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April 28, 1983

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

US Export Administration Act of 1979

1. The European Community and its Member States wish to refer to the recent proposal of the U.S. Government concerning the renewal of the Export Administration Act of 1979.
2. The European Community and its Member States wish to express their regret that the proposal has left the extra-territorial aspects of that Act largely intact and would appear indeed to have reinforced their impact in at least one respect.
3. While it is true that there is a new provision in Section 3 ("Declaration of policy") stating that it is the policy of the United States to minimise the impact of new foreign policy controls on business activities in allied or friendly countries, this policy statement is not matched by any amendments to those provisions in the operative sections of the Act which give rise to the possibility of extraterritorial application. Further, it leaves intact the possibility of taking extraterritorial measures for foreign policy reasons where this would be consistent with the underlying purpose of the controls. This statement also fails to address the question of extraterritorial application of controls where the controls are exercised for national security or short supply purposes.

4. The European Community and its Member States draw attention in this connection to the following defects in the draft bill:

a) the inclusion in Sections 5, 6 and 7 of the term "Person subject to the jurisdiction of the United States" without any definition to clarify that the words do not include the overseas subsidiaries or affiliates of U.S. parent companies;

b) the inclusion in Sections 5, 6 and 7 of some or all of the words "goods, technology or other information subject to the jurisdiction of the United States" without any definition to clarify that the words do not include goods, technology or information located outside the United States;

c) the retention in the definition of the term "United States person" in Section 16 of the words "and any foreign subsidiary or affiliate including any permanent foreign establishment of any domestic concern which is controlled in fact by such domestic concerns."

5. Furthermore, the possibility given to the President (in Section 11 (c) (3) to prescribe controls on imports of goods or technology of "whoever violates any national security controls" imposed under the national security provision (Section 5) of the Act, must, by its very nature apply mainly to companies outside U.S. jurisdiction, and can thus only have the effect of increasing or reinforcing the extraterritorial use that is likely to be made of national security controls.

6. The European Community and its Member States also wish to point out that the use of import restrictions in this manner could be contrary to the GATT. Article XXI of GATT does not

permit such extensive interpretation of national security as to permit controls to the extent envisaged in Section II (c) (3).

7. Furthermore, the proposal strengthens the enforcement section and penal sanctions in a way which will affect acts taking place outside U.S. territory and could undermine the climate of confidence indispensable to trade.

8. Finally, the European Community and its Member States would like to express their appreciation of the inclusion in the U.S. Government proposal of a contract sanctity clause (end of Section 6). They are concerned, however, with the limitations imposed in this clause.

9. Is it necessary to restrict transfer of goods under this clause to a period of 270 days? This time limitation may be appropriate when speaking of perishable goods (as in the Agricultural Futures Trading Act of 1982) but would seem inappropriate and of very limited application for contracts involving industrial goods which can require a longer delivery schedule before even the first transfer of goods takes place under the contract.

10. Furthermore, the sanctity clause only applies to transfer of goods or technology under sales contracts. This appears unnecessarily restrictive given that controls may also exist, and goods be transferred, under other types of contract, e.g. licences contracts, lease with option to purchase, etc.

11. Again, the sanctity clause only applies in the case of

foreign policy and not in the case of national security or short supply controls. Different economic or strategic considerations obviously apply in each case, but in the opinion of the European Community and its Member States these considerations are not sufficient to warrant application of the principle in one and not in the others.

12. Finally, the principle established is not absolute, is only a policy statement, and will only be exercised to the extent consistent with the underlying purpose of the controls. This fails to create the certainty in commercial dealings which would normally be achieved through a contract sanctity clause.

13. In conclusion, the Community and its Member States wish to reiterate their deep concern with the features of the Administration's proposal discussed above and in particular with its extraterritorial and retroactive reach. They therefore urge the Administration to reconsider these aspects which are contrary to international law and comity and are unacceptable in the context of relations with friendly countries.

Washington, D.C.

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