COMMENTS OF THE EUROPEAN COMMUNITY ON THE AMENDMENTS OF 22 JUNE 1982 TO THE U.S. 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 U.S. 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 U.S. regulations, as amended, contain sweeping extensions of U.S. jurisdiction which are unlawful under international law. Moreover, the new regulations and the way in which they affect contracts, in course of performance, seem 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

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States[1] is required to get prior written authorization from the Office of Export Administration for export and re-export to the U.S.S.R. of non-U.S. goods and technical data related to oil and gas exploration, production, transmission and refinement.

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[2] 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 written assurance was required under the U.S. Export Regulations when the data were exported;

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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)

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

- if any person subject to the jurisdiction of the U.S.A. (as defined in Note(3)) 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 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 U.S. 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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(3) 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)

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-U.S. 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(4).

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 rule 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 -

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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 company, subsidiary or other "U.S. controlled" company through a licensing agreement, royalty payments, or payment of other compensation, or because they have bought certain goods originating in the U.S.

7. Ad (I) The amendments in two places purport to subject to U.S. jurisdiction companies, wherever organized or doing business, which are subsidiaries of U.S. companies or under the control of U.S. citizens, U.S. residents or even persons actually within the U.S. This implies that the United States is seeking to impose its corporate nationality on companies of which the great majority are incorporated and have their registered office elsewhere, notably in E.C. Member States.

Such action is not in conformity with recognized principles of international law. In the Barcelona Traction case, the International

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Court of Justice declared that two traditional criteria for determining the nationality of companies, i.e. the place of incorporation and the place of the registered office of the company concerned, had been "confirmed by long practice and by numerous international instruments". The Court also scrutinized other tests of corporate nationality, but concluded that these had not found general acceptance. The Court consequently placed primary emphasis on the place of incorporation and the registered office in deciding the case in point(5). This decision was taken within the framework of the doctrine of diplomatic protection, but reflects a general principle of international law.

8. Ad (II) The notion inherent in the subjection to U.S. jurisdiction of companies with no tie to the U.S. whatsoever, except for a technological link to a U.S. company, or through possession of U.S. origin goods, can only be that this technology or such goods should somehow be considered as unalterably "American" (even though many of the patents involved are registered in the Member States of the European Community). This seems the only possible explanation for the U.S. regulations given the fact that national security is not at stake here (see below under B).

Goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them. Several Court cases confirm that U.S. jurisdiction does not follow U.S. origin goods once they have been discharged in the territory of another country(6).

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9. The amendments of 22 June 1982, therefore, cannot be justified under the nationality principle, because they ignore the two 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-U.S. 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(7). 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.

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(7) 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

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-U.S. companies to submit "voluntarily" to this kind of mobilization for U.S. purposes. 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(8). 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, freedom of contracts 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.

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

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).

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

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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.

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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.

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

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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 law 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.(9)

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.(10)

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(9) Wisconsin v. Pelican Insurance Company, 127 U.S. 265, 290 (1888), Restatement (2nd) conflict of laws para. 89.

(10) Restatement (2nd) para. 90

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...".

17. 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[11]

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

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 of 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".

A similar approach was followed in Mannington Mills[12] 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".

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

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

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[13] enjoins the evaluation of such factors as place of the activity to be regulated, links of persons falling under the regulation with other States,

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(13) 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.

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. governement 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

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already has sufficient spare capacity, at least 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. exports 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 bu the U.S. authorities at the time of their conclusion.

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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 the 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.(14)

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"(15). 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.

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

(15) Nashville et al v. Walters, 294 US 405, 429 (1935)

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,(16) 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.(17) 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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(16) Buttfield v. Stranahan - 192 U.S. 470, 493 (1904) indicates that insofar as it concerns U.S. external trade, it may be difficult to assert Fifth Amendment rights.

(17) This is not to say that the E.C. agrees in principle with the way in which these regulations handle the problem of extraterritoriality.