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Charles P. KinCannon

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THE DRESSER CASE: ONE STEP TOO FAR

*CHARLES P. KINCANNON**

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* J.D., Southern Methodist University School of Law. The author is currently in private practice in Dallas, Texas.

I. INTRODUCTION

> Commerce is the cure for destructive prejudices; and it is almost a general rule that where there is civilized behaviour, there is trade; and wherever there is trade, there is civilized behaviour.
>
> —Montesquieu

As much as one would like to believe this optimistic outlook, commercial realities have dictated otherwise. Particularly, in the last two decades, trade has been used more as an uncivilized political instrument than a civilized commercial one. With the overriding governmental concern of foreign policy, it is impressive that international trade, particularly between the Soviet Union and the United States, has been so successful. Nevertheless, whatever the current political ideology, trading multinationals frequently get caught in the middle, subject to competing United States intentions of improving the trade deficit and maintaining military parity. The multinational has often found itself subject to conflicting, if not irreconcilable, regulations imposed by the United States Government. As if domestic victims were not enough, views from abroad have characterized the onslaught of United States trade regulation as one of increasing worry to foreigners.[1]

The problem, although not a new one, is becoming more pronounced and important in international trade. As companies trade and form subsidiaries abroad, legal questions arise as to what law should govern and who should enforce it. In a recent situation, export controls were imposed by the Department of Commerce on a French subsidiary of a United States company, restricting exports or reexports from it to the Soviet Union. The diplomatic turmoil created by this action was both intense and widespread, with allegations that the United States Government had violated both United States and international law.

The *Dresser* case is well worth examining for its international legal implications. If nations are to deal with each other, the issues raised by the case must be understood and resolved. With these objectives in mind, this article will review the historical context for greater understanding and then consider international law for a resolution.

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1. Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 3 (1979).

II. Historical Overview of Export Controls

Export controls have been used by the United States for most of this century. In 1917, the Trading with the Enemy Act[2] was passed. This Act was the first major authority giving the Executive power to prohibit all exports to countries at war with the United States or its allies.[3] The rationale behind the Act was to safeguard the national security of the United States by preventing United States exports from strengthening foreign enemy countries.[4] The Act is still in existence.

Export controls were utilized throughout World War II.[5] With the termination of hostilities in 1945, export controls were continued. There were three main reasons for this. The first was to prevent exhausting the already short supply of goods.[6] The second reason was the necessity of establishing priorities in exporting goods in the rebuilding of Europe.[7] Finally, with the emergence of the Soviet Union and the Eastern Bloc countries as a direct threat to United States security,[8] the United States needed methods of restricting exports which might have aided the Soviet Union in its military expansionism.[9] As supply shortages dissipated, however, the major rationale for maintaining controls became national security.[10]

In response to this continuing threat, Congress passed the Export Control Act in 1949.[11] This Act, for reasons of foreign policy, national security and shortages of scarce materials,[12] gave the President authority to prohibit or curtail the export of goods and technologies.[13] Exporters were required to obtain a "general" or "validated" license under the Act, determined by the military, economic or political significance of the item and its destination. Under this scheme, most nonstrategic commodities could be exported to certain countries under a

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2. The current version of the Trading with the Enemy Act is 50 U.S.C. app. § 1 *et seq*. (1982).

3. Donovan, *The Export Administration Act of 1979: Refining United States Control Machinery,* 4 B.C. Int'l & Comp. L. Rev. 82 (1982).

4. For a discussion of United States export controls in this context, see W. Streng & J. Salacuse, Int'l Bus. Planning (1982).

5. Berman & Garson, *U.S. Export Controls—Past, Present and Future,* 67 Colum. L. Rev. 791 (1967).

6. *Id.* at 794.

7. *Id.* at 795.

8. W. Streng & J. Salacuse, *supra* note 4, at 397.

9. Berman & Garson, *supra* note 5, at 795.

10. Comment, *The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies,* 2 Nw. J. Int'l L. & Bus. 179 (1980).

11. Export Control Act of 1949, ch. 11, 63 Stat. 7 (repealed 1969).

12. *Id.* § 2.

13. *Id.* § 3(a)-(b).

general license, but most exports to communist countries required a validated license, obtainable through a special application process.[14] This Act was the first comprehensive attempt by the United States to regulate exports by categories. The Act was also regularly renewed by Congress and remained in effect for the next twenty years.

There were other acts in existence during this twenty year period as well. In 1951, the Mutual Defense Assistance Control Act was passed in order to regulate the export of arms, ammunition and other strategic items "to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all other countries under its domination."[15] Unlike the Export Control Act of 1949, this Act was administered by the State Department. Under the Mutual Security Act of 1954,[16] exports of munitions specifically came under executive control with administration handled by the State Department.[17] The Trading with the Enemy Act was also invoked during this period when the President restricted economic relations during both the Korean conflict in 1950 and the Cuban crisis in 1961.[18]

Thus, throughout the "Cold War" era (1945-1965), the United States already had established and implemented a comprehensive system of controls administered by the Department of Commerce, the Department of State and the Executive Office.

By 1969, however, the international political picture had changed somewhat, with both a policy of détente and increased trade between the U.S.S.R. and the United States. As a result of these changes, a new export control system was enacted through the passage of the Export Administration Act of 1969.[19]

The Export Administration Act (EAA) of 1969 was founded on several basic policies. The first policy centered on national security. The Act restricted the export of goods and technologies which would contribute to an enemy's military strength to the detriment of United States security.[20] The Act also encouraged trade with countries that shared diplomatic and trade relations with the United States. Third, the Act called for controls to further United States foreign policy goals

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14. Bertsch, *U.S. Export Controls: The 1970's and Beyond*, 15 J. WORLD TRADE L. 67, 68 (1981).
15. 22 U.S.C. § 1611 (1976), *amended by* 50 U.S.C. app. § 2416(e) (1982).
16. Ch. 937, 68 Stat. 832 (repealed 1976).
17. *Id.* at 848.
18. Berman & Garson, *supra* note 5, at 792-93.
19. Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified at 50 U.S.C. app. §§ 2401-2413 (1982)).
20. 50 U.S.C. app. § 2402(2)(A) (1982).

and responsibilities. Fourth, the Act attempted to guard against the excessive drain of scarce materials within the United States.[21]

Major revisions to this Act were enacted in 1977.[22] These revisions dealt with several areas of the Act, including the United States position towards boycotts, agricultural commodities and penalties for violations.[23] More importantly, there was a provision extending the Act's jurisdiction to any goods or technology exported by any person subject to United States jurisdiction.[24] Through this provision, the Act covered exports which were not only of United States origin, but also of foreign origin by persons subject to United States jurisdiction. This was a significant change, expanding the scope of controls one step further. In addition to this jurisdictional provision, the amendments also injected new factors into the decisionmaking process (e.g., when to invoke the Act). With these additions, the destination of the goods and the recipient country's present and potential relationship to the United States would have to be considered. In reality, this consideration came down to the question of whether a country was communist or noncommunist.[25] In addition to the status of the country, foreign availability also became an issue. This meant that the President would consider the effect of the controls. If the goods were freely available outside the United States, the effect would probably be minimal, requiring a reconsideration of the necessity of imposing controls.

Prior to the 1979 expiration date of the 1969 Act, the United States Government closely scrutinized the export control system as it then existed. As part of that examination, the General Accounting Office (G.A.O.) undertook an extensive study of the system, and found it unsatisfactory. First, there was inherent, unresolved conflict between export promotion and control. Second, the system was overly complex and lacked proper guidance. Third, the system was inefficient, causing delay and confusion. As a result of these factors the system was, according to the G.A.O., a stumbling block in United States commercial relationships with other nations.[26] With these criticisms in mind, Congress enacted the Export Administration Act of 1979.[27]

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21. Bertsch, *supra* note 14, at 70. *See also* Comment, *supra* note 10, at 183.
22. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (1982)).
23. 50 U.S.C. app. § 2406 (1982).
24. *Id.* § 2403.
25. *See id.* § 2402.
26. U.S. GEN. ACCT. OFF., EXPORT CONTROLS: NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION (1979).
27. 50 U.S.C. app. §§ 2401-2420 (1982).

III. THE 1979 ACT

The Export Administration Act of 1979 establishes a legal framework by which the Executive branch of the United States Government can implement export controls. Under the Act, implementation is allowed for three basic purposes. First, controls may be employed to protect the national security of the United States. Second, controls are proper to further the foreign policy of the United States. Third, controls may be used to protect the domestic economy from the excessive drain of scarce materials and the inflationary impact of foreign demand.[28] Pursuant to these purposes, the Act recognizes three types of controls which may be used by the Executive. These three types of controls are: (1) national security controls (section 5); (2) foreign policy controls (section 6) and (3) short supply controls (section 7).

Responding to earlier criticism of the 1969 Act, which consisted of lack of guidance, confusion and inefficiency of use, Congress deliberately included a statement of "findings" in section 2 and a "declaration of policy" in section 3 of the Act to guide the President and Commerce Department to properly implement the controls.

In section 2(2), Congress specifically recognized the importance of exports to both the United States and the world economy. Because of this importance, Congress acknowledged the danger in implementing any type of export controls. On the one hand, "unreasonable restrictions . . . can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations."[29] They also recognized, however, that when controls are necessary, special emphasis should be given to "the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country . . . which would be detrimental to the national security of the United States."[30] While emphasis on national security was stressed, Congress also stressed the need to minimize restrictions on agricultural commodities.[31]

With these findings in hand, Congress set forth policy guidelines in section 3 which are designed to guide the President in implementing the provisions of the Act. While stressing the importance of exports, Congress also made it clear that restrictions were available under certain guidelines.[32]

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28. *Id.* § 2402(3).
29. *Id.* § 2401(7).
30. *Id.* § 2401(8).
31. *Id.* § 2401(9).
32. *Id.* § 2402(2).

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the 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;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.[33]

A. National Security Controls

Of the three main purposes given for export controls in the 1979 Act, national security is probably the most important. Accordingly, Congress enacted a comprehensive set of guidelines for such controls. Section 5 gives the President authority to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."[34] Under section 3(2)(A), "goods or technology" are those which would make "a significant contribution to the military potential of any other country or, combination of countries which would prove detrimental to the security of the United States."[35]

Specific guidelines for national security controls are also found within this section. For example, although the communist or noncommunist status of any individual country must be taken into account in administering controls, it is not determinative by itself.[36] Other factors must also be considered. Such factors include a "country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States," and "its ability and willingness to control retransfers of United States exports in accordance with United States policy."[37] The Act also specifies

33. *Id.*
34. *Id.* § 2404(a)(1).
35. *Id.* § 2402(2)(A).
36. *Id.* § 2404(b).
37. *Id.*

that its primary concern is with the diversion of critical technology to military use and the need to prevent reexport of such technologies to countries which are a threat to United States security.[38]

Pursuant to these controls, the Secretary of Defense and the Secretary of Commerce must prepare a list of the critical technologies that are to become part of the Commodity Control List, which specifies all goods and technology subject to controls.[39] Items on this list normally require an approved, validated license.[40] If it is determined, however, that such items are available from sources outside the United States in sufficient quantity and quality such that the license requirement is not effective in protecting national security, the license requirement for that item must be discontinued.[41] The President, however, may exercise his discretion in the matter. If he decides to maintain the controls, notwithstanding foreign availability, the Act requires that he negotiate with appropriate foreign governments to eliminate such availability.[42] If there is evidence that diversion of controlled goods for eventual military use is taking place in a country to which exports are controlled, the right to export of the responsible party will be denied without regard to the issue of foreign availability.[43]

The list of items controlled for national security purposes and the countries to which such exports are controlled must be reviewed periodically, with the time period determined according to the type of control used. In the case of controls maintained with other countries, review is required every three years. Otherwise, review is required annually.[44]

B. Foreign Policy Controls

Another set of controls allowed under the Export Administration Act of 1979 are foreign policy controls. Section 6 of the Act sets forth the authority and criteria for using such controls. Like section 5, this section allows the President to "prohibit or curtail" exports subject to the jurisdiction of the United States or exports by persons subject to United States jurisdiction.[45] This authority, however, is only granted to "the extent necessary to further significantly the foreign policy of the

38. *Id.* § 2404(a)(3).
39. *Id.* § 2404(c)(2).
40. *Id.* § 2404(f)(2).
41. *Id.*
42. *Id.* § 2404(f)(4).
43. *Id.* § 2404(1)(1).
44. *Id.* § 2404(c)(3).
45. *Id.* § 2405(a)(1).

United States or to fulfill its declared international obligations."[46] In addition to this general requirement, the President must consider several other criteria before imposing these controls. Among these criteria are the probability that the controls will achieve their foreign policy objective in light of the availability of goods from other countries; whether the controls are compatible with United States foreign policy in general and with overall United States policy towards the target country; the reaction of other countries to the imposition or expansion of controls; the impact of the controls on United States exports, the competitive position of the United States in the international economy, the reputation of the United States as a supplier of goods and technology and specific businesses' employees and contracts; the ability of the United States to enforce the controls effectively and the foreign policy consequences of not imposing controls.[47]

In addition to these criteria, the Act also requires a determination that reasonable efforts have been taken to achieve the desired foreign policy goal through negotiations or other means,[48] a notification to Congress explaining the controls, the President's conclusions regarding the criteria, the alternate means attempted and an explanation of how the foreign policy objective will be achieved through the controls.[49] Finally, the Act requires prior consultation by the Secretary of Commerce with the affected industries.[50] These criteria are designed to require a greater justification than under previous acts (i.e., the EAA of 1969)[51] before imposing export controls.

Past examples of foreign policy controls are plentiful. One example is the restriction on exports and payments to the U.S.S.R. Olympics in Moscow. Another example is limits and controls placed on exports to pro-terrorist countries. A third example was embargos on exports to the Republic of South Africa.[52] This type of control was also used by President Reagan in the Soviet gas pipeline embargo, the concern of this paper.

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46. *Id.*

47. *Id.* § 2405(b).

48. *Id.* § 2405(d).

49. *Id.* § 2405(e).

50. *Id.* § 2405(c).

51. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified at 50 U.S.C. app. §§ 2401-2413 (1982)).

52. W. STRENG & J. SALACUSE, *supra* note 4, at 402. These examples will be discussed later in the article.

C. Short Supply Controls

A third type of export control is short supply. Section 7 of the Act authorizes the President to prohibit or curtail the export of goods[53] in order to "protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand."[54] To carry out this policy, the President must allocate a portion of export licenses based on factors such as "the extent to which a country engages in equitable trade practices with respect to United States goods and treats the United States equitably in times of short supply."[55] Prior history of exportation is not a factor to be considered.[56] There are also consultation, monetary and procedural requirements in this section.[57]

D. Licensing

Pursuant to the authorized export controls, a system of export licenses is set forth in the Act. Under section 4, the Secretary of Commerce is authorized to require any of the following types of licenses on exports:

(1) A validated license, authorizing a specific export, issued pursuant to an application by the exporter.
(2) A qualified general license, authorizing multiple exports, issued pursuant to an application by the exporter.
(3) A general license, authorizing exports, without application by the exporter.
(4) Such other licenses as may assist in the effective and efficient implementation of this Act.[58]

The validated license, as previously mentioned, is issued by the Office of Export Administration and requires approval. The goods subject to the license must be non-strategic. In other words, as one commentator suggests, "they must not upgrade the scientific, technological or industrial capacity of the country to which they will be exported or reexported and used by such country in a manner detrimental to United States security."[59] Other criteria used in granting the license

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53. 50 U.S.C. app. § 2406(a)(1).
54. *Id.* § 2402(2)(c).
55. *Id.* § 2406(a)(1).
56. *Id.*
57. *Id.* § 2406(b).
58. *Id.* § 2403(a).
59. Evrard, *The Export Administration Act of 1979: Analysis of Its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1, 19

include foreign availability, the recipient's military status and the relationship and confidence of the United States with the country.[60]

A qualified general license, first introduced by the Export Administration Act of 1979,[61] is also authorized. Its principal purpose was to relieve the pressure of the increasing number of license applications which were causing delay and uncertainty to exporters.[62] This type of license was designed to "permit multiple shipments to a particular consignee or for a specified end use."[63] This license was also intended to be available instead of a validated license where "practicable" and "consistent with the national security of the United States."[64]

A general license is a license established by regulations of the Department of Commerce. No application is required for its use, and no document is issued. General licenses cover goods and technology exports to countries which, when taken together, pose no threat to United States security.[65] The Export Administration Regulations[66] contain a list of categories of general export licenses in the Commodity Control List.[67] This is the same list as the one which identifies goods subject to validated licenses. The regulations also set out the procedures and time limits involved with the various types of licenses.

E. Sanctions

Section 11 of the EAA of 1979 sets forth the sanctions available for violations of the Act. Under this section, "whoever knowingly violates any provision of this Act or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than 5 years, or both."[68] If anyone willfully exports anything contrary to the Act, knowing that such export will be used by a country restricted for national security reasons, or otherwise violates a regulation or license restriction, he will be subject to a fine of up to five times

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(1982).

60. McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters*, 3 L. & Pol'y Int'l Bus. 42, 99-100 (1971).

61. 50 U.S.C. app. § 2403(a).

62. Comment, *Reconciliation of Conflicting Goals in Export Administration Act of 1979—A Delicate Balance*, 12 L. & Pol'y Int'l Bus. 415, 427-28 (1980).

63. Senate Report No. 96-169, 98th Cong., 1st Sess., *reprinted in* [1979] U.S. Code Cong. & Ad. News 2463-65, 2472.

64. 50 U.S.C. app. § 2404(e)(3).

65. Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970's and 1980's*, 65 Minn. L. Rev. 739, 751 (1981).

66. 15 C.F.R. §§ 368-399 (1984).

67. 50 U.S.C. app. § 2403(b).

68. *Id.* § 2410(a).

the value of the export or $1,000,000, whichever is greater (if not a person), and up to $250,000 or ten years imprisonment (if a person).[69] There are also civil penalties available in the regulations.[70]

IV. THE GAS PIPELINE EMBARGO

A. *Dresser-France Background*

The foregoing overview of the history and purposes of the Export Administration Act is important in analyzing the application of this Act to the *Dresser-France* case. Due to the complexity of the case, an understanding of the facts is essential.

Dresser-France is a French corporation with its main office and manufacturing operations in Rungis, France and Le Havre, France, respectively. The company makes compressors and pumps for the oil and gas industry, as well as drilling rigs (under license from Dresser Industries' Ideco Division). Dresser-France is also owned by Dresser A.G. (Vaduz), a Liechtenstein corporation which is wholly owned by Dresser Industries, located in Dallas, Texas.

In September, 1981, Creusot-Loire, S.A., a French firm, together with Machinoimport, a Soviet agency, undertook to purchase from Dresser-France twenty-one compressors to be installed in the Soviet gas pipeline project. Deliveries were to be made in August, 1982. The compressors utilized technology supplied by Dresser Industries pursuant to a license agreement of 1976.[71]

On December 30, 1981, the Commerce Department expanded its export control regulations to include oil and gas transmission equipment destined for the Soviet Union.[72] The Government passed the regulations pursuant to section 6 of the Export Administration Act of 1969.[73] Under these regulations, new technology to manufacture oil and gas transmission equipment abroad could not be transferred to foreign parties unless the foreign parties promised that the products would not be delivered to the Soviet Union. The United States Government also imposed restrictions on any licenses for export or reexport of equipment to the Soviet Union after December 30, 1981. These regulations were passed as a response "to the Soviet Union's heavy and direct responsibility for the repression in Poland,"[74] a foreign policy reason. Since Dresser-France already had the technology to manufacture the

69. *Id.* § 2410(b)(1)(B).
70. 15 C.F.R. § 387.1(3) (1984).
71. U.S. EXPORT WEEKLY (BNA), Oct. 5, 1982, at 7.
72. 47 Fed. Reg. 141 (Jan. 5, 1982).
73. Pub. L. No. 91-184, 83 Stat. 841 (codified at 50 U.S.C. app. §§ 2401-2413 (1969)).
74. 47 Fed. Reg. 141 (Jan. 5, 1982).

compressors and since they did not require United States made components or assistance, the company proceeded to manufacture the compressors pursuant to the September, 1981 contract with Creusot-Loire, S.A.[75]

B. *The June Amendments*

In June, 1982, the Department of Commerce issued further amendments expanding the existing export controls.[76] The June regulations prohibited all deliveries of oil and gas equipment to the Soviet Union by foreign firms that were "owned or controlled" by United States firms. The amendments also extended preexisting controls to embargo oil and gas equipment manufactured by foreign firms that used any technology supplied under license by a United States firm. This was effective even to technology supplied when there was no restriction present.[77]

The June amendments expanded the existing controls in two ways. First, the current controls had restricted exports and reexports of oil and gas goods and technical data of United States origin.[78] The June amendments expanded the controls to include exports to the U.S.S.R. of goods or technical data of non-United States origin by United States owned or controlled foreign firms.[79] Second, the existing rule restricted the export of foreign-produced products of United States technical data if export of the data was subject to receipt of a written assurance from the foreign importer that the data or its products would not go to proscribed destinations.[80] The June amendments extended the restriction to products of United States data where use of the data is subject to a licensing agreement with persons subject to the jurisdiction of the United States or where the use required payment of royalties or other compensation to such persons or in cases where the recipient of the technical data has agreed to abide by United States export control regulations.[81]

After the announcement of the June amendments, Dresser Industries instructed Dresser-France to suspend further manufacturing and other work on the Soviet compressor contract and to suspend shipment on three compressors which had already been completed. On August

75. U.S. EXPORT WEEKLY (BNA), Sept. 7, 1982.
76. 47 Fed. Reg. 27,250 (1982).
77. *Id.*
78. 47 Fed. Reg. 141 (1982).
79. 47 Fed. Reg. 27,250 (1982).
80. 47 Fed. Reg. 141 (1982).
81. 47 Fed. Reg. 27,250 (1982).

10, 1982, however, the French Minister of State for Research and Industry requested that Dresser-France honor its contract.[82] On August 23d, the French Government issued a requisition order for services which directed Dresser-France "to complete the manufacture and delivery of all compressors and other equipment provided for" under the contract.[83] This order was lawful, binding and enforceable under the laws of France. As a result of the order, the three completed compressors were loaded on a ship bound for the U.S.S.R. on August 26th.[84]

After an unsuccessful motion by Dresser Industries and Dresser-France for a temporary restraining order against the Commerce Department,[85] the Department issued an order temporarily denying export privileges (denial order).[86] This order imposed several broad sanctions. First, it revoked all export licenses involving Dresser-France. Second, the order denied Dresser-France the right to participate "in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or otherwise subject to the Regulation."[87] Third, the order also applied to Dresser-France's "agents, employees and to any successor."[88] Finally, no other person or firm, "whether in the United States or elsewhere," could participate in any negotiation or transaction which could result in Dresser-France obtaining technology or commodities exported or to be exported from the United States.[89] Although the order originally applied to all United States origin commodities and technology, it was later limited to transmission or refining equipment for oil and gas exploration and production.[90]

Following this order, Dresser filed a motion to vacate the order on August 26th and for a temporary restraining order staying the denial order on September 8th. Dresser was unsuccessful on both counts.[91]

In addition to Dresser-France, the Commerce Department also issued orders against other European firms, whose sole connection with the United States was their technology. On September 4th, the Department issued a denial order against Nuovo Pignone, S.P.A., Industrie Meccaniche e Fonderia prohibiting export of United States oil and gas

82. *Unit Told to Defy Pipeline Ban,* N.Y. Times, Aug. 23, 1982, at D9, col. 4.
83. U.S. EXPORT WEEKLY (BNA), Sept. 7, 1982.
84. *Id.*
85. *Legal Remedies for Pipeline Dispute,* INT'L FIN. L. REV., Oct. 1982, at 10.
86. 47 Fed. Reg. 38,170 (1982).
87. *Id.*
88. *Id.*
89. *Id.*
90. 47 Fed. Reg. 39,708 (1982).
91. U.S. EXPORT WEEKLY (BNA), Oct. 5, 1982, at 8.

equipment services and technology to the Soviet Union. The order also covered INSO, Sistemi per le Infrastutture Social, S.P.A., the firm's subsidiary.[92] The Italian Government nevertheless ordered the companies to comply with their pipeline contracts.[93]

A similar order was issued against John Brown Engineering, Ltd. of Scotland and its three United Kingdom subsidiaries:[94] John Brown Engineering Gas Turbines, Ltd., John Brown Engineering (International), Ltd. and Masaood John Brown, Ltd.[95] John Brown, like Dresser-France, also came "between Reagan and a hard place."[96] On August 2d, Britain's Trade Secretary ordered John Brown to comply with its Soviet contracts. Acting under section 3 of the Protection of Trading Interests Act of 1980, which allows the Secretary to counter measures taken by another country which are potentially damaging to the United Kingdom's trading interests,[97] the Secretary also ordered three British subsidiaries of American parents to comply.[98]

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92. U.S. EXPORT WEEKLY (BNA), Sept. 14, 1982, at 878.

93. *Siberian Pipeline Between Reagan and Hard Place,* ECONOMIST, Aug. 7, 1982, at 55.

94. Statement by Secretary of Commerce Malcolm Baldridge on Pipeline Sanctions, BUS. AM., Sept. 20, 1982 (prefatory statement).

95. U.S. EXPORT WEEKLY (BNA), Sept. 14, 1982, at 878.

96. *See* ECONOMIST, *supra* note 93, at 55.

97. Editorial, J. BUS. L., Sept. 1982, at 359-60. In a discussion of recent trends in United States legislation affecting international trade, the editors note:

> The anti-trust and trade legislation of the United States of America has, on occasion, claimed to have extraterritorial effect. Such claims contravene the established principles of international law as they infringe the sovereignty of other States. They lead to regrettable—and avoidable—friction between friendly governments.
>
> The problem has arisen again. The United States of America has imposed an embargo on the supply of equipment for the pipeline planned to connect Siberia with West Europe. The embargo was imposed on June 22, 1982. According to the relevant American legislation, it extends to subsidiaries and licensed enterprises of American corporations resident outside the United States.

Id.

98. *Id.* at 360. Tracing the development of British cooperation with orders of the United States Secretary of State regarding trade embargoes, the editors explain:

> At present there is in operation in the United Kingdom the Protection of Trading Interests Act 1980. It enables the Secretary of State to counter measures taken under the law of another country which could damage the trading interests of the United Kingdom (s.1(1)). On June 30, 1982, Lord Cockfield, Secretary of State for Trade, made an order under this provision of the 1980 Act citing the United States of America Re-Export Control Regulations as measures which are damaging to the trading interests of the United Kingdom. These are measures on which the United States of America embargo against the supply of pipeline equipment to the Soviet Union is founded. This Order enables the Secretary of State to issue directions prohibiting enterprises from complying with

The West German company AEG-Kanis encountered a similar predicament, with Chancellor Helmut Schmidt strongly recommending that AEG comply with the contracts.[99]

In the Hague district court, a Dutch subsidiary of the United States company Geosource, Inc. was also ordered to comply with its contract, subject to a $3,600 per day fine if it did not comply. The court said the sanctions were invalid and contrary to international law.[100]

V. PRINCIPLES OF JURISDICTION

In examining the facts behind the Soviet gas pipeline embargo it is clear that the United States sought to prescribe rules to regulate conduct both within the United States and abroad. To validly do so under international law, however, the United States must have jurisdiction, defined in the Restatement (Revised) as "the authority . . . to apply its law to the conduct, relations, status or interests of persons, or to things, by legislation, executive act or order, administrative rule or regulation . . . ."[101] In addition, since jurisdiction must rest on some acceptable basis to be valid, the first step in analyzing the export control regulations must be an examination of these acceptable bases.

The territorial principle is probably the best known of the bases of jurisdiction in international law. This principle provides that states have jurisdiction to prescribe rules as to acts or omissions occurring within their own territory.[102] Many authorities contend that states should not perform acts of sovereignty within the territory of another.[103] With the frequent commercial transactions in today's world, however, the principle has been expanded.

In more recent years, territoriality has been discussed in the context of the "effects" doctrine first raised in the *Alcoa* case.[104] In this

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> the United States embargo. He issued to date such directions to six British companies. There is no doubt that British enterprises, though subsidiaries or licenses of American corporations, will not refuse the performance of contracts entered with Soviet enterprises on the ground that they have to obey the contrary instructions of their American parent companies.

Id.

99. *Id.*

100. OIL & GAS J., Sept. 27, 1982, at 139.

101. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(1) (Tent. Draft No. 2, 1981) (defining jurisdiction to prescribe).

102. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

103. 1 L. OPPENHEIM, INTERNATIONAL LAW § 144a (H. Lauterpacht, 8th ed. 1955).

104. United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941), 148 F.2d 416 (2d Cir. 1945).

case, the court stated that "it is settled law that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders."[105] The court described two situations which could produce "effects." One involves agreements affecting imports; the other agreements affecting exports. The court determined that it was the former that was subject to United States jurisdiction.[106]

The Restatement (Second)[107] endorses the effects doctrine when the effect within the state exercising the jurisdiction is "substantial" and a "direct and foreseeable result of the conduct outside the territory."[108] It also requires that "the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."[109]

Other commentators have been more critical of the doctrine, limiting jurisdiction to the state where the primary effect of conduct abroad is felt. In determining the primary effect, two factors should be considered: (1) are the effects in one state more direct than the effects in other states, and (2) are the effects in one state more substantial than those in other states?[110] This view is realistic since any number of actions in one state may have some effect in another and, if no limit were imposed, intolerable assertions of jurisdiction would occur. As two authors put it, "any other conclusion could lead to chaos if widespread application of the rule were undertaken, making 'a shamble' of the territorial principle."[111]

The doctrine is also accepted in some form in Europe. In the past, for example, the British Government has conceded that jurisdiction may be based on the occurrence of substantial effects within the territory as a result of acts done abroad.[112] The laws of Belgium, the Netherlands and Denmark apply to acts exercising a predominant or substantial influence on the domestic market.[113] In Germany, the general opinion is that jurisdiction lies only as to acts which have a direct effect in Germany.[114]

In more recent years, the courts have moved away from the "ef-

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105. *Aluminum Co. of America*, 148 F.2d at 416, 443.

106. *Id.*

107. RESTATEMENT (SECOND), *supra* note 102, § 18.

108. *Id.*

109. *Id.* § 18(b), comments f, g and i.

110. Akehurst, *Jurisdiction In International Law*, 46 BRIT. Y.B. INT'L L. 145, 198 (1972-73).

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

112. Akehurst, *supra* note 110, at 199.

113. *Id.*

114. *Id.*

fects" test. One such example was *Timberlane Lumber Co. v. Bank of America*.[115] In this case, Timberlane commenced an antitrust suit against another United States company for antitrust violations allegedly committed in Honduras. Timberlane officials sought relief based on a claim that the company's acts had a direct and substantial effect on United States commerce.[116] The Ninth Circuit, on appeal, called for a tripartite analysis, rather than an "effects" test:

> (1) Does the alleged restraint affect or was it intended to affect the foreign commerce of the United States?
> (2) Is it of such a type and magnitude so as to be recognizable as a violation of the Sherman Act?
> (3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[117]

The third test is probably the most important, and presents an additional question of "whether the interests of, and links to, the United States . . . are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[118] In answering this question, the following elements should be considered: the degree of conflict with foreign law or policy; 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 effects on the United States as compared with those elsewhere; the extent to which there is an explicit purpose to harm or affect United States commerce; the foreseeability of such effects and the relative importance of conduct within the United States, as compared with conduct abroad, to the violation charged. Having assessed the conflicts, the court should then determine whether the contracts and interest of the United States are sufficient to support the exercise of extraterritorial jurisdiction.[119]

Timberlane[120] was followed three years later by the *Mannington Mills*[121] case, which upheld the balancing process approach in *Timberlane*.

The Tentative Draft No. 2 of the Restatement of Foreign Rela-

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115. 549 F.2d 597 (9th Cir. 1976).
116. *Id.* at 611-12.
117. *Id.* at 615.
118. *Id.* at 613.
119. *Id.* at 614-15.
120. *Id.* at 597.
121. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

tions Law[122] adopts a similar approach. Section 403 stands for the proposition that exercising jurisdiction to prescribe may not be unreasonable, as determined by: the extent of substantial, direct and foreseeable effects upon the regulating state; the links between the regulating state and persons responsible for the activity; the character of the activity and the importance of regulating it; the extent of interest another state may have in regulating the activity and the likelihood of conflict.[123]

Although these decisions occurred in the field of antitrust, the principle behind the extraterritorial application of the rules reflect the reasoning by the United States in such application. Equally important is the reaction of other nations to United States jurisdiction. The United Kingdom, for example, enacted a statute which protects British businesses from the extraterritorial application of United States private treble damage judgments in antitrust cases.[124] This is the same Act that was recently relied upon by the British Trade Minister in ordering John Brown to comply with its pipeline contract. The Canadian and Australian Governments adopted similar statutes.[125]

It is questionable, under the *Timberlane* criteria, whether the United States pipeline sanctions would withstand close examination. Although the United States has a foreign policy objective of loosening Soviet control over Poland, European interests are probably stronger. Energy needs, trade policy, potential damages from breaches of contracts, jobs and sovereignty all would simply tilt the scales in favor of Europe.[126] The effects of the sanctions are also greater abroad than within the United States.[127]

A second principle of exercising jurisdiction is under the nationality principle. Under this principle, "each state has jurisdiction to prescribe rules of conduct for its nationals, even if they are outside their home country."[128] This principle often forces nationals to choose between their home country law and the law of the country they are in. In other words, no rule of international law precludes subjecting persons, regardless of nationality, to extraterritorial jurisdiction in a manner requiring action inconsistent with the law of the host state.[129] How-

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

123. *Id.* § 403(2)(a)-(h).

124. Protection of Trading Interests Act of 1980, ch. 11.

125. See Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction,* 30 AM. U. L. REV. 323 (1981).

126. Birenbaum, *The Long Arm of United States Law,* INT'L FIN. L. REV., Aug. 1982, at 6.

127. *Id.*

128. Marcuss & Richard, *supra* note 111, at 443.

129. RESTATEMENT (SECOND), *supra* note 102, § 39.

ever, as will be subsequently noted, this jurisdiction is subject to limits.[130] In fact, "if the performance of such an act would be contrary to the law of the other state, then rarely, if ever, would such an order be given."[131]

In the context of the *Dresser* case, this principle is very important. Under the Restatement, if a foreign subsidiary of a United States parent can be characterized as a United States national, then the United States might be able to legitimately gain jurisdiction over the foreign subsidiary.

The important issue in utilizing this theory of jurisdiction is determining the "nationality" of a corporation. Traditionally, nationality has been determined by one of two theories. The first theory is used by common law countries, namely the United States and Great Britain. Under this view, the country which chartered the corporation establishes its nationality. If the corporation was doing business anywhere but the chartering country, it would be considered foreign. The Restatement adopts this view.[132]

The second theory is the seat rule. This rule has been generally favored by the civil law countries. Under this rule the law of the corporation's seat determines its nationality. The seat is usually determined on a case by case basis, with reference to the location of corporate headquarters, the place of board of directors meetings and the location of shareholder meetings.[133]

A third basis for exercising extraterritorial jurisdiction is usually referred to as the protective principle. Under this principle, a state has "jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State."[134] This principle also has a potentially unlimited reach. Consequently, efforts have been made to arrive at appropriate limits. One such limit suggested is to limit jurisdiction to cases where real necessity is demonstrated. This would include cases where other options are not available. Another suggested limitation is similar to that of the "effects" doctrine. This proposal would limit jurisdiction

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130. *Id.* § 40.

131. *Id.* § 39, comment a.

132. *Id.* § 27.

133. *See* Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1 DUKE L.J. 1 (1974). Noting that consistency in regulation is lacking among nation-states and that this fact leads to great uncertainty in policymaking for multinational enterprises, Dr. Hadari sets forth guidelines for determining and formulating the applicable law and the nationality of such enterprises.

134. Akehurst, *supra* note 110, at 170. *See also* RESTATEMENT (SECOND), *supra* note 102, § 33.

to cases where the "primary effect of the crime" is threatening to that state.[135] The principle has also been limited by the International Court of Justice, which held that a state could not extend diplomatic protection to a foreign corporation in which its nationals were majority shareholders just because a foreign government's actions tended to cause economic harm to that country.[136]

Two other bases exist for exercising extraterritorial jurisdiction. The passive personality principle allows a state to punish aliens for acts abroad that are harmful to nationals of the forum state.[137] This principle deals with offenses against individuals associated with the state exercising jurisdiction.[138] The universality principle recognizes jurisdiction on the part of states to punish acts where the crime is of a type universally prohibited.[139] These two principles, however, do not concern us.

VI. Analysis

A. *Control-Dresser as a Subsidiary*

The June amendments to the Export Administration Act were an attempt by the United States Government to prescribe retroactive rules to Dresser-France based on its status as a foreign subsidiary and licensee of United States technology. As previously mentioned, the United States never attempted to exert such jurisdiction for foreign policy reasons where the sole link with the United States was ownership or control. Even then, control was exerted for national security reasons.[140] Since the action against Dresser is unprecedented in the history of United States trade, one must question the validity of the grounds upon which the action is based. Specifically, can ownership or control be a sufficient link to confer jurisdiction upon a country? Since this link is at the heart of the problem, a rather in-depth look will be taken into its history as well as the problems of and reaction to its use.

1. The *Daimler* Case

The theory of jurisdiction based on legal control is not a new theory. Rather, it appeared as early as 1916 when the House of Lords de-

135. *See* Marcuss & Richard, *supra* note 111, at 446.

136. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3.

137. *See* Marcuss & Richard, *supra* note 111, at 446.

138. *See* I. Brownlie, Principles of Public International Law 303 (1979).

139. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans*, 83 Harv. L. Rev. 579 (1970).

140. *See, e.g.*, Trading with the Enemy Act, ch. 106, § 5, 40 Stat. 411, 415 (1917).

cided the *Daimler*[141] case. In *Daimler,* Daimler Co., Ltd. was incorporated as a sales subsidiary of a German corporation. The holders of the company's shares were all German except one, the secretary of the subsidiary. All other officers and directors of Daimler were also German.

After the outbreak of the First World War, an action was commenced on behalf of Daimler to recover a trade debt from Continental Tyre and Rubber Company, Ltd. (the defendant). The defendant asserted two defenses. The first alleged that Daimler was an alien company and any payment of debt to it would be trading with the enemy. The defendent also alleged that the action was commenced without the authority of the company.[142] For our purposes, the first defense is the important one.

Lord Parker of Waddington wrote the opinion of the majority. Lord Parker argued that a corporation is a legal entity, but without a mind or conscience. Consequently, any acts by it must be made through properly authorized agents. The company would be regarded as friendly so long as it carried on its business in England or another friendly or neutral country through its agents. The company, however, could assume an enemy character if the agents or persons in control of the company's affairs were "adhering to the enemy or taking instructions from or acting under the control of the enemy."[143] In that case, a person knowingly having dealings with the company was trading with the enemy.

The shareholders, according to Lord Parker, were also significant in determining the status of the company as friend or enemy because they are the ones who elect and remove those persons in control.[144]

The *Daimler* case is pivotal because it was the first significant common law case which overruled the superficial place of incorporation test in favor of a test examining the place from which the corporation was actually controlled.[145] In *Daimler,* the control test was used by England, the host country, defensively against an action taken by a company determined to be alien. This is a significant point and will be discussed later in this article.

141. Daimler Company, Limited and Continental Tyre And Rubber Company (Great Britain), Limited, 2 A.C. 307 (1916).

142. *Id.* at 308-10.

143. *Id.* at 345.

144. *Id.*

145. Kronstein, *The Nationality of International Enterprises,* 52 COLUM. L. REV. 983, 986 (1952).

2. Further Development

The United States also utilized the control principle when, during World War I, Congress passed the Shipping Act of 1916.[146] Under this Act, the transfer of ships during war or national emergency to corporations chartered outside the United States or controlled by persons who were not United States citizens was unlawful unless approved by the Maritime Commission. The Act was intended to cover every type of control known in 1917.[147]

The courts were slow to acknowledge this control principle, however, even during time of war. In *Behn Meyers & Co. v. Miller,*[148] for example, the Supreme Court adhered to the principle that the place of incorporation determined the nationality of the corporation, even with regard to wartime seizures.

The United States State Department, however, took a different view when, in 1920, the Mexican Government expropriated oil properties of Mexican corporations without compensating the British or United States shareholders. Mexico justified its act by the traditional rule that a corporation is a national of the state which creates it. The United States, on the other hand, adopted the control theory of nationality.[149]

With the coming of World War II, Congress authorized the President to freeze and later vest property of foreign nationals based upon control.[150] Under this act, a corporation was considered foreign if it was substantially controlled by a foreign national. With this interpretation, Congress, in effect, overruled *Behn Meyers.*[151] The Supreme Court acknowledged the reversal in 1947.[152]

3. The *Freuhof* Case

In 1917, the United States Congress passed the Trading with the Enemy Act.[153] Under the Act, the President could regulate and control any transaction by "any person . . . subject to the jurisdiction of the United States"[154] during a period declared to be a national emergency. Such an emergency has existed since 1941, and the President, through

146. 39 Stat. 728 (1916), *cited in* Kronstein, *supra* note 145, at 986, 987.
147. Kronstein, *supra* note 145, at 987.
148. 266 U.S. 457 (1925).
149. *Id.*
150. *See* 12 U.S.C. § 95(a) (1946). *See also* Kronstein, *supra* note 145, at 988.
151. 266 U.S. 457 (1925).
152. Clark v. Vebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947).
153. Craig, *supra* note 139, at 579.
154. 50 U.S.C. app. § 5(b)(1) (1982).

the Treasury Department, issued regulations limiting and restricting trade with communist countries.[155] In the Act, a "person" included any organization "wheresoever organized or doing business"[156] which was owned or controlled by a United States person or organization. By defining person to include all corporations controlled by United States companies or nationals, the United States gave itself jurisdiction based upon the concept of control.[157] With the exception of a few minor changes in wording, this definition has remained the basic definition of persons subject to United States jurisdiction for purposes of regulation.[158]

The problems with the Act and its extraterritorial application emerged in 1956 in *Freuhof v. Massardy*.[159] In this case, a French corporation, Freuhof France, was controlled by a United States corporation which held both a majority of shares and seats on the Board of Directors. Freuhof France contracted with another French corporation, Berliet, to sell tractor trailer units which Berliet would later resell to communist China. The Treasury Department ordered the United States corporation to suspend execution of the contract. It did so by ordering Freuhof France to cancel its agreement with Berliet. Freuhof France, faced with the threat of a million dollar suit by Berliet, brought suit against the five United States directors asking the court to appoint an administrator to execute the contracts and manage the company temporarily. The court granted the requested relief.[160]

Prior to *Freuhof*, the United States had generally accepted the international law principle of territoriality, subject to two exceptions.[161] The first was the nationality principle, which allows countries to exercise extraterritorial jurisdiction over their own nationals. The second exception was the protective principle, which allows countries to exercise jurisdiction over acts that threaten their national security.[162] In *Freuhof*,[163] it appears that the United States would only have been able to apply its regulations directly to a foreign corporation if that

155. Craig, *supra* note 139, at 585.

156. 31 C.F.R. § 500.329 (1963).

157. *Id.*

158. RESTATEMENT (REVISED), *supra* note 122, § 418, reporters' note 2.

159. 1968 D.S. Jur. 147, 1965 J.C.P. II No. 14 (Cour d'appel, Paris). *See also* an English summary of the case in 5 I.L.M. 476 (1966).

160. *Id.*

161. Craig, *supra* note 139, at 586. The other exceptions are: (a) the universality principle, under which countries may exercise jurisdiction over certain offenses which are universally prohibited and (b) the passive personality principle, which determines jurisdiction by reference to the victim's nationality.

162. *Id.*

163. *Freuhof*, 1968 D.S. Jur. at 147.

corporation was a United States national or if the security of the United States was threatened. It is questionable, however, that either exception would have applied.

In the *Freuhof* case,[164] unlike the *Daimler* case,[165] the United States sought to use the theory of control to apply its laws outside its own territory. Contrary to *Daimler,*[166] it was an extraterritorial offensive use of the principle rather than a defensive use. As previously mentioned, however, a defensive use may be more acceptable, if not required in international law.

4. Other Acts

In addition to the Trading with the Enemy Act, there have been other statutes passed referring to persons subject to the jurisdiction of the United States. One, in particular, utilized national security as a basis. The Foreign Assets Control and Transaction Control Regulations[167] prohibit a broad range of transactions with certain foreign countries designated as hostile,[168] and embargo transactions in strategic products with countries that are actual or potential adversaries. This latter category includes most communist countries. Both sets of regulations apply to foreign firms owned or controlled by United States firms.[169]

The Cuban Assets Control Regulations[170] were also based on national security concerns, but provided an exception under which trade with Cuba by foreign affiliates of United States firms could continue as long as it involved no United States citizens, residents or goods of United States origin.[171] As time went on, however, national security concerns subsided giving way to foreign policy concerns. Recognizing such a difference in purposes the regulations were modified in 1975 to provide for discretionary licensing by which most third country transactions involving nonstrategic items by United States foreign affiliates are readily approved.[172]

Other regulations have been based on foreign policy concerns and

164. *Id.*

165. *Daimler,* 2 A.C. at 307.

166. *Id.*

167. 31 C.F.R. pts. 500, 505 (1983).

168. 15 C.F.R. § 385.1 (1984) (the countries currently classified as such are Kampuchea, Vietnam, North Korea and Cuba).

169. 31 C.F.R. § 500.329 (1983).

170. 31 C.F.R. pt. 515 (1983).

171. 31 C.F.R. §§ 515.541 (1963).

172. 31 C.F.R. § 515.559 (1983). There is a presumption in favor of licensing even if as much as 20% United States goods are involved. *See* 15 C.F.R. § 385.1(b)(2) (1984).

have also been limited in their application. In the Rhodesian embargo, for example, the United Nations Participation Act[173] authorized the President to regulate economic relations between the United States and persons subject to its jurisdiction and any foreign country. The United States regulations, however, did not include third country subsidiaries as being subject to United States jurisdiction.[174] Rather, only United States citizens and residents within the United States were prohibited from involvement with third country subsidiary relations with Rhodesia.[175]

The trade embargo on Iran was imposed pursuant to the International Emergency Economic Power Act,[176] which authorizes the President in national emergency situations to impose restrictions on any person "subject to the jurisdiction of the United States."[177] The Executive Order[178] and regulations[179] under the Act, however, expressly excluded all entities organized and doing business under the laws of a foreign country. Instead, there was only a notice requirement for United States patents before any transaction could occur between the foreign entity and Iran.[180]

There is also a recent example under the Export Administration Act of 1979. The 1980 ban on exports to the Moscow Olympics also extended to any person subject to United States jurisdiction. Foreign subsidiaries of United States firms, however, were excluded from the category.[181]

5. The *Barcelona Traction* Case

In 1979, the International Court of Justice decided the *Barcelona Traction, Light & Power Co.* case.[182] The case contained numerous issues which will probably be commented upon for years to come. But, for purposes of this article, the focus will be upon the facts of the case, the ruling of the case and how the case deals with the theory of control.

Barcelona Traction, Light & Power Co., Ltd. was incorporated in Canada where it had its main office. It formed a number of subsidiaries

173. 22 U.S.C. § 287(c) (1982).
174. 31 C.F.R. § 530.404 (repealed 1979).
175. 31 C.F.R. §§ 530.307, 404 (repealed 1979).
176. 50 U.S.C. §§ 1701-1706 (1982).
177. *Id.* § 1702(a)1(A)-(B).
178. Exec. Order No. 12,205 § 1-102, 45 Fed. Reg. 24,099 (1980).
179. 31 C.F.R. § 535.207(b) (1980).
180. *Id.*
181. 31 C.F.R. § 385.2(d) (1982) (subsection (d) has been reserved in 1984).
182. (Belg. v. Spain), 1970 I.C.J. 3 (judgment of Feb. 5th).

in both Spain and Canada in order to create and develop electric power production and distribution in Spain. Barcelona Traction issued several series of sterling bonds, principally to Belgian nationals, which were serviced out of transfers to Barcelona Traction by the Spanish subsidiaries. In 1936, the servicing was suspended due to the Spanish Civil War. After the war, the Spanish Government refused to authorize transfer of foreign currency necessary to service the bonds.

In 1948, as a result of three Spanish bondholder's petitions, Barcelona Traction was declared bankrupt. The case involved procedural complexities, and eventually Belgium filed with the International Court of Justice on behalf of the Belgian shareholders, the principal owners of Barcelona Traction.[183]

The Court, in rejecting Belgium's claim, said that an injury to a shareholder's interests, as opposed to rights, was insufficient to found a claim. Rather, as a general rule, where the unlawful act is committed against a company representing foreign capital, only the national state of the company may exercise diplomatic protection.[184] The Court considered, however, the possibility of exceptions, finding two types. The first was the case of a defunct company; the second was the case of the state protecting a company lacking capacity to take action. They found that neither exception existed.[185]

It is noteworthy, however, that in analyzing the second exception, the Court reaffirmed the *Nottebohm*[186] "genuine link" requirement.[187] But, unlike *Nottebohm,* they did not weigh all the competing interests. Rather, they held that if a state has a "genuine connection," it is sufficient to confer capacity upon the state to protect the company exclusive of even the close connection of the shareholders.[188]

6. The Restatement

The American Law Institute has also addressed the problem. In the 1981 Tentative Draft of the Restatement of the Law, section 216 states: "Under international law, a corporation has the nationality of the state that creates it, but other nations need not accept that nationality if it is not based on a genuine link between the state and the corporation."[189]

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183. *Id.* at 6-11.
184. *Id.* at 32.
185. *Id.* at 41.
186. (Liechtenstein v. Guat.), 1955 I.C.J. at 3 (judgment of Apr. 6th).
187. *Barcelona Traction,* 1970 I.C.J. at 42.
188. *Id.*
189. RESTATEMENT (REVISED), *supra* note 122, § 216.

Although a corporation may only have one nationality, links other than nationality may be significant. Control is one of these links.[190] For example, states may treat ownership of corporate shares by nationals of the state as the equivalent of nationality. The state which has such links to a corporation may treat it as its own national for some purposes.

The Restatement also addresses control in section 418.[191] This section states that the United States has jurisdiction to apply its law to corporations organized under the laws of a foreign state that are substantially owned or controlled by nationals of the United States. This section reflects the principle that ownership and control are analogous to nationality links.[192] The ownership and control standard is fulfilled if "all of a majority of shares, or other evidence of ownership of the foreign corporation are held (directly or indirectly) by or for one or more individuals who are nationals of the United States or a corporation organized under the laws of the United States or one of the States of the United States."[193] Possession of a substantial block of voting shares or principal creditor status of the foreign corporation would also be sufficient.[194]

7. The Economic Unit Concept and Control

Another interesting aspect of control arose in Argentina in the early 1970's. Two decisions by the Argentina Supreme Court, together with subsequent legislation, have challenged the "separate identity of parents and subsidiaries"[195] and have imposed a view involving an "economic unit concept,"[196] which is designed to give control over the foreign parent that controls the operations of the subsidiaries through commercial relationships.[197]

In *Parke Davis*,[198] the first case, the Court refused to acknowledge the traditional licensor/licensee relationship because the subsidiary (li-

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190. *Id.* comment d.
191. *Id.* § 418.
192. *Id.* comment b.
193. *Id.* comment d.
194. *Id.*
195. Gordon, *Argentine Jurisprudence: the Parke Davis and Deltec Cases*, 6 LAW. AM. 320 (1974).
196. *Id.*
197. *Id.*
198. *See id.* at 328 n.4 ("P.306.XVI. Parke Davis v. Cia. de Argentina S.A.I.C.S. s/ recurso de apelacion. Corte Suprema de Justica de la Nacion, Buenos Aires, 31 Julio 1973"). See also Gordon, *supra* note 195, at 321, for an analysis of the facts and holdings of the Argentine Supreme Court decision in *Parke Davis*.

censee) was economically dependent on the parent (licensor). This occurred in the context of royalty payments by the parent to the subsidiary. The Court reasoned that since the parent controlled the subsidiary's operations, it could dictate all the terms of the licensing agreement. Consequently, when the parent required a very high royalty payment, a portion of the royalty received by the parent was actually profit. Thus, in essence, the Court pierced the corporate veil by determining the commercial reality of the transaction involved.[199]

The Court did not emphasize control by the parent as much as the lack of independence of Parke Davis, the subsidiary. In doing so, the Court found that since there was no effective licensing agreement between Parke Davis of Argentina (subsidiary) and Parke Davis of Detroit (parent), there was no commercial relationship between independent entities.[200]

The second case involving the economic unit concept was the *Compania Swift de la Plata (Cia Swift)* case.[201] Cia Swift was the largest meatpacker in Argentina and the largest subsidiary of Deltec International, Ltd. The company had been unprofitable for years and, as a result, a bankruptcy petition was filed in 1970. The commercial court of Buenos Aires rejected the claims of all other Deltec group companies based upon the theory of "penetration of corporate personality."[202] The commercial court also extended Cia Swift's liability to other Deltec group companies based upon the economic unit theory. In other words, the court found that the entire Deltec group was a single economic enterprise. The court of appeals affirmed the bankruptcy but refused to extend the liability of Cia Swift to other Deltec companies.[203]

The case reached the Supreme Court which, in 1973, affirmed the commercial court's decision. In affirming, the Court reacted to a "frustration over the lack of national control over the multinational entity, where the power is centralized abroad and the host nation of a subsidiary feels its impact, often to its detriment."[204] The Court rejected the notion that only one member of a multinational "group" (i.e., Cia

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199. *See* Gordon, *supra* note 195, at 328 n.4 (the *Deltec* case is cited as "C-705-XVI. Compania Swift de La Plata S.A., Frigorifica s/ convocatoria de acreedores. Corte Suprema de Justica de la Nacion, Buenos Aires, 4 Sept. 1973"). *See also* Gordon, *supra* note 195, at 330, for a complete translation of the *Deltec* decision.

200. *Id.*

201. Compania Swift de La Plata S.A., Frigorifica s/ convocatoria de acreedores. Corte Suprema de Justicia de la Nacion, Buenos Aires, 4 Sept. 1973, *cited in* Gordon, *supra* note 195.

202. Gordon, *supra* note 195, at 324.

203. *Id.*

204. *Id.* at 325.

Swift) should be responsible when it is subject to external control by another (i.e., Deltec).

The case was remanded to the commercial court, which declared thirteen companies of the Deltec group of companies bankrupt.

In the *Parke Davis* and *Deltec* cases the concept of control, by a piercing of the corporate veil, was made accessible through a new instrumentality, the economic unit. Yet, the Court failed to properly analyze the concept. As a result, Argentina was unable to effectively reach the assets of the parent.[205] Nevertheless, under the theory as applied, other Deltec group companies in Argentina were brought within the reach of Argentina's courts, making additional assets available to Cia Swift's creditors.

The subsequent Argentine investment legislation treats all subsidiary/parent transfers as profit, including subsidiaries which have majority foreign ownership.[206] The legislation, by focusing on control, approaches the problem as the United States courts do when applying the alter ego theory. The legislation penetrates the corporate fiction to bring within the jurisdiction of Argentina's courts those companies within the economic unit. Argentina, therefore, is given a new element of control over those multinationals operating within its borders.

8. Analysis and Conclusion

The validity of control as a sufficient link for jurisdiction in international law is questionable, at least when it is used for offensive purposes other than national security. Without a doubt, a state has authority under international law to prescribe and apply its law with respect to conduct within its own territory.[207] When a state attempts to apply its law to conduct outside its borders, however, some accepted basis for jurisdiction must be found or the state's action is unlawful. The prescription or enforcement of an extraterritorial rule without adequate jurisdiction "is a violation of international law."[208] If an order is not sustainable under international law, it is illegal.

Even if some prima facie basis for jurisdiction exists, an extraterritorial order is still improper if it would interfere with the legitimate jurisdictional prerogatives of other governments. Thus, the question becomes whether control is a sufficient claim by the United States "vis-a-vis those of other nations, to justify an assertion of extraterrito-

205. *See id.* at 326.

206. *See id.*

207. RESTATEMENT (SECOND), *supra* note 102, § 17; *see also* RESTATEMENT (REVISED), *supra* note 122, § 402(1)(a); I. BROWNLIE, *supra* note 138, at 298-302.

208. RESTATEMENT (SECOND), *supra* note 102, § 8.

rial authority."[209] Except where matters of national security are at stake, an extraterritorial decree must generally yield to the laws and strong public policies of the state having territorial jurisdiction over the conduct in question.[210]

The Restatement (Second) gives guidelines for determining when to yield under this principle.

> Where two states have jurisdiction to prescribe . . . each state is required by international law to consider, in good faith . . . such factors as
> (a) The vital interests of each of the states,
> (b) The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
> (c) The extent to which the required conduct is to take place in the territory of the other state,
> (d) The nationality of the person, and
> (e) The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[211]

To be sure, the United States has taken an aggressive view of the propensity of extraterritorial jurisdiction. For example, national security export controls under the Trading with the Enemy Act have been applied extraterritorially. They were justified, however, under the protective principle of international law, which grants a state prima facie authority to impose extraterritorial controls to protect its security interests.[212] In another field, antitrust regulation over controlled foreign corporations might be justified under the effects doctrine. Corporations may also be subject to jurisdiction when they are merely paper entities, i.e., instrumentalities of the controlling parent corporation used to subvert domestic regulatory programs. A prime purpose of such diversion is tax evasion.[213]

It is arguable, however, that where no special justification exists, jurisdiction by the state of the controllers (often a parent corporation) is subject to the superior sovereign claim of the host state. Under the Restatement (Revised) section 418,[214] "primary jurisdiction over an enterprise, whether doing business as a branch or as a separately incorporated subsidiary, rests with the state in which the enterprise is doing

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209. *Timberlane,* 549 F.2d at 613.
210. RESTATEMENT (REVISED), *supra* note 122, comment d.
211. RESTATEMENT (SECOND), *supra* note 102, § 40.
212. *Id.* § 33; *see also* RESTATEMENT (REVISED), *supra* note 122, comment d.
213. RESTATEMENT (REVISED), *supra* note 122, § 418, comments a, h.
214. *Id.*

business."[215] Thus, as in the *Dresser* case, where the conduct in question takes place entirely in a third country, is consistent with the public policy of the government of that country, and advances the legitimate interests of that government, exercise of extraterritorial jurisdiction by the United States or any other country based solely on control may be illegal.[216]

If any safe conclusion can be reached, it is that a country having a "controlled enterprise" by persons or entities abroad may use the fact of control to legislate within its borders as to actions taken by the corporation within that country's borders. This situation arose in the *Daimler*[217] case and in the Argentinian economic concept cases.[218] It is also clear that a country from which persons or entities control foreign corporations may generally not use their control as a link to legislate in that foreign country. This was the situation in the *Dresser* case. From these two points the principle may be characterized as a defense rather than a weapon. It may be used by a nation to protect its territorial integrity against commercial parasites supported externally by the controlling entity or person.

In light of this analysis, it is doubtful that "United States persons," within the context of export controls, was meant to include owned or controlled foreign subsidiaries when imposing foreign policy export controls. The legislative history also bears this out, demonstrating that Congress realized that the imposition of controls on owned or controlled subsidiaries had been used only in emergency situations, unless there was specific legislation to the contrary. The report of the Senate Banking, Housing and Urban Affairs Committee, for example, noted that

> [i]f Congress wishes to attempt to exert control in particular situations over wholly foreign exports of foreign subsidiaries of U.S. firms, Congress can do so by statute in the future as it has done in the past. The committee also recognizes that claims to U.S. jurisdiction over such exports are not likely to go unchallenged by the government of the countries in which such subsidiaries are located.[219]

This strongly suggests that Congress understood that the Adminis-

215. *Id.* comment c.

216. RESTATEMENT (SECOND), *supra* note 102, § 40; RESTATEMENT (REVISED), *supra* note 122, §§ 403, 418(4)(a).

217. *Daimler,* 2 A.C. at 307.

218. *See* Gordon, *supra* note 195.

219. S. REP. No. 169, 96th Cong., 1st Sess. 5, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1147, 1151-52.

tration would seek specific legislation before expanding export controls extraterritorially to owned or controlled companies. An amendment was also introduced which would have prohibited the "imposition of new controls on non-United States-origin exports of foreign subsidiaries of United States companies, except in international economic emergencies declared pursuant to section 202 of The International Emergency Economic Powers Act,"[220] but was withdrawn pending further study of the issue. Nevertheless, the legislative history is quite clear regarding Congress' view of the controls. According to the legislative history of the Act, "no aspect of U.S. export control policy received sharper criticism during Committee and Subcommittee hearings than controls maintained for foreign policy purposes."[221] Former Under Secretary of State George Ball expressed this criticism by stating that "such controls should be used very sparingly."[222] Former Under Secretary of Defense David Packard reacted similarly in stating: "I do not believe these unilateral constraints are effective in changing the policies or the behavior of the targeted countries."[223] European nations also reacted adversely to the actions of the United States. Great Britain's Trade Minister Peter Rees, for example, stated Britain's view as to this matter: "The nationality of a company is determined by its place in incorporation. Moreover, even where nationality is a legitimate basis for extraterritorial jurisdiction, it must remain subject to the primacy of the law and policies of the territorial state."[224] He went on to say that United Kingdom policy

> [g]enerally reflects the view that it is for each state to determine the economic policies applying to persons and companies in its territory and that it is undesirable that another state should seek to impose its policies and laws on those persons and companies, both as a matter of principle, especially when those policies conflict with those of the host country but also as a matter of practice, since such policies and laws may be beyond the ultimate limits of enforcement—or only enforceable in a very indirect manner.[225]

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220. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626.

221. U.S. CODE CONG. & AD. NEWS, *supra* note 219, at 1152.

222. *Id.*

223. *Id.* at 1153.

224. U.S. EXPORT WEEKLY (BNA), Nov. 11, 1982, at 207.

225. *Id.*

B. *Dresser as a Licensee*

The June amendments also seek to apply United States controls to foreign firms operating under technology licenses from United States firms.[226] This extension is based on the nationality principle, whereby the goods and technology are treated as American.[227] Under international law, however, goods and technology do not have a nationality. Consequently, they cannot be used as a basis for jurisdiction.

There are also United States judicial decisions holding that United States jurisdiction does not follow goods originating in the United States once they have been discharged in the territory of another country. One case, for example, stood for the proposition that "the U.S. does not accept the validity of extraterritorial orders of foreign governments preparing to seize assets of the U.S."[228] Other cases similarly hold that foreign patent laws may not be used to control the use of technology in the United States.[229]

It is arguable, however, particularly from the standpoint of the Government, that foreign licensees agree under the licensing agreement to be bound by United States law. Although parties may agree as to their choice of law and choice of forum, they may do so only when it does not conflict with the law of their respective state.[230] Generally, however, the only type of agreement recognized in international law is one between states. It is only through this type of agreement that one state may acquire jurisdiction to regulate conduct in another state.[231]

C. *Additional Remarks*

When examining a nation's actions, it is imperative to look at the past practices of that nation in the relevant area of law, both to the given fact situation and to a fact situation wherein the United States was in the host nation's shoes. As to the first point, the United States has, in other contexts, affirmatively supported the proposition that foreign subsidiaries should conform to the laws and policies of the host country. The OECD Guidelines for Multinational Enterprises[232] call

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226. 47 Fed. Reg. 27,250 (1982) (to be codified at 15 C.F.R. §§ 376.12, 379.8, and 385.2).

227. U.S. EXPORT WEEKLY (BNA), Aug. 17, 1982, at 718.

228. United Bank Ltd. v. Cosmic International, Inc., 542 F.2d 868, 876-77 (2d Cir. 1976).

229. *See, e.g.*, Deep South Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972).

230. It is customary to include choice of law and choice of forum provisions in international contracts.

231. RESTATEMENT (SECOND), *supra* note 102, § 25.

232. *Annex to the Declaration of 21st June, 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises*, 75 DEP'T ST.

upon multinational enterprises to "take fully into account established general policy objectives of member countries in which they operate" and, "in particular [to] give due consideration to those countries' aims and priorities with regard to economic and social progress, including industrial and regional development."[233] The United States was a leader in the establishment and development of these guidelines.

Another expression of the United States position is found in a statement made by the United States representative to the Permanent Council of the Organization of American States on March 10, 1976. Referring to the diplomatic protection of United States nationals and United States investment abroad, the delegate stated:

> First we believe that all sovereign states have the right to supervise and regulate the activities of foreign citizens in their territory consistent with the minimum standards of justice called for by international law. Second, we believe that private citizens must respect the laws of the nation in which they operate and that they must conduct themselves as good citizens of these nations refraining from improper interference in their internal affairs.[234]

As to the second point, the United States has always required United States subsidiaries of foreign firms to comply with United States laws and policies. An example of this occurred as recently as 1981 in the *Sumitomo* case.[235] In this case, the Court upheld the place of incorporation test of nationality and required that a United States subsidiary of a Japanese firm must obey the United States Civil Rights Act and not discriminate against women in job promotion.[236] The determination in this case is contrary to a treaty provision stating that Japanese companies operating in the United States could hire managers of their choice.[237] It is quite clear from this case that if a foreign country were to take measures similar to the June amendments, it is doubtful they would be recognized or enforced by United States courts, or be in conformity with United States law.

An excellent hypothetical was posited by David E. Birenbaum concerning this matter. It is worthy of quoting in its entirety as a summation of the points thus far stressed. Mr. Birenbaum states:

BULL. 854 (1976).

233. *Id.* at 856.

234. DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 434-35 (E. McDowell ed. 1976).

235. Sumitomo Shoji America, Inc. v. Avigliano, 102 S. Ct. 2374 (1982).

236. *Id.*

237. *Id.*

> Let us say that Saudi Arabia were to acquire a United States electronics company which manufactured parts critically needed for Israel for defense purposes. Implementing a Saudi national policy, that country prohibits all entities owned or controlled by the government or its nationals from selling specified types of equipment to Israel. The products made by the U.S. electronics company are on the Saudi list, but are under contract to Israel with the express authorization of the U.S. government. If the U.S. supplier fails to perform its agreement, it will be subject to imposition of substantial liquidated damages. Further, it will have frustrated U.S. policy. The most serious issues of political controls attending foreign investment in the United States would arise. Can anyone doubt that the United States government would take action to stop the Saudi Arabians or that the United States would consider subsequent action by them to sanction the U.S. company an illegitimate intrusion on U.S. sovereignty? If that is so, why is the outcome different if the party in question is a foreign subsidiary of a U.S. company under contract with the Soviet Union for the supply of pipeline equipment manufactured outside of the U.S.? And why should the result be any different if the connection to the United States is a bare license?[238]

With regard to the licensing argument, the United States Government would probably not recognize the private contractual claims of a foreign government to regulate conduct within the United States contrary to United States law. Evidence of this is found in several areas. For example, many Latin American countries have tried to obtain waivers of rights from United States nationals through the use of Calvo clauses. Under such a clause, a United States investor agrees that he will not seek United States diplomatic protection, but will be limited to local remedies. The United States recognizes the clause, but only to the extent that it requires exhausting of local remedies.[239] In other words, consenting to such a clause does not preclude the person's government from espousing a claim based on a violation of international law by the other government.[240]

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238. Birenbaum, *supra* note 126, at 6.

239. RESTATEMENT (SECOND), *supra* note 102, § 202 (comments and reporters' note).

240. 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 931 (1967).

VII. Validity of the June Amendments Under the EAA

In addition to the legality of the June amendments in international law, there is also the question of whether they satisfy the criteria laid down in the Export Administration Act itself. Assuming that Dresser-France or the technology is "subject to the jurisdiction of the United States" as required in section 6, there are six criteria to be considered by the President before "imposing, expanding, or extending export controls."[241] The first criterion to be considered involves "the probability that such controls will achieve the intended foreign policy purpose."[242] This criterion has been the source of extensive debate since the imposition of the controls in June, 1982. There has been considerable confusion, however, in determining exactly what the objective is, rather than whether it can be met. It is clear that the controls imposed on oil and gas equipment both in December, 1981, and June, 1982, were in response to the Soviets' "blatant disregard for the Helsinki Act in Poland."[243] Besides these, there has been little agreement on the purposes of the sanctions.

Assistant Secretary for Trade Administration Lawrence J. Brady has given a number of speeches throughout the United States in order to clarify the foreign policy objectives of the United States in relation to the Soviet pipeline. At the University of New Hampshire in October, 1983, he stated these objectives quite clearly: "We can have a major effect on the final configuration, productivity and efficiency of that pipeline by restricting the availability of our technology."[244] He went on to say that "the pipeline will not be finished on schedule and will not meet predicted output levels. This could result in a severe reduction of anticipated Soviet hard currency gains."[245] With respect to the June amendments, Secretary Brady stated the purpose as being to close the loophole of the December 29th controls, which were causing United States firms to bear "the full economic costs of the sanctions" while allowing the U.S.S.R. to still "obtain the embargoed commodities from U.S. subsidiaries and licensees abroad."[246]

The President apparently did consider the probability of effectiveness of the sanctions. In his mind, they were effective. This is a point of argument, but under the EAA such considerations are subject to a

241. Export Administration Act of 1979, 50 U.S.C. app. § 2405(b).

242. *Id.* § 2405(b)(1).

243. Speech by Lawrence J. Brady, Asst. Secy. for Trade Admin., on Dec. 7, 1982 to Nat'l Assoc. of Manufacturers.

244. Speech by Lawrence J. Brady, *reprinted in* Advisory Comm. on East-West Trade, Talking Points, Nov. 10, 1982.

245. *Id.*

246. *Id.*

good deal of discretion.

Probably the strongest argument against the controls centered on the third and fourth criteria. The European Community (EC), in response to the June amendments,[247] based much of their argument on these criteria. Criterion 3 requires that the reaction of other countries be considered.[248] The EC responded to this by stating that they "cannot fail to denounce the measure as unlawful in international law."[249] They also addressed criterion 4, which requires a consideration of the effects of the controls on the export performance of the United States.[250] In doing so, they stated that "confirmation of the U.S. measures . . . would involve complete disregard for damaging effects, not only immediately, but also in the longer term."[251]

VIII. CONSTITUTIONAL LIMITS

Notwithstanding the international legal implications of the export controls, there has also been serious discussion on the constitutional implications. Under the first amendment, the right to communicate with both United States citizens and foreign nations is protected.[252] This right also extends to scientific and technical exchanges,[253] with some limit allowed in a commercial setting.[254] In this context, licensing is viewed as most restrictive because of its "chilling" effect on speech.[255]

In 1981, the Justice Department's Office of Legal Counsel to the Commerce and State Departments rendered two opinions on the first amendment implications of export controls. In these opinions, the Office of Legal Counsel decided that the first amendment does not affect licensing controls which limit the transmission of technology used to assist foreign persons or enterprises acquiring devices subject to United States regulation.[256] However, the Office also acknowledged that export controls could not constitutionally limit

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247. *European Community Comments on June Amendments to Export Administration Regulations*, U.S. EXPORT WEEKLY (BNA), Aug. 17, 1982, at 717 [hereinafter cited as European Community Comments].

248. Export Administration Act of 1979, 50 U.S.C. § 2405(b)(3).

249. European Community Comments, *supra* note 247.

250. Export Administration Act of 1979, 50 U.S.C. § 2405(b)(3).

251. European Community Comments, *supra* note 247, at 721.

252. Kleindienst v. Mandel, 408 U.S. 753, 762-75 (1972).

253. United States v. Eder Indies, 579 F.2d 516 (9th Cir. 1978).

254. Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 562 (1980).

255. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

256. Ellicott, *Trends in Export Regulation*, 38 BUS. LAW. 541 (1983).

> dissemination of technical data by persons having no direct connection with foreign conduct in settings in which there is no more than belief or a reasonable basis for believing (1) that a foreign national may take the data abroad, and (2) that the data could be used by someone there in the manufacture or use of [a controlled item].[257]

Thus, it seems that although there is discussion of the constitutionality of controls, it is in a different context than the pipeline controls. Yet, from this author's viewpoint, it is very possible that such an issue may have to be formally considered in the event that another *Dresser* type case occurs in the future.

IX. CONCLUSION

On November 13, 1982, President Reagan lifted the foreign policy export controls.[258] As of the date of this publication, the Export Administration Act as such has expired. The President, however, by Executive Order[259] has continued the export control regulations by incorporating the provisions of the Export Administration Act in their entirety into his Presidential decree. President Reagan, in issuing the order, acted pursuant to and under the authority of the International Emergency Powers Act,[260] which allows the President to "investigate, regulate, or prohibit"[261] any transactions in foreign exchange when there is any unusual or extraordinary threat to the national security, foreign policy or economy of the United States.[262] President Reagan, in acting, has determined that "unrestricted access to [of] foreign parties to United States commercial goods, technology, and technical data"[263] constitutes such a threat. The President's actions have, in effect, left the export controls intact and as they were prior to December, 1981.[264] Exports by United States owned or controlled firms, as well as oil and gas exports, have been resumed.

The lifting of the sanctions, however, along with the President's actions, has left many of the issues raised in this article unresolved.

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257. Memorandum to Henry D. Mitman, Director, Capital Goods Production Materials Division, Dept. of Commerce, from Theodore B. Olson, Asst. Atty. General, Office of Legal Counsel (July 28, 1981), *cited in* Ellicott, *supra* note 256.

258. U.S. EXPORT WEEKLY (BNA), Nov. 16, 1982, at 239.

259. Exec. Order No. 12,470, Mar. 30, 1984.

260. Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (codified at 50 U.S.C. §§ 1701-1702 (1977)).

261. *Id.*

262. *Id.*

263. Exec. Order No. 12,470, Mar. 30, 1984.

264. U.S. EXPORT WEEKLY (BNA), Nov. 16, 1982, at 239.

For those involved, President Reagan's actions brought mixed emotions. For one thing, a grand opportunity was missed to evaluate a very contemporary international legal problem—the extraterritorial application of United States law. The opportunity also presented a splendid chance to discuss and evaluate the concept of control. True, there is supposedly comprehensive discussion occurring on reforming the Export Administration Act, including efforts to reassess East-West commercial ties in light of changed leadership in the Soviet Union.[265] In addition, there are efforts to clear up ambiguities in the Act itself and its application to situations such as the Soviet pipeline shipments. But, if statements by Assistant Secretary Brady mean what they appear to, "the President's hands [will continue to] not be tied."[266]

In the opinion of this author, President Reagan overextended his authority in imposing retroactive sanctions to Dresser-France and the other foreign firms involved. It is questionable that the June amendments were valid under either the Export Administration Act or under general principles of international law. The amendments, under the Restatement's guidelines regarding limitations to prescribe,[267] are clearly "unreasonable."[268] Even if the Act is apparently lawful, the United States may not ordinarily require one "to refrain from doing an act outside the United States required by the law of the state where the act is to be done."[269] This was precisely the case with Dresser-France when it acted under a requisition order from the French Government, a clear case of "foreign sovereign compulsion."[270]

Apart from this argument, President Reagan clearly acted inconsistently with both the history of, and congressional intent behind, the Export Administration Act. Although his foreign policy objective of tempering Soviet aggression in Poland had merit, his efforts to achieve it by regulating conduct abroad were infringements on the sovereignty of other nations. Foreign policy considerations are crucial, but they must be implemented within the established framework of international legal principles. Hopefully, the United States Department of Commerce learned a valuable lesson in diplomacy, if not legislative history.

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265. Speech by Lawrence J. Brady, *supra* note 243.

266. *Id.*

267. RESTATEMENT (REVISED), *supra* note 101, § 403.

268. *Id.* comment c.

269. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 418(1)(b) (Tent. Draft No. 3, 1982).

270. *Id.*