controversy provides an excellent opportunity to study the use of export controls. It is apparent that if the U.S. intends to accomplish foreign policy objectives by controlling the export of American goods and technology, stronger provisions must be enacted to guarantee enforcement of the E.A.A.[112]

This enforcement problem can be approached in several ways. First, the sanctions that can be invoked against the American parent corporations of foreign subsidiaries and licensees, which are clearly subject to U.S. jurisdiction, should be strengthened. In the *Dresser* case, the evidence suggests that Dresser Industries supported and abetted its subsidiary Dresser (France) in defying the U.S. sanctions.[113] Had the Reagan Administration been able to apply more coercive measures against Dresser Industries, Dresser may have opted to support the Government's efforts by preventing its subsidiary, Dresser (France), from shipping merchandise to the Soviets.

Second, enforcement of the E.A.A. should be strengthened through the resolution of the jurisdiction problems mentioned in section two of this Note. For the E.A.A. to be more effective as a foreign policy tool, the U.S. government needs a procedure that will guarantee quick and efficient legal recourse against foreign licensees and subsidiaries attempting to violate U.S. trade controls.

Such legal recourse could be obtained by international agreement. One possibility would be a multilateral agreement assuring international "full faith and credit" for the rulings of a signatory's court in matters relating to the final destination of a nation's exported goods and technologies. This would allow governments to control their multinational corporations and firms that license equipment for production or use abroad. Further, it would be a step toward insuring that foreign governments, foreign licensees, and foreign subsidiaries respect U.S. export laws and regulations.

A second possibility for resolving jurisdiction and E.A.A. enforcement problems would be the establishment of a new international tribunal that would specialize in litigation concerning multinational corporations, foreign subsidiaries, and companies manufacturing goods under foreign licenses.

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112. Members of the U.S. Senate, including the late Sen. Henry Jackson, voiced strong concerns over the inadequacy of enforcement. *See Options on Tightening Poland Controls Said Ready for White House Consideration*, U.S. EXPORT WEEKLY, No. 395, at 533 (1982).

113. *See supra* note 27.

Because of its limited scope, such a new court might be more acceptable to the United States than the International Court of Justice.[114]

It is doubtful, however, that the United States or any other nation would be willing to submit to compulsory jurisdiction for the resolution of inherently political questions. It is important to recognize that while the issue of extraterritorial jurisdiction under the E.A.A. may be legal in nature, it would not have arisen but for the foreign policy motives of the Reagan Administration. The sanctions imposed in June 1982, which purported to reach beyond U.S. territory, were an attempt to overcome the failure of the more limited January 1982 sanctions.[115] The sanctions were imposed explicitly for foreign policy purposes.[116] It can be argued, therefore, that regardless of whether extraterritorial jurisdiction is legally permissible, the President will more likely be guided in the future by political considerations.

The Export Administration Act itself provides substantial guidance concerning the circumstances in which the Executive Branch should enact export controls. Whether the President is enacting the controls for symbolic purposes, or to influence the behavior of foreign nations, the recommendations of the E.A.A. should be followed. Specifically, special attention should be given to the effect of U.S. trade controls on domestic industries.

Unfortunately the trade controls in the *Dresser* case apparently were not imposed in accord with the E.A.A.'s recommendations. The primary effect of the 1982 sanctions was to penalize U.S. industry for the sake of controls that were destined from the outset to be ineffective and disrupt political and trade relations abroad. Even if it were acknowledged that the controls were primarily symbolic in purpose, this would be slight justification for enacting controls when the United States has many other methods for communicating foreign policy disagreements to our allies and the world.[117]

Arthur E. Appleton
May, 1983

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114. A third possibility would be an international code of conduct to provide guidance in future disputes over jurisdiction over multinational corporations. *See* Merciai, *supra* note 5, at 37.

115. *See supra* note 5.

116. *See supra* notes 1-3 and accompanying text.

117. "Before resorting to the imposition of export controls under this section, the President shall determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means." Export Administration Act of 1979 §2405(d).