During 1982, a major dispute developed between the European Community and the US over the sale to the USSR of equipment related to the West Siberian gas pipeline project. As well as stopping direct exports for the project by US based companies the US Administration sought, through regulations made under the Export Administration Act:

- to stop the onward sales by overseas companies of equipment and components which had originated in the US;

- to prevent the fulfillment, by overseas subsidiaries of US companies, of contracts related to the pipeline, even where such contracts involved goods and technology originating outside the US, and

- to prevent the fulfillment of contracts by overseas licensees of US technology.

The regulations applied restrospectively to existing commercial contracts.

While the British Government supported the political objectives which motivated the US Administration - to bring about an improvement in the situation in Poland - it did not accept its imposition of export controls on companies registered and operating outside of its own territory.

The dispute was settled when the US lifted its regulations in November. However the British Government considers that its objection to the "extraterritorial" exercise of export control through the Export Administration Act remains valid. The pipeline case was only the most significant instance of regulations under the Act being made in support of unilateral US foreign policy objectives - with consequent damage to British and European commercial interests.

The Export Administration Act is due for renewal this summer. The British Government believes that the renewal offers an opportunity to remove a major source of irritation which has afflicted political and commercial relations across the Atlantic in the past and which could lead to further conflict in the future. It believes that amendments could be made to the legislation which would not reduce the President's powers to exert export controls on US based companies but, equally, would not permit the use of those powers in a way which infringes the sovereignty of foreign nations.

The Government is pursuing its case with the US Administration and in the Congress. It has and will continue to present political, economic and legal arguments along the following lines.

Major objections to the Export Administration Act

We object to a number of the features of trade sanctions imposed under the Export Administration Act including:

- their unilateral application to companies incorporated outside the US on the strength of a US shareholding;

- their unilateral application to goods and technology held outside the US on the strength of US origin;

- their retroactive application to contracts entered into lawfully and in good faith;

- their use in support of unilateral, and sometimes unpredictable, US foreign policy objectives and the lack of a requirement in such cases to consult foreign governments in advance.

We believe that these features of the export control regulations have already and may well, in the future, do considerable economic and commercial damage to the interests of both friendly countries and to the US itself. We consider their extraterritorial aspects to be invalid in international law. Further, we consider that the

threat of lasting political damage being done to the Western Alliance through the perpetuation of these practices is a real one.

Why the Act can damage commercial interests overseas and in the US

Regulations having an extraterritorial effect can damage the commercial and economic interests of friendly countries through:

- reduced industrial activity and the loss of important export markets;

- financial losses followed by job losses in companies which are incorporated outside the US;

- long term harm to the reputation of foreign registered companies as reliable suppliers.

Damage to US commercial interest is equally significant:

- foreign governments and other authorities which have traditionally welcomed US investment may feel differently if those investments are to be continually affected by US
- foreign policy concerns which may not be shared fully by the host government;

- because foreign companies and governments may wish not to remain dependent upon US materials, components and technology whose supply is, again, subject to the uncertainties associated with measures under the Export Administration Act.

There are also shared interests affected. Both the British and the US governments are, for instance, concerned about the free flow of investment and wish to promote collaboration in high technology industry. US export controls imposed unilaterally on overseas companies act against both objectives. It is especially contradictory for the US Administration to argue through the OECD for non-discriminatory or "national", treatment by host governments on inward investment while, at the same time, claiming the right unilaterally to influence and, perhaps, damage the operations of overseas subsidiaries of US companies for foreign policy purposes.

## Political arguments

The British Government recognises the need to prevent materials and technologies of real strategic significance from falling into the wrong hands. We have a good record of acting on our own account and of cooperating in international moves to improve strategic controls.

But action which is taken for strategic and political reasons and which has an affect on companies registered and doing business in the UK must be imposed directly by the British Government, whether it is acting independently or under policies agreed with our allies.

This is a fundamental issue of sovereignty. Only the US claims a right to apply controls of this kind outside its territory. It is not difficult to imagine the reaction in Congress and the Administration if the UK or any other foreign government attempted to exert similar powers on companies operating in the US.

Equally important is the damage that can be done to the Western Alliance by conflicts of this nature. If foreign policy-related trade measures are not imposed through consent among the Allies then the West appears incoherent, weak and divided. US Government action which is seen to disregard the sovereignty of the UK and other European nations and which damages companies and jobs imperils the Alliance and brings transatlantic relations into disrepute.

## European Community Interest

The UK views above are broadly shared by our European partners and the European Commission. The European Community played a prominent role in bringing pressure to bear on the Administration during the pipeline affair and has recently added its own representations on the Export Administration Act renewal to those made bilaterally by the UK.

## The legal challenge

In essence, the view of the British Government is that the extra-territorial aspects of regulations made under the Export Administration Act are contrary to international law. We believe this view is supported by the weight of court decisions and learned authority and that it is shared by the overwhelming majority of other countries.

# THE EXTRATERRITORIALITY PROBLEM

The problem of the exercise of extraterritorial jurisdiction is not new. The British and US governments have been discussing the general issue and individual cases for at least 25 years. Originally the problems were concentrated in the competition (antitrust) policy area, but latterly there have been other issues as well, notably the West Siberian pipeline dispute. Earlieron, the problem was regarded as primarily a legal one. But cases in recent years have demonstrated that the extra-territorality issue has some highly charged political and economic aspects. It touches on such sensitive issues as national sovereignity and is properly the concern of Governments as much as, if not more than, lawyers. The concern of the British government falls into three main areas.

## The "effects doctrine"

First, is the claim to jurisdiction through the "effects doctrine". This is the claim that a State may investigate activities outside its territorial jurisdiction if it believes that those activities have had a substantial and foreseeable effect on its domestic or foreign commerce. It generally arises in the field of competition (antitrust) policy, where UK companies have been proceeded against by the US authorities and courts in respect of activities carried on outside the United States, but which are perceived to affect US commerce.

The US has the most elaborate and comprehensive body of antitrust laws in the world. The method of their enforcement is essentially judicial, and infringements are subject to stringent criminal as well as civil action. This includes the provision for injured private parties to claim three times the damages they have suffered - "treble damage suits". It is open to any aggrieved person to bring an antitrust suit in the US and the bulk of US court cases are private suits. These cases are generally handled by US attorneys on a contingency fee basis if they lose the plaintiff does not have to pay costs and if they win they take a percentage of the damages.

In addition the US system provides for wide ranging discovery procedures involving demands for documents and commercial information located overseas. These procedures, which allow penalties for non-compliance, are not paralleled by any other country in the world. The British Government has consistently objected to "fishing expeditions" of this kind and provision was made in Section 2 of the Protection of Trading Interests Act 1980 to counter these demands.

## The "enterprise entity" doctrine

The second area of concern involved claims to jurisdiction based on the "enterprise entity" doctrine. In this case jurisdiction is claimed over foreign subsidiaries and affiliates of US companies by virture of the US shareholding in them. Their separate legal identity under the laws of the country of incorporation is disregarded.

Certain US domestic legislation defines a "United States person" and "persons subject to the jurisdiction of the United States" as to include not only individuals and companies with undisputed US nationality, but also companies incorporated in other countries in which there are shareholdings by US individuals or US incorporated companies, sometimes amounting to as little as 25%.

The contents of these United States laws impose various foreign policy based economic measures - for instance the US trade boycotts of Cuba, North Vietnam and North Korea, and the countering of the Arab boycott of Israel. These laws have been invoked by the US in attempts to prevent subsidiaries and affiliates of US companies in the UK from exporting goods manufactured in the UK from UK materials and UK technology to US prescribed destinations. The most recent and potentially damaging example was the West Siberian pipeline dispute.

In addition the US applies controls on the export and re-export of US origin goods and technology, claiming to extend these controls to the re-export of goods and technology from one foreign country to another.

The regulations of December 1981 and June 1982 banning the export of oil and gas equipment and technology to the USSR (the West Siberian pipeline dispute) were the most recent and spectacular examples of US export controls with these objectionable features.

No other country has such a wide ranging and detailed export control policy, and furthermore the US is alone in insisting on the right to control re-exports of wide categories of goods, many of which have no strategic application. Moreover the US's attempts to use its export and re-export control systems in support of peacetime foreign policy objectives have brought it into conflict with not only its allies, but also US business interests. These interests are concerned at the dislocation caused by what they term the "light-switch diplomacy" of the Administration.

US Demands for Commercial Information Overseas

The third area of concern is not in the strict sense of the word an extraterritorial one. It occurs in cases where US regulatory agencies, such as the Commodity Futures Trading Commission (CFTC) and the Securities Exchange Commission (SEC), attempt to extend their undisputed jurisdiction over activities in the US by demanding information about the non-US activities of foreign companies and information located abroad. In making such demands we believe these agencies go beyond the proper execution of their functions.

One such case involved a UK commodity dealer trading on the New York Exchange. The CFTC issued a demand for information about his contracts that was extensive and sought details about customers and transactions outside the US. Diplomatic representations failed to move the CFTC and a Direction not to produce the information requested was therefore issued to the company in March 1981 under Section 2 of the Protection of Trading Interests Act 1980.