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Brussels, August 12, 1982

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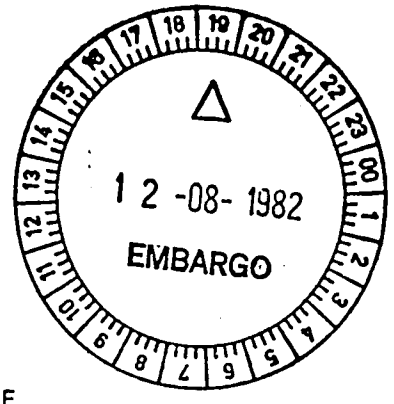

G A S P I P E L I N E

COMMENTS OF THE EUROPEAN COMMUNITY AS REGARDS THE MESURES TAKEN BY THE US GOVERNMENT

4. One of the main elements of the Community's policy of reducing the vulnerability of its energy supply is based on diversification of sources. Gas from the Soviet Union will help to conserve the Community's own stock of gas, oil and other fuels, and will reduce the Community's reliance on other foreign sources. Use of Siberian gas will not create a dangerous dependence on that source. Even when gas is flowing at the maximum rate, in 1990, it will represent less than 4 per cent of the Community's total energy consumption.

5. Whatever the effects on the Soviet Union, the effects on European Community interests of the U.S. measures, applied retroactively and without sufficient consultation, are unquestionably and seriously damaging. Many companies interested as sub-contractors, or suppliers of components, have made investments and committed productive capacities to the pipeline project, well before the American measures were taken. Though they may use no American technology, they will suffer complete loss of business if the European contribution to the project is blocked. Some of these companies may not survive. Major European companies that can survive the immediate loss of business, will nevertheless suffer from lower levels of capacity utilization and loss of production and profits, while workers will be laid off temporarily or permanently.

6. In the longer term, European Community companies may be damaged by the disruption of their contracts concluded in good faith, because they may cease to be reliable suppliers in the eyes not only of the Soviet Union, but also of their actual and potential business partners in other countries. One inevitable consequence would be to call in question the usefulness of technological links between European and American firms, if contracts could be nullified at any time by decision of the U.S. Administration. Another consequence to be feared is that the claim of U.S. jurisdiction accompanying U.S. investment will create a resistance abroad to the flow of U.S. investment. Thus, these export control measures run counter to the policy aims of the United States of easing the transfer of technology and of encouraging free trade in general. There will be other far-reaching effects upon business confidence. These measures thus add to the climate of uncertainty that is already pervading the world economy as a whole.

7. The European Community therefore calls upon the United States Authorities to withdraw these measures.

NOTE

1. With reference to the interim Rules promulgated on 22 June 1982 by the Department of Commerce under the Export Administration Act of 1979, and to the Community's note presented on 14 July 1982, the European Community wishes to present further Comments on the new Export Administration Rules, with the request that this note and these comments be transmitted to the Department of Commerce in accordance with that Department's invitation for public comments to be made by 21 August 1982.

2. The European Community wishes to draw attention to the importance that it attaches to the legal, political and economic aspects of the United States' measures, including their impact on the commercial policy of the Community. As to the legal aspects, the European Community considers the U.S. measures contrary to international law, and apparently at variance with rules and principles laid down in U.S. law.

3. As to the political and economic aspects, it is clear that the U.S. measures are liable to affect a wide variety of business activities, while their primary purpose is to delay the construction of the pipeline to bring Soviet gas to Western Europe. The European Community holds that it is unlikely that the U.S. measures will in fact delay materially the construction of the pipeline or the delivery of the gas.

   The pipeline from Siberia to Western Europe can be completed using Soviet technology and production capacity diverted from other parts of their current programme. Furthermore the recent U.S. measures provide the Soviets with a strong inducement to enlarge their own manufacturing capacity and to accelerate their own turbine and compressor developments, thus becoming independent of Western sources. Gas could still flow to the Community starting as scheduled in 1984 owing to the existence of substantial spare capacity in the existing pipeline system, sufficient to cover the requirements of the early phases of the programme of deliveries.

Finally, no person in the U.S. or in a foreign country may export or re-export to the U.S.S.R. foreign products directly derived from U.S. technical data (1) relating to machinery etc. utilized for the exploration, production or transmission or refinement of petroleum or natural gas or commodities produced in plants based on such U.S. technical data.

This prohibition applies in three alternative situations, namely:

- if a written assurance was required under the U.S. export regulations when the data were exported;

- if any person subject to the jurisdiction of the U.S.A. (as defined in note (2) receives royalties or other compensation for, or has licensed, the use of the technical data concerned, regardless of when the data were exported from the U.S.;

- if the recipient of the U.S. technical data has agreed (in the licensing agreement or other contracts) to abide by U.S. export control regulations.

3. The following comments will discuss firstly the international legal aspects of the US measures, including (a) the generally recognized bases on which jurisdiction can be founded in international law and (b) other bases of jurisdiction which might be invoked by the U.S. Government; secondly the rules and principles as laid down in U.S. law, in particular the Export Administration Act, and as applied by U.S. Courts, which would seem to be at variance with the Amendments of June 22, 1982.

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(1) This expression is very broadly defined in 15 CFR para. 379.1.

(2) Now defined as (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).

COMMENTS OF THE EUROPEAN COMMUNITY ON THE AMENDMENTS OF 22 JUNE 1982 TO THE US EXPORT ADMINISTRATION REGULATIONS

I. INTRODUCTION

1. On June 22, 1982, the Department of Commerce at the direction of President Reagan and pursuant to Section 6 of the Export Administration Act amended Sections 376.12, 379.8 and 385.2 of the Export Administration Regulations. These amendments amounted to an expansion of the existing US controls on the export and re-export of goods and technical data relating to oil and gas exploration, exploitation, transmission and refinement.

The European Community believes that the US regulations as amended contain sweeping extensions of US jurisdiction which are unlawful under international law. Moreover, the new Regulations and the way in which they affect contracts in course of performance seems to run counter to criteria of the Export Administration Act and also to certain principles of U.S. public law.

2. The main thrust of the Regulations may be summarized as follows:

First of all, persons within a third country may not re-export machinery for the exploration, production, transmission or refinement of oil and natural gas, or components thereof, if it is of U.S. origin, without permission of the U.S. Government.

Moreover, any person subject to the jurisdiction of the United States (1) is required to get prior written authorization by the Office of Export Administration for export or re-export to the U.S.S.R. of non-US goods and technical data related to oil and gas exploration, production, transmission and refinement.

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(1) Now defined as (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 (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).

II. THE AMENDMENTS UNDER INTERNATIONAL LAW

A. Generally accepted bases of jurisdiction in international law

4. The U.S. measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not within the United States.

They seek to impose on non-US companies the restriction of U.S. law by threatening them with discriminatory sanctions in the field of trade which are inconsistent with the normal commercial practice established between the U.S. and the E.C.

In this way the Amendments of June 22, 1982, run counter to the two generally accepted bases of jurisdiction in international law; the territoriality and the nationality principles (1).

5. The territoriality principle (i.e. the notion that a state should restrict its rule-making in principle to persons and goods within its territory and that an organization like the European Community should restrict the applicability of its rules to the territory to which the Treaty setting it up applies) is a fundamental notion of international law, in particular insofar as it concerns the regulation of the social and economic activity in a state. The principle that each state - and mutatis mutandis the Community insofar as powers have been transferred to it - has the right freely to organize and develop its social and economic system has been confirmed many times in international fora. The American measures clearly infringe the principle of territoriality, since they purport to regulate the activities of companies in the E.C., not under the territorial competence of the U.S.

6. The nationality principle (i.e. the prescription of rules for nationals, wherever they are) cannot serve as a basis for the extension of U.S. jurisdiction resulting from the Amendments, i.e. (i) over companies incorporated in E.C. Member States on the basis of some corporate link (parent-subsidiary) or personal link (e.g. shareholding) to the U.S.; (ii) over companies incorporated in E.C. Member States, either because they have a tie to a U.S.-incorporated

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(1) See Restatement (2nd) of the Foreign Relations Law of the U.S. (1972), paras. 17 and 30 respectively.

9. The Amendments of 22 June 1982, therefore, cannot be justified under the nationality principle, because they ignore the two traditional criteria for determining the nationality of companies reconfirmed by the International Court of Justice and because they purport to give some notion of "nationality" to goods and technologies so as to establish jurisdiction over persons handling them.

The purported direct extension of U.S.jurisdiction to non-US incorporated companies not using U.S. origin technology or components is a fortiori objectionable to the E.C., because neither of these (in themselves invalid) justifications could apply.

10. The last mentioned case exemplifies to what extent the wholesale infringement of the nationality principle exacerbates the infringement of the territoriality principle (1). Thus even E.C. incorporated companies in the example mentioned above according to the Amendments would have to ask special written permission not of the E.C, but of the U.S. authorities in order to obtain permission to export goods produced in the E.C. and based on E.C. technology from the territory to which the E.C. Treaties apply to the U.S.S.R. The practical impact of the Amendments to the Export Administration Regulations is that E.C. companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office within the Community which has its own trade policy towards the U.S.S.R.

The public policy ("ordre public") of the European Community and of its Member States is thus purportedly replaced by U.S. public policy which European companies are forced to carry out within the E.C., if they are not to lose export privileges in the U.S. or to face other sanctions. This is an unacceptable interference in the affairs of the European Community.

11. Furthermore, it is reprehensible that present U.S. Regulations encourage non-US companies to submit "voluntarily" to this kind of mobilization for U.S. purposes.

(1) The application of the nationality principle would imply ipso facto some overlapping with the application of the territoriality principle and this is acceptable under international law, in some instances, but we are not in such a situation in this case.

13. However, it is clear ab initio that the extension of U.S. jurisdiction implicit in the Amendments cannot be based on the principles mentioned under 12(a) or (b).

The "protective principle" has not been invoked by the U.S. Government, since the Amendments are based on Section 6 (Foreign Policy Controls) and not on Section 5 (National Security Controls) of the Export Administration Act. The U.S. Government itself, therefore, has not sought to base the Amendments on considerations of national security.

The "effects doctrine" is not applicable. It cannot conceivably be argued that exports from the European Community to the U.S.S.R. for the Siberian gas pipeline have within the U.S.A. direct, foreseeable and substantial effects which are not merely undesirable, but which constitute an element of a crime or tort proscribed by U.S. law. It is more than likely that they have no direct effects on U.S. trade.

14. For the reasons expounded above, it is clear that the U.S. measures of June 22, 1982 do not find a valid basis in any of the generally recognized - or even the more controversial - principles of international law governing state jurisdiction to prescribe rules. As a matter of fact the measures by their extra-territorial character simultaneously infringe the territoriality and nationality principles of jurisdiction and are therefore unlawful under international law.

III. THE AMENDMENTS UNDER U.S. LAW

A. U.S. Reactions to measures similar to the June 22 Amendments

15. If a foreign country were to take measures like the June 22 Amendments, it is doubtful whether they would be in conformity with U.S. law and they would therefore probably not be recognized and enforced by U.S. courts.

The kind of mobilization of E.C. companies for U.S. purposes to which the Community objects was subject to strong American reactions and legislative counter-measures, when U.S. companies were similarly mobilized for the foreign policy purposes of other states.

Even when submission to a foreign boycott is entirely voluntary, such submission within the U.S. has been considered to be undesirable and contrary to U.S. public policy (1). By the same token it must have been evident to the U.S. Government that the statutory encouragement of voluntary submission to U.S. public policy in trade matters within the E.C. is strongly condemned by the European Community. Private agreements should not be used in this way as instruments of foreign policy. If a Government in law and in fact systematically encourages the inclusion of such submission clauses in private contracts the freedom of contract is misused in order to circumvent the limits imposed on national jurisdiction by international law.

It is self-evident, moreover, that the existence of such submission clauses in certain private contracts cannot serve as a basis for U.S. regulatory jurisdiction which can properly be exercised solely in conformity with international law. Nor can a company prevent a state from objecting to any infringement which might occur of the jurisdiction of the state to which it belongs.

B. Other bases of jurisdiction

12. There are two other bases of jurisdiction which might be invoked by the U.S. Government, but which have found less than general acceptance under international law. These are:

a) the protective principle (para. 33 of the 2nd Restatement), which would give a State jurisdiction to proscribe acts done outside its territory but threatening its security or the operation of its governmental functions, if such acts are generally recognized as crimes by States with reasonably developed legal systems;

b) the so-called "effects doctrine", under which conduct occurring outside the territory but causing direct, foreseeable and substantial effects - which are also constituent elements of a crime or tort - within the territory may be proscribed (para. 18 of the 2nd Restatement).

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(1) Cf. Section 8 of the Export Administration Act and below under II.A.

This being the reaction of the U.S. legislator and judiciary to foreign measures comparable to its own measures of June 22, the U.S. Government should not have inflicted these measures on the E.C. companies concerned in the virtual knowledge that these measures would be regarded as unlawful and ineffective by public authorities in the E.C.

B. Conflicts of jurisdiction and Accommodation of Interest

17. In cases where the conflicting exercise of jurisdiction to prescribe leads to conflicts of enforcement jurisdiction between states, each state, according to para. 40 of the Restatement (2nd) Foreign Relations Law of the U.S., is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction. In this connection the following factors should be considered:

"a) vital national interests of each of the states;

b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;

c) the extent to which the required conduct is to take place in the territory of the other state;

d) the nationality of the other person ...".

18. Over the past years various U.S. Courts of Appeal have pronounced themselves in favour of this "balancing of interests" approach.

In the case of the Timberlane Co. v. Bank of America (1) Judge Choy suggested that comity demanded an evaluation and balancing of relevant factors, and continued: "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad".

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(1) Timberlane Lumber Co. v. Bank of America, 1977-1 Trade Cases No. 61.233.

The anti-foreign-boycott provisions of Section 8 of the Export Administration Act are testimony to that. In the same way as the U.S. could not accept that its companies were turned into instruments of the foreign policy of other nations, the E.C. cannot accept that its companies must follow another trade policy than its own within its own territorial jurisdiction.

It is noteworthy that the anti-boycott provisions of the Export Administration Act can be invoked in response to a boycott that takes a less direct form than the June 22 Amendments, namely a boycott which merely tries to dissuade persons from dealing with a third country by refusing to trade with such persons. An export restriction patterned on the June 22 Amendments, in contrast, would directly prohibit a person from dealing with a particular country under the threat of government-imposed penalties. Therefore, the latest Amendments would appear to be even more far-reaching than a boycott which might give rise to the application of the anti-boycott provisions.

16. Even if for some reason the foreign boycott provisions of the Export Administration Act were not considered applicable, a foreign country imposing such restrictions as those imposed by the June 22 Amendments would probably be viewed by U.S. Courts as attempting to extend its laws beyond its territory without sufficient nexus with the U.S. entity to justify such an extension. This certainly would be the case with respect to a mere licensee of a foreign concern.

If a foreign government complained that a U.S. licensee of a foreign company was not complying with that foreign government's export restrictions prohibiting such exports, a U.S. federal court would decline jurisdiction, because U.S. Courts will not enforce foreign penal statutes (1).

If the observance of a foreign export control by a U.S. subsidiary or licensee were to become an issue in litigation between the latter and its foreign parent company or licensor, a federal or state court would probably not refuse jurisdiction, but would decline to enforce the export restrictions of the foreign country on the grounds that it would be contrary to the strong public policy of the forum and not in the interest of the United States to do so (2).

(1) Wisconsin v. Pelican Insurance Company, 127 US. 265, 290 (1888); Restatement (2nd) Conflict of Laws para. 89.

(2) Restatement (2nd) Conflict of Laws pp. 90.

It does away with the rather artificial distinction between the right to assert a jurisdiction to prescribe and restraint in exercising it. It simply considers that the exercise of a jurisdiction to prescribe may be unreasonable; to decide whether this is so or not draft para. 403 (1) enjoins the evaluation of such factors as place of the activity to be regulated, links of persons falling under the regulation with other states, consistency with the traditions of the international system, interests of other states in regulating the activity concerned, and the existence of justified expectations to be affected by the regulation.

23. Whatever approach is adopted by the U.S. Government in balancing U.S. interests against the interests of the European Community, the following considerations have been neglected.

- The interest of the European Community in regulating the foreign trade of the nationals of the Member States in the territory to which the Community Treaties apply is paramount over any foreign policy purposes that a third country may have.
- The conduct required by the Amendments is to take place largely in territory to which the E.C. Treaties apply and not in U.S. territory.
- The nationality and other ties of many persons whose conduct is purportedly regulated by the June 22 Amendments link them primarily to E.C. Member States and not to the U.S.
- There are justified expectations on the part of E.C. companies which are seriously hurt by the U.S. measures.

C. Criteria under Section 6(b) of the Export Administration Act

24. It can hardly be claimed that the U.S. measures satisfy the criteria laid down in the Export Administration Act, and therefore it is doubtful whether the restrictions are properly applied in terms of U.S. law. Criterion 1 refers to the probability that the controls will achieve the intended foreign policy purposes. Soviet Authorities have clearly stated their intention to deliver gas to Western Europe as scheduled, and there is little reason to doubt their ability to do so, even without American or European equipment since the existing Soviet pipeline system already has sufficient spare capacity, at least

(1) Cited in Harold G. MAIER, Extraterritorial Jurisdiction at a Crossroads: an Intersection between Public and Private International Law, 76 American Journal of International Law 1982, 280, at 300-301.

A similar approach was followed in Mannington Mills (1) and is set out in paragraph 40 of the Second Restatement.

19. Although this "balancing of interest" approach applies in the first place to courts, there are good reasons why the U.S. Government should exercise such restraint already at the rule-making stage.

20. First, Section 6 of the Export Administration Act in several places enjoins the President to consider the position of other countries before taking or extending export controls.

Thus para. (b): "... the President shall consider: (3) the reaction of other countries to the imposition or expansion of ... export controls by the United States".

In para. (d): "... the President shall determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means".

Finally in para. (g): "... the President shall take all feasible steps to initiate and conclude negotiations for the purpose of securing the cooperation of such foreign governments in controlling the export to countries and consignees to which the U.S. export controls apply of any goods or technology comparable to goods or technology controlled under this section".

21. In the second place, these Amendments to the Export Administration Regulations may not be subject to substantive judicial review. This means that U.S. Courts may not be able to apply their balancing of interests approach in a clash of enforcement jurisdictions. It is therefore appropriate for the executive to apply it at the rule-making stage.

22. Finally, the direction in which informed legal opinion in the U.S. is moving on this issue is demonstrated by the new draft Restatement (3rd) of the Foreign Relations Law of the U.S.

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(1) Mannington Mills Inc. v. Congoleum Corp. 1979-1 Trade Cases No.62.547.

to cover the requirements of the early phases of the programme of deliveries. If the pipeline is built with Soviet technology and the gas flows on time, these U.S. export controls are at best ineffectual, and may well be self-defeating, as instruments of foreign policy.

25. Criterion 3 requires that the reaction of other countries to the imposition or expansion of such export controls be taken into account. In view of the extra-territorial application, and retroactive effect of the U.S. measures, the European Community cannot fail to denounce the measure as unlawful under international law; and in view of their damaging economic and political consequences, has already protested in the strongest terms.

26. Criterion 4 requires consideration of the effects of the proposed controls on the export performance of the United States. Here again, confirmation of the U.S. measures despite criterion 4 would involve complete disregard for damaging effects not only immediately, but also in the longer term, owing to the grave doubts that are bound to arise in future about the U.S. as a reliable supplier of equipment under contract, or as a reliable partner in technology-licensing arrangements. This danger has already been pointed out to the President of the United States by the U.S. Chamber of Commerce.

D. Compensation for damage resulting from U.S. measures

27. The U.S. measures inasmuch as they refer to exports from countries outside the U.S. are all the more objectionable, as they affect contracts that were free from restrictions imposed by the U.S. Authorities at the time of their conclusion.

The main contractors of the Siberian pipeline, a number of major sub-contractors and suppliers as well as other exporters, will suffer substantial economic and financial losses for which no compensation is provided. For many sub-contractors who for the most part have nothing to do with American goods or technology for gas transport, the practical consequences of the Amendments will be particularly severe and may actually force them out of business. Lay-offs of a considerable number of workers will result in any case from the Amendments.

28. The idea that compensation is due in case private property or existing contracts are seriously affected by government action is also familiar in the U.S. legal system. If U.S. Government takes private property by eminent domain it has to compensate the owner. The Supreme Court has indicated many times that if regulatory legislation virtually deprives a person of the complete use and enjoyment of his property the law of eminent domain applies (1).

Justice Brandeis has written: "It is true that the police power embraces regulations designed to promote public convenience or the general welfare ... But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured" (2). It is self-evident that for European contractors and sub-contractors within the E.C. the cost imposed upon them by the Amendments does not bear a reasonable relation to the advantage of furthering American export policy.

29. This lack of provision for compensation or protection is all the more disconcerting, because the Amendments of June 22 purport to regulate not merely U.S. external trade (3), but E.C. external trade as well. Moreover, these are considerations which obviously have played a role in the imposition of foreign trade embargoes in the past. Firstly, both the Cuban Assets Control Regulations (1981) and the Iranian Assets Control Regulations (1979) exempted to a large extent foreign incorporated firms with ties to U.S. firms from otherwise stringent or even absolute trade prohibitions (4). Secondly, both the trade embargo connected with the Iranian hostage crisis and the embargo on grain shipments to the U.S.S.R. permitted existing contracts to be honoured.

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(1) Most recently in Goldblatt v. Town of Hempstead, 369 US 590, 594 (1962).

(2) Nashville C. and St. L. Ry v. Walters, 294 US 405, 429 (1935).

(3) Buttfield v. Stranahan, 192 US 470, 493 (1904) indicates that insofar as it concerns U.S. external trade it may be difficult to assert Fifth Amendment rights.

(4) This is not to say that the E.C. agrees in principle to the way in which these Regulations handle the problem of extra-territoriality.

DELEGATION
OF THE
COMMISSION OF THE EUROPEAN COMMUNITIES

4/11.2(103) Spec. file can be given to public

A I D E - M E M O I R E

The European Community and its Member States have the honour to present to the U.S. Administration the following Aide-Memoire concerning the Export Administration Act of 1979.

1. The considerations set out below pertain to the way this Act affects companies doing business in the Community and in particular to the claims, implicit both in the Act itself and in the way it has been interpreted by the U.S. Administration, that U.S. jurisdiction under the Act extends to persons doing business in the Community.

2. The Export Administration Act contains such phrases as "any person subject to the jurisdiction of the United States" which has consistently been defined so as to include companies incorporated, having their registered office or doing business in foreign countries and owned or controlled by U.S. natural or legal persons. Moreover, the Act itself defines a "U.S. person" so that those words include foreign subsidiaries or affiliates of U.S. domestic concerns which are "controlled in fact" by those concerns. As regards the Administration's interpretation of the Act, this has consistently been such as to include within "goods", technology or other information subject to the jurisdiction of

IV. CONCLUSION

30. The European Community considers that the Amendments to the Export Administration Regulations of June 22 1982 are unlawful since they cannot be validly based on any of the generally accepted bases of jurisdiction in international law. Moreover, insofar as these Amendments tend to enlist companies whose main ties are to the E.C. Member States for purposes of American trade policy vis-à-vis the U.S.S.R., they constitute an unacceptable interference in the independent commercial policy of the E.C. Comparable measures by third states have been rejected by the U.S. in the past.

31. Even from the standpoint of U.S. law, the European Community considers that the United States has not adopted a proper "balance of interests" approach. The European Community further considers that the Amendments are of doubtful validity under the criteria of the Export Administration Act of 1979.

32. For these reasons, the European Community calls upon the U.S. Authorities to withdraw these measures.

BNA

News Highlights

4412(103)

Steel

U.S., EC REACH AGREEMENT ON ACCORD EXTENSION, SEMIFINISHED LEVEL STILL REMAINS UNRESOLVED

Administration action against steel imports from the European Community was temporarily averted at the last minute when the two sides Oct. 31 reached agreement on an extension of the U.S.-EC steel arrangements.

The deal, announced by U.S. Trade Representative Clayton Yeutter just hours following the deadline, provides for the restraint of European exports of all finished steel products to roughly 5.5 percent of U.S. consumption. This level marks a significant reduction from the 6.6 percent level for these goods prevailing through the first nine months of 1985, USTR reported. However, the new total is also slightly more than the 5.46 percent level agreed upon in 1982, and includes slight increases in EC shipments of consultation goods, according to a Community spokesman.

No Agreement On Semifinished

However, the two sides were unable to settle on a figure for semifinished steel—the chief stumbling block in reaching agreement. Yeutter stated that current arrangement coverage for semifinished steel would be extended, and the goods will remain as consultation products. However, the Administration has been pressing to include the products in the text of the accord and to assign them a specific quota level, and it is expected that the two sides will have to conduct further talks in light of the Administration's intentions to hold overall imports of semifinished steel to 1.7 million tons annually.

Reports from Brussels said the United States may hold the EC to anywhere from 400,000 to 500,000 tons of imports of semifinished next year if the two sides cannot reach agreement soon on this issue, but a USTR official said the matter was still under consideration.

Allocations For Other Products

The two sides were able, however, to work out separate allocations for 33 product categories, including each of the 11 complementary product categories established in August, the original 10 licensed products, pipe and tube, and oil country tubular goods, USTR said. Moreover, several new products were added to the accord which were not covered by the first arrangement, including wire rope, wire strand, stainless steel, strip and wire, and fabricated structural steel. The agreement will be in effect from Jan. 1, 1986, through Sept. 30, 1989, and will cover more than $2.5 billion worth of EC steel exports to this country.

Stainless steel has been a particularly sensitive matter because it is the subject of an import relief program that was put into effect by the Administration pursuant to Section 201 of the Trade Act of 1974. An EC spokesman said the two sides have agreed on a quota figure for stainless, but said it will not go into effect until the safeguard measures have been removed by the United States.

The two sides appeared to be heading toward a showdown earlier in the week when they failed to resolve their disagreement over semifinished steel trade. More pressure was added Oct. 30 when Yeutter announced that the Community would not be allowed to send any more shipments of certain categories of steel to the United States through the end of the year—notably the consultation products—if a deal was not reached by the Oct. 31 deadline. In announcing this step, Yeutter appeared to be indicating that shipments of these goods had exceeded quota levels sought by the United States.

Impact Of Agreement Disputed

However, Yeutter asserted in announcing the last-minute deal that the new arrangements constituted "a major accomplishment for the President's steel program, as well as a major step forward for trade relations between the U.S. and the EC." The scope and duration of the agreement, he maintained, "will preserve the integrity of the President's steel program, which provides for voluntary restraint agreements on steel shipments to the U.S. from the major steel-producing areas of the world."

Even with the agreement with the EC, many analysts believe that total steel imports this year will greatly exceed the President's target of 18.5 percent of the U.S. market. However, Administration officials said the new deal will help to decrease the import level starting in 1986.

Commenting on this matter, Yeutter asserted that the EC agreement "demonstrates that the Administration is firmly committed to accomplish the goals of the President's steel program. The Administration's original expectation on steel imports, 18.5 percent for finished steel products and 1.7 million tons for semifinished steel, remains in effect and will be greatly facilitated by the EC agreement."

The deal with the Europeans will now be subject to the approval process of the Community, Administration officials said. This action will result in two arrangements—one extending the 1982 carbon steel accord but revised to include certain additional new products as well as consultation products which were the subject of an agreement concluded Aug. 9, and another extending the current pipe and tube agreement. Both arrangements will run through Sept. 30, 1989, USTR said.

During the long and difficult negotiations that led to the agreement, the United States asked for reductions in the existing levels of imports and the addition to the accord of goods that are included in the voluntary restraint agreements with other countries. The Europeans were known to be concerned about these matters, and were said to believe that they were being asked unfairly to shoulder a disproportionate share of the burden of assisting the U.S. industry.

U.S. Industry Criticizes Agreement

The U.S. industry, which had pressed for a considerably tightened agreement with the EC, reacted quickly and sharply to news of the new accords. The deal, the American Iron and Steel Institute charged, "means that not only is the EC not being penalized for its persistent violations of the arrangement over the past two years, but is in fact being rewarded for its 'unconscionable violations,' as Ambassador Yeutter so properly characterized them in his statement yesterday."

AISI Chairman Donald Trautlein further argued in a statement on the accord that "the lack of an agreement on semifinished steel is also very disturbing. This news is

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tempered somewhat by the ambassador's statement that the Administration's original expectation of semifinished steel imports of 1.7 million tons remains in effect. Because of the surge in European exports of semifinished steel, it is obvious that some prompt and decisive action is required if there is to be any possibility of staying within that commitment."

Commenting on the steel relief program in general, Trautlein added that "it is obvious that action must be taken by year-end to include other significant steel-supplying countries for which no arrangements exist. It is also important that the terms of all the arrangements be strictly enforced. Such actions are vital for the President's program to be effective."

Deal Satisfactory To EC

EC officials, on the other hand, said the deal was a "workable" arrangement, and praised the efforts made by both sides to resolve the dispute. Questioned about the semifinished steel situation, a Community spokesman asserted that the Europeans did not agree to any figure, but noted that the United States wanted a precise export limit, and was prepared to impose a quota, if necessary. In Brussels, EC Commissioner for External Relations Willy de Clercq told reporters following announcement of the deal that the problem of semifinished exports will remain a point of contention between the two sides for some time to come.

De Clercq called the overall agreement "almost good news" for the Community. He said the Europeans naturally would have preferred no limitations on their shipments, but added that "considering the determination of the Americans to limit imports, it's a satisfactory result."

EC Plan For Ending Subsidies

Meanwhile, in related development, EC industry ministers have agreed on a comprehensive plan that will make Community steel production dependent on market conditions following more than four years of quotas and subsidies. Starting Jan. 1, the quantities of coated sheet steel and concrete reinforcing bars made in the EC will depend upon market forces. The ministers also agreed to ban state subsidies, with the exception of closure aid to companies that decide to go out of the steel business, as well as subsidies for research and development and environmental protection.

Also last week, LTV Steel President David Hoag, noting the recent jump in imports from the EC and other sources, called for immediate enactment of legislation to support compliance with the President's steel import relief program. He cited in particular HR 3459, which provides that imports of steel products from any country which is not party to a bilateral agreement under the President's program shall not exceed 70 percent of the amount of steel imported from such country during the base period Oct. 1, 1983, to Oct. 1, 1984.

Hoag asserted that "the September import level in excess of 30 percent of the U.S. steel market is an insult to the President, the Congress, and American workers, and vividly demonstrates one thing—our foreign trading partners continue to ignore the President's efforts to reduce the flood of steel into this country. There is only way to effectively make offshore producers act responsibly, and that is through legislation establishing levels of steel imports."

European Community

U.S. INCREASES DUTIES ON EC PASTA IN PROTEST OVER BRUSSELS REFUSAL TO END CITRUS DISPUTE

The United States turned down a last minute offer by the European Community to solve the citrus/pasta dispute before the U.S.-imposed deadline of Oct. 31 and substantially increased import duties on European pasta Nov.1.

The higher duties—which had been temporarily held up since July (2 ITR 949, July 24, 1985)—represent an increase from 0.5 percent ad valorem for pasta not containing egg to 40 percent. Duties on egg-containing pasta rose to 25 percent ad valorem from the normal duty of 0.25 percent.

In a statement issued Oct. 31, U.S. Trade Representative Clayton Yeutter said, "Regrettably the EC did not table a negotiating proposal until today, and that offer was clearly inadequate." He called the EC response "extremely disappointing."

GATT Dispute Panel Decision

The United States has claimed that the EC has blocked final acceptance of a General Agreement on Tariffs and Trade dispute panel decision rejecting special import preferences for imports from the surrounding Mediterranean countries for several months (2 ITR 898, July 10, 1985).

In Brussels, the EC announced that the U.S. action was unfair and said it would retaliate immediately with higher duties of its own on U.S. exports of lemons and walnuts. Their duties on lemons will rise from 8 percent ad valorem to 20 percent; walnut duties would go from 8 percent to 30 percent.

EC Charges U.S. Responsibility

Willy De Clercq, EC commissioner for external relations, asserted in Brussels: "The U.S. has ... taken responsibility for setting in motion a process that needlessly aggravates an already tense trade situation. This escalation does not make sense. It can only damage the two parties involved."

The EC official described the unilateral U.S. action as clearly in violation of the GATT, calling it a "quasi-embargo striking harshly against a Community industry particularly important for one of our member states, Italy." De Clercq said the U.S. decision was "particularly regrettable because it was taken despite progress made in exploratory contacts and despite the Commission's considerable efforts to find a reasonable and balanced solution to the citrus problem."

De Clercq contended that the Community is unable to meet the U.S. demands because any agreement would depend on the outcome of talks now under way with certain Mediterranean countries which are granted special trade preferences by the European Community. Those talks could last months, EC officials admit.

California Interests At Stake

Sen. Pete Wilson (R-Calif), anticipating lack of action by the deadline, charged in a Senate floor statement Oct. 29 that the EC has "whiled away the summer and waited until the middle of October to obtain even the bureaucratic mandate needed to begin negotiations on the preferential citrus agreements with Mediterranean countries." The bureaucratic delay is Europe's problem, not Washington's, Wilson maintained.

Wilson said the United States should counter-retaliate against the EC if the Community chose to impose higher duties on U.S. lemon and walnuts. California's citrus industry has lost $48 million annually to the discriminatory EC action since the unfair trade practice was first brought to the attention of U.S. trade officials in 1970, according to Wilson.

James Murphy, assistant trade representative for Europe and the Mediterranean, reportedly flew to Brussels three times in the past two weeks to head off a confrontation over the dispute. On learning that the EC agreement with certain Mediterranean countries was still some time off, he is

understood to have recommended that the Administration impose the promised duties on European pasta effective on the Nov. 1 deadline, rather than postpone the action again.

EC pasta exports to the United States are valued at about $30 million a year. Annual U.S. exports of lemons and walnuts to the EC amount to $1 million and $32 million, respectively, according to EC calculations.

Unfair Trade Practices

USTR SENDS FIRST 'NATIONAL TRADE ESTIMATE' TO CONGRESS LISTING OVERSEAS TRADE BARRIERS

The U.S. Trade Representative Oct. 29 transmitted a 240-page report on the more outstanding trade barriers to U.S. exports of goods and services existing in some 34 countries and the European Community.

The report was the first annual "National Trade Estimates" report to Congress required under the 1984 Trade and Tariff Act (1 ITR 528, Oct. 31, 1984). It excludes barriers in non-market economies.

In his accompanying letter to Senate Finance Committee Chairman Bob Packwood (R-Ore), USTR Clayton Yeutter pointed out that some of the report's information had been used recently to establish "priorities for specific U.S. initiatives." In many of the cases, consultations or other proceedings have already begun under Section 301 or the General Agreement on Tariffs and Trade dispute settlement mechanism. "In most others, we are in some stage of bilateral negotiations with the applicable foreign government," he stated.

Much of the work will also be used by the newly created unfair trade practices strike force in the Commerce Department (2 ITR 1328, Oct. 23, 1985), Yeutter noted.

Included in the report are evaluations of such questionable practices involved in tariffs and other import charges; quantitative restrictions; import licensing; customs barriers; standards, testing, labeling, and certification procedures; government procurement; export subsidies; lack of intellectual property protection; countertrade and offsets; services barriers; and investment barriers, among others.

Countries included are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, the European Community, West Germany, Finland, France, India, Indonesia, Italy, Japan, South Korea, Malaysia, Mexico, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, the United Kingdom, and Venezuela.

A preface to the report emphasizes that many of the barriers are not illegal under the GATT. Their impact further supports the need for another international round of trade negotiations, Yeutter pointed out.

Drafts of the USTR report were reviewed by various industry sector advisory committees.

An updated list of pending Section 301 cases issued by USTR recently appears in the Text Section.

Trade Policy

SENATE DEMOCRATS ISSUE LEGISLATIVE TRADE PROGRAM, EXPRESS HOPE FOR BIPARTISAN PLAN

Arguing that the Administration has failed to establish a coherent, effective trade policy, Senate Democrats Oct. 30 announced a five-point legislative program designed to enhance this country's competitive position.

The plan, which was endorsed in principle the day before by the Senate Democratic Caucus and which is to be introduced soon in the form of a bill, was apparently put forth at this time to enable the Democrats to seize the initiative on trade legislation. A comprehensive trade package currently is being put together by staffers for members of the Senate Finance Committee—almost all of them Republicans—and is scheduled to be introduced before Thanksgiving (2 ITR 1362; Oct. 30, 1985).

Plan Offered As 'Consensus Legislation'

In announcing the program on behalf of the Senate Democratic Working Group on Trade Policy, Sen. Lloyd Bentsen (D-Texas) described the plan as "consensus legislation" and argued that it will help to begin the job of building a bipartisan consensus on trade policy in the Senate. However, the move surprised some of those involved in formulating the omnibus Senate bill and seemed to mark yet another move in the political tug-of-war between the two parties over trade legislation. Both House Democrats and House Republicans have already announced their omnibus proposals (2 ITR 1289, Oct. 16, 1985), and congressional observers have been waiting for weeks to see what would happen in the Senate.

At the same time, however, Bentsen's emphasis on bipartisanship and the relative similarities among the packages and recommendations announced to date suggest that Democrats and Republicans will be able to reach a compromise when they turn their attention next year to coming up with an omnibus trade bill.

GATT Reform Urged

Among the points made by the Democratic senators was that the General Agreement on Tariffs and Trade should be reformed first before it is burdened with new rules of conduct. The Democrats noted that the Administration wants to come up with rules on trade in services in the planned new GATT round, but argued that "GATT coverage of services will be meaningless if we are unable to apply GATT rules to the subjects already covered in name only, such as trade in agriculture and trade with developing countries, as well as to make the existing rules enforceable and reciprocal."

Besides that, the trade bill planned by the Democrats will modify a procedure enacted in 1984, so that at least 60 days before formal trade negotiations begin, the Administration must set out in detail what preparations it has made. By disapproving the negotiations at this stage, Bentsen said, the congressional trade committees "could keep for Congress the option of amending any legislation the Administration might eventually propose to implement agreements arising out of such negotiations. However, if the plan were approved, the Administration would have the benefit of the special fast track for trade legislation."

Asserting that current trade policymaking is "confused and disorganized," the Democratic measure will also create a National Trade Council to make trade policy "a high national priority" and to replace the interagency committees that have grown up during the Reagan Administration. Also planned is a National Trade Data Bank to coordinate existing federal trade data programs and make recommendations for improving the timeliness, comprehensiveness, and utility of the existing data, the senator said.

Finally, Bentsen asserted that a study is needed of the future of the U.S. economy as it will relate to the "new global economy" of that era. Accordingly, the bill will