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TO: Avery DGI
FROM: Richard Wright *Raw*
DATE: February 20, 1991

*441.2(103)
Special file*

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: Schaub, Verrue, Lennon DGIII
: Hardy, Wilkinson DGXIII
: Kuijper DGXIII

SUBJECT: EXPORT CONTROLS - Reauthorisation of the Export Administration Act / US policy goals regarding COCOM

(1) EAA demarche and state of play

As agreed a letter signed by Ambassadors Van Agt and Philippe was sent last week to key Senators involved with the legislation to renew the Export Administration Act. A copy of the letter and list of destinataires is attached .

The EAA is today being debated on the floor of the Senate ; as we report no agreement has been reached between Democrats and Republicans on possible compromises on the two issues of interest to the EC namely the provisions on Chemical and Biological Weapons (CBW) and the Mack amendment on Cuba. According to an informed staffer on the Republican side there is no hope of getting, as the Administration wants, an open ended waiver authority giving the President discretion as to whether to apply sanctions for a violation of the CBW proliferation provisions. What is now under discussion is whether a " modest " amount of additional discretion could be obtainable. As yet there is no sign that even this would be acceptable to the Senate Democrats.

On Cuba the White House is also looking for flexibility in application of the provision. A general waiver authority is out so attention is being given to the possibility of a case-by-case review with a waiver in the event that applying the provision would be adverse to the US national interest. This has also made little headway ; another idea being bandied about is the possibility of a waiver in the case of conflicts of jurisdiction. So far , however, Senator Mack (D- Fl) shows no sign of compromising on his cherished amendment. We will keep you informed of further developments .

The Administration's ability to negotiate changes in the legislation on these items is severely constrained by the fact that the Senate leadership has the votes for passage of the 1990 Bill as well as for an override vote. As mentioned earlier the House will take up the EAA when the Senate completes passage of its version of the legislation.

We heard today that Canada has threatened again to invoke the provisions of its " Foreign Extraterritorial Measures Act " in case the Mack amendment becomes law. This would have the effect prohibiting any person or corporation in Canada from complying with any US measure to prevent trade between Canada and Cuba. We enclose a Canadian Press release on this subject.

(2) Administration policy goals relating to COCOM

On 14 February Delegation attended a seminar hosted by the Electronic Industries Association at which the keynote speaker was Robert Gates, Deputy Assistant for National Security Affairs at the White House. He gave an impressive and interesting talk on US export control policy arguing that the Administration was adjusting its controls but at a pace which safeguards national security. Since the COCOM core list review had begun a year ago one third of US export controls have been cut and there has been a 40% reduction in export licenses issued by Commerce. Gates added that when the core list is implemented in spring a further 25% reduction in licenses can be expected. On remaining covered products there was a convincing national security justification for maintaining controls in place.

With regard to certain East European countries (Poland, Hungary, and Czechoslovakia) the US have been pushing for a loosening of controls commensurate with these countries' introduction of export controls and re-export controls.

On telecommunications , Gates reported that technical experts had been working hard on the core list but the Administration still harboured major reservations about top of the line telecommunications equipment such as data switching systems being liberalised . The same reservations were held with regard to fibre optics equipment.

With respect to the Administration's efforts on non-proliferation export controls Gates said that " too often" the US had been left alone. He argued strongly that the Administration must act vigorously and in concert with its allies to stop the spread of weapons of mass destruction. He added that at meetings of the Australia group and at meetings of the Missile Technology Control regime countries the US would continue to push for co-operative multilateral efforts to control proliferation of these technologies and weapons. He felt that the Iraq war had shown up the dangers of inaction to all nations and the need to attack these matters aggressively. It was incumbent on the US to take on a leadership role.

In summary Gates argued that the end goal of US export controls was to prohibit exports which aid adversaries while avoiding choking off trade and investment. The Administration was doing its best , he argued, to balance these divergent interests.



Andreas Van Agt

The attached letter pertaining to the Export Administration Act was sent on 14th February, 1991 to the following members of Congress.

The Honorable John Heinz
Robert Dole
George Mitchell
Jake Garn
Claiborne Pell
Donald W. Riegle
John McCain
Paul S. Sarbanes
Alan Cranston
Jesse Helms

We note in passing that the recently published study on US export control policies requested by the Congress under the 1988 Trade Act which was undertaken by the National Academies of Sciences and Engineering supports our approach on these matters. We refer in particular to the following statement on pages 63-64 of this study "A distinctive feature of foreign policy export controls is that they may be applied with extraterritorial features and without corresponding action in other countries. As a result, they have caused serious damage both to the reputation of the United States as a reliable trading partner and to the competitiveness of US companies whose major foreign competitors are not similarly constrained". The study also makes the essential point of the need for a multilateral approach to dealing with threats of proliferation concluding on page 58 that "Without comprehensive multilateral regimes, the chances for effective control of proliferation threats are critically weakened".

Much the same considerations underlie our concerns about Section 128 of the Bill one of whose effects would be to prohibit US-owned subsidiary companies located outside the US from trading with Cuba. Notwithstanding our objections to the extraterritorial extension of US law to which this provision gives rise we would point out also that it is in sharp contradiction with the view frequently expressed by the US government that US enterprises domiciled in foreign countries should benefit from national treatment (i.e. be treated no less favourably than enterprises from the home country). By considering US subsidiaries in the EC trading with Cuba as falling within US jurisdiction, these companies are in effect being denied the very treatment that is espoused for them in other contexts.

We would ask you to take these views into account as the Senate debates the reauthorisation of the Export Administration Act in the next few days.

Andreas van Agt

Andreas van Agt
Head of Delegation

S. ...

André Philippe

André Philippe
Ambassador of Luxembourg



DELEGATION OF THE COMMISSION
OF THE EUROPEAN COMMUNITIES

14th February, 1991

The Head of the Delegation

The Honourable
John Heinz
United States Senate
Washington, D.C. 20510

Dear Senator,

We are writing to you in relation to the Bill to reauthorize the Export Administration Act of 1979 (S320) which will shortly be considered by the full Senate.

The European Community and its Member States have followed the Congressional debate on this legislation very closely because contained within the Bill are two sections which have the potential to have a negative impact on the Community's interests and indeed on EC-US relations as a whole.

The first of these sections is Title IV ("the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991"). The European Community and its Member States fully subscribe to the main aims of this title which are to control the proliferation of chemical and biological weapons and to seek multilaterally coordinated efforts with other countries to control such proliferation. Indeed the need for such efforts has never been so pressing as it is today.

These laudable aims - which, we repeat, the Community and its Member States fully share - could be undermined by other parts of the legislation which provide for the application of unilateral US requirements and sanctions in respect of activities undertaken outside the territorial jurisdiction of the US by companies incorporated within the EC. The European Community and its Member States have stated on many occasions that such extraterritorial extension of US jurisdiction is unacceptable as a matter of law and policy and we repeat again that we still strictly adhere to this position of principle.

Government
of CanadaGouvernement
du Canada

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news release

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For release

NEW U.S. "MACK AMENDMENT" WILL BE BLOCKED

The Secretary of State for External Affairs, the Right Honourable Joe Clark and the Attorney General of Canada, the Honourable Kim Campbell, said today that firm action will be taken to counteract a renewed attempt by the U.S. Congress to restrict trade with Cuba by U.S.-owned subsidiaries resident in Canada.

A measure was introduced in the U.S. Senate which, if passed into law, would prevent the issuance of any licences for trade with Cuba and therefore make it unlawful for any U.S. subsidiary abroad to trade with Cuba even in goods of local origin. This measure is part of the Export Administration Act Amendments of 1991.

In October 1990, the U.S. Congress passed a bill with an identical provision, referred to as the "Mack Amendment." Its application in Canada was blocked immediately by an order of the Attorney General of Canada under the Foreign Extraterritorial Measures Act (FEMA). Subsequent to this action and strong diplomatic representations by Canada, President Bush vetoed the bill and the Mack Amendment did not become law.

Ms. Campbell said that she would not hesitate to block the application of the new legislation to Canada through a fresh order. "Last year, with the concurrence of the Secretary of State for External Affairs, I issued an order respecting an identical provision in U.S. legislation to protect Canada's sovereignty. If the U.S. Congress passes this law, I shall take action again for the same reasons."

Canada

Mr. Clark said, "Canada's opposition to last year's Amendment was supported by President Bush's veto. We are therefore disappointed that this measure has been reintroduced in Congress. I hope members of Congress will reflect on the unacceptable nature of this extraterritorial application of American law in Canada. Let there be no doubt that Canada intends to block compliance with this measure by Canadian firms."

The Canadian Embassy in Washington will be making representations to the U.S. Government and Congress in the days ahead.

An order under FEMA could prohibit any person or corporation in Canada from complying with any U.S. measure to prevent trade between Canada and Cuba, and require them to report to the Attorney General any directives or instructions relating to such a measure.

Since 1963, Canada has rejected attempts by the United States to regulate trade with Cuba by Canada-based companies. Parliament passed FEMA in 1984 to counter the adverse effects of extraterritorial application of foreign laws to Canada's international trade or commerce.

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