

The Reagan Pipeline Sanctions: Implications for U.S. Domestic Policy and the Future of International Law

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***Abstract:** For nearly two years under President Ronald Reagan, the United States issued economic sanctions against the Soviet Union in response to the Soviet Union declaring martial law in Poland. While on the surface this seems to be a legitimate argument given Reagan's staunch anti-communist stance, in reality the sanctions were an attempt to prevent oil pipelines from entering Western Europe from Russia. This article analyzes the motives, effectiveness, and legality of the sanctions passed by the Reagan administration through the Export Administration Act of 1979. Economic sanctions are a common tool of international relations, typically used in response to unfavorable or unwarranted behaviors of other states. In this context, the Reagan pipeline sanctions were not out of the ordinary, and the United States was within its international legal rights to exercise said sanctions. However, the method by which the sanctions were employed raised questions about its legality. Firstly, the Export Administration Act of 1979 was interpreted to stop the use of licensed American technologies from being used in the construction of a Euro-Siberian pipeline, regardless of any contracts already in place, raising the issue of ex post facto applications of the law. Additionally, this interpretation of the law by the Reagan administration can be seen as violating international law and the sovereignty of foreign states by imposing U.S. law on foreign soil. As such, the sanctions caused outrage in Western Europe, the U.S.'s allies seeing this as an infringement on their rights as sovereign states to conduct business. This article concludes with suggestions for better U.S.-European cohesion regarding the Soviet Union.*

For close to two years, the United States maintained economic sanctions which were aimed at the Soviet Union but which in their application most directly affected its four closest allies in the Western world. The official reason for the imposition of the sanctions was the Soviet role in the declaration of martial law in Poland; the vehicle for the sanctions was the embargo of American goods and technology deemed vital to the completion of the Euro-siberian natural gas pipeline; and the mechanism for their imposition was the Export Administration Act of 1979.¹

Strictly speaking, the sanctions were a failure, just as previous U.S. attempts to unilaterally embargo its grain, goods or technology were diluted by the nature of the liberal

¹ The S.U. announced that its security was threatened by the civil unrest in Poland (*New York Times* [NYT], 11 December, 1981, 4:3); martial law was declared in Poland, (*NYT*, 13 December, 1981, 1:6); the S.U. announces the imposition of martial law in Poland one hour after the Poles first are informed, (*NYT*, 13 December 1981, 13:1); President Reagan announces economic sanctions against the S.U., (*NYT*, 29 December 1981, 1:6); defected Polish Ambassador cites S.U. role in martial law imposition, (*NYT*, 29 December 1981, 6:1). The EAA of 1979: 50 *USCA App. sec. 2401 et seq (SUPP. 1981)*.

international trade order it helped to create.² At the time that Mr. Reagan lifted the sanctions, on 13 November 1982, there was indeed little progress to report an easing of conditions in Poland and it was abundantly clear that even the toughened and expanded sanctions had made virtually no impact upon the Europeans' decision to proceed with their commitments for the construction of the line.³

Economic sanctions, even closely observed "universal" ones, have a remarkably low rate of success, yet they continue to be employed as an instrument of foreign policy and international law.⁴ Given the long-term counterproductive side-effects, (whether measured in lost jobs and markets, increased diplomatic tensions, or political capital spent), the symbolic quality of economic sanctions is at best dubious if not all together archaic. Furthermore, in the case of the Reagan Euro-siberian pipeline sanctions, a number of serious questions have been raised as to the compatibility of the U.S. sanctions mechanism and enforcement effect with accepted standards and precedents in international law.

This paper proposes to examine the Euro-siberian pipeline sanctions in the international legal context. There are two elements to the discussion: The first is an examination of the pipeline sanctions in the context of international economic sanctions, for which there is ample international legal precedent to suggest that the U.S. was within its prescribed legal rights in electing to construct an embargo. The second is an inquiry into the *modus operandi* of the Reagan sanctions, from which it is equally clear that the *ex post facto* and extraterritorial application of U.S. municipal law is in violation of international law, and arguably the enabling Act itself.⁵

On balance, the U.S. sanctions offer some valuable long-term contributions to the vitality of international law, even as the short-term objectives operated as a dysfunction of that system. For the U.S. domestically, it is quite likely that Congress will step in to revise existing Public Law to better reflect existing international law (ie: to alter the language in order to eliminate future conflicts-of-law by tightening municipal controls), and in so doing, enhance American interests and reinforce the structure of international law in the long run.⁶ The Judicial branch has

² See for example: *An Assessment of the Afghanistan Sanctions, Report*, Subcommittee on Europe and the Middle East, of the House Committee on Foreign Affairs, (Library of Congress, Congressional Research Service [CRS]), (97th Congress, 1st Session), GPO: April 1981.

³ Bernard Gwertzman, "Lifting of Sanctions," *NYT* 15 November 1982.

⁴ See: C. Lloyd Brown-John, *Multilateral Sanction in International Law, A Comparative Analysis*, NY: Praeger (1975); Margaret Doxey, *Economic Sanctions and International Enforcement*, NY: Oxford University Press (1971); Johan Galtung, "On the Effects of Economic Sanctions: With Examples in the Case of Rhodesia," *World Politics*, Vol. 19, No. 3. April 1967, 378-416.

⁵ Charles Maechling (op-ed), "Pipeline Embargo: Reagan's Off Base," *NYT*, 8 August 1982; Leslie Gelb, "Pipeline: An Impasse with No End in Sight," *NYT*, 31 August 1982; and Stephan Rosenthal, testimony in *Hearings: Soviet-European Gas Pipeline*, Subcommittee on International Economic Policy of the Senate Foreign Relations Committee, (97th Congress, 2nd Session), at page 43. Rosenthal states that some lawyers in the Administration have concluded that there is insufficient legal basis for applying U.S. export law to frustrate the contracts the European contacts the European licensees have undertaken. (Obviously a minority view.) In addition, the *NYT* reported that, "the legality of whether the U.S. can enforce such a ban beyond its borders may have to be decided in court, according to administration officials" (Steven Weisman, *NYT*, 23 July 1982, A1).

⁶ See generally, *Hearings: Soviet-European Gas Pipeline*, (op cit). And more recently, Hearings of the Senate Banking Committee pertaining to the renewal of the EAA of 1979, held 3 February 1983.

already made significant contributions in this regard, in recent Supreme Court rulings pertaining to corporate practices and antitrust.⁷

For the international system as a whole, the sanctions evoked a renewed interest and activity on the part of the Western trading nations in the establishment and reinforcement of multilateral coordinating forums for a broad range of priority issues which are destined to become sources of potential conflict in the decade ahead. Prominent areas of concern include: technology transfers and trade (particularly in the East-West security framework), communications and advanced technology systems and services (computers, satellites, trans-national data flows and fiber optics), energy (nuclear proliferation, alternate resources, oil and natural gas), and the global monetary system (international banking standards, developing country debt, inflation control and interest rate policy coordination). To meet these challenges, the U.S. has committed itself to long-term coordinated studies, consultations and negotiations within the framework of a number of multipartite international organizations (such as the Organization for Economic Coordination and Development, COCOM, the International Energy Agency and the North Atlantic Treaty Organization). At a minimum, it can be hoped that this interaction will help to alleviate future tensions resulting from the dogmatic and self-centered disregard for the community of nations. And taken to its maximum potential, it can result in the furtherance of international law and international organization, and thereby bring about a sense of peaceful coexistence and enhance national security.

The starting point for this analysis will be a brief background examination of the Euro-siberian pipeline project which is the impetus for the legal conflict. The chronology of events and the description of the pipeline deal from its inception are vital to a complete understanding of the particular policy stances taken by each of the disputants. (An annotated chronology follows the text, see Annex One.) Next will follow a survey of the broad theoretical concepts incorporated in the Reagan decision to block the construction of the pipeline as a method of sanctioning a perceived international lawbreaker and the European perspective as to why this unilateral action is unacceptable, regardless of the guiding rationale. The U.S. sanctions will be discussed in terms of the principles of economic welfare and the desire to advance certain ideologically-oriented foreign policies. The European counter-actions will be examined in the context of a proper and valid preservation of national sovereignty and the endemic obligation to fulfill binding legal contracts (ie: the triumph of law and economics principles over politics).

This will be followed by a substantive analysis of the EAA as domestic legislation with extraterritorial application and its compatibility with the standards and norms reflected in international law. The keystone to this discussion will be the derivation of the intent and the provisions of the Act as distilled from Congressional and Executive decisions and statements, and from prominent legal opinion and judicial precedents. In this regard, parallels will be drawn to relevant examples of other U.S. attempts to extend extraterritorial reach, as in the fields of antitrust and financial regulation. In addition, foreign countervailing measures will be assessed

⁷ See *Halophane Co. v. U.S.*, 352 US 903 (1956) aff'g per curiam, 119 F. Supp 114 (S.D. Ohio 1954); quoted in Kenneth Feinberg, "Economic Coersion and Economic Sanctions," *American University Law Review*, Vol. 30-323, Winter 1981, 323-348. For other recent developments in U.S. antitrust, see Karen Kane, "Judicial Confirmation of Considerations of Comity and International Relations in the Exercise of Extraterritorial Jurisdiction of the Sherman Act," *Delaware J Corp L*, 5:292-318 (1980).

from the perspective of the inherent dangers these actions and reactions could pose for the future of amicable international relations.

And finally, these observations will be condensed into a cogent assessment of their value and possible contribution to the effectiveness of international law. In this vein, conclusions will also be drawn as to why the existing international law was unable to respond more directly and decisively to the crisis incurred by the pipeline sanctions, and what progress can be expected in the near future on the substantive issues which prompted the imposition of these policies.

Negotiations began for "Russia #6" approximately six years ago.⁸ It represents the Soviet Union's third gas-for-export pipeline, and their sixth from the Yamburg/Urengoi gas fields (on the Yamal peninsula) west towards European Russia and its Eastern client states. As recently as a year ago, there was no open Western consensus as to the precise route the pipeline would take, nor where it would finally hook up with the West European network. The most recent information indicates that the Soviets plan to first expand the production from Urengoi fields to accommodate the initial contractual requirements (set to begin by late 1983 or early 1984), and then late "phase in" additional fields and lines to meet the incrementally expanded commitments. The pipe will pass through Czechoslovakia (which is partially responsible for the construction of that portion of the link) and will ajoin the Western network of Uzhgorod on the Czechoslovakian frontier with the Federal Republic of Germany (FRG). (Refer to maps in Annex 2, 3, and 4.)⁹

The present 5000 kilometer, 56-inch diameter pipeline project promises to be one of the largest engineering feats in recent history. Even so, the starting point for the negotiations proposed a pipeline of even more grandiose proportions, reportedly quadruple of Europe's present energy demands. The original proposal was to involve between 10 -15 billion dollars of European capital, plans to develop natural gas fields even further east along the Yamal peninsula and a target export capacity to Western Europe to reach up to 60 – 70 billion cubic meters (bcm) per year (ie: constituting about 10 percent of Soviet gas exports).¹⁰

Under present agreements, "Russia #6" will represent about 15 percent of the total value of various Soviet pipeline projects to be built over the next decade, according to U.S. estimates.¹¹

In the early 1970s, both the U.S. and Japan were also involved in the process of seeking Soviet gas. In 1977, Japan was able to conclude a deal to drill offshore oil near Sakhalin Island. (Portions of that project were also affected by the Reagan sanctions and the Japanese announced plans to reschedule certain operations as a result.) The first American bid for the Siberian gas was led by a consortium of three Texas-based corporations in 1971-72 during the Nixon administration, but failed.¹² The second effort, by the El Paso Corporation, Occidental Oil of Los Angeles and the Bechtel Corporation, actually sank 50 million dollars into exploratory efforts before dropping out.¹³

⁸ Miriam Karr and Roger Robinson, "Europe's Big Gamble on Soviet Gas," *NYT*, 19 April 1982. The term "Russia #6" is used throughout EC documentation to distinguish that project from other pipeline or natural gas negotiations.

⁹ Ed A. Hewett, "The Pipeline Connection: Issues for the Alliance," *The Brookings Review*, Fall 1982, 15-16.

¹⁰ *Ibid.*, 15-16.

¹¹ Bernard Gwertzman, *op cit.*

¹² John Hardt, "Soviet Pipeline Factsheet: Energy Equipment Sales to the USSR," U.S. Library of Congress, CRS, 15 July 1982, (mimeo), 4

¹³ Victor Perlo, "Reagan's Pipeline Vendetta," *New World Review*, July/August 1982, 15.

In the “North Star” project, the main Western negotiator was American-based Tenneco. The plan was to carry 20 bcm from Urengoi to Murmansk by pipeline, and then transport it by ship to the U.S. The deal, like its other American predecessors, fell through because of “the U.S. government reluctance to contemplate loans and guarantees in the magnitude implied by the deal (set at 7 billion dollars).” Another U.S. – S.U. deal also collapsed due to financial constraints.¹⁴

In 1978, the European Community (EC) financed the “MEGAL” pipeline system, which connected several European networks to a Siberian natural gas outlet on the Czechoslovakian border. It was to be the first leg of a system that was intended to eventually network most of Europe with sources in the S.U., Iran and North Africa, as well as the EC’s “domestic” sources such as in the Netherlands.¹⁵ Stemming partly from earlier plans and partly in response to U.S. concerns of “energy cut-off blackmail,” the EC has re-emphasized that it is proceeding with these plans to tie all of its member states together under one network, so that any unforeseen cutbacks or shortages can be met by adequate “domestic” reserves.¹⁶

Based on these previous arrangements, Soviet gas deliveries to Western Europe reached 23.5 bcm per year in 1980.¹⁷ According to the EC, the new Soviet gas supplies will significantly diversify Europe’s sources and thereby conserve “domestic” European gas. The additional gas will represent less than 4 percent of the EC’s total energy consumption and approximately one-third of its gas consumption. Of course, the energy consumption blend in each member state will vary according to its own resources and foreign acquisitions.¹⁸ By 1990, European countries will be relying on Soviet natural gas to the following amounts: the FRG, 34 percent; France, 26 percent; Italy, 35 percent; the Netherlands, 11 percent; and Belgium, 40 percent.¹⁹

At this time, seven West European countries are expected to benefit from the Urengoi gas deliveries – Italy, the Netherlands, Belgium, Austria, Switzerland, France, and the FRG. Only the latter two, however, have at present concluded contracts for the Siberian gas (roughly 10 bcm per year each). In addition, Italy, Great Britain, France and the FRG will also be supplying the Soviets with pipeline components such as pumping stations, large diameter high pressure steel pipes, turbines and computer controls. It has been speculated that the Netherlands withdrew from the negotiations (competition) for the finance credit portion of the deal when it was determined that they were out of the running for equivalent orders of goods and services in the pipeline project.²⁰ However, the early reportage which suggested that the Euro-siberian pipeline was essentially a pipeline-for-gas “swap” represented a considerable oversimplification of the matter, as will be shown below.

The “deal” is actually comprised of three separate elements, all negotiated on a bilateral basis between the various West European concerns and the Soviet state trading agency. The

¹⁴ Hewett, *op cit*, 15.

¹⁵ European Investment Bank, “Press Release, 20/78 (8 June 1978)” 1.

¹⁶ See: “Europe Protests Bans By Reagan,” and “Text of Common Market Statement on Embargo,” *NYT*, 13 August 1982.

¹⁷ Karr and Robinson, *op cit*.

¹⁸ Text of EC statement, *NYT*, *op cit*.

¹⁹ EC “Newsbrief, 23/24 Nov 81.” In addition, Austria is to receive 82% of its natural gas through Soviet imports (*NYT*, 15 November 1982, *op cit*).

²⁰ “The Gas Bubble Breaks,” *Europe Magazine* (EC), April 1982.

breakdown can be made as follows: 1) official credit lines, 2) equipment and pipeline sales, and 3) sale of the natural gas.²¹

(1) *Official credit lines extended to the S.U.* – A total of between 5-15 billion dollars has been organized by a consortium of European banks headed by Deutsche Bank, which can be used to purchase equipment manufactured in each of the West European participant countries. The loans had been agreed to in principle as early as 2 February 1982, but as domestic interest rates rose a short time thereafter, the bankers became unwilling to assume the additional risk. (The Soviets had insisted on single-digit interest rates and the interbank rate at that time was 13 percent.) The final agreement encompassed a 10-year loan with a 3-year grace period, at an interest rate of 7.75 percent.²² *The Economist* reported that “agreement became possible when the Bundesbank quietly increased from DM 3 million to DM 5 million the discounting facilities it provides the AKA Ausfuhrkredit GmbH, which act as a private export bank.²³ This procedure brought down the nominal rate to the Soviets to an acceptable 9.18 percent – the difference to be made up on higher prices for equipment sold to the Soviets. The Soviets, in prime capitalist form, chose to pit various national banks against each other in order to receive the most competitive offer. It has been speculated that as time grew nearer to the 1984 deadline for its 5-year-plan, the Soviets became more flexible in negotiations, and more generous in their demanding terms. (Still, most sources believe that the lion’s share of the benefits accrue to the S.U. from the negotiated deal.)²⁴ The FRG will officially insure 85 percent of its 2 billion dollar commitment, while the French government will underwrite 100 percent of its 1 billion dollar portion of the loan, after amending their original commitment to insure only 85 percent of the total.²⁵ This French extension reverses its February 10, 1982 “gentleman’s agreement” to lend the final 15 percent (140 billion dollars) at market rates with no government guarantees, as the FRG is doing. But the French have argued that without the additional government guarantees, they are at a competitive disadvantage due to the lower underlying inflation rates in the FRG.²⁶ The accord signed by the consortium of western banks on July 13, 1982 provides for credits of DM 2.8 billion initially (but this amount can be raised to as high as DM 4 – 5).²⁷ The effective rate is said to be 9.6 percent taking into account the additional surcharge on the equipment delivered to the S.U.²⁸ France’s state-subsidized credits are at a flat rate of 7.75 percent. Britain’s Morgan Gren Fell & Company merchant bank has extended a 348 million dollar line of credit at developed countries consensus rates. It is also backed by Her Majesty’s Government Exports Credit Guarantee Department.²⁹

²¹ Hewett, *op cit.*

²² *Facts on File*, 1981, 205.

²³ “Fudged Finance,” *The Economist*, 1 August 1982, 60.

²⁴ “How the Deal Was Done,” *Financial Times*, 30 August 1981.

²⁵ Henry Trewhitt, “Pipeline Challenges Builders and Nations,” *Baltimore Sunpapers*, 2 March 1982. See also Peter von der Heydt (op-ed), “The Pipeline Sanctions: Both Sides Have Erred,” *Wall Street Journal*, 4 August 1982.

²⁶ *Facts on File*, 1982, 459. For an elaboration on the French argument and credits disputes, see also: Felix Kessler, *Wall Street Journal*, 15 November 1982, and Flora Lewis, *NYT*, 16 November 1982.

²⁷ “This Week in Germany – 16 July 1982,” FRG Information Office, 1.

²⁸ “Fudged Finance,” *The Economist*, 1 August 1982, 60.

²⁹ Steve Mufson, “Anatomy of the Continuing Soviet Pipeline Controversy,” *Wall Street Journal*, 31 August 1982, 29.

(1) *Equipment and pipeline purchases.* With the bank credits, the Soviets will be purchasing the following:

- 22 compressors from general contractors of Germany's Mannesmann and France's Creusot-Loire, for 940 million dollars,
- 19 compressor stations from Nuovo Pignone Company Italy for 560 million dollars, and
- approximately 700,000 to 1 million tons per year of large diameter high pressure steel pipe from Mannesmann and others.

Under these contracts, major suppliers are:

- West Germany's AEG-Kanis (five 10-megawatt turbines for the head stations and 42 25-megawatt turbines from the line stations),
- West Germany's Demag (five turbines for the head stations),
- Britain's John Brown Engineering (21 25-megawatt turbines),
- France's Creusot-Loire (42 gasline compressors),
- Dresser-France (21 gasline compressors),
- France's Thomson/CSF (computer controls),
- Alstom-Atlantique of France (40 25-megawatt rotor sets),
- Italy's Nuovo Pignone (57 turbines and 57 compressors).³⁰

In the context of private exposure to losses, the *Financial Times* of London reported the details of risks to suppliers as follows:

“The initial exposure of companies is probably confined to about 5 percent of the contract value, according to bankers handling financial negotiations. Financial exposure starts at the time of down payment but one supplier noted that contracts allow for change of status in export licenses and they specify that the supplier needs to gain the license to gain the down payment.”³¹

The report went on to say that the most vulnerable point in the “safety net” is a time deadline. If components are not received within a specified period of time, the Soviets have the right to cancel the entire order, and the Europeans are left to finance their stock. It would seem reasonable to assume that part of the reason that Italy, France, Great Britain and the FRG were so quick to order their firms to commence shipping their contracted equipment to the Soviets despite the Reagan sanction was to avoid this potentially expensive predicament.

(3) *Sale of the natural gas.* West Germany's Ruhrgas AG acted as the purchasing agent for Germany and France, in a commitment which will raise imports from the S.U. gradually from 1984 – 1987 to approximately 60 bcm per year.³² Ruhrgas, a private firm, is Germany's largest bulk natural gas transporter and operates the longest transport pipeline network in the FRG. In France, the state has a controlling interest in Gaz de France (GDF), which will be obtaining the Siberian gas via Ruhrgas; the general public receives its residential gas almost exclusively from GDF (by about 95 percent).³³ The gas purchase agreements have a 25-year duration, at an undisclosed official rate (estimated to be approximately 5.70 dollars per billion BTU, based on a

³⁰ Elizabeth Pond, “The ABC's of the Soviet Pipeline,” *Christian Science Monitor*, 1 September 1982, 1. See also: Paul Cheeseworth, “Hard Choices for Europe,” *Financial Times*, 22 February 1982.

³¹ Cheeseworth, *op cit*.

³² Hewett, *op cit*, 16.

³³ *Medium-Term Prospects on the Community Gas Sector*, EC, 28 September 1972, 81.

price escalator formula tied to the OPEC oil pricing BTU equivalent).³⁴ It is expected that the Soviets will be able to amortise their loan credits within four to ten years – thereafter, they will be receiving Western hard currency in return. Based on an import schedule of an additional 35 – 40 bcm per year at 20 – 25 pfennig per bcm, the Soviets could earn between DM 6 -8 per year.³⁵ This would mean that earning would jump from 3 billion dollars to 11 billion dollars by 1987. Still, it is estimated that it will probably not be large enough to forestall the decline in hard currency earnings from total energy, as the S.U. may cease to be a net exporter of oil by 1990. In 1981, the S.U. earned 14 billion dollars in non-natural gas energy exports, mostly oil. And significantly, total energy exports constitute 70 percent of all S.U. hard currency trade receipts.³⁶ These projected earnings do not take into account, however, the secondary costs associated with the building of the pipeline. The Soviets must provide labor, equipment and transport, infrastructure investment (towns, roads, communications, etc.), as well as some additional coordinating and management assistance.³⁷ One source states that “for each dollar spent on imported technology and equipment, an equivalent ruble expenditure of two dollars is required to cover local infrastructure costs – taking the total price for the Yamburg line to about 45 billion dollars.”³⁸

Over the course of time, the U.S. has raised a number of serious questions as to the political dangers for Europe in entering into a contract of such magnitude and such duration with the S.U. (while still emphasizing that the official reason for the sanctions is the imposition of martial law in Poland). These include: energy dependence (with the risk of political blackmail by the Soviets), concessionary credit arrangements (this pertains also to the previous loans to Poland, where the export-to-debt-service ratio is said to be excess of 140 percent), and the transfer of sensitive goods and technology to the S.U. (with potentially dangerous military applications and a net R&D savings to the East Bloc). These issues will be discussed in more detail below.

Mr. Reagan’s decision to unilaterally impose economic sanctions against the Soviet Union indicates four important points: 1) that he was unsuccessful in bringing a halt to the flow of technology and pipeline components to the S.U. from Western Europe through negotiation, corporate leverage or political pressure; 2) that he believed that there was a linkage between economic deprivation and political change; 3) that he concluded that unilateral U.S. action would have some measure of effect, despite vocal disapproval from the West Europeans (who vowed to proceed with plans to complete the pipeline); and 4) that he felt that the U.S. possessed a viable enforcement mechanism, at least to the extent that announcement was to be seen as more than a mere threat or pure political rhetoric.

It can be said that the first phase of the sanctions, the control of exports of goods and technology from U.S. soil, was met with general compliance and in no way challenged the norms

³⁴ CRS has reported this schedule, but so far this has been the only precise data available on the price structure per se. See: *Soviet Gas Pipeline: Overview of U.S. Sanctions and their Implications*, Library of Congress, CRS, 1982 (11 page mimeo).

³⁵ A four year estimate is presented in “Europe Ready to Finalize Huge Gas Deal,” *German Tribune*, 12 April 1981.

³⁶ Hewett, *op cit*, 18.

³⁷ *Ibid.*

³⁸ Karr and Robinson, *op cit*. See also: John Schutte, Jr., “Pipeline Politics,” *SAIS Review*, Summer 1982.

of international law and convention.³⁹ But the second phase of the sanctions, the attempted extraterritorial reach of U.S. law to foreign soil to dictate the actions of foreign corporations and foreign governments, is very much an infringement of sovereign rights and greatly contested under international law.

International law does provide for the use of economic sanctions as a form of coercive self-help short of war. Multipartite sanctions are codified in the U.N. Charter under Chapter VII. It is incumbent upon the Security Council (SC) to “determine the existence of any threat to peace, breach of the peace, or act of aggression” (Article 39), and the employment of economic sanctions is among the measures stipulated under Article 42 to “maintain or restore international peace and security.” Clearly the intent of the Charter was the universal application of sanctions by the full membership of the U.S. against an international law breaker as a form of collective security measure.

In this regard, the U.S. sanctions pose two problems. First, the U.S. and the S.U. are both permanent members of the SC and are therefore both capable of vetoing any propositions or recommendations repugnant to their own national self-interest. Second, the Reagan sanctions were imposed in the name of promoting “foreign policy” rather than protecting its “national security.”

Preservation of the latter is of course a universally accepted application of international law. The former, the management of foreign affairs, is also an important and broadly recognized doctrine of international law, but generally only to the extent that it does not impede the actions of other sovereign states. Interventions are acceptable only under specific conditions: 1) as justified by a treaty; 2) under collective action; 3) upon the explicit invitation of a state; and 4) on humanitarian grounds.⁴⁰ The Reagan administration maintains that the sanctions were imposed on humanitarian grounds (to protest the Soviet involvement in the imposition of martial law in Poland). The underlying reason, however, is a perhaps misguided belief that economic denial will bring the S.U. “to its knees” – certainly a strong element of economic warfare through commercial intercourse, or the denial thereof.⁴¹

In a manner of speaking, war has already been declared upon the U.S. – at a commercial level at least. In 1957, Nikita Khrushchev was quoted as saying: “We declare war upon you (the U.S.) in the peaceful field of trade.”⁴² But, in fact, the actions undertaken by the S.U. were merely one aspect of the ongoing Cold War hostilities between East and West since World War II. The ambiguity between a willful policy of constrained commercial relations and the full declaration of war was best described by Churchill in his reflection on the 1935 League sanctions against Italy: Stanley Baldwin, the incumbent British Prime Minister was resolute on the issue

³⁹ Two reports of violations are fully discussed in: Robert Cole, “U.S. Cites Pipe Sanctions in Making First Seizures,” *NYT*, 16 October 1982. On 8 October 1982, 30 cases of parts were seized at the Red Hook Terminal in Brooklyn. On 15 October 1982, 3 million dollars worth of turbine parts were seized (made by G.E. for Nuovo Pignone of Milan, which claimed that parts were destined for use in Algeria). Nuovo Pignone was added to the Commerce Dept. “blacklist” on 4 September 1982; G.E. claimed it hadn’t violated any restrictions in effect at the time.

⁴⁰ See generally: J.L. Briefly, *The Law of Nations*, Oxford: Clarendon (1963); T.J. Lawrence, *The Principles of International Law*, Boston: Heath (1906); and Sir Arnold McNair, *The Law of Treaties*, NY: Columbia Univ. Press (1938).

⁴¹ Frederick Painton, “Imbroglia Over a Pipeline,” *Time*, 2 August 1982, 30-31.

⁴² Quoted in Robert L Allen, *Soviet Economic Sanctions*, Washington D.C.: Public Affairs Press (1960), 39.

that “sanctions meant war; secondly he was resolved that there must be no war; and thirdly, he decided upon sanctions.”⁴³

At the theoretical level, one scholar has defined economic warfare as the “conscious attempt to increase the relative economic, military and political position of a country through foreign economic relations.” He went on to state that:

“The action must be purposeful, otherwise a nation merely in pursuit of the benefits of trade would be considered engaging in economic warfare if the action should improve its relative position. Economic warfare does not imply success. Rather it is the attempt that counts; a nation may fail and its actions may even have the reverse effect.”⁴⁴

There is, however, a very substantial difference between economic sanctions and economic warfare. Sanctions can, of course, be employed within the context of an economic war. But the declaration of sanctions does not generally, in and of itself, imply a declaration of economic warfare.

The distinction between the two concepts originates with the differences in the final goals sought, and particularly in the time-frame in which they operate. “Economic warfare seeks to affect and absolute change in the status of the target state and perhaps incidentally to spark structural changes within the state’s political and economic system.” Sanctions, on the other hand, “may be designed to affect the entire social system (as in Rhodesia). Generally, however, a more usual goal is to impose a price for the offending state’s continuation of an offensive policy or practice and if necessary to cause a change in that state’s political system or political attitudes – that is, to force the offender to renounce or alter a policy or mode of behavior.”⁴⁵

Sanctions, then, can be interpreted as not being designed to destroy a state outright, but merely to bring about a change of policy by making the continued implementation of a particularly policy a costly economic endeavor. When applied in conjunction with a declared state of war, it is clear that the distinction becomes less obvious. Historically, sanctions have evolved as an instrument of warfare; more recently, however, they have become more useful as an instrument for punishing an international lawbreaker. This reflects both the advancement of military technology and destructive capabilities to the point where its application is extremely costly and lethal (particularly true for nuclear capability), and the development of international law to a point where international standards for conduct (such as self-determination and basic human rights) have been effectively codified and are broadly adhered to, and avenues of redress are available in the form of international courts for arbitration and settlement.

The objectives for the imposition of economic sanctions can be identified as follows: 1) Primary: concerned with actions and behavior of a state against whom they are directed (the so-called “target state”); 2) Secondary: relating to the status, behavior, and expectations of the government(s) which are imposing the sanctions (ie: the “imposing states”); 3) Tertiary: concerned with the broader international system as a whole (either to the structure or the operation of the international system).⁴⁶

⁴³ James Barber, “Economic Sanctions as a Policy Instrument,” *International Affairs* (London), July 1979, Vol. 55, No. 3, 367.

⁴⁴ Allen, *op cit*, 28.

⁴⁵ Brown-John, *op cit*, 17.

⁴⁶ Barber, *op cit*, 370.

This is to say that, in the first instance, sanctions seek to redirect the behavior of the target state. Secondly, they seek to demonstrate the effectiveness of the imposing government(s) – for instance, that of the U.S. in controlling events in the Caribbean basin or that of the S.U. in Eastern Europe.⁴⁷ The implication of the success in this area is the moral, military, political or economic superiority of the imposing state(s) upon the target state. Conversely, of course, the failure of these sanctions can be seen in a similar light – which is perhaps why Mr. Reagan sought to use a shadow “agreement” among the allies as his political “fig leaf” in lifting the sanctions.⁴⁸ And thirdly, the imposition of sanctions to stave off an impending belligerent act or to enforce basic human rights is an essential mandate of international law in the quest to improve the international system. As Professor Hindmarsh once observed: “Sanctions are seen as the means for enforcement of the enlarged application of international law.”⁴⁹

Still, there is a general agreement among scholars that economic sanctions alone have not been an effective instrument in the attainment of their officially declared objectives.⁵⁰ Politicians, however, do not share this view – perhaps because their standard of measurement reflects a different calibration for success.

The prevailing view of sanctions encompasses three main points: 1) aside from purely punitive or symbolic considerations, sanctions have not been useful devices to induce, persuade or compel the target to comply with desired modes of behavior; 2) they may be dysfunctional by serving to make the target *less* rather than *more* compliant; and 3) while some effects may be deprivational, other effects may be very beneficial for the target, enhancing its political and economic situation in ways not foreseen by the senders.⁵¹

Integral to the success of sanctions is the degree of intensity to which a government commits itself to fulfill them. This level of commitment has often depended on that state’s direct interest in the case – “Sanctions against Iran were much more rigorously enforced by the U.S. and sanctions against Rhodesia... were much more strictly applied by Britain than by most other countries.”⁵² Furthermore, it has been noted that “embargoes (sic) on imports from a target country, except in the case of scarce commodities (eg: certain minerals), have tended to be more effective than prohibitions on exports to them as a natural function of the intense competition for export markets.”⁵³ This reflects the fact that while sanctions are decided by the government, and compliance is required by all sectors of society (individuals, groups, firms, financial organizations, etc.), the sacrifices are often incurred unevenly, as some companies (exporters to the target state) may be forced into bankruptcy, while others may even prosper from the demise of a foreign competitor.⁵⁴ The distribution of the burden of the sacrifice is often much easier to bear in the target state, where the hardships imposed can result in a unity against the oppressor

⁴⁷ *Ibid.*, 380.

⁴⁸ Henry Trewhitt, “France Has It Both Ways on Trade Accord,” Baltimore Sunpapers, 12 November 1982.

⁴⁹ Albert Hindmarsh, *Force in Peace: Force Short of War in International Relations*, Port Washington (NY): Kennikat (1973).

⁵⁰ See generally: Barber, *op cit*, 373-4; Doxey, *op cit*, 140. Specifically on Rhodesia, see: Galtung, *op cit*, p. 409+, Leonard Kapungu, *The UN and Economic Sanctions Against Rhodesia*, Lexington: Heath (1973), 128; and Harry Strack, *Sanctions: The Case of Rhodesia*, Syracuse (NY), Syracuse Univ. Press (1978), 238.

⁵¹ Strack, *op cit*, 13.

⁵² Robin Renwick, *Economic Sanctions*, Cambridge (MA): Harvard Univ. Press (1981), 79.

⁵³ *Ibid.*, 80.

⁵⁴ Barber, *op cit*, 377.

and an even greater determination to resist. The notion of “reverse psychology” was described in the following terms: “these assumptions of political collapse following hard upon economic disaster have proved to be unfounded. Indeed, economic sanctions have generally had the opposite effect of creating a sense of community in the target state.”⁵⁵

In some instances, though, governments may in fact be satisfied with the secondary, or demonstrative, quality of the sanctions. It may be that their desire is to win political capital to use in negotiations with the target state. In that case, one would anticipate that the heaviest burden resulting from the sanctions should fall upon the target state, and the imposing state uses the sanctions to negotiate a more favorable agreement. Or, in a similar fashion, if it is the intent of the imposing state to illustrate its willingness to “go the extra mile” in forcing the target state to a position of weakness (or to emphasize that certain threats made are more than political rhetoric), then the imposing state may wish to accentuate the high cost of the sanctions to its own economy – the acceptance of high costs demonstrates greater political will and resolve.⁵⁶

Alternately, the sanctions could be intended to be more symbolic than effectual – or intended purely for “domestic consumption.” Former British Prime Minister MacMillan wrote in his memoirs that “it is generally important for governments to be seen to be concerned and busy.” To illustrate this point even more poignantly, he quoted Foreign Minister Lloyd George in his assessment of Britain’s commitment to the League sanctions against Italy in 1935: “They came too late to save Abyssinia, but they are just in the nick of time to save the government.”⁵⁷

The termination of economic sanctions can be an equally vexing problem for the imposing state, particularly if they did not bring about desired change in the target state – and then particularly so if they were also designed to impress opinion in third countries. In general, one would expect that the leadership of the imposing state would have made the appropriate contingency plans in advance, in order to be able to retreat gracefully from a situation gone amuk.⁵⁸ If the benefits to be derived from the sanctions are to be meaningful, then a careful calculus of all necessary prerequisites and possible outcomes must be undertaken well in advance, and the leadership must “make a large, and of necessity, unquantifiable allowance for

⁵⁵ *Ibid.*, 376.

⁵⁶ Renwick, *op cit*, 85.

⁵⁷ Quoted in Barber, *op cit*, 380.

⁵⁸ An interesting “timing theory” appears to have evolved out of the particular sequence of events surround Mr. Reagan’s decisions to broaden the sanctions on 18 June 1982, as well as to terminate them on 13 November 1982. One account asserts that it was the “flip assessment by Bonn and Paris that the painstakingly worked out Versailles compromise was a worthless piece of paper with no impact on ‘business as usual’ with the S.U. that triggered the U.S. sanctions on oil and gas transmission equipment in the first place.” Jess Lukomski, *Journal of Commerce*, 16 November 1982). In other words, the broadened sanctions represented a rather childish display of upmanship prompted by the Europeans’ cocky dismissal of earlier U.S. threats. (See also: Gwertzman, *NYT*, 15 November 1982 and Pine, *Wall Street Journal*, 15 November 1982).

But even more speculation surrounded Mr. Reagan’s termination of the sanctions on the afternoon of Saturday 13 November 1982. That same morning Mr. Reagan had visited the Soviet embassy in Washington to offer his condolences upon the death of Mr. Brezhnev. The previous day, Mr. Andropov had been named Mr. Brezhnev’s successor and the Polish media had erroneously announced Mr. Walesa’s release from official interment. And finally, the announcement came on the eve of Chancellor Kohl’s first official visit to the U.S. Mr. Reagan was therefore in a prime position to score big political points in the timing of his termination announcement – offering the Soviets the prospects of improved relations under the Andropov regime, as well as cementing relations with Europe via Mr. Kohl’s visit. For elaboration, see: Flora Lewis, “Pipeline Politics,” *NYT*, 16 November 1982, A27, and Jack Anderson, “High Tech Pipeline in Moscow,” *Washington Post*, 26 December 1982 D7.

the redirection of trade, leakages, disguised exports, and so forth.”⁵⁹ In other words, it must be realistic in its assessment of the possible outcome of the sanctions, or else risk both an unfavorable resolution of events or political embarrassment.

As alluded to above, there are several types of economic sanctions that can be applied, ranging from the very passive to the very active. A *boycott* is the refusal to import goods and services from a particular target state. An *embargo* is the denial of exports to a target state. Both of these are generally seen as rather passive, and they are also very often confused in popular literature. On the most active end of the spectrum is the economic *blockade* or “quarantine,” which is an attempt to rigorously enforce the economic isolation of a target state by breaking all of its commercial ties with the rest of the world. Often this policy has to be supported with military involvement, such as mining the harbors of the target state, or encircling it with ships or land forces.⁶⁰

Without multinational support, these long-establish methods can only be effective if the imposing state is the major trading partner of the target state, or perhaps even the monopoly seller or market (or has such a degree of military superiority that it can apply an effective quarantine without outside resistance).

In recent history, even economic sanctions with world-wide support and U.N. mandate, such as the Rhodesian episode, have proven to be not fully successful in establishing economic isolation. “Rhodesia is the only case in which an effort has been made to maximize sanctions on each of these three scales – universal, comprehensive, and mandatory. It took 30 months to reach that position, and even then the application of sanctions did not gain universal support.”⁶¹ As in the case of an economic cartel, surreptitious avoidance (or open disregard) of an established code of conduct can bring a windfall of profits – as South Africa and Switzerland both serve to illustrate.⁶²

More recently, new and more sophisticated methods of applying economic pressure have been devised and successfully implemented. In response to the seizure of its embassy in Tehran, the U.S. government ordered certain Iranian financial assets frozen in American banks.⁶³ And as will be discussed more fully below, the U.S. has sought to stop the flow of ideas (ie: technology, licenses, and patents) and services (banking, management, engineering and insurance) abroad under the Export Administration Act of 1979 (EAA).⁶⁴

⁵⁹ Renwick, *op cit*, 58.

⁶⁰ Brown-John, *op cit*, 16.

⁶¹ Barber, *op cit*, 368. For a step-by-step analysis of the Rhodesian sanctions, see Strack, *op cit*, 16+.

⁶² See: Renwick, *op cit*, 84, and for a more recent illustration of cartel-breaking benefits, see: “Britain, Norway Lower Oil Price; Nigeria Expected to Follow Suit,” *Washington Post*, 19 February 1983 A1, A14.

⁶³ On the Iranian Assets cases: Executive Order #12, 170, 3 CFR 457 (1979): President Carter blocked removal of Iranian government property from the U.S. For amplification see: Feinberg, *op cit*, 336.

⁶⁴ For a thorough treatment of the relationship between technology transfers and national security issues, see: John V. Granger, *Technology and International Affairs*, SF: Freeman 1979, (especially Chapter 5: Export Controls [74-91]). Particularly relevant is the examination of the so-called “Bucy Report,” prepared for the Defense Science Board, which made three specific recommendations: “1) Technology contained in applied research or development may be of significance for selected areas,” but it is “control of design and manufacturing *know-how* [that] is absolutely vital to the maintenance of U.S. technological superiority. Compared with this, all other considerations are secondary; 2) A new systematic approach to controlling technology exports is overdue. This perspective *should focus on technology and not end product of technology*.... and 3) For the most critical technologies, the U.S. should

The immediate origin of the application of the EAA can be traced to a U.S. response to a form of economic sanctions imposed upon it by the Arab oil exporting states in the early 1970's. The Arabs sought to enforce a boycott of commerce with American corporations that were also doing business with Israel. The purpose of their boycott, then, was to affect a change of trading behavior of American corporations in an indirect manner. The U.S. has incorporated similar "end-user" clauses in certain export licenses (particularly high tech and military hardware) to prevent the re-sale of these goods to states deemed hostile to American interests.⁶⁵ The intent of Congress in enacting the present version of the EAA is not at all clear and is greatly disputed both here and abroad. The Act warrants a more substantive analysis also because it is the authority under which Mr. Reagan imposed the economic sanctions against the Soviets.⁶⁶

The pipeline sanctions were first imposed by Mr. Reagan on December 29, 1981, approximately two weeks after the Polish government declared a state of martial law on December 13, 1981.⁶⁷ But it was not until immediately following the Versailles economic

not release know-how beyond its borders and then depend upon COCOM agreements for absolute control." (Granger, 84) (Emphasis added).

On the costs of technology transfers from the West to the Soviets and the East Bloc, see *The Economist*, 20 November 1982, 22, and Jack Anderson, *op cit*, *Washington Post*, 26 December 1982. Anderson documents 19 specific military and industrial secrets obtained by the S.U. Examples include: ultra precise ball-bearing technology – which the S.U. used for its SS19 missile guidance systems; electro-optic sensors – used for laser range finders for tanks; and propulsion devices – such as missile case filament winding.

⁶⁵ Pertinent controls sections of the EAA: 50 USCA App. sec. 2405 (a)(1) (Supp. 1981). On Arab boycott see: House Report #95-190, 4-6. On the EAA of 1977, see Public Law 95-52, Title 1, sec. 204, sub-sec 11 (2), 95 sec 235. On end-user clauses see: International Traffic in Arms Regulations and the Mutual Security Act of 1954, Trading With the Enemy Act, 50 USC App sec 1 et seq (1970). For an annotated description of U.S. export controls see: 15 CFR, sub-sec 368-399.2. (See also: Hacking, *op cit*, 7 and the testimony of Marcuss, Senate Hearings, *op cit*, 3 March 1982.)

Four U.S. government agencies control export licensing: 1+2) State (in consultation with the Defense Department): arms, ammunition, implements of war (including space items) and related data and equipment – under the International Traffic in Arms Regulations and the Mutual Security Act of 1954, as amended; 3) Nuclear Regulatory Commission – has statutory responsibility over nuclear materials and technical data; and 4) Commerce Department – regulates the major portion of U.S. exports – those not classified under the above three headings. (Granger, *op cit*, 86.) For an annotated description of regulation controls under the EAA, see Marcuss, testimony for Senate Hearings, *op cit*, 3 March 1982.

There are two types of required export licenses: 1) *general license*. Established by the Commerce Department. No application is required and no documentation is issued – no restrictions on re-export apply. 2) *validated license*. A document, ie permission, issued by Commerce authorizing a specific export in accordance with the terms of the license. Contains restrictions on re-export and is subject to revision, suspension or revocation without prior notice. (Marcuss, *op cit*, 30.)

Penalties under U.S. export control law includes fines which can reach up to 250,000 dollars per person and 1 million dollars per firm or, if greater, five times the value of the prohibited transactions; jail sentences can be up to 10 years maximum. (Richard Lawrence, "France Rejects U.S. Sanction," *Journal of Commerce*, 23 July 1982.)

Under Secretary of Commerce Ulmer stated that the penalties were 'discretionary' pending investigation. (In other words, the administration may find that the corporation did all it could to comply with U.S. law, blame France for the violation, and then let the matter rest.) If deemed necessary, a warning letter is issued, and the corporation is placed on a denial list ("black-listed"), meaning that it would be prohibited from receiving the export of any goods or data from the U.S. (Clyde Farnsworth, "Collision is Near on Soviet Pipeline," *NYT*, 12 August 1982 D1, D6).

⁶⁶ On the dispute, see: Leslie Gelb, "Pipeline: An Impasse With No End in Sight," *NYT*, 31 August 1982; Marcuss and Rosenthal, testimony for Senate Hearings, *op cit*, 3 March 82, 43-44. And more recently, hearings were held in the Senate Banking Committee on the subject of the renewal of the EAA (3 February 1983).

⁶⁷ On Mr. Reagan's first sanctions announcement, see: *NYT*, *op cit*, 29 December 1981, 1:6; on martial law declaration, *NYT*, *op cit*, 13 December 1981, 1:6.

summit meeting in June 1982 that the Reagan sanctions flared up as a major policy dispute between the Western powers and as a direct challenge to international law.⁶⁸

On June 18, 1982, Mr. Reagan broadened the restrictions incorporated in the U.S. sanctions to include also the dissemination of technical data and licenses from the U.S., in addition to the actual goods and services covered in the original (December 29, 1981) edict. In so doing, the U.S. attempted to extend its long reach of law to foreign shores in an effort to prohibit the manufacture of U.S.-licensed products intended for the pipeline, as well as their subsequent re-export from foreign states to the S.U.⁶⁹

The announcement was met with immediate and heated denunciations from the West European capitals, accentuated by a 14-page formal protest document issued by the EC. At issue was not only the question of the nature of the sanctions' reach (ie: their attempted extraterritorial application), which was seen as an unacceptable violation of European sovereignty, but also their *ex post facto* demands (retroactively applied to licensed items already en route or under contract), which was seen not only as a breach of contract, but also as a break from the "assurances" to the contrary made by the U.S. at the Versailles summit (and earlier).⁷⁰

At home, the broadened sanctions also caused a political stir, and was the apparent "straw that broke the camel's back" which prompted the resignation of U.S. Secretary of State Alexander Haig, Jr. Mr. Haig was seen as Europe's "point man" in working to achieve the removal of the sanctions, but his effectiveness was reportedly greater hampered as a result of his

⁶⁸ On the Versailles Summit, see: RC Longworth, "Summit Virtually Ignores World Trade Chaos," *Chicago Tribune*, 11 June 1982; "Failure at Versailles," *Wall Street Journal* (editorial), 8 June 1982; Donald Regan, "The Versailles Summit and the World Economy," *Wall Street Journal*, 15 June 1982; Herbert Rowan, "The Summit Produced Few Real Decisions," *Washington Post*, 13 June 1982.

For official statements, see: "Press Conference of President Francois Mitterrand," Versailles, 5 June 1982 (French government release); "President Reagan Attends Economic and NATO Summits," *Dept. of State Bulletin*, July 1982, 1-9; International Communication Agency – *Morning Digest. Foreign Media Response*, (4, 5, 6, 9, 10, 14 June 1982) (Summary – President's European Trip, 14 June 1982); White House Press Office – *News Releases*, "Background Briefing of Senior Administration Official (Regan)," 27 May 1982, (35 page mimeo), "Briefing With Regan," 25 May 1982 (38 page mimeo), "Statement of the President," 6 June 1982 (2 page mimeo).

⁶⁹ Leslie Gelb, "U.S. Hardens Curbs on Soviet Gas Line," *NYT*, 19 June 1982, 1:2.

⁷⁰ In response to U.S. urgings, the 24 members of the OECD "took action to lift the minimum interest rate on export credits to the Soviets to more the 12 percent, bringing them in line with their rates to other major borrowers." As a consequence, Eurocredits were running at 33 percent of the previous year. (Peter Osnos, "U.S., Allies Still Far Apart on Trade Curbs," *Washington Post*, 20 November 1982. This is partly a reflection of the banks' attempts to tighten their belts to counterbalance the previous over-extensions of credit lines to Eastern Europe (*Der Spiegel*, #23/1982). On 15 April 1982, the *New York Times* reported that "the Reagan administration has decided to avoid further conflict with European allies and will seek instead to establish common ground rules for East-West trade at the Versailles Summit." On the Versailles Summit "deal," *Newsweek* reported that "The U.S. would reluctantly go along with Western Europe's plan to finance a gas pipeline to Siberia if France and the other Allies reciprocated by cutting back on cheap credits to the S.U." (2 August 1982, 37).

Chancellor Schmidt quoted the EC Statement of 22 June 1982 in assailing the U.S. actions, saying that the restrictions on licenses "implies an extraterritorial extension of U.S. jurisdiction... contrary to the principles of international law." On 24 June 1982, he was quoted as reaffirming the German commitment to "keep the contractual obligation" to the S.U. (*Facts on File*, 1982, 459 and *Newsweek*, 2 August 1982, 39.) Britain and France voiced similar sentiments (Susannah Kirkman, "EEC Chastises Reagan For Pipeline Restrictions," *Baltimore Sunpapers*, 30 June 1982.

frequent and well publicized clashes with his Cabinet colleagues on a broad range of issues, including the pipeline sanctions.⁷¹

As mentioned above, the basis for the Reagan sanctions was the EAA of 1979, which is a direct descendent of the Export Control Act of 1949 and has seen numerous revisions and reforms in the thirty years in force.⁷² The provisions under which Mr. Reagan imposed the embargo of U.S. technology and equipment have the peculiar language enabling the President to “prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the U.S. or exported by any person subject to the jurisdiction of the U.S., to the extent necessary to further significantly the *foreign policy* of the U.S. or to fulfill its declared international objectives.” (emphasis added)⁷³

The primacy of foreign policy considerations over “declared international objectives” such as maintaining the Western alliance (or even implicit ones such as the dedication to the spirit and the letter of international law) represents a steady deterioration of American leadership in the vanguard of the creation of international law and the reinforcement of international organization.⁷⁴

It is clear that the promotion of national foreign policy is an integral operation of the state in the modern international system and can be a vital link for international cooperation in that regard; but it is equally obvious that major policy decisions based purely on foreign policy considerations (as opposed to the “national security” or “vital interests” formulations), are repugnant to the spirit and long-term objectives of international law. The most incompatible

⁷¹ Secretary of State Haig’s resignation is offered and accepted, 25 June 1982 (*NYT*, 26 June 1982, 1:6, 4:2). A summary of Mr. Haig’s clashes is compiled in the same issue, page 6:2. See also Bernard Gwertzman, “Lifting of U.S. Sanctions,” *NYT*, 15 November 1982.

⁷² For some historical background on the EAA, see: David Lord Hacking, “The Increasing Extraterritorial Impact of U.S. Laws,” *Northwestern J of International L and Business*, 1: 1-10, Spring 1979, p. 7+; and “EAA – amendment H.R. 6838,” U.S. House Report, Committee on Foreign Affairs, (97th Congress, 2nd Session), House Report 97-762 (18 August 82). See also: 15 CFR pt 374 (1981), 15 CFR pt 374 (1974), and 15 CFT pt. 372.12 (b)(1), (1959).

⁷³ EAA of 1979, sec 2405 (a)(1); On the application thereof “The June order required that: 1) All persons within a third country may not re-export machinery or components for the exploration, production, transmission or refinement of oil and natural gas, if of U.S. origin, without the permission of the U.S. government; 2) Any person subject to the jurisdiction of the U.S. (including U.S.-owned or partly-owned corporations or subsidiaries in other countries) must get prior written authorization by the Office of Export Administration for export or re-export to the USSR of non-U.S. goods and technical data related to oil and gas exploration, production, transmission and refinement; and 3) no persons in the U.S. *or in a foreign country* may export or re-export to the USSR foreign products for similar purposes derived from U.S. technical data – a criterion very broadly defined.” (Quoted from “The Giants Lower Arms,” EC Commission, Background Report, 8 November 1982, ISEC/B35/82, p. 5).

On the legal authority for the broadened sanctions under the EAA, a report issued for the Subcommittee on Economic Policy and Trade of the House Foreign Affairs Committee stated: “The amended regulations control the foreign-made products of U.S. technical data, regardless of when the data was exported from the U.S., if the right to the use of the data is subject to a licensing or compensation agreement with persons subject to U.S. jurisdiction or if the recipient of the data has agreed to abide by U.S. export control regulations.” (“Legal Authority Under the EAA of 1979, as amended,” Committee Draft Document, mimeo, 2). It goes on to say that “regulations covering re-export of U.S. goods or technical data clearly advise exporters and foreign importers prior to export from the U.S. that subsequent shipments will be subject to controls in effect *at the time of re-export*” (p.4). “As with other controls, foreign importers are placed on notice that U.S. content in foreign products may subject such products to *subsequently imposed* U.S. controls” (emphasis added, p. 5)

⁷⁴ One might cite the U.S. role in the creation of the UN and the IMF as major contributions to international law and organization, while the U.S. opposition to the UN Law of the Sea Treaty could be said to represent a rather negative stance.

aspect of that provision or criterion is the fact that foreign policies can change as frequently as administrations change (or even more frequently than that, as Mr. Carter illustrated), while one can assume that the vital issues that define national security are potentially more concrete and substantable, and hence more defensible in the international legal context. Taken to the extreme, however, even the boundaries of “national security” policy can be so far reaching so as to make them unacceptable as an international legal defense.⁷⁵ As will be elaborated below, the developing notion of legal comity in international relations promises to be a significant contribution to the future of international law.

In a very real sense, the EAA has already inched a bit closer to the spirit of international law (*vis-à-vis* the concept of reciprocity and sovereign rights and duties), despite its recurrent use as a divisive or coercive foreign economic policy instrument. In revising the language of the Export Control Act of 1949, Congress (in 1969) removed a significant criterion for the consideration of an export license in deleting the phrase “export makes a significant contribution to the... economic potential of such nation or nations...” from the EAA of that year. In its effect, the change reflected the “Congressional feeling that the possibility that the export would strengthen the economy of the receiving nation was not of itself contrary to the security or foreign policy of the U.S.” A subsequent amendment even added language stating that “it is the policy of the government to encourage the widest possible range of exports, including technical data, for peaceful uses.”⁷⁶

In recent Congressional hearings, there is evidence of a certain continuation of this outward-looking trend.⁷⁷ There are at least three underlying reasons for this seemingly benevolent action. The first is that there is a growing Congressional concern that increased U.S. protectionism will be met with protectionism abroad, which could in turn lead to an all-out trade war – obviously not the recipe for a global recovery. Thus, certain obstructionist schemes such as domestic import legislation, anti-competitive non-tariff barriers and DISC’s (Domestic International Sales Corporations), are undergoing a healthy re-evaluation. More positive steps are also being undertaken to enhance U.S. industrial competitiveness and make U.S. law more compatible with international law.⁷⁸

The second reason for the Congressional action in this area is a desire to reform the Department of Commerce, something which has been attempted for the last two decades, but still lacks the momentum to produce conclusive results. The argument is that the Commerce Department cannot be simultaneously effective in promoting U.S. trade abroad while also being charged with the responsibility of vigorously applying the restrictive regulations mandated by law. Congress is looking at proposals to make the export control arm a separate entity, or to turn the authority over to the Customs Bureau (under the auspices of the Department of the Treasury) in order to better regulate these sensitive exports.⁷⁹

⁷⁵ The Soviets stated that their national security was being affected by the Polish unrest (and pressured the Polish government into imposing martial law), (*NYT*, 11 December 81, 4:3).

⁷⁶ Granger, *op sit*, 87.

⁷⁷ U.S. Senate Banking Committee Hearings, *op cit*, 3 February 1983. Among the specific recommendations made was the establishment of an Office of Strategic Trade – aimed at consolidating export control enforcement and ending agency infighting.

⁷⁸ Marcuss, *op cit*.

⁷⁹ U.S. Senate Banking Committee Hearings, *op cit*.

The third reason is that Congress seeks to create a more active role for itself in the formulation and implementation of future U.S. foreign economic policy. It can do so directly through a greater involvement in the control of corporations (MNC's) and export/import regulations (for example, by re-shuffling the Commerce Department authority).⁸⁰ Or it can do so by influencing the Executive branch. This past term, the House had passed a bill which would have repealed the Reagan sanctions, yet even if it would have survived a veto, the President would still have the authority to re-impose the same sanctions (as is still the case in the current EAA). Nonetheless, Congress would have made its policy point. Alternately, Congress could go even further by re-defining the President's authority under certain legislation. It could, for example, specify that the export controls may only be used in a declared state of national emergency. In the current EAA, the President *is* required to consider a grocery list of potential side-effects (including "the reaction of other countries to the imposition or expansion of such export controls..."), but he is not required by law to make those deliberations public.⁸¹ It should also be pointed out that the president has numerous other methods of imposing economic sanctions under his emergency powers.

These three key points are certain to be among the central themes discussed during the course of Congressional deliberations on export controls in the present Spring term, since the EAA is up for renewal this year. Foremost on the agenda will have to be a clarification of Congressional intent on the subject of jurisdiction over export controls, their prescribed proper application and limits. It is apparent from previous hearings, critical literature as well as Administration and Cabinet statements, that there are still many substantive questions that need to be answered.

To answer these questions, Congress will have to clarify the following five "grey areas" which were exposed as a result of the frictions incurred by the Reagan sanctions:

First, there is an "open question" as to whether Congress intended for the EAA to go beyond the control of actual exports from the U.S. and attempt to reach out to affect goods and technologies already exported to a foreign state. The EAA was "traditionally interpreted by U.S. government officials to give them control over commodities and technology originating in the U.S., even if only a small part of the product originated in the U.S." In broad application, this would give jurisdiction over foreign-produced machinery of which a U.S.-licensed technology was a contributing component.⁸²

⁸⁰ *Ibid.*

⁸¹ Generally, see: Arthur Downey, testimony, U.S. Senate Hearings, *op cit*, 3 March 1982 (p. 25). The specific considerations for the President are as follows: "1) probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including availability from other countries of the goods or technology proposed for such controls; 2) compatibility of the proposed controls with the political objectives of the U.S., including the effort to counter international terrorism, and with overall U.S. policies toward the country which is the proposed target of controls; 3) the reaction of other countries to the imposition or expansion of such export controls by the U.S.; 4) the likely effects of the proposed controls on the export performance of the U.S., on the competitive position of the U.S. in the international economy, on the international reputation of the U.S. as a supplier of goods and their employees and communities, including the effects of the controls on existing contracts; 5) the ability of the U.S. to enforce the proposed controls effectively; and 6) the foreign policy considerations of not imposing the controls. 50 USCA App sec 2405 (b) (Supp 1981). (Quoted by Marcuss, Hearings, *op cit*, p. 38).

⁸² Rosenthal, *op cit*, 44.

Second, a further refinement of that same argument proceeds along the lines of control over goods and persons “subject to the jurisdiction of the U.S.” This too, would permit application to extend to foreign-based subsidiaries of American corporations or licensees by virtue of jurisdiction over their American counterparts or home office.⁸³ Both arguments one and two conflict with that foreign state’s right to control commerce within its own sovereign jurisdiction, as well as to conduct its own foreign policy (if the U.S. prohibits the sale or re-sale of legally-licensed technology to a third state).⁸⁴

This brings up point three – the *ex post facto* application of the controls. If the goods and technology were in fact legally licensed from U.S. firms, and if legally binding contracts and commitments have been made pertaining to the subsequent re-export of those goods and technology – does the U.S. have the right to demand a suspension of the entire process in order to comply with “foreign policy objectives?” The Europeans have a long tradition for putting commercial ventures above politics, but even the U.S. must recognize the value of *pactus in servanda* – honoring the sanctity of contracts. Furthermore, as one former Cabinet official pointed out, “the *ex post facto* character of the action... may be in violation of the due process clause of the Constitution.”⁸⁵ In general practice, contract provisions are construed in terms of the reasonable expectations of the contracting parties towards their fulfillment – therefore no “perpetual veto” clause on the part of the U.S. is foreseen or permissible in international law.⁸⁶ And in light of Mr. Reagan’s “soft-peddling” any options to broaden the sanctions at the time of the Versailles summit, it is clear that “(his) breach was aggravated by his failure to give prior notification, let alone to consult.”⁸⁷

Point four relates to the foreign reaction to the U.S. extraterritorial reach. In response to earlier U.S. exercises of antitrust and discovery procedures, several European countries have taken to the defense and have developed so-called “blocking statutes.” Recent U.S. Supreme Court rulings on comity and the international “Hague Convention on Taking Evidence” notwithstanding, our allies fear that without the formation of countervailing statutes, they will run the risk of continued American infringements upon their legal sovereignty.

Taking the example of antitrust, the American view is that “the relevant markets of antitrust concern are not neatly arranged according to national boundaries,” and that therefore the U.S. “...must be concerned with restrictive activities offshore which interfere with its own

⁸³ *Ibid.*

⁸⁴ On the question of extraterritoriality – is it obtained only through the foreign nation’s consent, see: John H. Wigmore, *A Guide to American International Law and Practice*, NY: Bender (1943), 47.

On corporate jurisdiction, the *Restatement (Second) of the Foreign Relations Law of the U.S.* (1965) states: “A corporation or other private legal entity had the nationality of the state which created it” (sub-sec 27, 39-40). Furthermore, it has been noted by the Courts that “if an American corporation owns sufficient stock of a foreign subsidiary to elect a majority of the board of directors, then it possesses necessary control” (In *Re Investigation of World Arrangements*, 13FRD 280, 285 (D.D.C. 1952), (Quoted in Feinberg, *op cit*, p. 335.)

⁸⁵ Former Commerce counsel Marcuss was quoted in Leslie Gelb, *op cit*, 31 August 1982.

⁸⁶ Rosenthal, *op cit*. Also, see generally, the concept of *rebus sic stantibus* in Brierly, *op cit*; and McNair, *op cit*.

⁸⁷ Maechling, *op cit*.

economy and society.”⁸⁸ That view is basically a restatement of the classic “effects doctrine” which has evolved out of the *American Banana* and *Alcoa* court cases.⁸⁹

The European view obviously reflects the perspective from the standpoint of those states on the receiving end of that doctrine, as best expressed by a member of the British House of Lords: “We do not oppose the rationale of antitrust... we do, however, take exception to the belief that antitrust objectives can be achieved internationally only by the extraterritorial application of U.S. law.”⁹⁰ The British response to the U.S. intrusion upon its jurisdiction was the Protection of Trading Interest Act of 1980. Although the Act is basically designed to “block investigation and discovery, the obtaining of documentary evidence, the compelling of testimony and the carrying out of judgements” pertaining to antitrust, it is clear that complimentary statutes designed to block other forms of U.S. economic imperialism are in great danger of gaining currency among our trade partners.⁹¹ The Trading Act was imposed by the Thatcher government to order British corporations to defy the Reagan ban. Although Mrs. Thatcher was vocal in her opposition to the sanctions, the government issued a carefully worded statement to the effect that the government supports defiance, but does not directly order noncompliance of the Reagan sanctions.⁹² Mysteriously, this form of “hedging” was also repeated by France and Germany.⁹³ The motive for this delicate manoeuvre is not clear at this point in time. Perhaps it was just a

⁸⁸ James A Rahl, “International Application of American Antitrust Laws: Issues and Proposals,” *Northwestern J Int L and Bus*, 2: 334-83, (Autumn 1980), 341.

⁸⁹ Feinberg observes that the U.S. “may claim subject matter jurisdiction over activity or conduct occurring outside its territory, if direct, *foreseeable* effect will occur...” The argument is that “the U.S. must protect its citizens from economic misconduct initiated abroad from otherwise safe havens.” (pp. 326-7) “Compare: *American Banana Co. v. Limited Fruit Co.*, (213 US 347, 356 [1909]) – ‘(T)he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done’ with *U.S. v. Aluminum Co. of America* (148 F 2nd 416, 443 – 2nd Cir [1945]) – ‘(I)t is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends’ (fn: p. 326).

An important clarification of the extent to which the Sherman Act may be applied extraterritorially occurred in *Mannington Mills v. Congoleum Corp.* (595 F 2nd, 1287, 3rd Cir [1979]) – It concluded that once subject matter had been determined, the courts should consider the interests of other nations (see: Kane, *op cit*, pp. 292-3). In effect, the narrow “effects doctrine” of *American Banana* had already been rendered obsolete under *Timberlane Lumber v. Bank of America* (549 F 2nd 597, 608-12, 9th Cir [1976]), *Zenith Radio Corp. v. Matsushita Elec Industrial Co.* (494 F Supp 1161, 1181 E.D. Pa [1980]), and *Dominicus Americana Bohio v. Gulf + Western Industries* (473 F Supp 680, 687, SDNY [1979]): “(H)istory has proven *American Banana* to be not a seminal decision but an aberration... There is now a broad agreement that is holding on the issue of jurisdiction is obsolete” (Feinberg, *op cit*, p. 327).

⁹⁰ Hacking, *op cit*, 3.

⁹¹ Rahl, *op cit*, 348. See also: “When the Pipeline Row Is Over,” *The Economist*, 30 October 1982, 19. *Other states with blocking statutes include: Australia, France, New Zealand; Canada has legislation pending. The U.K.’s Protection of Trading Interests Act of 1980 is reprinted in 959 Antitrust and Trade Regulation Report (BNA) at F1 (10 April 1980). See also comments by Lord Kilgerran in Milstein, “Debate: Extraterritorial Application of U.S. Antitrust Law,” 50 *Antitrust J* (Nov 81) at p. 624.*

⁹² Rita Dallas, “Britain Orders Firms to Defy,” *Washington Post*, 3 August 1982, A1. Three of the four companies ordered to defy are U.S. subsidiaries (Smith International [North Sea], Baker Oil Tools [UK], and AAF Ltd). While the British government supports, but does not order non-compliance, disregard of the Trade Secretary’s “suggestion” carries a maximum fine of 1750 dollars and possible jail terms for violators.

⁹³ *Facts on File*, 1982, 459. In addition, see: “Communique From the Office of the Prime Minister,” 22 July 1982 and “News and Comments – Vol. 82/26,” 24 June 1982 for French government documentation. For the FRG, see: “Statements and Speeches: Ambassador Peter Hermes, Milwaukee 14 May 1982 (Vol. 5/12, 25 May 1982),” and “This Week in Germany,” issues 17 June, 25 May, 2 July, 9 July and 16 July 1982.

method of avoiding possible future arguments under the “foreign government compulsion” principle as a legal defense in damage suits.⁹⁴ Or perhaps they felt that there had already been sufficient injury inflicted upon the body of international law, without adding additional blows to a moot issue.

The final “grey area” warranting Congressional action is whether the EAA should continue to be a potential instrument of U.S. foreign policy (as differentiated from national security). A corollary to this question is the definition of what constitutes the appropriate forum for the control of sensitive exports to the S.U. – and indeed, whether the regulation of trade should even be a policy instrument.

The Executive branch would argue that trade controls are an essential part of the repertoire of effective diplomacy – both as a “carrot” and as a “stick.” The opening of U.S. markets to Peking is seen as a powerful bargaining chip in the negotiations to establish normal political relations with the People’s Republic; and, it is argued, the denial of trade to the Soviets is an important instrument of “leverage” when seeking a particular policy concession. In the real world, however, these assertions do not really prove valid, particularly vis-à-vis superpower relations. Whereas there may be some intuitive validity in that argument in the rare case in which the U.S. is either the sole market for a good or the monopoly producer (arguably certain military hardware), experience has shown that if sufficient political will exists, any foreign state can easily circumvent any U.S. obstructionist policies. In some cases, the egocentric policy can even result in permanent and irreversible damage to the U.S.⁹⁵

Perhaps the most convincing arguments as to why the U.S. should refrain from resorting to the “trade lever” in pursuing foreign policy objectives are purely economic ones. Since WW II, the U.S. has been seen at the forefront of efforts to establish and maintain a liberal international economic order (which translates into positivist international legal order) – both for ideological as well as security reasons. An inadvertent side-effect of that policy is economic interdependence. Although foreign trade represents a relatively small percentage of U.S. Gross National Product (GNP), there are nonetheless many thousands of industries and jobs directly tied to international markets, both as a result of competing imports and U.S. export competitiveness (or lack thereof).⁹⁶

⁹⁴ For an explanation of enforcement of foreign government compulsion defense, see: *Interamerican Refining Co. v. Texaco Maracaibo Inc* (307 F Supp 1291, D Del [1970]): “The Courts of the U.S. will not impose liability where the acts under scrutiny were required by the country in which a defendant does business” (Kane, *op cit*, p. 293fn). On the Act of State and the Foreign Government Compulsion defenses, Rahl writes, “Two corollary questions of great importance merit study. One is whether strong encouragement or persuasion by a state which falls short of probable compulsion should ever be given status as a defense...” Presently, this is not the case, he concludes.

⁹⁵ Generally, see: *An Assessment of the Afghanistan Sanctions*, Report, Subcommittee on Europe and the Middle East of the House Foreign Affairs Committee (Library of Congress, CRS) (97th Congress, 1st Session), Washington DC: GPO (April 1981).

⁹⁶ The number of people abroad who are directly or indirectly support by U.S. economy is estimate at 20 million; if every employee supports four others, 80 million; ITT alone supports 400,000 globally outside the U.S. (Hacking, *op cit*, p. 10fn). Furthermore, U.S. government actions are compelling U.S. MNC’s to divert sensitive operations abroad. For example, the Cameron Iron works of Houston has received a 100 million dollar contract in the S.U. for oil and gas well equipment (unrelated to the Siberian gasline project). It side-stepped the December Reagan prohibitions against trade with the S.U. by contracting through its German subsidiary and having subsidiaries in Germany, France, and Scotland assemble the equipment (Marcuss, “Firms Are In a Bind Over Pipeline,” *Washington Post*, 9 August 1982.

In establishing a reputation as an unreliable trade partner, the U.S. is defeating the comparative advantage it may possess in particular sectors, and it is denying itself the role of leadership in the transition from an industrial to a service society. By attempting to preserve a perceived monopoly by applying economic sanctions contrary to international law and her long-term interests, the U.S. is ignoring a lesson experienced centuries ago by the British, who attempted to preserve their “monopoly” of (weaving) mill technology through the attempted extraterritorial application of domestic law. At that juncture, mill technology fled the constrictive British environment and flourished in the more liberal American colonies. By adhering to a policy that was unenforceable and counterproductive, Britain took the first steps toward her own decline, while simultaneously contributing to the speeded development of a commercial adversary.⁹⁷

The Reagan sanction were not the first American use of economic sanctions, nor were they the first attempt to block European plans to diversify energy stocks and to create employment via the construction of a pipeline from Soviet Siberia. In 1962, for example, President Kennedy was successfully able to pressure German Chancellor Adenauer to drop plans for an oil pipeline from Siberia to Western Europe, which was also to employ Western technology and Western large diameter pipe. At that time, the U.S. was able to squash the effort through its NATO network.⁹⁸

President Reagan, however, faces a different Europe today than the Europe of the early 1960's. For one thing, the relative economic status of Europe vis-à-vis the U.S. has changed substantially, partly as a result of American policies and misfortunes (such as Vietnam and deficit spending, and Watergate) and partly as the result of the creation of the EC, which has deflected economic dependence on external resources and has reinforced intra-european trade and development. As a direct consequence of the awakening of a separate European (economic) identity, Europe has also developed a very distinct political conscience, based on shared mutual interests among the European states, and often highlighted by the collective differences within the U.S.⁹⁹

Among the more noticeable differences to emerge in recent years has been the issue of détente. For the three decades following the close of WWII, the U.S. has dominated discussions of East-West policy; on a purely military plateau, this monopoly is perhaps understandable – since the U.S. nuclear “umbrella” has served well to shield Western Europe from the perceived Soviet threat. (This has also meant that relatively fewer European resources have had to be earmarked for defense purposes, and hence available for more productive uses, such as expansive social welfare programs, increased industrial development, etc.) The U.S. has

⁹⁷ Compare this analogy with the “Bucy Report”(supra, footnote 64). There are two obvious problems with regulations essentially aimed at controlling ideas: 1) it would mean a curtailment of the movement of technology to friendly countries, whose attitudes are perhaps less stringent, vis-à-vis trade with a third country, and 2) controlling the movement of know-how is equivalent to controlling the movement and activities of people (Americans, as well as foreign nationals) who may have gained design and production engineering experience through the study at U.S. universities or through employment by U.S. firms (Grange, *op cit*, p. 85).

⁹⁸ Steven Mufson, *Wall Street Journal*, 14 July 1982, p. 32.

⁹⁹ Note for example the cohesive and forceful negotiations conducted by the EC on steel quotas in the Summer of 1982. For a summary of EC-US grievances or sources of conflict, see: EC Commission Background Report, “The Giants Lower Arms,” 8 November 1982.

benefitted from this policy not only through the stability this produced in Western Europe, but also through the prosperity which spread world-wide from the massive influx of American Marshall Aid as well as the liberal international trade order that was established under American direction. The political dividends were paid to the U.S. in the form of undisputed American leadership role for close to twenty years. During the early post-war years, the U.S. military presence paralleled her economic hegemony in that region – and her policies were without question mutually beneficial in the short-run.

The present Euro-siberian pipeline debacle can be seen in the context of Europe's growing political independence. But contrary to Washington's sense of logic, the progressive easing of tensions with the East on the part of the Europeans does not foreshadow a forsaking of Western ideals, nor does it necessarily mean that Europe is intent on ending one form of hegemony only to turn to another. Instead, the Europeans perceive a vital interest in reducing tension with the S.U., their geographical neighbor, both for security reasons as well as for potential commercial value. Their political argument is that stronger economic interdependence between East and West will contribute to improved overall cooperation in the long term; relations such as the pipeline project merely exemplify the comparative advantages of the two regions – fair exchange is beneficial to both parties.¹⁰⁰

The U.S. sees this increasing interaction and interdependence as potentially harmful, primarily because it represents a limiting factor in European options vis-à-vis East-West relations and hence portends a serious cleavage in Atlantic cohesion. But as one observer correctly noted, "it is America that henceforth must adjust to this condition or incur the onus of endangering Allied unity."¹⁰¹

It is therefore essential that the U.S. take the initiative, not to employ futile obstructionist policies such as the unilateral pipeline sanctions, but rather to construct and reinforce collective bodies for cooperative consultation and joint policy formation. The "agreements" reached among the allies can really only be seen as stalling tactics in lieu of more substantive discussions in a more appropriate operative forum. Perhaps existing organizations such as COCOM can be strengthened to better serve the multifarious needs of the Atlantic partners; or perhaps entirely new bodies will have to be formed in order to embrace the highly technical and complex details comprising transnational data flows and security. It is clear that these concerns are not shared *only* by the Western industrialized states alone; there is an increasing awareness among the Less Developed Countries (LDC's) and the Newly Industrialized Countries (NIC's) that they too have a real stake in the management of data flows and the allocation of technological resources.

For this reason it is clear that unilateral mandates are unacceptable, just as a "tyranny of the majority" is quintessentially divisive. For the U.S. to establish a commonground for the resolution of these potential conflicts, it should take the high ground and define the boundaries of the dispute by creating the forum for the discussion. The positivist element in the formation of international law is as inevitable as it is regrettable; still, the U.S. stands to lose more than it can possibly gain by insisting on playing by rules superceded by current events. (U.S. Colonial history comes to mind again – as the poorly equipped and severely understaffed Colonists

¹⁰⁰ Hewett, *op cit*, 19.

¹⁰¹ Robert Tucker, "...No, the Act is Right," *NYT*, 8 August 1982.

wrought havoc upon the British forces who insisted upon formation fighting, Continental-style, in the wilderness.)

The U.S. can learn from the pipeline sanctions and move immediately to enhance international law at two levels: First, it can incorporate the legal concept of comity into its relations with the international community by first reinforcing its practice domestically. As defined by the Supreme Court, comity “involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of another country.”¹⁰² In this context, Congress should mandate the consideration of extraterritorial effect in relevant legislation in order to balance the scale to an equilibrium point – ie: to neutralize any potentially coercive extraterritorial incursions upon foreign sovereignty (albeit, obviously not such an extent so as to curtail the Executive’s powers and prerogatives or “hamstring” the full range of national security options).

Second, the U.S. should “externalize” these policies via existing forums for international legal cooperation (such as UNCTAD, COCOM, GATT, etc.) in order to provide for their adoption through custom, and it should expedite the formulation of needed international guidelines through multipartite conventions and treaties. In addition, the formation of adjunct forums to focus specifically on the issues of greatest concern to the U.S. for the decade ahead should be conducted with an interest in furthering international organization and in the spirit of international law.

The U.S. possesses the economic and political resources to bring about these positive changes; it has the technological advantages and scientific skills to maintain its leadership role in this arena, as well as built-in incentives to protect not only her own endowments but also to preserve the environment in which they best operate; it needs to gather the political will to implement those policies which best serve the universal long-term interest. To wait for the next storm to reinforce its shelter may be too late.

In conclusion, one important point must be made. For the U.S. to be able to prove conclusively that existing U.S. Public Law provides adequate jurisdictional justification for the attempted extraterritorial application of those provisions is, in the final analysis, still not a sufficient burden of proof to suggest that the provisions will or can be successfully enforced. The clearest direct result of the entire Reagan pipeline sanctions episode is that on the political level, the U.S. has squandered its diminishing remaining political capital on efforts that were doomed for failure from their genesis, in light of their inherent international legal defect.

Moreover, as a result of this failed attempt, the international legal system as a whole has been substantively reinforced, and there are now strong indications that this new consciousness will provide a certain momentum for further improvements in the field of international law creation. The emerging concern for comity in municipal courts is certainly a positive step – and one element of hope to counterbalance the generally negative demeanor incorporated in recent “blocking statutes” and protective trade measures.

¹⁰² Feinberg, *op cit*, 336.

It would have been quite interesting to have seen the sanctions case go before the International Court of Justice at The Hague (a non-existent possibility, of course, since the U.S. had made it clear from the start that it would not submit itself to this forum of legal rigor).¹⁰³

In previous cases pertaining to the question of extraterritoriality and conflicts of laws jurisdiction, the I.C.J. has generally issued rulings restricting the assertions of extraterritoriality and sided in favor of the municipality in which the entity in question is legally domicile.¹⁰⁴ And as mentioned above, the U.S. Supreme Court has concurred with these decisions, in cases which pertain to the attempted application of foreign jurisdiction upon U.S. soil.¹⁰⁵

These two factors underscore the fact that the U.S. must therefore discount its presumption of control via antitrust laws, securities regulations and legislation such as the EAA, which are based primarily upon “control over ‘American persons’ including corporations and companies producing under American licenses.”¹⁰⁶

If, on the other hand, the U.S. wishes to rely on the enforcement of “end-user” clauses contained in certain validated export licenses, it may perhaps stand on firmer legal foundations. As Professor Lauterpact noted: “The legal nature of private law contracts and international treaties is essentially the same... Every treaty contains rules governing the international conduct of the signatory states, and every treaty, law making or not law making, is a source of international law for the contracting parties – and for no one else. Only agreements (which serve identical aims to contracting parties) may be regarded as sources of international law.”¹⁰⁷ Thus, if the European firms submitted themselves to certain and very specifically detailed criteria at the time of signing the contracts, whose effects may be altered or revised by subsequent events, and which may indeed call for the submission of their domicile state’s sovereignty, then the U.S. can

¹⁰³ Gelb reported at “Administration officials have said that they are not about to let the matter be adjudicated by the International Court of Justice in The Hague, with all the consequences for American law that an adverse decision would hold.” Secondly, she noted that the U.S. would be equally reluctant to press the issue in U.S. municipal courts, as it would surely entail a long process of appeals, and in the end France could just ignore the verdict, if found favorable. *NYT*, 31 August 1982.

¹⁰⁴ *Ibid.*

¹⁰⁵ This follows similar actions abroad. In 1953, the Hong Kong Supreme Court ruled that American goods, once placed on Hong Kong soil, were “discharged” and were “no longer subject to the jurisdiction of the U.S.” The goods in question were then delivered to China and no formal U.S. protest lodged. In the mid-1960s, the Fruehof Corporation told its French subsidiary not to ship tractor trailers to China. The French courts put the company under French receivership, the trailers were dispatched according to the contracts. The Johnson Administration took no punitive action. And, finally, the U.S. Supreme Court decided recently in *Avaglino v. Sumitomo/Shojo America* that the American subsidiary of a Japanese firm was subject to U.S. law where it concerned hiring practices. (The above cases were cited in Gelb, *op cit*, *NYT*, 31 August 1982.

¹⁰⁶ *Ibid.*

¹⁰⁷ H. Lauterpact, *Private Law Sources and Analogies of International Law*, NY: Longmans (1927), 156-157.

Note to the Reader: To date, the *Wall Street Journal* has been the only public source of information regarding the specifics of the license contracts. It reproduced the relevant passages from the G.E.-licensing contracts as follows: “... To facilitate the furnishing of data under this agreement, Alsthorn hereby gives its assurance in regard to any General Electric origin data that unless prior authorization is obtained from the U.S. Office of Export Administration, Alsthorn will not knowingly... export to any country Group Y any direct product of such technical data if such direct product is identified by the Code Letter A. Alsthorn further undertakes to keep itself informed of the regulations (including amendments and changes thereto) and agrees to comply therewith.” The *Wall Street Journal* explained that “Group Y” referred to certain countries, including the S.U., and that the “Code Letter A” is the status Mr. Reagan gave the rotors and other equipment and data in his 18 June 1982 edict. (*Wall Street Journal* (editorial), 23 July 1982.)

expect these obligations to be fulfilled, just as any other treaty in force among the Atlantic allies. The fact that the European states which are affected by these actions will naturally find any U.S. attempts to exercise enforcement under these agreements repugnant and injurious to their sovereignty is all the more reason to anticipate either cooperation and consultation to abridge the effects of these agreements, or to expect European moves to prevent such incursions in the future.

Now that the U.S. sanctions have been lifted, this particular case is moot. Nonetheless, it is clear from the detailed examination of the surrounding international legal issues involved, that the U.S. and her Western allies must take immediate and affirmative actions to remedy this malaise and to strengthen the laws governing peaceful coexistence through international law.