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THE EURO-SIBERIAN GAS PIPELINE DISPUTE — A COMPELLING CASE FOR THE ADOPTION OF JURISDICTIONAL CODES OF CONDUCT

PATRIZIO MERCIAI*

I. INTRODUCTION

In 1981-1982, Western participation in the Euro-Siberian gas pipeline project was subjected to United States foreign policy export controls, the extraterritorial reach of which was challenged by European countries as being at variance with international law. In response, many of these countries sought to nullify the effects of these export controls through juridical actions. Nonetheless, the dispute was not settled by juridical means. Moreover, it has been widely publicized and might provide the necessary incentive to the countries involved to find a compromise between their increasingly divergent legal conceptions of jurisdiction in international law.

This article will review the main issues raised by the pipeline dispute, particularly the limits to jurisdictional claims, the legal means of blocking them when excessive, and possible solutions for such conflicts. Special attention will be given to the position of subsidiaries of foreign corporations and recipients of foreign technology. Before turning to such issues, it is necessary to expose the circumstances and the developments of the dispute itself.

II. THE SIBERIAN GAS PIPELINE PROJECT

The Euro-Siberian gas pipeline under construction,¹ officially called "Rossiya No. 6" by the Soviet Union, is part of a large-capacity, long-distance network originating from the natural gas fields of the Taz Peninsula, in the Western Siberian region of Yamal, north of the Arctic Circle. Rossia No. 6 will ultimately consist of a double 56-inch wide, 4451 kilometer long pipeline joining Urengoi field to the border town of Uzhgorod, where it is to be connected with the MEGAL pipeline over Czechoslovakia to the West European gas network.² One hundred and twenty-five compres-

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1. For general sources see Bibliography at end of article.

2. Staff of the Joint Economic Committee, Subcommittee on International Trade Finance and Security Economics, 97th Cong., 1st Sess., *Energy in Soviet Policy* 84, 88, 94, 94 n.15 (Comm. Print 1981) (Bresnick & Hardt, authors, *Soviet Economic Policy Toward West Eu-*

sor stations, each capable of 16 to 25 Megawatt power, are needed to transport yearly 40-70 billion cubic meters of gas.³

Construction of a project of this size, in extremely adverse conditions, is a formidable task for the Soviet Union, to be rewarded with a 40 percent increase of its overall gas production as soon as the new network is put into operation, which should occur by 1990.⁴ The first phase of the project, for which the arrangements discussed in the article were made, includes construction of a single pipe, with 41 compressor stations, and its completion is scheduled for 1984-85.⁵ The whole project represents a \$15 billion investment,⁶ but could earn more than \$8 billion in convertible currencies per annum.⁷

A. *Western Participation*

Although it would have been possible for the Soviet Union to rely exclusively on domestic capital and technology and build a scaled-down version of the project, with smaller compressors and pipe, resort to Western

rope) [hereinafter cited as Bresnick & Hardt]; Stern, *Gas for Western Europe: Choices for the 1990s*, 36 WORLD TODAY 305, 305 (1982) [hereinafter cited as Stern, *Choices*]; Karr & Robinson, *Soviet Gas: Risk or Reward?* 4 THE WASH. QUARTERLY No. 4 at 3, 4; Painton, *Imbroglia Over a Pipeline*, TIME, Aug. 2, 1982, at 30, 31. A particularly significant branch line will be built over Czech and East German territory to supply West Berlin. See J. STERN, SOVIET NATURAL GAS DEVELOPMENT TO 1990: THE IMPLICATIONS FOR THE CMEA AND THE WEST 102 (1980) [hereinafter cited as J. STERN].

3. Bresnick & Hardt, *supra* note 2, at 96; Painton, *supra* note 2, at 30-31; Stern, *Specters and Pipe Dreams*, 48 FOREIGN POL'Y 21, 23 (1982) [hereinafter cited as Stern, *Specters*]; Ball, *The Case Against Sanctions*, N.Y. Times, Sept. 12, 1982, §6 (Magazine), at 63, 118.

These 40 billion cubic meters amount to 1.7 quadrillion B.T.U.s or are equivalent to 292 million bbl. of crude oil. For BCM-0.9 mt. oil conversion factor, see Stern, *Choices*, *supra* note 2, at 307 n.8.

4. See Bresnick & Hardt, *supra* note 2, at 88.

5. TIME, Jan. 23, 1984, at 22 (doubts arise in West as to the possibility of completion before the end of 1985 with only one or two of the forty-one stations currently on line). Although the first phase would involve construction of a single pipe, this one could carry more than half the final capacity because the completed pipeline will be operated below the maximum pressure.

6. *Hearings on United States Assertion of Extraterritoriality with Respect to the Soviet-European Gas Pipeline before the Subcommittee on International Economic Policy of the Senate Committee on Foreign Relations*, 97th Cong., 2d Sess. 21 (1982) [hereinafter cited as *Hearings*]; see also TIME, Jan. 23, 1984, at 22 (citing a higher cost estimate of \$18 billion).

7. This figure is based on the mid-1982 reference price of \$4.75 per million B.T.U.s and a volume of 40 billion cubic meters delivered. See Bresnick & Hardt, *supra* note 2, at 97-98 (\$10 billion estimate by 1990); and *Hearings*, *supra* note 6, at 15, 21 (\$4-\$7 billion estimate by 1990); but see Stern, *Specters*, *supra* note 3, at 23 (discussing recent scaled down delivery estimates of 21 BCM per year, resulting in hard currency earnings of \$3.8 billion per year in 1982 dollars).

finance and supplies will cut costs considerably, through a faster pace of construction and greater reliability, and provide higher performance. Moreover, it would have been extremely difficult for the Soviet Union to secure European credits and gas purchases without conceding countertrade opportunities by importing construction machinery, steel pipe, compressors and monitoring equipment.⁸ Thus, the Soviet Union arranged to buy Western capital goods on Western credit, and to pay for the goods in gas supplies.

While such a trade pattern is not uncommon in East-West relations, the Euro-Siberian project is impressive by virtue of its size and the number of participating countries.⁹ Also noteworthy is the politically sensitive context of East-West trade in energy¹⁰ and technology¹¹ in which the project has progressed. On the one hand, Western European countries are excessively dependent on Middle East oil supplies. On the other hand, the United States has strongly opposed West European cooperation in several Soviet projects related to energy transportation over the past thirty years.¹² In ad-

8. For references to the stimulus that the Soviet pipeline represents to West European heavy industrial employment, see Karr & Robinson, *supra* note 2, at 5, 7; Stern, *Choices*, *supra* note 2, at 312; Ball, *supra* note 3, at 119; Stern, *Specters*, *supra* note 3, at 30-31. It may be observed yet again that while the U.S. would deny Western Europe this shot-in-the-arm for industrial employment, it wavered not at all in its ongoing wheat deals with the USSR. Ball, at 120; *Hearings*, *supra* note 6, at 45; Stern, *Specters*, *supra* note 3, at 35-36.

9. See Karr & Robinson, *supra* note 2, at 4; Bresnick & Hardt, *supra* note 2, at 94 (the project is known as the "largest project in recorded history"). The ten nations to receive gas through the Yamal pipeline are: Federal Republic of Germany, Italy, Austria, France, Belgium, Switzerland, Netherlands, Sweden, Finland, Greece. Bresnick & Hardt, at 96; Karr & Robinson, at 5.

10. Staff of the Joint Economic Committee, Subcommittee on International Trade Finance and Security Economics, 97th Cong., 1st Sess., *Energy in Soviet Policy* 3, 4, 7 (Comm. Print 1981); Bresnick & Hardt, *supra* note 2, at 85, 86, 98, 99; Stern, *Choices*, *supra* note 2, at 305, 309, 310, 312; Karr & Robinson, *supra* note 2, at 4; Gustafson, *Energy and the Soviet Bloc*, 6 INT'L SECURITY No. 3 at 65 (1982).

11. Bucy, *Technology Transfer and East West Trade: A Reappraisal*, 5 INT'L SECURITY No. 3 at 132, 133, 135-41 (1981); see generally, Bucy, *On Strategic Technology Transfer in the Soviet Union*, 1 INT'L SECURITY No. 4 at 25 (1977). For an outline of the related "dual use" of technology issue, see *infra* note 16, Note, *Dresser Industries: The Failure of Foreign Policy Trade Controls Under the Export Administration Act*, 8 MD. J. INT'L L. & TRADE 122 (1984).

12. In 1963, the Consultative Group of NATO member countries embargoed West German steel pipes to be fitted into the *Druzhba* USSR-CMEA oil pipeline, with the sole effect of boosting third-party exports and accelerating the acquisition of Soviet expertise in domestic production. See 1982-83 EUR. PARL. DOC. (No. 1-83/82) 15 (H. J. Seeler, rapporteur, 1982); Ball, *The Case Against Sanctions*, *supra* note 3, at 63, 120.

When the Carter Administration first placed export controls on oil and gas equipment to the Soviet Union in 1978, the Caterpillar Tractor Company lost its 85% share of the Soviet tractor and pipelayer market to its chief competitor Komatsu of Japan. *Hearings*, *supra* note 6, at 7-8.

dition, East-West relations were deteriorating at the time the Siberian project was launched.¹³ Western Europe has nevertheless accepted the Siberian project,¹⁴ after balancing the political risks against the strategical necessity of diversifying its energy supplies.¹⁵

West German wide-diameter pipes have been used in recent years for the *Soyuz* pipeline, the gas equivalent of the *Druzhba* oil system, with renewed criticism from the United States, see Stern, *supra* note 2, at 77-78.

The United States itself, however, contemplated purchasing liquefied natural gas (LNG) from the Soviet Union under the so-called "North Star" project. See 1982-83 EUR. PARL. DOC. (No. 1-83/82) 15-16 (H. J. Seeler, rapporteur, 1982); Ball, *supra* note 3, at 120.

For an analysis of negative Congressional reaction to the Nixon Administration's North Star proposal, see Bresnick & Hardt, *supra* note 2, at 98-100; see generally, J. KOSNIK, NATURAL GAS IMPORTS FROM THE SOVIET UNION (1975).

13. Stern, *Specters*, *supra* note 2, at 22-23.

14. The first contract was concluded by Austria in 1968. J. STERN, *supra* note 2, at 102. The Federal Republic of Germany began contracting for Soviet gas in 1970. *Id.* at 100. France and Italy have followed its example and are all the more pleased to diversify from Algerian and Libyan supplies that have proven to be unreliable in recent years. See Ball, *supra* note 3, at 118-19. For a discussion of the role of Algerian gas exports to Europe, see Stern, *Choices*, *supra* note 2, at 308-14.

15. This cost-benefit analysis necessarily yields a different conclusion when engaged in by the Europeans rather than by the United States. For a pointed discussion of the historic difference between U.S. and European understandings of détente, see Ball, *supra* note 3, at 119. *European Energy Demand:*

While the U.S. imports 50% of its energy supplies and has significant reserves, Western Europe imports 75% of its energy supplies. Over the past decade European use of natural gas in particular has boomed from 80 billion cubic meters in 1970 to 245 billion cubic meters in 1980. See Stern, *Choices*, *supra* note 2, at 306 (220 BCM use in 1980). The increased consumption is in part a result of the exploitation of Dutch, particularly the Groningen, fields, and of British offshore fields, which have by and large reached and passed peak production. See Stern, *Choices*, *supra* note 2, at 307-09; Karr & Robinson, *supra* note 2, at 8.

Imports of natural gas must play a major role in diversifying from crude oil. The four non-EEC suppliers of natural gas to Europe are Norway, Algeria, Libya, and the USSR. Stern, *Choices*, *supra* note 2, at 306. Algeria and Libya, however, are also OPEC oil producers with a history of unreliable delivery, hence the European interest in Soviet energy development projects. Stern, *Choices*, *supra* note 2, at 311; Karr & Robinson, *supra* note 2, at 9. Norway, for economic, political, and geological reasons, may not be able to take up the slack caused by the decline in Dutch production. Stern, *Choices*, *supra* note 2, at 307; Stern, *Specters*, *supra* note 3, at 28-30.

Soviet gas imports supplied both under earlier contracts and through the new pipeline would provide 20% of EEC natural gas consumption by 1990, or 4% of the EEC's overall energy requirements. Stern, *Choices*, *supra* note 2, at 309; Bresnick & Hardt, *supra* note 2, at 96. Stern, *Specters*, *supra* note 3, at 23-24. According to 1982 forecasts by the Commission of the European Communities, Algeria and Norway would provide another 12% each of gas supplies. See Stern, *Choices*, *supra* note 2, at 309 (assigning 9% and 10% shares to Algeria and Norway respectively). Libya is expected to provide 4% of gas supplies.

No single EEC member country would be dependent on the Soviet Union for more than 33% of its gas consumption. See Painton, *supra* note 2, at 31 (30% as to Western Europe on

B. *Contracts Related to the Pipeline*

Although the construction and exploitation of the Euro-Siberian pipe-

average). One commentator cautions, however, that figures depend on variables: overall energy consumption patterns, and success in arranging alternatives. Stern, *Specters, supra* note 3, at 24. Some regions on the trunk pipeline route, such as Bavaria, may reach much higher figures. See Stern, *Choices, supra* note 2, at 310 (estimating Bavarian dependence at 85%); Karr & Robinson, *supra* note 2, at 8. An intensification of security measures to temper increased dependence on Soviet gas is one of the major concerns of these European nations. Such measures include interconnection of national networks in order to even out shortfalls or cutoffs in one area, strategic stockpiling of methane in liquefied or gaseous form (reinjecting into depleted fields), and the use of convertible burners. Stern, *Choices, supra* note 2, at 310; Karr & Robinson, *supra* note 2, at 9. Stern, *Specters, supra* note 3, at 24-25.

U.S. Objections and European Justifications:

This situation has met with differing reactions within the United States:

Without regard to how we arrived at this point, the bottom line is that we did not persuade them of our position. We should be trying to assist the Europeans in the development of effective contingency plans to allow substitutions and alternative energy supplies so as to diminish the opportunities for the Soviet Union to make use of any sort of gas weapon to exert political pressure.

Hearings, supra note 6, at 14-15 (Statement of Arthur T. Downey, On Behalf of the Chamber of Commerce of the United States.)

On these flexibility-in-allocation issues, see generally, Commission of the European Community, Communication from the Commission to the Council Concerning Natural Gas, COM (81) 530 final (Oct. 1, 1981). Commission of the European Community, Communications from the Commission to the Council Concerning Measures to Enhance the Security of Gas Supplies to the Community, COM (82) 45 final (Feb. 15, 1982); Commission of the European Community, Communication from the Commission to the Council on Natural Gas Supplies, COM (82) 653 final (Oct. 15, 1982); Directorate-General on Energy, Commission of the European Community Report on the search for and exploitation of liquid gaseous hydrocarbons in the mainlands and off-shore under the jurisdiction of the Community, EC Doc. XVII/360/76 (1976).

Nevertheless, the U.S. Administration considered it advisable to divert European nations from the pipeline project because its unprecedented size would intensify Soviet-European relations. See Bresnick & Hardt, *supra* note 2, at 94, 98. In brief, the reasons for opposing this form of heightened Soviet-European interdependence were as follows:

1). Western Europe would be dependent on the USSR for strategic energy supplies and for continued credit repayment. Stern, *Choices, supra* note 2, at 312; *Hearings, supra* note 6, at 13; J. HARDT, D. GOLD, F. MIKO & S. SLOAN, SOVIET GAS PIPELINE: U.S. SANCTIONS AND THEIR IMPLICATIONS (Library of Congress, Congressional Research Service, No. IPO 219S, 1982) [hereinafter cited as J. HARDT]; Ball, *supra* note 3, at 118; Painton, *supra* note 2, at 31. Such dependence could undermine the strength of the Western alliance:

With reduced U.S. security involvement and increased Soviet economic penetration in Europe, some perceive the political and diplomatic influence of the USSR to be greatly enhanced. The extension of Soviet gas lines from the Soviet border areas to France in the 1980s may make an economically unified Gaullist-type Europe "from Brest to Brest" a reality, but with the dominant role played by Moscow rather than Paris or other Western European capitals. As viewed by some, the economic leverage of the Soviet Union might

at some point be used to encourage the removal of all Western export controls and to influence the extension of Western preferential credits and other trade concessions. Coupled with the perceived shift in the military balance to the Warsaw Pact, this trend might lead to Soviet dominance of Europe.

Bresnick & Hardt, *supra* note 2, at 91.

The U.S. commitment to greater Western unity in this area was evidenced by last ditch offers to the EEC to turn to U.S. coal, synfuels, and nuclear power as alternative energy supplies, the so-called "Rashish Raid" of fall, 1981. Stern, *Specters*, *supra* note 3, at 27; see also Karr & Robinson, *supra* note 2, at 9; J. HARDT & K. TOMLINSON, SOVIET GAS PIPELINE: U.S. OPTIONS 3 (Library of Congress Congressional Research Service Major Issue System, Issue Brief No. IB8 2020, 1982) [hereinafter cited as J. HARDT & K. TOMLINSON]; Ball, *supra* note 3, at 63; N.Y. Times, Feb. 26, 1982, at A3, col. 1.

European policy-makers and public opinion would answer the preceding arguments in this way. What is an acceptable degree of Soviet-European interdependence is a question peculiarly within the realm of European sovereign nations' judgment:

Having been at a conference in Munich embracing all European countries, having talked to the representatives, defense ministers, etc., of every one of those countries, knowing of the absolute conviction that they have to go ahead with this Trans-Siberian pipeline, I must say that they have listened to us. They are well aware that they are vulnerable. They are well aware that the spigot of the pipeline could be turned off, but they are not going to allow themselves to get into a position of overdependence. They have decided that they have the sovereign right to make this decision, and they will make it. . . . They are fine friends and allies, but they have decided that in their judgment on balance it is best for them go ahead with this.

Hearings, *supra* note 6, at 4-5 (statement of Senator Charles H. Percy, Committee Chairman).

As to the energy dependence issue, security measures to enhance flexible allocation of gas within the EEC, are the best remedy. The Soviet Union, moreover, is considered to be a more reliable source of gas than Algeria, Libya, and Qatar. Ball, *supra* note 3, at 119. As to dependence for credit repayment, it is true that it could cause a form of dependence for the creditor, not just for the debtor, in the same way that trade makes the seller dependent on the purchaser, as in the grain trade with the Soviet Union. The question is whether in the circumstances, the project produces overdependence:

Europeans might also argue that Yamburg, the European version of the earlier "North Star" proposal promoted by Richard Nixon and Peter Peterson in 1972-74, is a much sounder credit risk and more secure source of supply than "North Star" would have been to the U.S. The cost to the Soviet Union of not meeting repayments of delivery commitments from Yamburg would be substantial. Examination of the Eleventh Year Plan (1981-85) may illustrate how reliant the USSR now is on a continuing and expanding supply of technology and equipment from the West. These technology imports cannot be repaid by export earnings from nonenergy exports and oil sales, so expanded gas sales and Western credit facilities will continue to be crucial to trade with the West. The Soviet Union might, at any point, risk the cost of technology trade and credit cutoff and the attendant increase in the economic and political costs by gas delivery cutoffs or a credit default. The question is would the cost of that action be too high as viewed by Soviet leaders?

Bresnick & Hardt, *supra* note 2, at 98.

Many argue that the dependence cuts both ways, in light of the USSR's "three disastrous harvests, a hard currency crisis in Eastern Europe, and a continuing need for technology and

equipment imports. . . ." Stern, *Specters*, *supra* note 3, at 26; *see also* Painton, *supra* note 2, at 31.

2). Hard currency earnings from the pipeline would enable the Soviet Union to obtain the equivalent value in advanced Western technology to enhance further its military capability. *Hearings*, *supra* note 6, at 13; Stern, *Specters*, *supra* note 3, at 21; Painton, *supra* note 2, at 31.

The scope of this article cannot include the dual use issue, that is, the question of whether the oil and gas production equipment provided by Europe to the Soviet Union to build the pipeline is in and of itself "advanced Western technology" capable of being put to military use, and therefore the proper subject of unilateral and multilateral "national security" export controls. For several sources, *see infra* note 16. For detailed discussion *see* Note, *supra* note 11.

In response, opponents argue that hard currency earnings should first be discounted by the cost of building the pipeline. *See supra* note 7; *Hearings*, *supra* note 6, at 21-22.

Although Europe has granted concessionary rates of 7.8% on the financing arrangements, recipients of the gas will pay prices lower than the current French-Algerian LNG contract price. *See* Stern, *Choices*, *supra* note 2, at 312; Stern, *Specters*, *supra* note 3, at 30; *Hearings*, *supra* note 6, at 22, 27. Secondly, the Soviet Union must use hard currency on its huge grain import requirements, estimated in 1982 at \$6-8 billion. Third, recent estimates place the earnings from gas sales much lower than first expected. *See* Stern, *Specters*, *supra* note 3, at 23. Moreover, European energy demand has decreased significantly since the gas supply contracts were signed. *TIME*, Jan. 23, 1984, at 22. Finally, if and when hard currency earnings from Soviet gas exports replace and then surpass those presently made from declining oil exports, Western producers of advanced technology must come to terms with deciding what to sell and what not to sell, regardless of the depth of the buyer's pocket. *See Hearings*, at 22; *see also* Bresnick & Hardt, *supra* note 2, at 97 (discussing the expected shift in the Soviet oil-gas earnings ratio, from a very low gas position in 1980 of \$1.5 billion as compared to \$11.5 billion for oil, to more than a reversal by the end of the decade).

3). Advanced technology would be made available to the East without adequate safeguards. The U.S. previously stressed the importance of developing a common Western policy on restricting energy equipment exports. These efforts at the Ottawa and Versailles summit meetings were unsuccessful. J. HARDT, *supra*, at 1; *N.Y. Times*, Nov. 15, 1982, at A10; for the results of the Versailles summit, *see also* *N.Y. Times*, Nov. 14, 1982, at 25, col. 1.

In response, as to releasing advanced technology to the Soviet Union, without adequate safeguards, the dual use issue again arises. It is by no means clear that the energy equipment embodies unique high technology convertible to military use. *Hearings*, *supra* note 6, at 24. *See also* Ball, *supra* note 3, at 118 (assigns little credibility to such "rationalization"). It is important to note that the foreign policy export controls, and not the national security export controls, were invoked under the Export Administration Act to restrict the pipeline project. Most significantly, were the dual use risk found to be real, it can be argued that the method of minimizing such risk should be one that unifies the Western Alliance rather than wrenching it apart, once sovereign nations have decided that it is necessary to take this risk. *See* sources cited in notes 11, and 16, and Note, *supra* note 11.

Finally, as for the effect on non-military imports, it is by no means clear who would gain from an aggravation of Soviet economic difficulties in the present state of world affairs. *See e.g.*, Ball, *supra* note 3, at 118.

In addition to these ongoing reasons for American opposition to the project, with the imposition of martial law in Poland on December 13, 1981, the U.S. Administration seized on

line represent a significant intensification of East-West economic relations,¹⁶ no treaty on international cooperation has been concluded to minimize these tensions. Nor have the scores of contracts between Soviet State agencies and foreign banks and enterprises been integrated under a framework agreement. In order to secure more favorable terms than would have been possible in multilateral talks, the Soviet Union insisted on contracting for loans,¹⁷ imports of capital goods, and gas exports¹⁸ on a bilateral basis. Ma-

a final justification. See Ball, *supra* note 3, at 118.

Nor should we — as the White House now appears to be doing — brandish the threat of such economic warfare in an effort to force our allies to punish the Soviet Union economically in some other way, on the bizarre pretense that that would somehow alleviate pressure on the Poles. . . .

[Moreover], . . . no one has convincingly shown that depriving Moscow of \$1 billion in foreign exchange will force it to spend \$1 billion less on weapons. . . . Moreover, under the Soviet system, the claim of the military sector on the total resource pie is determined far less by the magnitude of the pie than by the political clout of the military leadership and its ability to play on the primordial Russian fear of encirclement.”

Id.

16. It should be noted that two thirds of the West German (as well as Japanese) exports to Eastern Europe, including the USSR, consist of capital goods and steel, and one third of imports are fuel supplies; on the other hand, two-thirds of U.S. exports to Eastern Europe are foodstuffs and raw materials, and only one sixth of U.S. exports consist of fuel (mainly petroleum products). Stankovsky, *Trade and Credit Relations between East and West*, 18 SOVIET & EAST. EUROPE FOREIGN TRADE 3, 14, 20 (1982). For example, in 1982, four-fifths of U.S.-Soviet trade was comprised of grain and agricultural products. N.Y. Times, May 9, 1983, at A1, col. 2; see also N.Y. Times, Nov. 16, 1982, at D6.

17. A large number of West European banks, grouped in consortia on a national basis, will provide the Soviet Union with government guaranteed loans at a concessionary rate of 8-12% in most cases. See Karr & Robinson, *supra* note 2, at 6. Ball, *supra* note 3, at 63.

The nonconcessionary rate for five year loans to the Soviet Union was 12.15-12.40% in July 1982, according to the international guidelines for the use of subsidized export credits, and the real cost of such credits might have been higher in several lending countries concerned. Financial Times, Sept. 28, 1982, at 18, col. 1. Thus, part of the cost had to be borne by Western governments, which chose not to align the interest rates for pipeline loans in exchange for price moderation in Soviet gas supplies. See also Stern, *Specters*, *supra* note 3, at 30-31 (gives the concessionary rate as 7.8%). Cf. Painton, *supra* note 2, at 31 (gives 15% as the going rate in August 1982).

The duration of these credits is usually five years but unguaranteed repayment loans are already agreed upon. The sum total of all loans may approximate \$6 billion, of which the largest part is tied up in the purchase of capital goods in each of the lending countries. See Maechling, *The Pipeline Embargo: Reagan's Off Base*, N.Y. Times, Aug. 8, 1982, §4, at E19. West German firms have equipment supplies contracts for over \$2 billion, France and Italy for more than \$1 billion each, British enterprises account for approximately \$0.7 billion.

18. It had been agreed in 1982 that Ruhrgas AG of West Germany would receive 10.5 billion cubic meters every year, and West Berlin another 0.7 billion; Gaz de France 8 billion and the Italian SNAM 7 billion. More than 3 billion cubic meters could be shared by Belgium, the Netherlands, Austria, and Switzerland. All these countries being connected to

major contracts were concluded between September and December 1981, and in July 1982, while several other talks were still in progress. Final considerations are the subcontracts for equipment supplies and the possible reallocation of gas purchases between European countries.

Capital Goods

The primary United States contractors involved were the Caterpillar Tractor Company¹⁹ and Fiat-Allis Construction Machinery, Inc., a subsidiary of the Italian group Fiat S.p.A., as well as the General Electric Company,²⁰ which has developed advanced technology for the rotors to be mounted in compressor stations. Among the key European contractors is Mannesmann AG, a large West German metal manufacturer, which enjoys a virtual monopoly over the wide-diameter pipes needed for the project.²¹ Half of the compressor stations have been contracted to Nuovo Pignone S.p.A., a subsidiary of the Italian state agency ENI; the other half has been contracted jointly to Creusot-Loire, a nationalized French group, and to Mannesmann-Anlagenbau AG.²²

These firms subcontracted the supply of turbines to AEG-Kanis

the continental network, they might arrange, as is common practice, for resale of Siberian gas to each other. However, the downward trend in oil prices and better diversification of energy supplies have recently encouraged West European countries to scale down their planned purchases to the agreed floor value (6.4 billion cubic meters in the Gaz de France contract, for instance). *Journal de Genève*, May 30, 1984, at 3.

Danish and British connection to the existing network is strongly advocated by the European Community. See Stern, *Choices*, *supra* note 2, at 309. The resulting enhanced flexibility could allow for greater security, which in turn could relieve member countries from the need to use natural gas for electricity production and optimize use of energy resources, pursuant to EC Council Directive No. 75/404/EEC of Feb. 13, 1975, 18 O.J. EUR. COMM., (No. L 178) (July 9, 1975). See *Hearings*, *supra* note 6, at 7-12; Bresnick & Hardt, *supra* note 2, at 97; Stern, *Specters*, *supra* note 3, at 31; J. HARDT & K. TOMLINSON, *supra* note 15, at 13.

The price paid to the Soviet Union will be indexed to the price of supplies from other countries and to that of crude oil. It is expected to be higher than that of EEC gas, but lower than Norwegian, Algerian, or Libyan current prices.

The base price of Siberian gas as of July 1, 1982 was \$4.75 at the West German border and \$4.65 at the Italian border. Dutch supplies from Groningen cost \$4.50 or less, but Algerian LNG shipped to France was priced at \$5.12 on the same date. Estimated floor prices by mid-1984 are \$5.50 for Siberian gas and almost \$6 for Algerian LNG, see *Financial Times*, Sept. 3, 1982, at 11, col. 4; Sept. 28, 1982, at 1, col. 7; Sept. 29, 1982, at 16, col. 1. (All prices given per million B.T.U.s; a one-dollar price differential is equivalent to a \$5.80 change in the price of one barrel of crude oil.)

19. See *Hearings*, *supra* note 6, at 7-12; Bresnick & Hardt, *supra* note 2, at 97; Stern, *Specters*, *supra* note 3, at 31; J. HARDT & K. TOMLINSON, *supra* note 15, at 13.

20. Bresnick & Hardt, *supra* note 2, at 97; N.Y. Times, Nov. 15, 1982, at A10.

21. See Bresnick & Hardt, *supra* note 2, at 97; Stern, *Specters*, *supra* note 3, at 30.

22. See Stern, *Specters*, *supra* note 3, at 30; Painton, *supra* note 2, at 31; J. HARDT & K. TOMLINSON, *supra* note 15, at 14.

Turbinenfabrik G.m.b.H., a subsidiary of the West German AEG-Telefunken, currently under receivership; to John Brown Engineering, of Glasgow, which belongs to John Brown & Company;²³ and to Dresser (France) SA,²⁴ a wholly-owned subsidiary of Dresser Industries, Inc., of Dallas. The monitoring system of the pipeline was contracted to a French State-owned firm, Thomson-CSF. All these contracts represent shipments of approximately \$2.5 billion for pipe to build the first of the double trunk line, and \$2 billion or more for other equipment needed for this first phase.

Dresser (France) is the largest but not the only foreign-owned subsidiary of a U.S. corporation involved in the pipeline contracts. United States parents control such subcontractors as Rockwell-Valves SA in France, and Sensor Nederland BV, the Dutch subsidiary of Geosource, Inc., of Houston. British subsidiaries of U.S. corporations include Andrew Antenna Systems, Ltd., Baker Oil Tools (United Kingdom) Ltd., Walter Kidde Co., and Smith International (North Sea) Ltd.

Other firms are recipients of American technology. General Electric rotors were to be fitted to turbines provided by AEG-Kanis, John Brown Engineering and Nuovo Pignone.²⁵ Alsthom-Atlantique, a French firm controlled by the nationalized CGE group, holds a license from General Electric for the manufacture of spare rotors. In addition, Creusot-Loire holds licenses for cooling and filtering devices from the U.S. firm, Cooper Industries, Inc.²⁶ These, and other smaller suppliers, rely on American technology to fulfill their contracts.²⁷

III. THE PIPELINE DISPUTE

The Soviet pipeline dispute arose when the United States imposed trade controls on pipeline-related technology in response to Soviet activity in Poland.²⁸ The embargo, generally viewed as short-sighted by West European countries, caused a major crisis in Euro-American relations.²⁹ The cri-

23. See Maechling, *supra* note 17; Stern, *Specters*, *supra* note 3, at 30.

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

25. J. HARDT & K. TOMLINSON, *supra* note 15, at 13.

26. See Bresnick & Hardt, *supra* note 2, at 97.

27. See N.Y. Times, Nov. 15, 1982, at A10.

28. See sources cited *infra* at note 34; 47 Fed. Reg. 141 (Jan. 5, 1982) ("repression" in Poland refers to the imposition of martial law).

29. See *Hearings*, *supra* note 6, at 1-3, 14-15, 38, 50; Ball, *supra* note 3, at 119; Ellicott, *Trends in Export Control Regulation*, 38 BUS. LAW. 533, 552 (1983). See generally, *Does Mr. Reagan's Writ Run in Europe?* 19 COMMON MKT. L. REV. 497 (1982); Painton, *supra* note 2.

sis occurred in part because the Europeans did not perceive a link between Western foreign policy goals and the measures propounded by the U.S. European countries refused a request by the United States to take part in politically motivated economic sanctions which were likely to be, and have since proved to be, counterproductive.³⁰ The legal dispute arose when the United States attempted to dispense with the collaboration of its European allies and enforce the trade controls abroad. This article will deal only with the international law aspects of this affair and not with the domestic, political and strategic issues.

A. *United States Action*

United States concern with West European participation in the Siberian pipeline project was expressed at the Ottawa summit meeting of the seven major industrialized countries in July of 1981,³¹ but this did not prevent European firms from concluding decisive contracts, with their respective governments' approval, in the following autumn. The imposition of martial law in Poland on December 13, 1981, however, represented, in the Reagan Administration's view, a development that should be responded to by the imposition of economic sanctions against Poland and the Soviet Union.³² Among the measures announced December 29, 1981, against the

30. See N.Y. Times, May 9, 1983, at D3 (a Congressional Study by the Office of Technology Assessment concludes that the Soviet Union may well have benefitted from the public display of Western disunity and that the embargo was, at the very best, "inconclusive.") Cf. Ball, *supra* note 3, at 120.

America cannot afford such conflict with its trading partners. Our large and embarrassing foreign-trade surplus of the postwar years has now been replaced by a troublesome deficit. As our new Secretary of State, George P. Shultz, wrote three years ago, we no longer have the luxury to indulge in "vigorous and flamboyantly administered initiative that uses foreign trade as a tactical instrument of foreign policy."

For a general discussion of the inefficacy of economic sanctions, see M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 125 (2d ed. 1980); R. RENWICK, *ECONOMIC SANCTIONS* (1981) (discussion of the imposition of economic sanctions on Rhodesia (now Zimbabwe) and Italy during the Abyssinian crisis, concludes that such sanctions are worth the costs only when vigorously enforced and unanimously applied); Bingham & Johnson, *A Rational Approach to Export Controls*, 56 FOREIGN AFF. 894 (1979) (addressing the tension between the need to correct a trade deficit with security and policy reasons for export controls, particularly in the context of East-West trade); Neff, *The Law of Economic Coercion: Lessons from the Past and Indications of the Future*, 20 COLUM. J. TRANSNAT'L L. 411 (1981) (discussing legitimacy of economic sanctions in history and competing characterizations of such sanctions as governmental economic actions and as international legal means of promoting international order).

31. See Ball, *supra* note 3, at 63.

32. See 82 DEP'T. ST. BULL. No. 2059 at 1 (Feb. 1982); see also Leich, *Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT'L L. 374, 379

latter was the expansion of export controls under the Export Administration Act of 1979³³ to include commodities and technical data related to oil and gas transportation.³⁴ These measures, effective December 30, 1981, suspended all licensing for the export of these items, thereby putting the items under embargo.

The European Community decided, at the instigation of the United States, to curtail its imports from the Soviet Union,³⁵ but took no measure regarding the gas pipeline. Governments of the countries involved informed contractors that they had no intention of interfering with the project. The U.S. embargo did, however, jeopardize the continuous flow of supplies and data to subsidiaries and licensees of American firms.

Faced with the prospect of having the pipeline construction proceed despite the sanctions and the loss of American contracts, the U.S. Administration attempted to block European shipments. Amendments to regulations promulgated under the Export Administration Act extended jurisdiction to subsidiaries of the United States-based corporations and technology already licensed and transferred abroad,³⁶ thus purporting to subject these firms and property to export controls.

These measures were announced on June 18, 1982, and made effective as of June 22.³⁷ This was shortly after the Versailles summit meeting,

(1982) (discussing President Reagan's December 31, 1981 request to Poland to honor international agreements on human rights as a condition to not imposing sanctions and the sanctions finally applied).

33. 50 U.S.C. app. §§ 2401-2410 (Supp. III 1979), *amended by* the Export Administration Amendment Act of 1981, 50 U.S.C. app. §§ 2401-2420 (Supp. V 1982). The E.A.A. was to expire on March 30, 1984. President Reagan, however, extended the effect of the E.A.A. in Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984). The legal issues raised by this Order are beyond the scope of this paper. On the Export Administration Act of 1979 generally, see Ellicott, *supra* note 29.

34. 47 Fed. Reg. 141-45 (Jan. 5, 1982), *amending* 15 C.F.R. pts. 379, 385, 390, 399 (1981) (Export Administration Regulations), *amended* June 22, 1982, *repealed* Nov. 17, 1982; *see infra* note 59. *See* 82 DEP'T. ST. BULL. No. 2059, at 8 (Feb. 1982); Leich, *supra* note 32, at 384.

35. Regulation No. 596/82/EEC of March 15, 1982, amending the Import Arrangements for Certain Products Originating in the USSR, 25 O.J. EUR. COMM. (No. L72) 15 (March 16, 1982), *effective* March 16 to Dec. 31, 1982.

36. 47 Fed. Reg. 27,250-52 (June 24, 1982), *amending* 15 C.F.R. pts. 376, 379, 385, *repealed* Nov. 16, 1982, *infra* note 59. *See* 18 WEEKLY COMP. PRES. DOC. 820. (Statement on Extension of U.S. Sanctions, June 18, 1982) (June 21, 1982); *see also* *Hearings, supra* note 6.

37. The relevant provisions of the newly amended regulations read as follows:
§379.8(a) Prohibited Exports and Reexports.

(4) Export or reexport to the U.S.S.R., . . . of any foreign produced direct product of U.S. technical data, or any commodity produced by any plant or major component thereof that is a direct product of U.S. technical data . . . if:

where no indication was given by President Reagan to European heads of State concerning developments in the U.S. position.³⁸

B. *European Community Reaction*

The four European countries principally involved, France, West Germany, Italy and the United Kingdom, brought the affair to the EEC Council and to the European Council, which is the summit meeting of EEC countries. The European Council endorsed the EEC Council statement of June 22, according to which the U.S. extension of sanctions "taken without any consultation with the Community, implies an extraterritorial extension of U.S. jurisdiction which, in the circumstances, is contrary to the principles of international law, unacceptable to the Community and unlikely to be recognized in courts in the EEC."³⁹

The United States was then formally apprised of European indignation through diplomatic channels. A first diplomatic note was transmitted to the United States by Denmark, then president of the EEC Council, on behalf of the Community on July 14, 1982. The definitive note was transmitted on August 12,⁴⁰ accompanied by legal comments by the EEC Commission that

(ii) The U.S. technical data are the subject of a licensing agreement with . . . any person subject to the jurisdiction of the United States as defined in §385.2(c), regardless of when the data were exported from the U.S.

§385.2(c)(1) [P]rior written authorization . . . is required . . . for the export and reexport to the U.S.S.R. of oil and gas exploration, production, transmission or refinement goods of U.S. origin. . . . Also included in the scope of this control are technical data of U.S. origin. . . . The foreign product of such data is also controlled [§379.8]. . . . In addition, prior written authorization is required for the export to the U.S.S.R. of non-U.S. origin goods and technical data by any person subject to the jurisdiction of the United States.

(2) For the purpose of this §385.2(c) only, the term "person subject to the jurisdiction of the United States" includes (i) Any person, wherever located, who is a citizen or resident of the United States; (ii) Any person actually within the United States; (iii) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; or (iv) Any partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (i), (ii), or (iii) of this section.

47 Fed. Reg. 27,250-52, *repealed* Nov. 16, 1982.

38. See Economic Summit Final Communiqué, 82 DEP'T ST. BULL. No. 2064, at 5, 6 (July 1982).

39. 15 BULL. EUR. COMM. No. 6 at point 2.2.44 (1982).

40. Presidency of the Council of the European Community and Commission of the European Community, Gas Pipeline: Comments of the European Community as Regards Measures Taken by the U.S. Government (Aug. 12, 1982), *reprinted in* EUROPE DOCUMENTS, No. 1212 (Aug. 12, 1982), N.Y. Times, Aug. 13, 1982, at A4, col. 3.

were thus endorsed by the main political organ of the Community, representing the opinion of all member States.⁴¹

In the meantime, individual European governments, held fast to their position as to the invalidity of the export controls, and renewed instructions to their domestic companies to proceed with normal execution of contractual obligations with the Soviet Union despite the U.S. embargo. Three lines of argument, legal and extra-legal, justified such instructions. First, the American decision was considered not only legally unenforceable, but also politically undesirable, since the decision seemingly ignored the contrary views voiced by European countries. Second, poor economic conditions at the time made financially troubled firms reluctant to forego performance of Soviet contracts; moreover, long-term policies favored continuation of energy and equipment trade with the Soviet Union. Third, the firms involved faced high penalties claimed by Soviet agencies for breach of contract, because U.S. government compulsion would not be recognized by the USSR as an adequate defense.⁴²

C. *The Euro-American Crisis*

As a result of the pipeline embargo, West European governments that have seldom reached a common position East-West or Atlantic issues were able to achieve unprecedented political unity.⁴³ As the scheduled date of the

41. Commission of the European Community, Comments of the European Community on the amendments of June 22, 1982 to the U.S. Export Administration Regulations (Aug. 10, 1982), *reprinted in* 21 INT'L LEGAL MATERIALS 891 (1982) [hereinafter cited as EC Legal Comment].

42. *See supra* note 15.

43. *See* Resolution on Trade Relations between the USA and the EEC, 1982-1983 EUR. PARL. DOC. (No. PV 26) 3, 4 (1982); Resolution on the Soviet Gas Pipeline and the Extension of the Embargo to Firms Based in the Community, Minutes of Proceedings of the Sitting of Thursday, Sept. 16, 1982 in 25 O. J. EUR. COMM. (No. C 267) 41, 42 (1982); Union of Industries of the European Community, Press Release (Aug. 19, 1982) (circulated as EC Doc. 9198/82, Aug. 27, 1982).

The initial European reaction in each country was as follows: in the United Kingdom, the Secretary of State for Trade invoked the Protection of Trading Interests Act of 1980, ch. 11. Pursuant to this Act four U.K. companies were indirectly instructed to carry on business as planned. *See* Statement by U.K. Secretary of State for Trade (Aug. 2, 1982), *reprinted in* 21 INT'L LEGAL MATERIALS 851, 852 (1982).

In France, the French Minister for Industry issued an order on July 22, 1982 pursuant to a 1959 ordinance, No. 59-63, 1959 O.J. 548 (Jan. 8, 1959), 1959 D.L. 212, informing Dresser (France) and Rockwell Valves, two foreign controlled firms, that the French government would requisition them if they did not carry on their contractual obligations. *See* *Le Monde*, July 24, 1982, at 1, col. 4.

The Italian government controlled all the major suppliers affected by the U.S. embargo so that mere governmental instructions were sufficient to ensure compliance. *See* *Le Monde*, Nov.

first deliveries of the controversial compressor parts approached, Euro-American relations deteriorated rapidly.⁴⁴ Neither the United States nor the European countries took steps to avoid confrontation.

On August 23, 1982, the French government ordered Dresser (France) to proceed with the loading of three compressors on a Soviet-bound ship. On the same day, Dresser (France) filed a petition for a temporary restraining order against the U.S. Department of Commerce with the Federal District Court for the District of Columbia, arguing that it would suffer "immediate and irreparable harm" if it were forced to comply with the U.S. regulations.⁴⁵

Judge Thomas O. Flannery was unconvinced by this argument, however, and took note of the Administration's declaration that it was not prepared to recognize the validity of the French order and that, under those circumstances, relief from the regulations would "severely damage the foreign relations of the United States." The court thus refused to grant injunctive relief to Dresser (France).⁴⁶

Faced with penalties from both the United States and France, Dresser (France), the wholly-owned French subsidiary of an American parent, choose to comply with the law of France, the country where it was incorporated, does business, and where it has its headquarters and its factories. The compressors were loaded on August 26, 1982 on board the *Borodine*, at Le Havre.

Almost instantly on confirmation of the delivery, the U.S. Department of Commerce issued, as had been foreseen, a temporary denial order against Dresser (France)⁴⁷ and, most surprisingly, Creusot-Loire,⁴⁸ the principal contractor of the French share of the compressor supplies. The two companies were put on an exclusion list and were denied all export

16, 1982, at 6, col. 5.

In West Germany, the affected firms were assured of government support by means of a letter from the Under Secretary of State, Dr. Dieter von Winzen, dated August 25, 1982. See N.Y. Times, Aug. 29, 1982, § 4, at 3, col. 4.

44. Examples of the tensions included disputes over steel and agricultural subsidies, foreign consequences of the U.S. interest rates policy, not to mention the psychological impact of the extension of the grain sales agreement with the Soviet Union.

45. *Dresser Industries v. Baldrige*, 549 F.Supp. 108 (D.D.C. 1982). Reported in N.Y. Times, Aug. 25, 1982 at A1, col. 4 and D5, col. 1.

46. *Id.* 47 Fed. Reg. 38,170 (Aug. 30, 1982) as modified by Order of September 7, 1982.

47. 47 Fed. Reg. 39,708 (Sept. 9, 1982). The choice of penalties is discretionary under the Export Administration Act. It is reported that Department of Commerce officials contemplated resort to extradition from France and imprisonment of the managers of the firms involved. N.Y. Times, Aug. 25, 1982, at D5, col. 4, *id.*, Aug. 27, 1982, at D14, col. 4.

48. 47 Fed. Reg. 38,169 (Aug. 30, 1982), as modified by Order of September 23, 1982, 47 Fed. Reg. 42,392 (Sept. 27, 1982).

privileges, meaning that any goods or services imported by them from the United States, but not their exports to the United States, were embargoed for an initial and renewable period of 30 days. This action, termed "a measured response" by Department of Commerce officials,⁴⁹ was clearly intended as political pressure. It was most unlikely to have any effect on the participation of these firms in the pipeline construction, while it could, in the long run, sever all their parent-subsidiary relationships. Including Creusot-Loire on the exclusion list provided an alternate subject of future retaliation in case of a Dresser (France) takeover by non-Americans: pressure could easily be exerted over the thirteen U.S. subsidiaries of Creusot-Loire which were cut off by the embargo from support by their parent company.

While Dresser (France) appealed to the Department of Commerce, events in other European countries clearly showed their determination to challenge the American position. On August 31, 1982, John Brown Engineering, subject to Her Majesty's Government order,⁵⁰ began delivery of six turbines. In the course of the next few days, similar shipments of parts to be used in General Electric-designed compressor kits, were made by Nuovo Pignone and AEG-Kanis. Thus, in an unprecedented near-unanimity, public opinion leaders strongly supported fulfillment of existing contracts and resistance to United States claims.

Faced with criticism from Congress and American public opinion,⁵¹ in addition to the massive European outcry, United States officials began to lose confidence. On September 7, 1982, the denial order affecting French companies was restricted to oil and gas equipment, thus allowing restoration of normal corporate intercourse in most fields of business.⁵² Moreover, a clause stressed that renewal or repeal of the order depended on the outcome of an administrative investigation regarding the validity of the foreign compulsion argument as a defense.⁵³ This clause, together with the narrower scope of the export restriction, represented a major departure from the earlier, more inflexible stance.

The scaling down of sanctions notwithstanding, the Administration maintained its determination to enforce the June 22 regulations. Measures

49. N.Y. Times, Aug. 27, 1982, at A1, col. 4. See also N.Y. Times, Aug. 29, 1982, §4, at 3, col. 1; N.Y. Times, Sept. 3, 1982, at D4, col. 4.

50. U.K. Protection of Trading Interests (U.S. Reexport Controls) Order 1982 No. 885, reprinted in 21 INT'L LEGAL MATERIALS 851-52 (1982).

51. See *Hearings*, supra note 6, at 35; N.Y. Times, Aug. 11, 1982, at A1, col. 1; N.Y. Times, Aug. 23, 1982, at 8, col. 4; N.Y. Times, Aug. 31, 1982, at A1, col. 2; N.Y. Times, Sept. 1, 1982, at A1, col. 1.

52. 47 Fed. Reg. 39,708 (Sept. 9, 1982).

53. *Id.*; see also supra note 45.

were taken in September against Nuovo Pignone and its subsidiary INSO S.p.A.; against John Brown and AEG-Kanis; and against three companies of the Mannesmann group, that was penalized as principal contractor. These firms joined Dresser (France) and Creusot-Loire on the new specific denials list.⁵⁴ Thirteen Creusot-Loire European subsidiaries were considered for inclusion on the denial list.

Nevertheless, European resistance did not weaken. On September 10, 1982, the British Secretary of State for Trade took a second step under the procedure of the Protection of Trading Interests Act of 1980⁵⁵ and ordered Walter Kidde Company and Andrew Antenna Systems, both subsidiaries of American firms, to fulfill their contracts with the Soviet Union.⁵⁶ A few days later, a smaller French contractor, Compagnie européenne des pétroles, won a case in a lower Dutch court ordering Sensor Nederland BV, a subsidiary of the Texan firm Geosource, Inc., to supply the former with 2400 seismometers destined for the Siberian pipeline, in spite of the fact that the latter's parent company was willing to comply with the U.S. regulations. The court ruled that these regulations were at variance with international law and incompatible with Dutch law, and thus could not represent a valid excuse for nonperformance.⁵⁷

From the end of August to mid-October 1982, almost every day brought news of shipments of pipeline equipment to the Soviet Union, of Department of Commerce denial orders, and of European countermeasures. While construction of the pipeline went on, the political situation in Poland was unchanged. These sanctions, originally imposed to effect a united Western Alliance response to an East-West impasse, had evolved into a source of Euro-American tension.

D. *An Inconclusive Epilogue*

The United States Administration made it clear from the beginning that export controls related to the pipeline would be lifted only if the European allies accepted new, stricter, multilateral controls on East-West commercial, technological and financial relations.

But many European governments did not share President Reagan's

54. 47 Fed. Reg. 40,205 (Sept. 13, 1982).

55. U.K. Protection of Trading Interests Act, 1980. ch. 11, reprinted in 21 INT'L LEGAL MATERIALS 834 (1982).

56. See Order cited in Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313 (1982).

57. Judgment of Sept. 17, 1982, Arrondissementsrechtbank, The Hague, 1982 Rechtspraak van de Week, Kort Geding No. 167, translated in 22 INT'L LEGAL MATERIALS 66 (1983); see Basedow, 47 RABELS ZEITSCHRIFT 141, 147 (1983).

views on the matter.^{57.1} France was not prepared to negotiate the termination of sanctions taken unilaterally in violation of international law. The other European countries took a more cautious line by actively seeking a diplomatic solution even though they shared France's view on the inadmissibility of the controls.

Negotiations took place in Washington between the United States and the ambassadors of France, West Germany, Italy and the United Kingdom, joined at a later stage by representatives of Japan and Canada, and by the EC Commission and Danish EC presidency. The White House published on November 12, 1982,⁵⁸ a vaguely worded joint declaration of intent that represented the very agreement on reinforced East-West trade controls which the Administration had made a precondition to the lifting of sanctions. On November 13, 1982, the controversial regulations were repealed.⁵⁹

European countries were not particularly pleased to see that Washington had linked the repeal of sanctions to a multilateral agreement, but most of them acceded. The French government, however, publicly announced that it was not a participant in the agreement, in accordance with its position that the sanctions had to be withdrawn unconditionally.⁶⁰ This attempt at depriving Washington of its pretext only added a last-minute element to a year-long imbroglio.

It is safe to assert that the events that actually led to the repeal of the sanctions were not more related to the objectives of the sanctions than were the events that first triggered the controls. Nevertheless, it is important to determine the legal relevance of these actions, which have added to the international law practice in the States concerned. The resolution of the pipeline dispute was far from satisfactory in one very important respect. The interested parties, by issuing the declaration of intent, reached a political settlement which was isolated from the juridical issues at stake. This determination to separate political and juridical issues prevented the countries involved in the dispute from attempting to bridge the widening gap between their concepts of international law. Thus, the pipeline dispute raises more legal problems than it helps to solve.

57.1. In particular, the American attempt at reviving CoCom (the Coordinating Committee of the informal Consultative Group of most NATO countries and Japan, founded 1949 in Paris) failed during an unfortunate meeting held shortly after the peak of the pipeline crisis. *Journal de Genève*, Oct. 6, 1982, at 5.

58. See 18 WEEKLY COMP. PRES. DOC. 1475-76 (Nov. 22, 1982).

59. 47 Fed. Reg. 51,858 (Nov. 18, 1982), amending 15 C.F.R. pts. 379, 385, 390, 399.

60. *Le Monde*, Nov. 16, 1982, at 6, col. 3.

IV. PRINCIPAL LEGAL ISSUES

The extraterritorial reach of United States law has caused a number of problems in international economic relations over the last decades. The pipeline dispute has therefore many antecedents, although it is unique in its repercussions on international public opinion. It is all the more regrettable that no attempt has been made to submit it to the International Court of Justice or to an arbitral tribunal, thus depriving the legal community of a decision or an award that could have been of major significance for the definition of jurisdiction in international law. This article has no intention of substituting its findings for the case law badly needed on those aspects. It simply relates several major problems of international law to State practice as developed during the pipeline affair and then suggests a possible solution for analogous confrontations likely to occur in the future.

A. *Jurisdiction in International Law*

Jurisdiction is one of the cornerstones of international law, directly related to sovereignty since it consists of the State's right to exercise its powers over its territory and its nationals.⁶¹ Thus, jurisdiction appears as a corollary of the principle of sovereign equality,⁶² although, unlike sovereignty, jurisdiction by its very nature cannot be exclusive.

The existence of two principal bases of jurisdiction, territoriality and nationality, may cause conflicts of jurisdiction between the national State and the territorial sovereign.⁶³ Moreover, both territoriality and nationality are subject to different interpretations with regard to their applicability to certain facts and to legal persons that do not fit exactly into basic categories. The pipeline dispute raises several issues in this respect. For example, some problems can be considered as classic, such as the existence of nationality links in the case of corporations, particularly multinational enterprises. Others may be more difficult to fit under usual definitions, such as the

61. See J. BRIERLY, *THE LAW OF NATIONS* 162 (6th ed. 1963); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 120, 291 (2d ed. 1973); Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* [hereinafter cited as *HAGUE REC.*] 1, 9 (1964-1). In H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 216 (2d ed. 1966), the proposition is reversed to the effect that territory and national population are determined by the sphere of validity of national law as defined by international law, so that they depend on the range of jurisdiction much more than the latter depends on them.

62. I. BROWNLIE, *supra* note 61, at 120.

63. 1 (1) G. SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 183 (3d ed. 1957); Akehurst, *Jurisdiction in International Law*, 46 *BRIT. Y.B. INT'L L.* 145, 145; Mann, *supra* note 61, at 10.

United States claims over the foreign use of technology. These are the main concerns of the present discussion but, in order to avoid presumptive affirmations, it will be useful to review briefly existing international rules on the limits to State jurisdiction in general.⁶⁴

A major difficulty arises from the fact that the international case law on jurisdiction is infrequent; further, most cases address particular aspects of jurisdiction, which do not warrant generalization. One undisputed point, however, is that sovereignty and jurisdiction find their principal limit in territory. As Max Huber ruled in the *Island of Palmas* case:

Territorial sovereignty is, in general, a situation recognized and delimited in space, Territorial sovereignty . . . involves the exclusive right to display the activities of a State. . . . Territorial sovereignty cannot limit itself to its negative side, *i.e.*, to excluding the activities of other States; for its serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.⁶⁵

It is also uncontested that "legislation is one of the most obvious forms of the exercise of sovereign power"⁶⁶ so that, if *prima facie* "the territory is coterminous with the sovereignty,"⁶⁷ then legislative or prescriptive jurisdiction is principally territorial.⁶⁸ This proposition leaves two issues open: (1) whether prerogative or enforcement jurisdiction is coterminous with legislative jurisdiction; and (2) whether primordial grounds for jurisdiction other than territoriality exist. An attempt to answer both questions was made by a narrow majority of judges of the Permanent Court of International Justice in the often-quoted case, *S.S. Lotus*.⁶⁹ Having restated the undisputed principle that:

64. See generally Akehurst, *supra* note 63; Jennings, *The Limits of State Jurisdiction*, 32 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 209 (1962); Mann, *supra* note 61; Sahovic & Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in MANUAL OF PUBLIC INTERNATIONAL LAW 311 (M. Sprensen ed. 1981).

65. *Island of Palmas* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 839 (Perm. Ct. Arb. 1928).

66. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 53, at 48 (Judgment of April 5).

67. *North Atlantic Coast Fisheries* (U.S. v. Gr. Brit.) 11 R. Int'l Arb. Awards 167, Hague Ct. Rep. (Scott) 141, 157 (Perm. Ct. Arb. 1910).

68. I. BROWNLIE, *supra* note 61, at 291; Mann, *supra* note 61, at 30.

69. *S.S. Lotus* (Fr. v. Turk.) 1927 P.C.I.J., ser. A. No. 10 (Judgment of Sept. 7).

The first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁷⁰

The Court went on to note that:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases.⁷¹

Thus, after mentioning the existence of customary exceptions to the strict rule of territoriality, the majority of the Court extended the scope of exceptions by affirming the existence of a general permissive rule, both for legislative and enforcement jurisdiction. This permissive rule should be traced back to the ultimate principles of international law; its effect would be to nullify the territorial principle. The Court stated:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.⁷²

The effect of this dictum would have been to contradict the principle that the competences of the State are limited by international law, in favor of what has been termed the principle of presumptive freedom of State ac-

70. *Id.* at 18.

71. *Id.* at 19.

72. *Id.* at 19.

tion,⁷³ were it not for the fact that the Court decision is far from being authoritative on this matter. First, the president of the PCIJ was forced to cast the decisive vote over a divided court. Moreover, the case arose over fifty years ago, before international relations underwent a far-reaching evolution. Finally, the Court's statement appears to be dicta in a case that focuses on the particular issue of criminal jurisdiction with respect to colliding ships on the high seas. Although commentators have strongly criticized the Court's decision,⁷⁴ the *S.S. Lotus* remains influential in United States practice.⁷⁵ In the opinion of this author, the language of the *S.S. Lotus* does not provide a solution to the problem here posed.

B. *Legislation and Enforcement Jurisdiction*

The single concept of jurisdiction has two aspects — those of legislation and enforcement — for prescription of rules cannot be a proper exercise of State sovereignty if the State is not allowed the right to enforce them. But it does not necessarily follow that the distinction between legislative and prerogative, or enforcement, jurisdiction is secondary. Any legislative claim to jurisdiction or its enforcement beyond the limits set by international law is, of course, unlawful.⁷⁶ The Permanent Court of International Justice has recognized that, in given circumstances, the very enactment of a statute at variance with international law gives rise to international obligations, regardless of subsequent enforcement.⁷⁷ The reverse proposition, namely that if enforcement is unlawful, then legislation must be unlawful as well, is not always true. There are cases where a State can pass legislation compatible with international law and yet have no practical means to enforce it without resorting to a claim of excessive prerogative

73. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 20 (1958).

74. See the authorities cited by I. BROWNLIE, *supra* note 61, at 295, and by Mann, *supra* note 61, at 35.

75. It appears that United States practice recognizes limitations to enforcement jurisdiction only under certain conditions which, broadly speaking, amount to considerations of opportunity and effectiveness, and rely on comity as voluntary restraint rather than as a consequence of the principle of sovereign equality. See *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW*, §§37, 39, 40 (1965); see also Jacobs, *Asserting Control over the Conduct of Foreign Companies: The Main Issues Involved*, *SWISS REV. INT'L ANTITRUST L.* No. 13, 3, 14 (1981); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, *76 AM. J. INT'L L.* 280 (1982).

76. I. BROWNLIE, *supra* note 61, at 302.

77. *Phosphates in Morocco (It. v. Fr.)*, 1938 P.C.I.J., ser. A/B, No. 74, at 25 (Judgment of June 14).

jurisdiction.⁷⁸

The principle of strict territoriality of enforcement jurisdiction, with the obvious exception of universal jurisdiction, appears to have been recognized in recent times by United States courts.⁷⁹ Several uncertainties remain regarding court orders intended to have an extraterritorial reach. It does not seem that American jurisprudence makes the distinction familiar to civil law countries⁸⁰ between curial jurisdiction enabling a court to subject persons to its procedure and substantive jurisdiction aimed at regulating the conduct of those persons in a manner comparable to law-making.⁸¹ Therefore, European doctrine usually opposes the extraterritorial effect of United States courts' substantive orders, which have given rise to many problems in international practice,⁸² as in the *Dresser* case.⁸³

One of the clearest ways to distinguish between what is permissible and what is not regarding extraterritorial judicial enforcement is to follow the example of one of the most learned writers⁸⁴ and resort to the classical

78. A classic case would be that of a State subjecting its nationals abroad to military service. See Mann, *supra* note 61, at 13, 128.

79. *FTC v. Compagnie de Saint-Gobain Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

80. The distinction is also familiar to the United Kingdom and Commonwealth countries that have enacted statutes blocking the extraterritorial reach of foreign court orders by prohibiting for instance production of documents. See, e.g., Protection of Trading Interests Act, 1980, §2; U.K. Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, British Embassy, Washington, Note No. 225, at 2 (Nov. 27, 1979) reprinted in 21 INT'L LEGAL MATERIALS 847, 848 (1982). See generally authorities cited by Samie, *supra* note 56, at 316 n.18.

81. It would fall outside the range of the definition of lawmaking, since such a prescription would neither be general nor abstractly termed, but would fall under the broader category of normative acts, a familiar concept to civil law lawyers. See also Mann, *supra* note 61, at 146.

82. Two antitrust cases gave rise to strong foreign protest: *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (ordering compulsory licensing to American firms in Great Britain), *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, [1955] 1 Ch. 19, [1953] 2 A11 E.R. 780 (Ch. 1953), *aff'd* [1954] 3 A11 E.R. 88 (C.A. 1953) (injunction against compliance with S.D.N.Y. Court order granted and affirmed on ground of U.S. intrusion on British sovereignty); *United States v. Watchmakers of Switzerland Information Centre, Inc.*, 1963 Trade Cas. (CCH) ¶77,424 (S.D.N.Y. 1963), *rev'd* 1965 Trade Cas. (CCH) ¶71,352 (S.D.N.Y. 1965) (order to terminate Swiss government-sponsored market allocation agreement in Switzerland repealed after diplomatic protest). See Akhurst *supra* note 63, at 194, 201; Goldman, *Les champs d'application territoriale des lois sur la concurrence*, 128 HAGUE REC. 631, 655, 710 (1969-III); Mann, *supra* note 61, at 106; Samie, *supra* note 56, at 318; Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L & COMP. L.Q. 127 (1982).

83. See *Dresser Industries v. Malcolm Baldrige*, No. 82-2385, (D.D.C. Nov. 4, 1982), for a complete history of the Commerce Department's administrative decisions.

84. Goldman, *supra* note 82, at 706.

concepts of *imperium* and *jurisdictio*. That is, judicial cognizance of facts outside the territory of the State of the forum would be an exercise of *jurisdictio*, while court orders of a prescribing character would represent a form of *imperium* and as such would amount to a breach of international law if they are capable of interfering with justified exercise of sovereignty by another State.⁸⁵

C. Grounds for Exercise of Jurisdiction

Except in particular cases, prerogative or enforcement jurisdiction is strictly territorial. Prescriptive jurisdiction, on the other hand, may be justified on other grounds, as already suggested by the aforementioned nationality principle.

It is frequently affirmed that legislative jurisdiction may be grounded on one of the five following principles: (1) territoriality; (2) nationality; (3) protective principle; (4) universality; and (5) passive personality.⁸⁶ This article will neither address the universality principle, which has no relation to the issues involved in the Siberian gas pipeline dispute, nor the passive personality principle, which has not been claimed as a basis of jurisdiction by the countries involved.⁸⁷ Similarly, the protective principle need not be examined here, since the question of national security interests has been raised neither by the United States⁸⁸ nor by European countries with respect to East-West cooperation related to the pipeline project. Discussion of the applicability of the protective principle would, however, be necessary in a broader review of trade controls.

We are thus left with the two basic principles, territoriality and nation-

85. On the imputability of acts of judicial organs to the State, see, e.g., *Draft Convention on the International Responsibility of States for Injuries to Aliens*, art. 16, 55 AM. J. INT'L L. 548 (Harvard Research in International Law, 1961).

86. See, e.g., I. BROWNIE, *supra* note 61, at 293; Dickinson, *Introductory Comment—Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. (Supp.) 443 (Harvard Research in International Law, 1935); Sahović & Bishop, *supra* note 64, at 355. To simplify, we assume that jurisdiction with respect to trade, as in the case of export controls or even antitrust, can be dealt with from the criminal law point of view, *but see* Akehurst, *supra* note 63, at 190; Mann, *supra* note 61, at 95.

87. See generally I. BROWNIE *supra* note 61, at 296; Sahović & Bishop *supra* note 64, at 365, and authorities cited therein.

88. It is safe to assert that the protective principle applies only to offenses seriously endangering the State. Since the pipeline export controls were enforced pursuant to Section 6 of the Export Administration Act, *supra* note 33, §2405, concerning foreign policy controls, and not as national security controls under Section 5 of the same Act, §2404, it is not necessary to review possible U.S. arguments over the security implications of the pipeline embargo enforcement. See also Judgment of Sept. 17, Arrondissementrechtbank, The Hague, §7.3.3; EC Legal Comment, *supra* note 41, at 6.

ality. The latter is not on the same footing as the former, since in many fields, such as criminal law, legislative jurisdiction follows strict territoriality.⁸⁹ It is therefore important to distinguish acts taking place within the territory from acts committed by nationals, even if the distinction is somewhat blurred in international economic matters.

Indeed, the problem of distinguishing between national and territorial jurisdiction is well illustrated by the effects doctrine, most frequently resorted to in antitrust matters.⁹⁰ By applying the effects doctrine, a State purports to regulate factors wherever they may occur, whose undesirable effects can be felt within its territory. It should simply be recalled that this doctrine relies on the concept of objective territoriality,⁹¹ as opposed to subjective territoriality according to which the location of the author, not of the act, is relevant. Thus, the United States and the European Community⁹² resort to it and purport to regulate events whose undesirable effect

89. Only a constitutive element of the crime need take place within the territory, however. See the *S.S. Lotus*, 1927 P.C.I.J. at 23, 30; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, §18 (1965); *Draft Convention on Jurisdiction with Respect to Crime*, art. 3, 29 AM. J. INT'L L. (Supp.) 480 (Harvard Research in International Law, 1935). On the exceptions to the rule of territoriality, see, e.g., 1 L. OPPENHEIM, INTERNATIONAL LAW §147, at 333 (H. Lauterpacht ed., 8th ed. 1955); Dickinson, *supra* note 86, at 546; Mann, *supra* note 61, at 82.

90. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §18 (1965). Excessive consequences of the effects doctrine are somewhat offset by the "balancing of interests" approach, *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §40 (1965). Explicit acceptance of the existence of international law limits to extraterritorial reach of jurisdictional claims under the effects doctrine is still lacking in United States practice.

On extraterritorial antitrust jurisdiction, see generally K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); Akehurst, *supra* note 63, at 190; Goldman, *supra* note 82; Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279 (1982); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957); Joelson, *Extraterritorial Effects of American Antitrust Laws*, 12 INT. LAW. 616 (1978); Kestenbaum, *Antitrust "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test*, 18 STAN. J. INT'L L. 311 (1982); Mann, *supra* note 61, at 95; Oliver, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 AM J. INT'L L. 380 (1957); Samie, *supra* note 56; Sornarajah, *supra* note 82; Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 (1954).

91. Anticompetitive agreements concluded in the United States but whose effects are felt only abroad (the so-called export cartels) are not prosecuted under United States antitrust law, *Webb-Pomerene Act*, 15 U.S.C. §§61-64 (1976).

92. *Imperial Chem. Indus. v. Commission (Dyestuffs)*, 1972 E. Comm. Ct. J. Rep. 619,

can be felt within their respective territories, wherever they may occur.

In the Soviet pipeline project, technology, goods and services are all moving out of the United States, into Western Europe and the USSR; the activities of European participants to the pipeline project are unlikely to have any effect within U.S. territory. The effects doctrine, therefore, would not have been a valid ground for the United States' jurisdictional claim.⁹³ The extraterritorial jurisdiction of the pipeline export controls must rely on another ground, namely nationality.

D. *Extraterritorial Jurisdiction Based on Nationality*

American concepts of jurisdiction frequently resort to nationality as a basis for asserting competence over persons and property abroad. In this respect, the June 22, 1982 amendments on oil and gas equipment are by no means unique. Many regulations⁹⁴ have been extended to include business entities owned or controlled by United States citizens, residents or corporations,⁹⁵ and goods and services of whatever origin using technology developed in the United States.⁹⁶ First, it is useful to review the basic rules of national jurisdiction.

International law leaves every State free to determine the conditions under which it grants nationality to individuals.⁹⁷ Nevertheless, the International Court of Justice ruled that national links may be opposed by other

[1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶8161, *aff'g* Decision of July 24, 1969 (Dyestuff manufacturers), 12 O.J. EUR. COM. (No. L 195) (Aug. 1, 1969), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶9314. *But see* Akehurst, *supra* note 63, at 197 (Court ruling does not explicitly support effects doctrine).

93. EC Legal Comment, *supra* note 41, at 7.

94. *E.g.*, Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1983); Transaction Control Regulations, 31 C.F.R. pt. 505 (1983); the Cuban Assets Control Regulation, 31 C.F.R. pt. 515 (1983); the Iranian Assets Control Regulations, 31 C.F.R. pt. 535 (1983). The regulations amended on occasion of the Siberian pipeline affair, as discussed *supra* notes 33 & 34 and accompanying text, are part of the Export Administration Regulations, 15 C.F.R. pts. 368-369 (1983), pursuant to §14(2) of the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2410 §2415(2), which defines United States persons as:

[A]ny United States resident or national . . . , any domestic concern . . . and any foreign subsidiary or affiliate . . . of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

95. *See supra* text accompanying note 36.

96. *Id.*

97. Nationality Decrees in Tunis and Morocco, 1923 P.C.I.J., ser. B, No. 4, at 23 (Advisory Opinion of Feb. 7); Acquisition of Polish Nationality, 1923 P.C.I.J., ser. B, No. 7, at 26 (Advisory Opinion of Sept. 15), *implemented*, Acquisition of Polish Nationality (Ger. v. Pol.), 1 R. Int'l Arb. Awards 401, 420 (Dr. Kaeckenbeek, Arb.).

States only if they meet certain conditions under international law.⁹⁸ According to the Court, there must exist a genuine connection, as defined by objective and psychological criteria, between the individual and the State, in order to entitle the latter to put forward claims on behalf of the former.⁹⁹ The *Nottebohm* ruling has been extended to a general doctrine of nationality over entities under international law,¹⁰⁰ even though it was intended to apply only to individuals. Secondly, *Nottebohm* does not affect the basic rule of domestic jurisdiction in regard to the granting of nationality. Finally, it may cause difficulties if extended to cases other than those involving double nationals.¹⁰¹ Consequently, the *Nottebohm* case does not support the position that any business entity having close connections with United States interests should be regarded as a United States national.¹⁰² In fact, the idea of nationality of corporations is not even generally accepted in international practice.¹⁰³

Another famous case closely related to the issue is the *Barcelona Traction* case.¹⁰⁴ In determining which State may be considered the national State of the company involved, the Court remarked:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals.¹⁰⁵ The traditional rule attributes the right of diplomatic protection to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long

98. *Nottebohm Case (Second Phase) (Liechtenstein v. Guat.)*, 1955 I.C.J. 4 (Judgment of April 6).

99. *Id.* at 76.

100. See, e.g., Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 456 (1981).

101. *Nottebohm Case*, 1955 I.C.J. at 65 (Dissenting Opinion of Paul Guggenheim, *Ad Hoc Judge*).

102. Marcuss & Richard, *supra* note 100, at 456. It should be stressed that the genuine connection concept has been introduced by *Nottebohm* as a negative test towards non-opposability of claims based on nationality and not as a constitutive element of nationality itself.

103. I. BROWNLIE, *supra* note 61, at 408; L. CAFLISCH, *LA PROTECTION DES SOCIÉTÉS COMMERCIALES ET DES INTÉRÊTS INDIRECTS EN DROIT INTERNATIONAL PUBLIC* 90 (1969); 1 L. OPPENHEIM, *supra* note 89, §293; 1 (1) G. SCHWARZENBERGER, *supra* note 63, at 387; Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 469, 480 (M. Sprensen ed. 1968).

104. *Barcelona Traction, Light and Power Co. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5).

105. *Id.* at 42. The Court explicitly rejected, however, the applicability of the *Nottebohm* ruling to the case in point.

practice and by numerous international instruments.¹⁰⁶

The Court, however, avoided any *obiter dictum* on the validity of other criteria, restricting itself to the particular issue of diplomatic protection:

It has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the States concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance.¹⁰⁷

In particular, the Court has not discussed the validity of the test of control, as recognized by the United States¹⁰⁸ and several other countries.¹⁰⁹ The concept of control might nevertheless have great importance in asserting jurisdiction over the foreign subsidiaries of a domestic corporation, either on the ground of institutional links (corporate relationship) or of equity shareholding.

E. Nationality of Foreign-Based Subsidiaries

Present international law does not confer a single personality on the many legal persons, each incorporated under the laws of the different State, that together make up the single economic entity known as a multinational enterprise.¹¹⁰ The World Court expressed this state of affairs in the follow-

106. *Id.*

107. *Id.*

108. To remain in the field of export controls, the Export Administration Regulations define "control in fact" as: "the authority or ability of a domestic concern to establish the general policies or to control day-to-day operations of its foreign subsidiary, partnership, affiliate, branch, office or other permanent foreign establishment." 15 C.F.R. §369.1(c)(1) (1984).

109. Notably in Switzerland, see J. MULLER & L. WILDHABER, *PRAXIS DES VOELKERRECHTS* 362 (1977), and cases cited therein.

110. It is also known as the multinational corporation, or transnational corporation. See generally, e.g., J. BEHRMAN, *NATIONAL INTEREST AND THE MULTINATIONAL ENTERPRISE* (1970); F. FRANCONI, *IMPRESE MULTINAZIONALI, PROTEZIONE DIPLOMATICA E RESPONSABILITÀ INTERNAZIONALE* (1979); Angelo, *Multinational Corporate Enterprises*, 125 *HAGUE REC.* 443 (1968-III); Feliciano, *Legal Problems of Private International Business Enterprises*, 118 *HAGUE REC.* 209 (1966-II); *Conference on the Regulation of Transnational Corpora-*

ing terms:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests . . . Here, as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.¹¹¹

This appears as a conservative position, compared with certain doctrinal tendencies advocating the granting of an international status to multinational corporations and to their contracts and relations with host States.¹¹² This position has been welcomed as the precondition to the development of an international law solution capable of protecting the interests of every category of States concerned, including host States.¹¹³ In fact, such development is now in progress and may help solve future disputes comparable to the pipeline affair.

In the case of international corporations, the concept of control is more widely accepted as a means of asserting jurisdiction in the regulation of

tions—*Proceedings*, 15 COLUM. J. TRANSNAT'L L. 367 (1976); Jenks, *Multinational Entities in the Law of Nations*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 70 (W. Friedmann, L. Henkin, O. Lissitzyn, eds., 1972); Kopelmanas, *L'application du droit national aux entreprises multinationales*, 150 HAGUE REC. 295 (1976-II); Siqueiros, *The Juridical Regulation of Transnational Enterprises*, 8 CALIF. WEST. INT'L L.J. 1 (1978); Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 743 (1970); Vogelaar, *Multinational Corporations and International Law*, 27 NETH. INT'L L. REV. 69 (1980).

111. *Barcelona Traction, Light and Power Co.*, 1970 I.C.J. 3.

112. *See, e.g.*, W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964). Regarding contracts, the Permanent Court of International Justice has adopted a restrictive view in *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 112 (Judgment of July 22). For a more recent view on the subject, *see, e.g.*, C. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW* 207 (1974); D. IJALAYE, *THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW* (1978).

113. *See generally* Abi-Saab, *The International Law of Multinational Corporations, A Critique of American Legal Doctrines*, 2 ANNALS INT'L STUDIES 97 (1972).

certain practices than as a means of assigning corporate nationality generally. Not only is there a tendency to consider the multinational enterprise as a whole with respect to labor relations, taxation and, in developing countries, control of technological imports,¹¹⁴ but also, national courts resort to parent-subsidiary linkage as a substitute for the effects doctrine in antitrust cases.¹¹⁵

Although wider acceptance of corporate links as a basis of jurisdiction might help solve several problems of extraterritorial application of antitrust law, the same cannot be said about export controls, the main issue in the pipeline dispute. Most countries do not recognize the validity of the corporate or shareholding link as a ground for application of controls on corporations registered under their respective laws. There seems to be only one case on this matter,¹¹⁶ *Fruehauf v. Massardy*, but it was decided without reference to the corporate link issue. Its impact has been significant, however, and shall grow, since it is analogous to the pipeline dispute and has been referred to in discussions of the latter.

Fruehauf (France) S.A. was a majority-owned subsidiary of the United States-based Fruehauf Corporation. Minority directors of the French company had subcontracted with Automobiles Berliet S.A. for French-made trailers to be fitted to trucks purchased by the People's Republic of China. The United States Department of the Treasury, pursuant to the Trading with the Enemy Act,¹¹⁷ ordered suspension of the contract, and the Ameri-

114. One of the main issues involved in such matters is the disclosure by the subsidiary of information relating to other corporate entities, such as international reallocation of production within the enterprise, and price-fixing methods for international transactions (transfer pricing). See generally, *Commercial Speech, Transborder Data Flows and the Right to Communicate under International Law*, 17 INT'L LAW. 87 (1983). There is also a tendency to make the parent responsible for subsidiaries' obligations, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RESPONSIBILITY OF PARENT COMPANIES FOR THEIR SUBSIDIARIES (1980).

115. The Court of Justice of the European Communities considered it proper to exercise jurisdiction over foreign-based parent companies in certain cases, on the ground that "the actions of the subsidiaries may in certain circumstances be attributed to the parent company." *Imperial Chem. Indus. v. Commission*, 1972 E. Comm. Ct. J. Rep. 619, 665. In the *Alcoa* case, on the contrary, the newly-formulated effects doctrine was preferred to the corporate link as a means of asserting jurisdiction over the act of a Canadian company. *United States v. Aluminum Co. of Am.*, 148 F.2d 416. See Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1967).

116. Judgment of May 22, 1965, Cour d'appel, Paris, 1968 D. Jur. 147, translated and reprinted in part in 5 INT'L LEGAL MATERIALS 476 (1966).

117. The Trading with the Enemy Act of 1917, 50 U.S.C. app. §5, §§1-6, 7-39, 40-44 (1976 and Supp. IV 1980), amended by Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §160, 96 Stat. 25, 48, is now restricted to war-time application. The Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1983), extending jurisdiction to subsidiaries

can parent instructed the majority directors of Fruehauf (France) to comply. Since non-execution of the contract would have entailed payment of a large sum in damages and a great loss in earnings and probably in the commercial credibility of the French company, the minority directors obtained an order from the local commercial court at Corbeil appointing a temporary administrator so as to assure execution of the Berliet contract. The case was affirmed on appeal on the ground that the majority decision, in conformity with corporate instructions, amounted to an *abus de droit* (abuse of a legal right), since it was likely to jeopardize the very existence of the French company and therefore prove contrary to social interest.¹¹⁸

The judgment did not mention the problems of foreign compulsory export controls and of jurisdictional claims by home countries of multinationals, but it demonstrated the determination of French authorities to ensure compliance by foreign-controlled subsidiaries with the laws of the host country. The *Fruehauf* case has been of great significance for many host States of multinationals in asserting that the enterprise's right to exist and grow is in the social interest and considering it a matter of *ordre public* (public policy). Its influence can be felt upon the underlying philosophy of codes of conduct for multinational enterprises negotiated within the United Nations. Additionally, the *Fruehauf* judgment expresses a concern that multinationals comply with domestic economic policy. The United States would certainly share this concern as a host country.¹¹⁹ The extension of jurisdiction to subsidiaries abroad in matters of export control has never been formally challenged by Western countries. Nevertheless, the unanimous reaction of West European countries involved in the pipeline dispute supports the proposition that such an extension is improper where a primordial host State's interests are affected. In the opinion of the author, jurisdiction over subsidiaries abroad will be recognized in export control matters only under a conventional permissive rule or under the provision of codes of conduct as proposed *infra*.

F. *Jurisdiction Over Future Uses of Technology*

Since technology is an intangible factor of production which may be

abroad, were applied in a way very similar to the Export Administration Regulations in the pipeline dispute, 47 Fed. Reg. 27, 250-52.

118. *Fruehauf v. Massardy*, 1968 D. Jur. 147; Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970); Marcuss & Richard, *supra* note 100, at 466; Comment, *Western European Sovereignty and American Export and Trade Controls*, 9 COLUM. J. TRANSNAT'L L. 109, 118 (1970).

119. EC Legal Comment, *supra* note 41, at 7.

used for an indefinite quantity of goods and services, once it has been disseminated there is no means of retrieving the technology alone in order to deprive recipients of their newly-acquired expertise. Thus, it may be desirable, on grounds of national security, for a State to intervene to prevent the diffusion of different forms of production incorporating sensitive technology. Nevertheless, contractual instruments may prove insufficient to protect the original supplier's rights, and may fail to provide the necessary safeguards. Thus, the United States enacted the Export Administration Act of 1979,¹²⁰ that purports to establish a permanent link between the technology and the country where it has been developed, in order to assert jurisdiction over its subsequent use, regardless of contractual rights and obligations. This concept has been termed "nationality" for lack of a better word and by analogy to the extensive concept of nationality of individuals and corporations advocated in the United States.¹²¹ This may sound strange to European ears when applied to technology, since there does not seem to be any such thing as a nationality of property.¹²² Moreover, it seems contradictory to assert the genuine connection doctrine, which has been developed by the World Court as a shield against weakly-grounded nationality links of individuals, and to expand the nationality concept to an all-embracing category of legal persons, financial assets, goods, services, and knowledge.

Thus, the notion that technology can be assigned a nationality is one peculiar to the United States. Such a notion is without support, either directly or by analogy,¹²³ in international law. It follows necessarily that attempts at controlling the use of products incorporating technology developed in the United States once they have left U.S. territory and in the absence of contractual controls is clearly an intrusion upon the sovereignty of other States since it amounts to challenging the validity of the title to property under the law of those States.

Several cases demonstrate that courts of the recipient countries have not accepted claims that the technology is controlled by the source country

120. 50 U.S.C. app. §§ 2401-2410 (Supp. III 1979), amended by the Export Administration Act of 1981, 50 U.S.C. app. §§ 2401-2420 (Supp. V 1982), extended in Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984).

121. Marcuss & Richard, *supra* note 100, at 480.

122. EC Legal Comment, *supra* note 41, at 4.

123. We cannot even consider as valid the analogy that Marcuss & Richard, *supra* note 100, at 480, attempt to draw with cultural property. It seems on the contrary that several States invalidate titles to property in view of the general interest of the international community, which is certainly not comparable to the exclusivity implied in the concept of nationality of technology. Judgment of June 22, 1972, Bundesgerichtshof in Zivilsachen [hereinafter BGHZ], 59 Entscheidungen des BGHZ 83 (a contract insuring art objects exported in violation of the law of the country of origin and of the general interest of the international community as reflected by certain nonbinding international instruments is not enforceable).

as a valid excuse for nonperformance of contracts.¹²⁴ Of course, this is not enough to ensure proper diffusion of technology unjustifiably controlled by the source country, but the pipeline affair has shown that four major European countries have been able to find legal or political means to overcome the problem. Only the technological capabilities that had not been shared with other countries have been successfully embargoed by the United States, thus stressing the lack of any practical means of control over technology once it has left the territory.¹²⁵

G. Possible Countermeasures

Export controls as expanded on June 22, 1982 were thus likely to meet the opposition of the States under whose territory they purported to have effect. This opposition gave rise to a political and legal dispute which entailed not only formal protests but also countermeasures designed to block the international reach of the amended regulations. Several governments put forward legislation enabling them to control economic activities and they accordingly ordered private firms to perform existing contracts. In Great Britain such legislation was passed to counter foreign claims to extra-territorial jurisdiction over trade.¹²⁶ Furthermore, in another case, a court injunction was issued to ensure fulfillment of a contract by a firm that intended to comply with the United States regulations.¹²⁷ Two aspects of such countermeasures are discussed herein, namely their institutional origin and the fact that they were in the nature of a response to political and jurisdictional conflicts.

124. *American President Lines, Ltd. v. China Mutual Trading Co.*, 1953 A.M.C. 1510 (Hong Kong Sup. Ct.) (goods once discharged from an American ship are no longer subject to U.S. jurisdiction); *Moens v. Ahlers*, North German Lloyd, 30 *Rechtskundig Weekblad* [RW] 360 (Rechtbank van Koophandel/Tribunal de commerce, Antwerp, 1966) (goods exported under a valid Canadian license are not subject to U.S. export controls even if the holder of the license has been placed on a U.S. denial list). See Marcuss & Richard, *supra* note 100, at 466; Comment, *supra* note 118, at 111. *But see Regazzoni v. K.C. Sethia [1944] Ltd.*, 1958 A.C. 301, [1957] 3 All E.R. 286 (H.L. 1957) (no damages granted because contract was in violation of export controls of a friendly country whose aims are shared in England).

125. Technology should be understood here to include not only technical data, but also expertise and investment which provide the capacity to use technical specifications profitably. In a broader sense, it could be said that rotor technology for gas turbines had left the United States since Alsthom-Atlantique was capable of reproducing it, but wide-diameter steel pipe technology could still be successfully embargoed in West Germany since Soviet firms are not capable of replicating such pipes at a comparable cost even after importing them for years.

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

127. Judgment of Sept. 17, 1982, Arrondissementsrechtbank, The Hague.

H. *Executive and Judicial Measures*

Government orders to private firms must be founded on legislative or constitutional rules enabling the executive branch to intervene in the management of economic activities. Constitutional powers of the French executive branch are, for instance, extremely broad. In the United Kingdom there was a statute on point readily available to Her Majesty's Government. The Federal Government in Bonn, on the contrary, had to rely on informal measures.¹²⁸

The French and British actions were almost identical, with a first order intended as a warning which requested concerned firms to carry on their obligations in spite of the risk of being denied U.S. export privileges, and, as a second step in specific cases, an order amounting to governmental compulsion to perform the contracts. Such an order was not considered a valid excuse by the U.S. Department of Commerce or the District Court for the District of Columbia however, which refused to grant relief to the requisitioned firms.¹²⁹

I. *Jurisdictional and Substantive Conflicts*

Conflicting jurisdictional claims are frequent in international transactions involving multinational corporations or suppliers and purchasers of

128. See *supra* note 43.

129. See *supra* text accompanying note 45.

In addition, it should be noted that, although the American attempt at preventing European firms from doing business with the Soviet Union had been compared to what is known as a secondary boycott, there was no resort to anti-boycott laws in Europe. EC Legal Comment, *supra* note 41, at 7. A secondary boycott is broadly defined as "the extension of trade restrictions to third countries or persons not directly involved in the dispute." 1982-83 EUR. PARL. DOC. (No. 1-83/82) 15 (H.J. Seeler, rapporteur, 1982) at 10. Such an analogy was based on political considerations, to mobilize public opinion, but no one ever seriously asserted that the gas pipeline export controls were contrary to human rights. The French anti-boycott law, for instance, was not deemed applicable, and French counter-measures were based on foreign policy grounds. Loi No. 77-574 du 7 juin 1977 portant diverses dispositions d'ordre économique et financier, 1977 O.J. 3 (June 8, 1977), 1977 J.C.P. III 45772, 1977 JOURNAL DU DROIT INTERNATIONAL [Clunet] 958. See J. BISMUTH, LE BOYCOTTAGE DANS LES ÉCHANGES ÉCONOMIQUES INTERNATIONAUX AU REGARD DU DROIT (1980).

In one case, a European court, namely the Hague District Court, issued a mandatory injunction to a reluctant subcontractor, in order to secure continuation of supplies to the plaintiff, a pipeline contractor. Judgment of Sept. 17, Arrondissementrechtbank, The Hague, *supra* note 57. Resort to the courts in Europe was not more frequent simply because all other subcontractors continued fulfillment of their obligations. There are good reasons to assume, however, that many European courts would have decided similar cases in accordance with the Dutch judgment or the better-known *Fruehauf v. Massardy*, 1968 D.Jur. 147.

technology.¹³⁰ For example, more than one country may claim jurisdiction to collect income taxes from a multinational corporation. In the pipeline dispute, however, the conflict was more than purely jurisdictional. It was also substantive because the requirements of the United States, the corporate home country, and the European host countries were irreconcilable. Orders from European governments and courts only exacerbated the dilemma. Nevertheless, domestic courts would probably have affirmed the validity of those orders, if challenged, as a matter of public policy (*ordre public*). The scope of this concept varies from one European country to another, and courts have much latitude in determining if it is applicable in a given case, so that this issue will not be reviewed in great detail. Suffice it to say that contractual obligations, foreign policy requirements,¹³¹ and major social interests, as in the *Fruehauf* case, are deemed in most countries to be a matter of public policy (*ordre public*). Therefore, a matter such as the transfer of technology within a multinational corporation will be subject to the domestic law of the host State as a matter of public policy, regardless of whether it is also subject to the jurisdiction of the home State as a matter of international law.

The substantive and jurisdictional arguments are distinct but clearly interrelated, because it is evident that no country will accept as a part of public policy any principle that would be at variance with the basic tenets of its national law, including its international practice.¹³² Similarly, there is no reason for a court to reject the public policy argument in a case comparable to the pipeline affair, only to refuse the validity of the foreign rules for lack of jurisdiction under international law. On the other hand, if a country shares the aims of the State enacting export controls, a court in that country might apply them as foreign law — but not as a consequence of an obligation under international law — if it considers respect for foreign policy aims of a friendly country a matter of public policy.¹³³ In every other case, however, recourse to the latter would be sufficient to enable a court to issue an injunction compelling performance of a contract if non-performance would jeopardize major domestic interests.

130. See Kopelmanas, *supra* note 110, at 305, 324.

131. Compliance with foreign unilateral export controls would amount to carrying out a foreign trade policy, which would be against the public policy of the European Community countries, asserts the EC Legal Comment, *supra* note 41, at 5.

132. See, e.g., Horn, *Codes of Conduct for MNEs and Transnational Lex Mercatoria*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 45, 67-69 (N. Horn ed., 1980).

133. *Regazzoni v. K.C. Sethia [1944] Ltd.*, 1958 A.C. 301, [1957] 3 A11 E.R. 286 (H.L. 1957).

J. *Self-Restraint in Jurisdictional Claims*

Considering the strength of these two arguments, one must wonder if the U.S. Department of Commerce had underestimated the likelihood that foreign governments and courts would successfully challenge compliance with its regulations. This theory would explain why the extraterritorial effect of the June 22, 1982 regulations were not mitigated by restraining clauses. For example, restraining clauses appeared both in the Foreign Assets Control Regulations¹³⁴ and the Cuban Assets Control Regulations.¹³⁵ In the former case, the regulations are subject to a general enabling clause for all transactions not expressly prohibited. The effect of such a clause is therefore to suspend the extraterritorial effect of the regulations except for a closed list of countries and goods:

(a) Except as [specifically] provided [in other paragraphs] of this section, all transactions incident to the conduct of business activities abroad engaged by any individual ordinarily resident in a foreign country . . . , or by any partnership, association, corporation or other organization which is organized and doing business under the laws of any foreign country . . . are thereby authorized.¹³⁶

This kind of clause would not have been particularly helpful in the gas pipeline affair since the regulations were already limited to specific goods and a specific country of destination. The type of restraining clause found in the Cuban Assets Control Regulations would have been much more useful since it leaves the door open to restraint in extraterritorial claims in case of conflict with local law or foreign policy considerations:

Specific licenses will be issued in appropriate cases for certain categories of transactions between U.S.-owned or controlled firms in third countries and Cuba, where local law requires, or policy in the third country favors, trade with Cuba.¹³⁷

Such a restraint does not amount to a recognition of the supremacy of international law whenever the latter is conflicting with a jurisdictional claim under the regulation. Restraint in favor of the local law remains a matter of comity, not of international obligation.

134. 31 C.F.R. pt. 500 (1983).

135. 31 C.F.R. pt. 515 (1983).

136. 31 C.F.R. §500.541(a) (1983).

137. 31 C.F.R. §515.55 9(a) (1983).

Even if resort to such clauses in the pipeline regulations would not have changed the basic United States position as regards extraterritorial jurisdiction and hence would not have prevented potential conflicts, the politically unpleasant effect of the unrestricted extraterritorial scope of those regulations would have been subdued. Such restraint could have been perceived in Europe as a sign of good will and could have opened the way to negotiations capable of preventing the politicization of the pipeline dispute.

V. POSSIBLE SOLUTIONS FOR COMPARABLE DISPUTES IN THE FUTURE

Although several United States claims to jurisdiction seem to be ill-founded, their effects cannot be easily dismissed by European countries. Resort to countermeasures would not bring about any solution to a difference which is a source of many potential trade conflicts. Nor would a political compromise be enough because it would not bind domestic courts. This situation gives rise to a need for a form of dispute settlement that could be made part of a permanent framework for continuing co-operation in implementing a set of international rules. These in turn would have to be flexible enough to be readily accepted without questioning the principles of each party's legal policy. They would also have to be capable of evolution in response to improved collaboration over time.

Such a framework does exist. The Committee on International Investment and Multinational Enterprises (CIME) of the Organization of Economic Co-operation and Development (OECD) has proven to be extremely useful with respect to problems involving multinationals in Western countries.¹³⁸ Dispute settlement is of a political character, since compromise is reached through confidential negotiation between governments, business and labor, but it has a major legal significance for it provides authoritative interpretations of the OECD Guidelines for Multinational Enterprises.¹³⁹

138. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REPORT OF THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, REVIEW OF THE 1976 DECLARATION AND DECISIONS, OECD Doc. L (1979) 102 (Final) (1979) *reprinted in* 18 INT'L LEGAL MATERIALS 986 (1979) [hereinafter cited as OECD Review]; R. BLANPAIN, THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1977); R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS, 1976-1979, 31-36 and 256-62 (1979).

139. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Declaration on International Investment and Multinational Enterprises, Press Release A(76)20, *reprinted in* 15 INT'L LEGAL MATERIALS 967 (1976) [hereinafter cited as OECD Guidelines]. See Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT'L LAW. 339 (1977); Schwamm, *The OECD Guidelines for Multinational Enterprises*, 12 J. WORLD TRADE L. 342 (1978); Vogelaar, *The OECD Guidelines*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 127 (N. Horn ed., 1980); D. CAMPBELL & R. ROWAN, MULTINATIONAL

Observance of these rules is "voluntary and not legally enforceable,"¹⁴⁰ their substantive provisions are fairly flexible, but they represent a wide consensus and are subject to follow-up and "clarification"¹⁴¹ within an international framework.

The pipeline dispute was not submitted to CIME, however, most likely because it was not limited to specific problems of multinational enterprises and because it raised sensitive issues of foreign policy that were considered non-negotiable except within the framework of the Atlantic Alliance or of Seven-Nation talks.¹⁴² Nevertheless, the OECD provides an adequate forum for many of the jurisdictional issues raised by the pipeline dispute and it may be used successfully to settle similar affairs before they give rise to heated political debate.

The OECD Guidelines represent the first attempt at regulating multinational business activities on a flexible, multilateral basis through codes of conduct.¹⁴³ Instruments such as the guidelines may allow political-legal

ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES (1983); THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A BUSINESS APPRAISAL (Institute for International and Foreign Trade Law, Georgetown University, 1977). *See also* authorities cited *supra* note 138.

140. OECD Guidelines, *supra* note 139, Introductory Considerations, para. 6.

141. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Revised Decision of the [OECD] Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, OECD Doc. C (79) 143 (1979) *reprinted in* 18 INT'L LEGAL MATERIALS 1171 (1979) [hereinafter cited as OECD Decision on Consultation]. "Clarification" results from consultation and negotiation over specific problems brought to the attention of the CIME, but is abstractly worded pursuant to para. 4 of the OECD Decisions on Consultation which reads: "[CIME] shall not reach conclusions on the conduct of individual enterprises." *See* OECD Review, *supra* note 138, paras. 25, 26, 86 (1979).

142. The "Seven-Nations" refer to participants in the meetings of the major industrialized countries, like the Versailles Summit: Canada, France, West Germany, Italy, Japan, the United Kingdom, the United States, as well as the Commission of the European Communities and the country currently assuming presidency of the Council of the European Communities.

143. For information on the negotiation and implementation of codes of conduct, *see* R. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT (1980); D. WALLACE, INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS (1976); Grosse, *Codes of Conduct for Multinational Enterprises*, 16 J. WORLD TRADE L. 414 (1982); Keohane & Doms, *The Multinational Firm and International Regulation*, 29 INT'L ORG. 169, 187 (1975); EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT (S. Rubin & G. Hufbauer eds. 1984); W. FELD, MULTINATIONAL CORPORATIONS AND UN POLITICS (1980); R. HELLMANN, TRANSNATIONAL CONTROL OF MULTINATIONAL CORPORATION (1977); LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, *supra* note 132; J. ROBINSON, MULTINATIONALS AND POLITICAL CONTROL (1983); C. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE (1982); Chance, *Codes of Conduct for Multinational Corporations*, 33 INT'L LAW. 1799 (1978); Coombe, *Multinational Codes of Conduct and Corporate Accountability*, 36 BUS. LAW. 11 (1980); Tharp, *Transnational Enterprises and International Regulation*, 30

settlement of disputes over conflicting claims of jurisdiction, although most of them have been, or are currently being, negotiated on a worldwide level and may therefore bring about inadequate solutions for disputes among Western industrialized countries. Moreover, in order to accommodate countries at all stages of development, general rules are necessary. Specific rules which thrive where negotiating countries have common concerns are not satisfactory in this context.

Codes of conduct as progressively clarified by mutually-agreed implementation, could represent a workable compromise between the existing "hard" law, which at times proves uncertain and the kind of inconclusive diplomatic solutions as exemplified by the epilogue of the pipeline crisis.

A. *The Concept of Codes of Conduct*

In addition to the OECD Guidelines, there are two codes of conduct already drafted on two specific subjects: the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy¹⁴⁴ and the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,¹⁴⁵ negotiated and implemented within the

INT'L ORG. 47 (1976); Wallace, *International Codes and Guidelines for Multinational Enterprises: Update and Selected Issues*, 17 INT'L LAW. 435 (1983).

144. INTERNATIONAL LABOUR ORGANISATION, TRIPARTITE DECLARATION OF PRINCIPLES ON MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (adopted by the Governing Body of ILO, Nov. 16, 1977)(ILO Pub. 1977), reprinted in 17 INT'L LEGAL MATERIALS 423 (1978). See Morgenstern, *Déclaration de principes tripartite de l'OIT sur les entreprises multinationales et la politique sociale: nouveaux problèmes, nouvelles méthodes*, 1983; Günter, *The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, (ILO Sales Doc. 1981).

145. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES (Adopted April 22, 1980), UN Doc. TD/RBP/CONF/10/Rev.1 (1980) reprinted in 19 INT'L LEGAL MATERIALS 813 (1980). Atkeson & Gill, *The UNCTAD Restrictive Business Practices Code: A Step in the North-South Dialogue*, 15 INT'L LAW. 1 (1981); Brewer, *International Regulation of Restrictive Business Practices*, 16 J. WORLD TRADE L. 108 (1982); Davidow, *International Antitrust Codes: The Post-Acceptance Phase*, 26 ANTI-TRUST BULL. 567, 578 (1981); Miller & Davidow, *Antitrust at the United Nations: A Tale of Two Codes*, 18 STAN. J. INT'L L. 347 (1982); see also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES (1977); COMPETITION IN INTERNATIONAL BUSINESS: LAW AND POLICY ON RESTRICTIVE PRACTICES (O. Schachter & R. Hellawell eds. 1981); Athos, *Antitrust Law: United Nations Guidelines*, 22 HARV. INT'L L.J. 405 (1981); Brusick, *UN Control of Restrictive Business Practices*, 17 J. WORLD TRADE L. 337 (1983); Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587 (1979); Gill, *The UNCTAD Restrictive Business Practices Code: A Code for Competition?*, 13 INT'L LAW. 607 (1979); Oesterle, *United Nations Conference on Restrictive Business Practices*, 14 CORNELL INT'L L.J. 1 (1981).

framework of the International Labour Organisation (ILO) and the United Nations Conference on Trade and Development (UNCTAD), respectively. Two other far-reaching codes are still under negotiation, the United Nations Code of Conduct for Transnational Corporations¹⁴⁶ and the UNCTAD Code of Conduct on the Transfer of Technology.¹⁴⁷ Even if they bear different names and have been elaborated under different circumstances, these codes obey a similar pattern, so as to warrant their inclusion under a single category of international rules. They are multilaterally agreed sets of non-compulsory provisions¹⁴⁸ regulating both the activities of multinational enterprises and their treatment by home and host governments. The provisions are augmented by stricter rules on intergovernmental

146. Intergovernmental Working Group on a Code of Conduct, Commission on Transnational Corporations, UN Econ. & Soc. Council, Report on its Special Session, UN Doc. E/C.10/1983/S/5, June 2, 1983, *reprinted in* 1983 UN ESCOR Supp. No. 7, Annex (Draft text as of May 21, 1982) [hereinafter cited as UN Code]. See, e.g., Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273 (1977); Rubin, *Harmonization of Rules: A Perspective on the UN Commission on Transnational Corporations*, 8 LAW. & POL. INT'L BUS. 875 (1976); Asante, *United Nations International Regulation of Transnational Corporations*, 13 J. WORLD TRADE L. 55 (1979); Fatouros, *Le Projet de Code international de conduite sur les entreprises transnationales: essai préliminaire d'évaluation*, 1980 Clunet 5; Primoff, *International Regulation of Multinational Corporations and Business*, 2 J. INT'L L. & ECON. 287 (1977); Wellens, *Transnational Corporations: UN Involvement Towards a Code of Conduct*, 21 GERMAN Y.B. INT'L L. 442 (1981).

147. United Nations Conference on Trade and Development, Draft International Code of Conduct on the Transfer of Technology, Nov. 4, 1983, UN Doc. TD/CODE TOT/41, earlier version *reprinted in* 19 INT'L LEGAL MATERIALS 773 (1980) [hereinafter cited as UNCTAD Code]. See, e.g., Jeffries, *Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT'L L.J. 309 (1977); Miller & Davidow, *supra* note 146; Skelton, *UNCTAD's Draft Code of Conduct on the Transfer of Technology: A Critique*, 14 VAND. J. TRANSNAT'L L. 381 (1981); Thompson, *The UNCTAD Code on Transfer of Technology*, 16 J. WORLD TRADE L. 311 (1982); COMPETITION IN INTERNATIONAL BUSINESS: LAW AND POLICY ON RESTRICTIVE PRACTICES, *supra* note 145; H. PERLMUTTER & T. SAGAFI-NEJAD, INTERNATIONAL TECHNOLOGY TRANSFER: GUIDE-LINES, CODES AND A MUFFLED QUADRILOGUE (1981); Bulajić, *Transfer of Technology and International Law of Economic Development: Universal Code of Conduct or Dual Norms?*, 1980 WORKSHOP HAGUE ACAD. INT'L L. 256; Fairley, *The UNCTAD Code of Conduct for the International Transfer of Technology: Problems and Prospects*, 18 CAN. Y.B. INT'L L. 218 (1980); McCulloch, *Technology Transfer to Developing Countries: Implications of International Regulation*, 1981 ANNALS 110; Roffe, *UNCTAD Code of Conduct for the Transfer of Technology: Progress and Issues Under Negotiation*, 14 J. WORLD TRADE L. 160 (1980); Roffe, *UNCTAD Transfer of Technology Code*, 18 J. WORLD TRADE L. 176 (1984); Thompson, *The UNCTAD Code on Transfer of Technology*, 16 J. WORLD TRADE L. 311 (1982); Wilner, *Applicable Law and Dispute Settlement in the Transfer of Technology Code*, 17 J. WORLD TRADE L. 389 (1983).

148. It is almost certain that the UN and UNCTAD codes will not be incorporated into a binding agreement, although this was the original conception advocated by developing countries.

co-operation and they are geared toward implementation and constant adaptation and improvement in response to specific problems.

Although not legally enforceable, the provisions of the codes are not deprived of all legal authority.¹⁴⁹ While remaining short of the binding character of "hard" international law, the codes may have far-reaching effects, especially as regards incitation and legitimization of domestic law-making and policy, and standard-setting for court and administrative decisions. A reasonable degree of uniformity in implementation on the national level may be achieved by multilateral review and consultation. These in turn may contribute towards international rule creation.

B. *Relevant Provisions of Codes of Conduct*

In the opinion of this author some of the following provisions, however vague and flexible, could represent a starting point for the development of international standards, which would gradually be tested by practice and ultimately develop into formally compulsory rules. Their importance for the settlement of future disputes should therefore not be underrated, even if their substance would probably be modified in accordance with their increasingly binding character.

1. *Compliance With Local Law and Policies*

The "good citizen" rule, that is, compliance with the law of the host State as well as with its major public interests, is clearly a major element of the OECD Guidelines. In relevant part, the rule reads as follows:

. . . The entities of multinational enterprises located in various countries are subject to the laws of these countries. . . .

Enterprises should

1. take fully into account established general policy objectives of the Member countries in which they operate;
2. in particular, give due consideration to those countries' aims and priorities with regard to economic and social progress,

149. See LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, *supra* note 132; Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978); Sanders, *Implementing Codes of Conduct for Multinational Enterprises*, 30 AM. J. COMP. L. 241 (1982); Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?* 11 INT'L LAW. 529 (1977); Fikentscher, *United Nations Codes of Conduct: New Paths in International Law*, 30 AM. J. COMP. L. 577 (1982).

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Nonetheless, important differences persist between Western and developing countries in the most recent draft of the UN Code. These differences are shown by bracketed text:

6. Transnational corporations should/shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its [full permanent sovereignty] [in accordance with international law] [in accordance with agreements reached by the countries concerned on a bilateral and multilateral basis] over its natural resources [wealth and economic activities] within its territory.

7. [Transnational corporations] [Entities of transnational corporations] [should/shall observe] [are subject to] the laws, regulations [jurisdiction] and [administrative practices] of the countries in which they operate. [Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate to the extent required by the national law of these countries.]

8. Transnational corporations should/shall respect the right of each State to regulate and monitor accordingly the activities of their entities operating within its territory.¹⁵¹

It appears clearly from these crucial provisions of the UN Code that it is difficult to phrase the "good citizen" rule without raising issues of jurisdiction, compliance with local standards and policies other than national law, and the range of application of all the preceding rules with respect to the enterprise as a whole.

The third relevant code, the UNCTAD Code, cannot easily be compared to the OECD Guidelines or the UN Code, which are general-purpose instruments, since its subject-matter is different. Its basic principles, however, are clearly in line with the provisions of the UN Code:

(iii) The principles of sovereignty and political independence of States (covering, *inter alia*, the requirements of foreign policy and national security) and sovereign equality of States, should be recognized in facilitating and regulating transfer of technology transactions.

(ix) Technology supplying parties when operating in an acquiring

150. OECD Guidelines, *supra* note 138, Introductory Considerations, para. 7, General Policies, paras. 1-2.

151. UN Code, *supra* note 146, paras. 6-8.

country should respect the sovereignty and the laws of that country, act with proper regard for that country's declared development policies and priorities . . .¹⁵²

All the preceding provisions, including that of the UNCTAD code, aim to protect the rights of host countries and technology recipients; no such provisions can be found as regards technology suppliers and home countries. In the pipeline dispute, had the necessity for foreign subsidiaries to comply with the "good citizen" rule been recognized by the U.S. government it would have avoided offending its European allies.

2. *Provisions Treating an Enterprise as a Whole*

The OECD Guidelines provide that:

8. [T]he guidelines are addressed to the various entities within the multinational enterprise (parent company and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the guidelines.¹⁵³

This provision has no equivalent in the UN Code, which attempts to distinguish provisions applicable to the enterprise as a whole from those concerning single entities.¹⁵⁴

3. *Jurisdiction*

The OECD Guidelines put forward the principle that State jurisdiction is limited by international law, but do not provide for a specific conflict of jurisdiction rule:

7. Every state has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and the international agreements to which it has subscribed. . . .¹⁵⁵

152. UNCTAD Code, *supra* note 147, para. 2.2.

153. OECD Guidelines, *supra* note 139, Introductory Considerations, para. 8.

154. UN Code, *supra* note 146, para. 1(b)-1(c).

155. OECD Guidelines, *supra* note 139, Introductory Considerations, para. 7. On May 18, 1984, the OECD Council approved the outcome of the second review of the Guidelines, to which provisions will be added to encourage Member States to consult with each other in case of conflict arising from extraterritorial jurisdictional claims; the final text of the accompanying

Furthermore, it should be noted that this provision is immediately followed by the "good citizen" rule,¹⁶⁶ so that it seems to be designed to protect host country interests. Home State jurisdiction is more explicitly dealt with in several alternative wordings of the relevant provision of the UN Code:

58. [States should [use moderation and restraint in order to] [seek to] avoid [undue] encroachment on a jurisdiction more [properly appertaining to, or more] appropriately exercisable by another State.] Where the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction, States concerned should endeavor to adopt mutually acceptable [principles and procedures, bilaterally or multilaterally, for the avoidance or settlement of such conflicts,] [arrangements] on the basis of respect for [their mutual interests] [the principle of sovereign equality and mutual interests.]¹⁶⁷

This provision still appears more as a catalogue of possible conceptions rather than as an attempt at reducing divergences. A solution would be to include settlement of concrete problems in the follow-up machinery, as suggested by another provision:

62. States [agree to] [should] consult on a bilateral or multilateral basis, on matters relating to the Code and its application [in particular on conflicting requirements imposed on transnational corporations by the countries in which they operate and issues of conflicting national jurisdictions] [in particular in relation to conflicting requirements imposed by their parent companies on their entities operating in different countries] . . .¹⁶⁸

It is not always easy to trace such alternative wordings back to their respective sponsoring countries, and hasty inferences must be avoided at any cost. The "moderation and restraint" clause bracketed in paragraph 58 of the draft UN Code, for instance, had been sponsored by the developing countries' group but was qualified by another provision stating that "[e]specially, an entity of a transnational corporation should not be con-

report by CIME will make an explicit reference to the very controls under the Export Administration Act that triggered the gas pipeline dispute. MULTINATIONAL INFO, No. 10, at 14 (1984). Publication of the revised Guidelines and of the report is imminent at the time of going to press.

156. See *supra* text accompanying note 151.

157. UN Code, *supra* note 146, para. 58.

158. *Id.* para. 62.

strained by a foreign jurisdiction to violate the law or the declared policy of its host country."¹⁵⁹ This provision, which would have been of the utmost importance if accepted, disappeared from the official compromise drafts, probably as a consequence of United States opposition;¹⁶⁰ thus making the bracketed moderation clause applicable, so it seems, to both home and host State jurisdictional claims.

The many alternative drafts of the UNCTAD Code chapter on jurisdiction are confusing and deal principally with choice-of-law and arbitration rules in contracts¹⁶¹ and not with compliance by technology recipients with trade regulations retroactively applicable to existing and currently performed contracts, as was the case in the pipeline dispute.

C. *Codes of Conduct as a Shield Against Excessive Jurisdictional Claims*

The relevant provisions of the codes of conduct certainly represent an attempt at settling jurisdictional conflicts, in most cases in favor of the host country. Home States are also to a certain extent shielded against host countries' demands regarding compliance by the parent company with the local law and policy of the countries where each subsidiary operates. Protection of the host countries against extraterritorial claims by home countries is certainly much stronger, however, even if this results more from the combined effect of many specific provisions rather than from the general rules quoted above.

This does not amount to saying, at least in the case of the OECD Guidelines, that resort to codes of conduct would always be detrimental to home countries' interests. The most interesting feature of such codes is their implementation machinery, which may well provide an adequate forum for the kind of dispute settlement that is much needed in Western trade and investment relations, and which might have provided a more acceptable solution for all parties concerned in the pipeline dispute.

The defusing of potential conflict that could be achieved by a more frequent resort to CIME or similar organizations would, in the long run, bring together divergent conceptions and practices. It would then be possible for all countries involved to find a general consensus towards develop-

159. Group of 77 Proposal for para. 56 (now para. 58) UN Doc. E/C.10/AC.2 (XIV). (Informal paper circulated at the 12th session of the Intergovernmental Working Group of the Commission on Transnational Corporations on a Code of Conduct, January 1981).

160. No official records of the negotiations within the Intergovernmental Working Group are kept.

161. UNCTAD Code, *supra* note 147, Chapter 9 and Appendix A and F, as well as working papers found in UN Doc. TD/CODE TOT/IC/R.2, Annex II (May 25, 1982).

ment of a common legal policy with respect to jurisdiction over trade practices. Codes of conduct would thus provide an intermediate step between the present situation of conflict and a possible long-term evolution towards an undisputed harmonization of trade law among industrialized countries. Thus, if codes of conduct had been applied to the pipeline dispute the result might have been a movement toward a greater understanding among the parties instead of the inconclusive epilogue which was, in fact, its progeny.

VI. CONCLUSION

The extraterritorial extension of the United States export controls on supplies to the Euro-Siberian gas pipeline project was an unfortunate move with respect to collaboration with European countries. Furthermore, it has brought to the limelight major differences in conceptions of legal policy and international law practice. These differences now appear to European public opinion as linked to foreign policy tensions among Western countries, and consequently are particularly sensitive.

Perhaps equally unfortunate was the diplomatic settlement of the dispute, which did nothing to resolve the legal issues raised. The U.S. export controls were implemented and withdrawn on political pretexts, making it all the more difficult to reach an agreement over the legal problems involved.

These problems belong to some of the most uncertain fields of international law, subject to a far-reaching evolution in international economic relations. Review of the existing law has not always allowed us to find clear-cut solutions to the issues involved. In several cases, however, the underlying conceptions of United States practice do not find firm support in international law. The European reaction to the pipeline controls seems to be more in line with present-day international law, even if many European countries and the Community itself frequently resort to extraterritorial claims to jurisdiction to protect their own interests. As long as the investment and technology balance shows a European deficit against the United States, however, the position of the United States will be a likely source of potential conflict.

A judicial or arbitral settlement would avoid political considerations and provide a clearer view of the real issues, but it would tread on unstable ground and would have to proceed cautiously. This makes judicial or arbitral settlement impractical for disputes similar to the pipeline affair.

Thus, the pipeline dispute presents a compelling case for improving cooperation among industrialized countries towards codes of conduct which would lead to gradual and flexible harmonization of their respective practices. Such a solution would be easier to reach than a more traditional one, since States are reluctant to bind themselves with "hard" rules in trade

matters, but would still have major legal significance and achieve a greater degree of consistency in foreign governmental action than would a merely political settlement.

Since one of the principal purposes of international trade law is precisely to prevent erratic national actions detrimental to the common interest, such a solution ought seriously to be considered.

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