EDITORIAL COMMENTS

Does Mr. Reagan's writ run in Europe?

In addition to other problems which are straining relations between the European Community and the United States of America (European steel exports, the Community's agricultural policy, *etc.*), the U.S. Government's embargo on the supply of equipment for the Siberian-European natural gas pipeline has created an atmosphere which causes transatlantic recriminations to be voiced with deplorable vehemence. As a result, the immediate future of industrial and political cooperation between the Western allies looks anything but bright. European governments are overtly defying the Reagan administration's ban on the use of American equipment and know-how to build the pipeline and they have asked or ordered companies under their jurisdiction to honour their contractual commitments to the Soviet Union. The hapless firms are thus caught in the middle. If they do fulfill their contracts with the Russians, company directors face heavy criminal and commercial penalties in America. If they don's, they may have to pay large penalty fees to Russia. Thus, in defiance of all sensible rules of diplomacy, the Western allies are fighting a battle which does not hurt the intended victims of the American trade offensive, *viz.* the Soviet Union and the Jaruzelski regime in Poland, but, instead, punishes the West's engineering industry and jeopardizes the Western alliance.[1]

European countries and the European Community are seriously angered by the fact that the American decision to launch a selective trade offensive against the Soviet Union was made without proper consultation with its European allies. They are particularly inflamed with Mr. Reagan's decision of 22 June 1982 to extend the sanctions (1) to exports to the U.S.S.R. of oil and gas equipment or technology by foreign subsidiaries of American companies, and (2) to exports of equipment produced by *any* company using American know-how under a licensing agreement with an American company or its subsidiaries. This foreign policy measure hits hard at European engineering. It also involves an attempt to apply American legislation extraterritorially, and retrospectively at that. Such a breach of the law, and especially public international law, can not go unchallenged. If Europe were to abstain from protesting against the assertion of American jurisdiction over the conduct of firms located in Europe and organized in accordance with the law of European countries, such silence would risk to establish precedents damaging to European sovereignty in future disputes over trade matters with the United States.

Although the American measures affect primarily the interests of (certain) Member States, which have co-ordinated their positions and have taken a common stand in Washington, the sanctions issue has acquired a Community dimen-

1. See the lucid commentary which appeared on this matter in *The Economist*, 4 Sept. 1982, pp. 13 – 14.

sion. Commission experts have made an in-depth analysis of the problem and, on August 12, the Presidents of the Council and the Commission have made representations to the U.S. Government in the form of a Verbal Note of Protest, accompanied by a Legal Memorandum. In these documents the Community discusses the political, economic and legal aspects of the sanctions issue. It requests the Reagan administration to withdraw the disputed measures since these must be considered to amount to an "unacceptable interference in the independent commercial policy of the EEC".

It is entirely appropriate and justified that the Community asserts a right of its own to protest against the attempted exercise of extraterritorial jurisdiction by the United States. The Community is fully entitled to provide diplomatic protection for the nationals of its Member States in matters concerning its competence. As Bleckmann has shown in a recent article in this Review,[2] the transfer to the European Community of territorial and personal jurisdiction over nationals of its constituent Member States, which transfer has been recognized by public international law, authorizes the Community under international law to make a complaint based on failure of foreign states to respect this jurisdiction. There can be no doubt that the excessive legislative jurisdiction claimed by the U.S. Government for the purpose of regulating the conduct within Europe of European firms, encroaches upon the competence of the Community in the field of commercial policy. As the Community's Legal Note points out, the amended Export Administration Regulations of 22 June 1982, require companies located within the Community and established under the laws of Member States to obtain prior authorisation by the U.S. authorities (Office of Export Administration) for the export to the U.S.S.R. of equipment produced within the Community, even in cases where no U.S. technology has been used and where the goods are shipped to the U.S.S.R. from Community territory. The American Government in this manner uses European companies as instruments for implementing American trade policy, thereby infringing the rights of the Community which has a commercial policy of its own *vis-à-vis* the Soviet Union.

There is yet another reason why the Community, alongside certain Member States, may and must be involved in seeking to protect European interests. The smaller Member States have not directly been affected by the American measures but it is unlikely that the repercussions of the imposition of sanctions on the big engineering firms in France, Britain, Italy and Germany, will not make themselves felt at the level of subcontractors in the Netherlands, Belgium and the other Member States. It is for the Community organs to see that compromises that may eventually be reached between the U.S. and certain Member States take due account of interests not directly represented in bilateral or multilateral negotiations with the Americans, including the interests of the Community itself. In acting in this manner the Community may certainly be deemed to pursue the objectives of the Community Treaties.

2. See A. Bleckmann, "The Personal Jurisdiction of the European Community", 17 C.M.L.Rev. 1980, 467–485, at 480.

The Community's Memorandum convincingly shows that the legal ground on which the Reagan Administration bases its case is shaky. The EEC argues that the sanctions are illegal because the Export Administration Act of 1979 does not allow the kind of embargo decreed in June 1982 and because the ban violates international law. In support of the latter contention, the legal text affirms that none of the jurisdiction principles recognized in international law can be validly invoked as a justification for the exercise by America of extraterritorial jurisdiction over the conduct of American subsidiaries in Europe and over that of other European firms which use American technology under licencing agreements with persons or companies subject to U.S. jurisdiction. The EEC does not deny that a State may lawfully exercise jurisdiction on other bases than territory alone. However, it is generally recognized that the jurisdiction of the territorial sovereign should take priority over jurisdiction based on nationality. If application of the local law is not allowed to prevail, the resulting interference with the affairs of the territorial State may be destructive of normal international intercourse.

According to the reasoning of the EEC, in the present case the principle of nationality as a basis for American jurisdiction over extraterritorial acts can not at all be validly invoked. Subsidiaries of American firms organised under the laws of European States cannot possibly be regarded as companies having U.S. "nationality". Neither can the mere fact that European companies, as licencees of American firms, use American technology be a valid ground for bringing these companies within American jurisdictional grasp. Public international law knows of no rule which confers a certain "nationality" on goods or technology and which would allow the country of origin to extend the application of its laws to persons abroad using these goods or know-how. Therefore, the conclusion is that, since other bases of jurisdiction (for example the protection principle) are not present, the pipeline sanctions amount to an excess of jurisdiction and are prohibited by public international law.

The Europeans' case could be helped by the inconsistencies in the American attitude. Why should America be allowed the right to do to Europeans that which it denies the Europeans or the Japanese the right to do to Americans? The U.S. does not accept that American subsidiaries of foreign companies remain subject to the laws of the State of the parent company. As recently as June 1982, the U.S. Supreme Court ruled that the American subsidiary of the Sumitomi Company of Japan was an American and not a foreign company and therefore had to obey American civil right laws when hiring managers, despite a Japanese-American agreement which provided that Japanese companies in America could hire managers of their choice.

Like every other State America must heed the principle of the mutuality of the character of jurisdiction.[3] As the Supreme Court has put it in 1953 "in dealing with international commerce we cannot be unmindful of the necessity for mutual

3. See F.A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *Hague Recueil* (1964, I), 9–162, at 48.

forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction".[4]

Common sense suggests that efforts should be stepped up to terminate this legal wrangle as soon as possible and by diplomatic means. State practice shows that in most cases the good sense and restraint of political and judicial authorities have prevented international disputes arising between the State of the territory and the State which claims personal jurisdiction based on nationality. The West's trading policy toward the communist east can only make an effective contribution to furthering the cause of human rights and to containing the Soviet Union's military expansion if this policy is based on consensus between the U.S.A. and Europe and if the partners respect each other's sovereignty. Abuses of jurisdiction create controversies and are counterproductive. Breaches of international law are unpardonable even if they are committed in the pursuit of sensible policy ends. The American writ does not run in Europe, except with the consent of the Europeans. The U.S. Government would be well-advised to substitute talks for sanctions and to forego the exercise of both legislative and enforcement jurisdiction against companies located in European territory.

4. *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) at 583.