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# ECONOMIC SANCTIONS AS AN INSTRUMENT OF U.S. STRATEGIC AND FOREIGN POLICY

On October 16, 1982, alumni of the University of Pennsylvania Law School and friends of Professor Schwartz sponsored the first Louis B. Schwartz International Trade Conference at the Law School in Philadelphia. The conference addressed the timely issue of "Economic Sanctions as an Instrument of U.S. Strategic and Foreign Policy", focusing upon economic and political consequences of sanctions for the United States and its allies as well as for the target nation. The panelists for the conference were:

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## Introduction

Although economic sanctions against Argentina, Chile, Iran and Rhodesia were also discussed, most of the Conference focused upon the sanctions announced by President Reagan on December 29, 1981, intended to deter Soviet encouragement of martial law in Poland. The most controversial of those sanctions, the so-called "pipeline sanctions", commanded the greatest amount of attention from Conference participants.

The Commerce Department issued the pipeline sanctions on December 30, 1981, under the authority given to it by Congress in the Export Administration Act of 1979 [1]. The regulations extended the existing export licensing requirement covering trade with the U.S.S.R. in equipment and technical data for oil and gas production and exploration [2], to equipment and technical data for oil

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and gas refinement and transmission [3]. The December 30, 1981, regulations also suspended processing of license applications for exports to the U.S.S.R.

The Commerce Department issued amendments to the regulations on June 22, 1982, which extended licensing to the export of foreign goods and technical data by companies owned or controlled by U.S. persons [4]. The amendments also applied to foreign-produced goods whose production depended on U.S. technology licensed by a company subject to U.S. jurisdiction. The June 22 regulations also suspended the processing of license applications for export to Poland.

The pipeline sanctions were very controversial at the time of the Conference, and until President Reagan rescinded them effective November 13, 1982 [5]. Conference participants voiced many of the same concerns raised by U.S. corporations, foreign firms, and foreign countries affected by the pipeline sanctions.

*Dean Mundheim*

Our topic this morning is economic sanctions as an instrument of U.S. strategic and foreign policy, and it is most timely. Our first speaker, Bill Taft, will set forth the theme of our present policy and its rationale.

*Mr. Taft*

Thank you. I will describe the present policy of the government. Our subject concerns using economic sanctions against Communist countries, particularly Eastern European countries and the U.S.S.R., in order to have some impact on their power and on the policies which they pursue.

First, it is important to remember that our economic policy is carried on in the context of our national security policies and overall foreign policies, and is one component of our overall bilateral relationship with Eastern European countries rather than our dominant concern. These countries are not our allies. Some of them are members of a military alliance, and one in particular poses a substantial and growing military threat to our country and to our allies. In the Third World, these countries have pursued policies inimical to our interests, while attempting to frustrate our own policies. Thus, while the terms of our economic relations with the Eastern European nations are established, our primary concerns must be national security and our other foreign policies.

The national security issue should not be brushed aside too quickly. In many circumstances, national security concerns do have a direct impact on our terms of trade with the Eastern bloc. Trade can result in development of technologically advanced systems, because the Soviet Union and its allies use trade to collect technological information. The Soviet Union's use of this technology to increase its military capabilities causes us tremendous expense. We in turn must develop systems to respond to the threats that, with the benefit of the technology received through trade, these countries are able to pose.

The direct solution is economic sanctions – the policy that we will not trade with these countries in technological equipment which will advance their military capabilities. Our allies are generally agreed that when a country threatens you, you withhold items which will enhance its military capability. The economic sanctions that we have imposed to restrict trade with the U.S.S.R. and its allies are the result of a straightforward application of this principle, which is the policy we start with in the government. It requires working with our friends, at which we will continue to improve as evidence mounts that the technology made available through trade has indeed increased the military threats posed to the Western alliance.

When the economic sanction is directed toward achieving a foreign policy objective rather than national security, the analysis is more subtle. Unless the unusual situation arises where the sanction is a total one directed toward essentially undermining the countries involved, for example against Rhodesia in the late 1960s, sanctions must be established very carefully.

The relationship between a selective sanction and a selected foreign policy objective is part of our overall foreign relations and economic dealings with the countries affected. The trick is to identify the conduct you wish to affect, and to select the economic sanction appropriate to that goal. The sanction should be designed to positively affect the conduct of the country involved. If this effect is a practical economic consequence of the sanction, that is to the good, but it is not essential. You can create a relationship between the conduct and the sanction simply by stating it. The sanction is appropriate in that intermediate area where military force is excessive but where the expression of moral outrage is simply inadequate.

What kind of sanction and what kind of conduct should be matched up? First, a sanction, if successful, should have an adverse effect. For example, if the pipeline sanctions were completely successful, the pipeline would be retarded or abandoned, an objective which the United States supports. The grain embargo is different since our policy is not to prevent the Soviet Union from feeding its people. That would be an undesirable result.

A second point is that the imposition of the sanction should be equitably borne within the country imposing it. This policy is a matter of common sense and political practicality. A sanction that bears unequally on one segment of our own society will be difficult to sustain over the long run. This was another defect of the grain embargo – it imposed an extremely heavy burden on just one segment of our society. The pipeline sanction would have an identifiable impact on our society and on particular segments of it, but in this case the burdens imposed on the directly affected segments of our industry are smaller, and can be more easily accommodated, than could the grain embargo.

Finally, the foreign policy or conduct of the country that is the subject of the sanction should be both discrete and newly established. The Afghanistan situation and the Polish situation, which provoked the two different em-

bargoes, were both changes in the policy of the Soviet Union with respect to Afghanistan and Poland. Because it is a change, such a policy presumably can be reversed and this helps to give logic to the sanction.

If the targeted conduct is indeed reversed, you need to be prepared to lift the sanction, and the country that is being sanctioned should receive some immediate benefit from its removal. If that nation wants the sanction lifted, the incentive to reverse the objectionable policy will be strong.

To make the sanction effective, to make it something that hurts the target, the cooperation of our allies must be obtained. We have had difficulties with this goal in the pipeline case and the grain embargo. Certain types of conduct should not occur without protest, however, and in specific circumstances the United States must attempt the sanction even if we are not able to obtain the cooperation of our allies. Thus, we should stress to the countries involved that we are concerned about the particular conduct, and that we will take steps towards reversing the undesirable conduct.

I think this discussion has outlined our policy and I am prepared to defend it. We now call on Lee Marks.

*Mr. Marks*

We are focusing on the use of export controls to influence Communist behavior, mostly in the context of the pipeline. But I think it is wise to start with some historical perspective. First, there is nothing new about the use of economic sanctions to influence behavior. We have had import controls for long portions of our history and have used them to reward friends and punish nonfriends.

The obvious example is the denial of most-favored-nation treatment to Communist countries, unless they meet certain conditions, mandated by sections 401–410 of the Trade Act of 1974 [6]. Also, the Jackson–Vanic amendment, section 402 of the Trade Act, links most-favored-nation treatment to the emigration practices of Communist countries: namely, to freedom of emigration [7]. Section 402 is an important illustration of one problem with the use of sanctions to influence behavior – they may prove counterproductive. Although the target was the Soviet Union, section 402 applies to all nonmarket-economy countries. Most of these have no significant emigration restrictions, and their existing restrictions do not single out Jews; religiously based emigration restrictions were one of the original targets of the Jackson–Vanik amendment [8]. Nonetheless the law says that the President may not extend most-favored-nation treatment unless he receives assurances from the country in question. Because most of these countries find this requirement offensive for reasons wholly unrelated to their emigration practices, section 402 has impeded East–West trade with a number of countries whose behavior in fact does not offend the legislative purpose.

We have had export controls at least since World War I under the Trading

with the Enemy Act [9]. That Act now applies only in time of war; similar but more restrictive powers apply under the International Emergency Economic Powers Act [10] for national emergencies. Under those laws, the President may prohibit virtually any kind of economic transaction with a designated foreign country – imports, exports, travel, and remittance. The International Emergency Economic Powers Act was the basis for the foreign asset controls imposed on Iran. Export controls are extensively used against countries other than Communist nations. During the Carter Administration, they were used to enforce human rights. We impeded the sale of Boeing jets to Libya; embargoed Uganda; embargoed all goods, including shoelaces and toilet paper, destined for the police or military forces of South Africa; and in one random application of economic sanctions to which I will return, we prevented Oshkosh Truck Company of Wisconsin from fulfilling its contract to sell 400 trucks to Libya.

U.S. legislation contains a number of export controls aimed at combatting human rights abuses. Foreign aid to all countries that grossly violate human rights is prohibited under the Foreign Assistance Act [11], and for these purposes foreign aid includes both AID assistance and Export–Import Bank financing. The prohibition of Export–Import Bank financing is often quite sufficient to prevent the consummation of an economic transaction. Indeed, the Evans Amendment [12] prohibits Export–Import Bank financing for any transaction in South Africa unless the Secretary of State certifies that the South African party to the transaction applies the principles of Reverend Leon Sullivan's nondiscrimination employment code to its workers. Needless to say, there has been no Export–Import Bank financing in South Africa since the passage of that amendment in 1978.

I would like to discuss the Oshkosh trucks contract, because it has several things in common with the pipeline and because it preceded the Export Administration Act of 1979 [13]. Most of our export controls are under that Act, the successor to the Export Control Act of 1949 [14] and the Export Administration Act of 1969 [15]. The 1979 Act was passed specifically to restore some balance in favor of exports and against controls.

Oshkosh, a Wisconsin manufacturer, entered into a contract to sell 400 standard off-the-shelf trucks to the Libyan government. Libya insisted that the force majeure clause in the contract exclude any reference to the imposition of U.S. export controls. Oshkosh asked the Department of Commerce if it could sell these trucks to Lybia. The Commerce Department said that the sale of standard off-the-shelf trucks was under general license, which meant in effect they were already licensed for export [16]. Ten months later, when the trucks started coming off the assembly line, the State Department asked the Department of Commerce to put the trucks under validated license procedure [17], which requires a specific license for export, and then to deny the license. Why? Quadaffi was growling at Sadat, our ally, who had recently gone to Jerusalem. Nobody quite knew the proposed use for the trucks, but many strongly

suspected that the Libyans would use them to haul tanks to the Egyptian border.

Two features stood out in the Oshkosh situation. First, the U.S. Government changed the rules in the middle of the game. When the contract was negotiated and signed, Oshkosh could send the trucks; when they were ready for shipment, we changed those rules. Second, there was nothing unique about these trucks. Oshkosh had narrowly beaten out British Motors, Mercedes Benz, BMW, and Renault to get the contract, and those companies stood willing and able to supply the trucks without government restrictions. This demonstrated both the futility of applying controls when the goods in question were freely available elsewhere, and the unfairness of changing the rules.

The Export Administration Act of 1979 addresses both of those issues at some length [18]. On the question of foreign availability, the Act states that the President shall not impose export controls for foreign policy or national security purposes on U.S. exports and technology which he determines are available without restrictions from sources outside the United States, unless the President determines that adequate evidence has been presented to him demonstrating that the absence of export controls is detrimental [19]. In other words, he should not impose controls unless, of course, he really wants to do so.

On the question of changing the rules, the Congress stated in section 2(6) of the Act that: "uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States" [20]. It repeats that language in section 3 and again in section 6 on foreign policy controls [21]. The pipeline controls are not national security controls; they are foreign policy controls. Section 6 sets the criteria for the President to consider in imposing foreign policy controls: "the likely effect of the proposed controls on the export performance of the United States,...the competitive position of the United States in the international economy,...the international reputation of the United States as a supplier of goods and technology", and the effects of controls on individual U.S. companies and their existing contracts [22]. Of course, having solemnly considered all of those matters, President Reagan nonetheless concluded, as did President Carter with respect to Oshkosh, that the pipeline controls should be imposed.

Many claim that certainty is important for exports and that U.S. export policy is neither consistent nor certain. It is in fact wholly clear, consistent, and certain. Our export policy reserves the right to impose controls whenever we want, on whomever we want, wherever we want and for whatever reason we want. This policy is not without difficulty, but there is nothing unclear, inconsistent, or uncertain about it.

I would argue that we pay a high and unmeasurable price for that policy. The price is not only calculated by looking at sales forgone, but also by the fact that we are increasingly regarded as unreliable suppliers. To buy turbines from

the United States is risky when for any number of reasons spare parts may be unavailable because of export controls. Countries that license technology from the United States will have to consider, after the pipeline controls, what restrictions may be imposed ten years later in situations wholly unforeseeable at the time the licence is issued.

A client of mine illustrates this problem. It makes a device that a British company wants to use in a weapons system. The order would be huge for this U.S. company. The British company says it understands U.S. export controls and that there are re-export problems. It wants a list of the countries that it will be unable to export to, so that it can determine whether it can live with the list. The company does not intend to sell weapons to the Communist bloc, so there should not be any problem. Our answer is that we simply cannot provide a list. In three years we may be angry at Iraq or Libya or South Africa or Iran, or any other country, and we may tell you that you cannot re-export your weapons system if it contains a device that is made in this country. The British company's reaction to this explanation is wholly predictable.

One legal solution exists for a substantial part of the uncertainty, although it would have frustrated the imposition of the controls in the pipeline case. It would be to say that the relevant date for controls is the contract date, not the delivery date. A company would be subject only to controls in existence on the date it enters into a contract to sell goods. Six months or two years later, the rules cannot be changed because the product has not been delivered yet. There is logic and sence to this approach. In Bill Taft's point of view, it would deny flexibility to the President, however, and in the pipeline case it would have made the controls wholly ineffective.

Let us look again at the criteria in the Export Administration Act of 1979 as they apply to the imposition of pipeline controls. Under section 6(b), the President must consider these criteria when imposing, expanding, or extending foreign policy export controls [23]. (In imposing national security controls, the President has much more leeway.) The President shall consider, first, "the probability that such controls will achieve the intended foreign policy purpose...". There is not a lot of evidence that the pipeline is being slowed down or that it won't be built.

The second criterion has to do with terrorism, which is irrelevant here.

The third is "the reaction of other countries to the imposition or expansion of such export controls by the United States". It is fairly clear in this case what that reaction is.

Fourth is the effects of the controls on U.S. reputation. This is considered prior to imposing the controls.

The fifth criterion, "the ability of the United States to enforce the proposed controls effectively", seems to be nonexistent in this case. The sixth one, "the foreign policy consequences of not imposing controls", is hard to judge because it is much more ambiguous [24].

Clearly, to look at these criteria objectively, the pipeline controls did not fall within many of them. Interestingly enough, the criteria worked fairly well with the grain embargo, but we have to consider who is bearing the cost of an embargo. The contrast here is between workers in England, France, Germany, and Italy, none of whom vote in American elections, and farmers in Iowa, Idaho, Indiana, and Missouri, most of whom do vote and traditionally vote Republican. I assume that is what Mr. Taft had in mind when he spoke about equitably bearing the costs of export controls.

One aspect of the pipeline case which was not found in the Oshkosh truck situation, although it is not new, is the issue of extraterritoriality. In the pipeline case we did not impose controls only on goods or technology located in the continental United States. Rather, we imposed controls on technology that was located abroad, and in a variety of circumstances. In the celebrated Fruehauf case in the middle 1960s, the Treasury Department ordered Fruehauf Company in Deteroit to tell its French subsidiary, Fruehauf-France, to renege on Fruehauf-France's contract to sell semi-trailers to another French company for eventual export to China [25]. Fruehauf-France was a 70% owned subsidiary. The minority directors went to a French court, which issued an order appointing a temporary receiver, ousting the board of directors and directing the Company to live up to its contract [26]. Faced with that, the Treasury Department concluded that Fruehauf-Detroit was not in control of the situation any longer and made no further effort against Fruehauf-Detroit or Fruehauf-France. There was also a great furor with Canada in the 1960s having to do with the proposed sale of Canadian Ford automobiles to the People's Republic of China.

It was somewhat in reaction to both the Fruehauf and Canadian cases that the Cuban export control regulations [27], drafted in large measure by Professor Lowenfeld, took a more reasoned and moderate stand on extraterritoriality than had been the case before, or, until recently, since. Extraterritoriality is not unique to export controls. We have the problem of extraterritoriality in many areas of our legislation. Our boycott legislation has some aspects, as does the enforcement of our security laws, internal revenue laws, etc. The Europeans for the most part restrict their regulations to their own territory.

We reserve the right to regulate foreign corporations owned or controlled by U.S. corporations in a variety of circumstances, for good reason. A multinational corporation finds it easy to ship goods, services, or technology from anywhere in the world so that if extraterritorial behavior was not regulated, enforcing some of our laws would be very difficult. We have the basic idea, again quite different from European ideas, that General Motors in France is a U.S. company. By and large extraterritorial application of U.S. laws is not confrontational. The Europeans are not angry that we subject U.S. subsidiaries to foreign corrupt practices regulations abroad because it leaves their own companies free to get large business orders that U.S. companies cannot get.

Extraterritoriality of course is a matter of degree. The real problem with the extraterritorial controls here is that they go further down the spectrum than we have ever gone before. We are purporting in the pipeline case to extend controls, not only to foreign licensees who have acquired technology under a contract obligation to comply with export control regulations, but also to foreign licensees who acquired the technology long ago and whose only link with the United States is that they pay royalities under a licence agreement. In one case, we are attempting to extend our jurisdiction to a subsidiary of a U.S. company that is dealing not with American technology but with technology it developed long before it was acquired by a U.S. corporation. The feeling in Europe, as expressed by the EEC in its Brussels comments to the United States [28], is that this is a form of economic imperialism which the Europeans find unacceptable and which may ultimately prove unacceptable to the U.S. courts.

The pipeline case presents the further issue of foreign sovereign compulsion. Here the Europeans have done more than protest; the English and the French have ordered the subsidiaries in their countries to comply with their laws. In the case of *Dresser France* [29], the police took physical possession of the goods, requisitioned them, and put them on ships. Ultimately, a serious due process question arises: whether the U.S. Commerce Department can blacklist or deny privileges to a French company which violates U.S. regulations by following an order from its own government on shipment from its own country of goods and services to a third country.

*Dean Mundheim*

Thank you, Lee. I think you have set up some points of difference. Now, it is useful to hear directly the European Community's reaction to sanctions. John Maslen, can you give us an overview of that?

*Mr. Maslen*

Thank you very much, Dean Mundheim. My remarks will be confined to the case of the gas pipeline. I should say straight away that the European Community is not against sanctions as such. We would agree with many of Mr. Taft's comments. Economics and trade policies cannot be viewed in isolation, but must be seen in the context of national security and foreign policy as a whole. This fact is illustrated by the work done in the Conference on Security and Cooperation in Europe, where one of the main points stressed by Western delegations is that none of the aspects of the conference – political, security, economic, human rights – is independent; they all stand together. There cannot be detente in the economic field and confrontation in the fields of military or human rights activities. Furthermore, in the U.S. approach to relations in Eastern Europe, security and foreign policy concerns are of primary importance while economic policy is not a main concern. This is largely for economic reasons. The flow of trade between Eastern and Western

Europe is much more important to Western Europe than the East–West trade flow is for the United States.

I should like to discuss some of the considerations raised by the U.S. sanctions imposed against European firms in June [30]. In general terms, the European Community, as it stated in legal comments made in July and August, considers these measures contrary to international law and at variance with rules and principles of U.S. law as well [31]. As to the political and economic aspects, the U.S. measures are liable to affect a wide variety of business activities. The primary purpose of these measures is to deny or delay the construction of this pipeline, but that the measures will have this effect is unlikely. The pipeline from Siberia can be completed using Soviet technology and production and capacity diverted from other parts of their gas transmission program. Gas could still flow to the Community starting as scheduled in 1984, because there is substantial spare capacity in the existing pipeline system which would cover the requirements of the early phase of the gas supply plan.

The most important justification for the U.S. measures has been the danger that the Community will become dependent on Soviet gas supplies. We have all seen discussions in the press about just how dangerous that dependence is. Even when the gas contracts are all fulfilled and gas is flowing at its maximum rate, it will represent less than 4% of the Community's energy consumption. But clearly there is a danger of dependence, because while some Community Member States are not in the least dependent on Soviet gas, certain Member States do risk dependence. But the dependence on the Soviet Union is only one consideration. Gas from the Soviet Union will help the Community to conserve its own stock of gas and oil and other fuels and will reduce its dependence on other sources – Libya or the Gulf – which are not likely to be very much more reliable than Soviet supplies. The problem of dependence has been studied exhaustively in the Community Member States and by the Community itself, and we have concluded that it is in our interest to diversify by getting a portion of our gas from the Soviet Union. This goal has to be accompanied by other measures: increasing storage capacity, improving links between gas networks, and introducing interruptable contracts for industrial clients which will enable any short-fall in supplies to be remedied more easily.

One can debate the effect of U.S. sanctions on the pipeline project itself, but there is no doubt that the effect of these measures on U.S. and on European companies is very damaging. Many companies are involved as main contractors, subcontractors, or suppliers of equipment, and even if they use no U.S. technology at all, they will suffer losses of business if the European contribution to the project is blocked. Some of these companies may not survive. And some are located in areas of the Community where unemployment is already at unacceptably high levels.

Another problem is the disruption of contracts concluded in good faith and the effect which this can have on international business confidence in the

European firms as suppliers. If a company cannot supply turbines based on General Electric technology without risk of supply being cut off in the future, then purchasers will not buy from it. In addition, the usefulness of technological links between European and U.S. firms is placed in doubt. The proposal that contracts once concluded should be allowed to be fulfilled is a very sound suggestion. U.S. regulations in recent years – the Cuban assets control regulations of 1981 and the Iranian control regulations of 1979 – to a large extent exempted foreign incorporated firms on the one hand, and on the other, they permitted existing contracts to be honored.

I might turn to the problem of extraterritoriality. The June regulations can be summarized as follows: persons within a third country may not re-export machinery of U.S. origin for the exploration of oil or natural gas or components thereof without permission of the U.S. government [32] (which cannot be obtained). Moreover, any person subject to the jurisdiction of the United States is required to get authorization – which again it will not get – for export to the U.S.S.R. [33]. Thus, it is not just European firms which cannot export U.S. technology, it is U.S. controlled firms, defined very widely by the June regulation [34]. The result is no exporting for even European technology.

Another provision provides that no person in the United States or in a foreign country may export or re-export to the U.S.S.R. foreign products derived from U.S. technical data in the field of oil and gas exploitation, under three conditions [35]. The first condition forbids export if a written assurance was required under U.S. export regulations when the data were exported [36]. This condition is reasonable, for at the time that the company bought the licence it knew problems might occur in re-exporting. Second, exports are restricted if the recipient of the technical data has agreed to abide by U.S. export control regulations [37]. Again, if there is such an item in the contract one can argue that the restriction is reasonable. The third condition, actually the second in the regulation, restricts exports when the recipient has paid royalties or other compensation to, or has licensed the use of the technical data concerned from, any person subject to U.S. jurisdiction [38]. In other words, if you have paid for your technology, you are not allowed to do what you like with it.

The extraterritoriality principle could be left aside under certain conditions, which are not always generally admitted in international law but which have a certain amount of justification. First of all, there is the "protective" principle which enables a state to regulate acts performed outside its territory but which threaten its security. This can hardly apply in the present case because the protective principle also requires that such acts are generally recognized as crimes by states with reasonable legal systems. There is nothing criminal about exports. A second possible exception to the extraterritoriality principle is the effects doctrine: conduct occurring outside U.S. territory but causing direct, foreseeable and substantial effects, which are also the constituent elements of a

crime or tort, can be forbidden. But this doctrine is not presented here either. There is no direct or substantial effect and there is no element of crime or tort under U.S. law. If a Community country were to pass regulations similar to the June 22 amendments [39], it would be doubtful whether these would be acceptable under U.S. law. The antiforeign boycott provisions of the Export Administration Act show that the United States cannot accept its companies being turned into instruments of the foreign policy of other nations. In the same way, it is difficult for the Community to accept this with regard to companies incorporated and registered within the Community that follow some internal trade policy different from Community trade policy. And that is what is being imposed upon us.

I would like to add one final point: that economic sanctions in general are a permitted, recognized part of international practice. Examination of the history of sanctions show that, except in very strictly defined circumstances, sanctions do not work. Sanctions do not seriously affect the economy of the country they are directed against, and this is all the more true when that country is one of the few in the economically independent position of the Soviet Union.

The function of sanctions is to do something other than a hostile warlike act to express moral reprobation. We find this is perfectly true, and comes when a government or public opinion cannot accept something like the Soviet invasion of Afghanistan. The government has to show its disgust by some other means than declarations and the sanction is used for this purpose. If stretched further than a gesture, a sanction will fall into the danger, which has already occurred in the pipeline case, of having more serious effects on the economies of the countries taking the measure and its allies than on the economies of countries the sanctions are directed against.

*Dean Mundheim*

Thank you, John. One of your last statements was that sanctions are not a warlike act. That is a proposition that I know my colleague Noyes Leech has thought about.

*Professor Leech*

Under our statutes we distinguish between so-called national security controls and foreign policy controls. My discussion will concern mainly foreign policy controls. When Congress enacted the foreign policy export controls in the 1979 Act, it was doubtful that this was a wise and useful step. Testimony at the hearings by George Ball and Dean Rusk was aimed at dissuading Congress from enacting these particular kinds of controls [40]. And further, economic sanctions are not the sole prerogative of the United States; we sometimes can be on the other end of them as during the OPEC oil embargo.

With that background, I would like to take a look at these sanctions from a point of view slightly different from their application in a particular case like

the pipeline. There is a sense in the international community that there should be significant restraints on the use of this weapon. My question is whether there are legal restraints required by international law. I suspect that if the embargoes were more successful, if they did in fact force foreign states to alter their policies or change their governments, then the call for their abolition would be louder and far more insistent, and the claim that economic sanctions violate international legal principles would be more credible.

Let me sketch out the legal context in which it is claimed that sanctions already violate international law. I would like to start with the United Nations Charter. We may indeed indict U.N. institutions for their failures to operate effectively. The near monopoly of force that the Charter gave to the Security Council has turned into a paralysis of force, and the General Assembly has frittered away its enormous potential in futile protestations about South Africa and Israel. But the principles (if not the insitutions) of the Charter are as valid today as they were in 1945. In particular, take the Charter's express requirement in Article 2(4) that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations [41]. However cynical we may have become or however much that injunction is evaded by resort to measures of so-called self-defense (preserved by Article 51 of the same Charter), no state that I know of takes the position that the use of force or its threat is a permissible tool in international relations. The question, of course, is: What kind of force is prohibited? The majority of commentators have argued that Article 2(4) encompasses only military force, that this section of the Charter sought only to abolish the scourge of war. But others have read in this prohibition a broader injunction against other, nonmilitary forms of force.

Article 19 of the Charter of the Organization of American States, for example, states that no state may use or encourage the use of coercive measures of an economic or political character in order to coerce the sovereign will of another state and obtain from it advantages of any kind [42]. Our neighbors in this Organization apparently believe that this provision of the O.A.S. Charter has meaning. When the United States suspended military sales to Ecuador in 1971, because of our dispute with that country over fishing rights in waters off the Ecuadorian coast, Ecuador called a meeting of O.A.S. foreign ministers at which the U.S. economic sanctions were roundly criticized. The matter was resolved by a resolution supported by both Ecuador and the United States in which there was a call to abstain from the use of any kind of measure that may affect the sovereignty of another state. Another example is the General Assembly resolution entitled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" [43]. One principle states that no state may use or encourage the use of economic, political, or any

other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Is this only a political statement? Perhaps, but it is indicative of a consensus, to which we may not be altogether sensitive, against the use of forceful nonmilitary coercion.

Maybe we should parse these prohibitions with care and conclude that we do not and did not seek *advantage* through economic sanctions against Cuba, Communist China, Russia, or Poland, or that if we do seek advantages, it is not to benefit the United States but rather the peoples of these countries. But this is precisely what the Charters of the U.N. and the O.A.S. and the General Assembly resolution, are all about: to forestall one nation's use of force – clearly military force and arguably economic force – in pursuit of its own unilateral view of preferred political goals.

I say one nation's view, because a major principle of the U.N. Charter is that coercive action should so far as possible be collective. Collective economic sanctions give more promise of being effective than unilateral sanctions. But the principle of collective sanctions serves purposes beyond effectiveness alone. In a world in which national interests are highly intertwined, the use of unilateral force, even economic force, is dubious for two reasons. First, it may be conceived myopically or demagogically, based on premises that cannot be convincingly defended or cannot be sympathetically accepted even by allies. And second, it may have negative consequences affecting nations beyond the two antagonists, consequences that should be weighed by the community, or at least some significant part of it.

The U.N. Charter and the O.A.S. Charter call for the making of collective decisions about sanctions. Admittedly, the formal institutions of those charters are weak. Yet, the pipeline sanctions demonstrate the tragedy of going it alone. They illustrate the wisdom of seeking collective *agreement* on sanctions – agreement in fact, not merely consultation, by whatever formal or informal means such agreement can be reached. It may be argued that if collective agreement is sought, it may be refused, because other states have too much to lose to join in the effort. This is precisely so. A collective process reveals the world as it is: a world with multiple and conflicting needs that have to be balanced against hopes, not a world as viewed only in the present through the eyes of the U.S. government.

*Dean Mundheim*

Lou Schwartz, we will let you be the clean-up hitter in our line-up.

*Professor Schwartz*

Rather than a statement, I have a question, a challenge to one of the statements you have heard. I am deeply concerned by the scope and vagueness of the concept of national security, in general in the political and legal life of

this country, and specifically with reference to the question of the kind of sanctions that should be imposed. What is not related to national security? In one recent episode the Department of Defense has intervened in the matter of restructuring of the telecommunications network of the United States [44], which obviously has security implications. I have encountered many antitrust cases in which the court was advised to suspend operations or tailor the relief with a view to national security. National security is certainly affected by the political structure of a country. And the end of the line "everything affects national security" is martial law such as in Poland. You ought not to have unions that disrupt production, you ought not to have this squabbling that obfuscates our national position. In other words, it is an extremely broad and elusive concept.

It seems to me that the Department of Defense has taken an imaginative view of its role in defining this undefinable matter. One would not say that the Department of Defense was getting out of bounds if it intervened in a projected sale of military equipment or material to a country that we are planning to invade or defend against. Obviously, anything that directly changes the balance of military power is a concern of the Department of Defense. But when you get beyond that, it seems to me that the Department of Defense ought to speak very softly. The Department of State expresses our international policy, of course not on our defense, but taking it into consideration along with a lot else. I am grateful that you came here, Bill, but I wonder what you would say about the limitless definition of security and the role of the Defense Department in defining our national and international domestic structure.

*Mr. Taft*

I am delighted to be here, and I think that the point you have made, that not everything is connected with national security, is not one I wish to quarrel with. I am here because I was invited, but I have no doubt that the Department of State and our foreign policy considerations are dominant in the area we are talking about. As far as the pipeline is concerned, it has been explicitly pointed out that these sanctions were not invoked under the national security section of the statute but under the foreign policy section. We do recognize that distinction. In the Department of Defense, we do not view our responsibility for the national security as a license to roam in the field of antitrust anymore than in the fields of labor relations or foreign policy. At the same time, there are activities with which we are concerned and the communications sector is definitely one. National security, for which we do have responsibility, is affected by the communications industry structure that may be determined in antitrust cases. We participated in the AT&T antitrust case [45], but we did not say that the national security issues necessarily had to determine the outcome of the case. We did say they were important factors to be considered

in the public interest and we worked with the Justice Department in that case. We work with the Labor Department on matters of labor unrest, with the Commerce Department on the export of critical technology and with the State Department on foreign policy. I do not disagree with you that the mandate for national security matters is limited, and it should be.

*Dean Mundheim*

Lou, you may recall that Myer Rashish had been invited as a panelist to convey the State Department philosophy, but could not be here. Bill Taft's presence does not represent a view that the Defense Department is the only agency of government concerned with sanctions.

I would like to open the floor now for questions of the panelists and for discussion.

*Mr. Shestack* (Schnader, Harrison, Segal, and Lewis, Philadelphia, PA; U.S. Representative to the U.N. Commission on Human Rights, 1979–80)

I was interested in the question of double standards. This administration brushes aside the seeming inconsistencies of sanctioning grain exports to the U.S.S.R. while pursuing pipeline sanctions, which you explained realistically in terms of voters in Iowa. With respect to Chile and Argentina, and other Latin American countries, all of the criteria that you set forth including the ability of sanctions to affect policy, and the equitable bearing of the costs of the sanctions would seem to call for sanctions. Yet, the United States now has reversed the policy of the prior Administration with respect to economic and military assistance to countries such as Argentina and Chile. In Chile, the most recent example, the human rights situation has clearly deteriorated. Yet, it seems rather obvious that high members of this Administration want to certify Chile as a case where economic and military aid should be rendered. The prior Administration was severely criticized, and sometimes justly, for application of double standards; this Administration seems to be doing the same thing, but more egregiously so.

*Dean Mundheim*

Bill, would like to take a crack at this question?

*Mr. Taft*

I see a very great difference between the Soviet Union and Warsaw Pact members and the Latin American members of the O.A.S. We have a different relationship with them. And the differences stem from the military and foreign policies that the Soviet Union pursues, and the effect that those policies have on us and the policies that are pursued by Chile, Argentina, and other members of the O.A.S. These countries simply are not in the same boat and our economic relations with them should be treated differently. The sanctions

that have been in effect against some Latin American countries in no sense were directed toward their international policies or any military threat, except to the extent that we did impose an arms embargo on Argentina during the Falkland Island crisis. That is the fundamental difference and you do not need a double standard to reach a different result when you are starting from a different base.

*Dean Mundheim*

Lee Marks, do you want to add to that?

*Mr. Marks*

I must say that I find myself very much in agreement with what Bill Taft has said. There is a serious question whether the imposition of export controls against Chile and Argentina during the Carter Administration was effective in influencing the behavior of those countries or was warranted in the interest of the United States. It is one thing to say that if a country has an authoritarian regime you are not going to sell it thumb screws or cattle prods or other torture instruments. But I do not see that any interest of the United States was served, for example, when we told Westinghouse that we would not provide Import–Export Bank financing for a $400 million turbine generator project in Argentina and thereby ensured that the order would go instead to a German firm. I do not think it affected Argentina's internal or external policies. All it did was to demonstrate that the United States is not a good country to do business with. (I do not assert that as a true proposition but rather something which the Carter Administration tended inadvertently to establish.) I do not think there is a double standard being practiced by the current Administration (even though I disagree with the pipeline controls). I do not think the answer to human rights violations is the imposition of controls upon Chile and Argentina, and probably to the extent that the Carter Administration did, it was a mistake.

*Mr. Downey* (Sutherland, Asbill, and Brennan, Washington, D.C.; Deputy Assistant Secretary, U.S. Department of Commerce, 1975–77)

I have a hypothetical question for Mr. Taft, and perhaps others might wish to join in the response. My own views with respect to the pipeline are that the President's action was a petulant one, accomplished with a legal blunderbuss. It was and is virtually indefensible on any score. I also represent clients here and in Europe who are now faced with the grisly problem of complying with your sanctions and U.S. law, thereby having European criminal actions threatened against them; or if they fail to comply with U.S. law, having the same thing threatened in the United States. My hypothetical, though, is an effort to take some of the passion out of the discussion of a foreign policy action. I would like to draw on the extraterritorial comment that Lee Marks made and just flip the situation.

An American company, American Motors, has a French company, Renault, acquire shares in its stock to a point where Renault has a controlling interest in American Motors. Renault also supplies technology to American Motors, a new design for a car. American Motors gets a contract to sell $100 million worth of cars to a Central American country called Ameco. This contract is important for the United Auto Workers and the automobile industry in the United States, and is fully consistent with U.S. foreign and trade policy. The government of France, however, while happy to sell a Concorde and French bread to Ameco, does not wish anyone to sell automobiles to Ameco. The French Government then declares that American Motors is subject to the jurisdiction of France by virtue of its ownership and control by French citizen Renault or by American Motors' use of French technology. It then tells American Motors, "You must cancel your contract with Ameco or you will be subjected to sanctions of the French government." What action do you think the U.S. Government should take in defense of U.S. national interests, and do you think the French action is consistent with international law?

*Dean Mundheim*

Bill, do you want to start or should I hand that over to one of our other panelists?

*Mr. Taft*

I ought to say initially that I do not agree with your characterization of the pipeline sanctions. Your hypothetical raises, most importantly, the question of the relationship between the governments. The U.S. Government, in the position that you posit, should work with the French Government to resolve difficulties. I understand that failure of the two governments to act consistently toward a single private entity causes problems for that entity. Even if that was not the case, it would be desirable for the allies to work together. We are trying to work out our differences. The fact that we have not been successful in resolving our differences with the European governments to date, and that private companies are therefore experiencing difficulty, is something we will have to work on.

*Dean Mundheim*

I want to put the legal question that resided in that hypothetical. Noyes, what is the result if American Motors is sued for breach of contract in a federal district court?

*Professor Leech*

The U.S. court will take the position that we clearly have jurisdiction over the American Motors company. I do not even think we have to concede that France has jurisdiction, and we probably would argue against that, although I think that is a separate question.

The point being made here about extraterritorial jurisdiction is an interesting legal point. We have changed that position in the scholarly community in the last twenty years. When the Restatement of the Foreign Relations Law of the United States was drafted in the early 1960s, the American Law Institute's position was that for subsidiaries of foreign corporations the jurisdiction of a state rests upon the nationality of those who control the foreign corporations [46]. A subtle change has occurred, for which Andy Lowenfeld has been partly responsible, and he can speak up for himself. But the current draft of the revision of the Restatement says flatly that we have jurisdiction over the subsidiary itself, if a U.S. parent has control [47]. But jurisdiction is only half the question. In many cases two states have jurisdiction over a single person or event, and over the years we have tried to work out accommodations for that. The early Restatement established a set of criteria to weigh the respective national interests, among other things, in determining which state ought to concede the other state's stronger right to control the event [48]. That same process is continued under the new Restatement [49]. The Lowenfeld formulation is that we look to the reasonableness of the exercise of jurisdiction. I do not think you can avoid conflicts like those posed in the hypothetical, but they have to be resolved and are not resolvable simply through taking a very rigid position on the question of jurisdiction alone.

*Mr. Marks*

On the question of what the U.S. courts would do, *Sumitomo Shoji America, Inc. v. Avagliano* [50] is worth mentioning. Though its facts are very different, in terms of how American courts look at things it has some relevancy. *Sumitomo* is a sex discrimination case brought by female employees of the U.S. subsidiary of a major Japanese trading company. Sumitomo sends Japanese male employees everywhere it operates, including the United States. The technical legal issue involved the construction of the 1953 Treaty of Friendship, Commerce, and Navigation between the United States and Japan, under which Japanese companies had the right in the United States to employ executives of their choice [51]. Even conceding that the treaty overrode Title VII of the Civil Rights Act, the question was whether the U.S. branch of Sumitomo, incorporated here and owned by Sumitomo in Japan, should be considered as a U.S. or a Japanese corporation. The opinion of the Supreme Court is based on a construction of the treaty. Nonetheless, it is fairly clear that the Court's motivation was that somehow a U.S. corporation ought to be subject to the civil rights laws, no matter who owned it. That is, of course, the hypothetical that Art Downey is trying to pose. When you flip it around, we tend to feel that if incorporated here, you are one of ours, and if incorporated over there, but owned by us, you are still one of ours.

*Professor Lowenfeld* (New York University Law School)

I want to respond to the invitation Noyes Leech gave me and talk a little

about the Restatement. I would also like to make a couple of other responses to today's comments: first of all, the question whether economic sanctions are a flop. The historical answer seems much more ambiguous than our discussion has indicated. In Rhodesia, for example, though in the end the situation was solved by war, clearly the sanctions kept the courage of those who revolted against Smith alive in a way that would not have happened had there been no sanctions. The sanctions kept a subject as an international issue that otherwise would have gone away. In Iran [former Deputy Secretary of the Treasury] Bob Carswell says, it was the freezing of Iran's assets that in the long run led to the settlement [52]. That may be an overstatement, but the freezing of assets was certainly not irrelevant. The effectiveness of sanctions on the Soviet Union is hard to estimate. I suspect that though the Soviet Union did not pull out of Afghanistan after the reaction to its invasion, the fact that it did not, for example, go into Iran may have had something to do with the sharpness of the United States' reaction measured by the sanctions imposed. Furthermore, who is to tell whether the reaction to the Afghanistan invasion did not have something to do with the fact that the Soviet Union did not invade Poland in 1981. So I think the question is really much more ambiguous. It is not like a lawsuit where somebody wins and sombody loses. I think one ought to keep in mind the various motivations behind sanctions.

My second point concerns the definition of "existing contract". When we imposed sanctions against Rhodesia and when Britain imposed sanctions against Argentina during the Falkland Islands crisis, the governments ignored existing contracts and deferred questions of damages and on whom the risk falls. When the United States tried to get the European allies to join them in sanctions against Iran, the Europeans were quite reluctant. Eventually, the EEC agreed to impose sanctions, but only subject to fulfillment of existing contracts. That was particularly at the insistence of the British. And then the British began to interpret existing contracts as including dealings with parties that had previously dealt together but were not contractually bound. Thus, the exception for existing contracts looms so large that you can understand the United States being reluctant to exempt them.

The third thing I would like to speak on is this question of national security or foreign policy justifications. Lou Schwartz made a nice statement that one can use national security to cover almost anything. For example, section 232 of the Trade Expansion Act [53], was used to keep foreign oil out to protect Texas oil and we called it "national security". That seems rather ironic now. On the other hand, it seems to me that the effort by Congress to distinguish "national security" for which the President does not have to make any findings and foreign policy on which he has to apply a whole series of criteria [54] is a failure partly because the President can invoke either one. For instance, in the grain embargo he invoked both national security and foreign policy.

If you look at it in Constitutional terms, however, why shouldn't the

President determine that, let us say, an invasion of a far-off country in Central Asia in some way threatens the national security? It is not that the wheat, or the grain, or the weight of the hogs who eat it are a national security issue. It is that the President wants to do something to protest the invasion. While it is fair to say that former President Carter and President Reagan have undermined and frustrated the intent of Congress in passing the 1979 Act, that intent was, I think, somewhat misguided. I am not defending the various embargoes, but I think it is worth considering the point in a Constitutional context, *i.e.* the degree to which Congress can or should limit the President's judgment in the conduct of foreign affairs.

The fourth question is the issue of foreign availability. When Lee Marks talked about the Oshkosh trucks situation, he said both that they were sold off-the-shelf and that they took ten months to manufacture. Availability is not always quite clear, and it is interesting to see the role played by the multinationals in this context. A series of products – computers are a good example – is available in Europe, for instance, as well as in the United States. But when one looks carefully at the European sellers, one finds that they turn out to be European subsidiaries of American companies, so the technical test, whether the product is available, breaks down.

My last point is the question of jurisdiction and international law. It is interesting that everybody cites the Restatements. Mr. Maslen had before him the EEC Démarche, which cites both the 1965 Restatement, in which Professor Leech had a prominent part, and the current tentative drafts in which I have had a role [55]. That both sides cite the Restatement is as it should be, for that gives a certain legitimacy to the whole Restatement process. Now, what does the Restatement say on the question of legislative or regulatory jurisdiction? I do not think anybody believes that a company stops at the water's edge, or that it is improper for a country to tell a multinational corporation that a consolidated tax return is expected. Various kinds of credits and deductions are given to avoid double taxation, but of course a tax form is demanded. There are other things which no country would dream of doing. No one would say Dresser-France has to comply with the Wage and Hour Act [56] of the United States, for instance.

Quite clearly there is overlap in jurisdiction. For individuals it is easy: jurisdiction is based on either territoriality or citizenship. If I travel to Paris with an American passport, clearly the United States has some jurisdiction over me, though not total. Well, what about a company that travels to France? The argument is that the United States has jurisdiction over a wholly-owned subsidiary, at least, and one can argue about the minimum level of control required to accord jurisdiction to the United States. There is also, of course, some jurisdiction in the host country. The new Restatement, building on a germ of an idea from section 40 of the first Restatement, says that given overlap and conflict, the rule is reasonableness [57]. Reasonableness is defined

in terms of the expectations, of other competing interests and so on.

It seems to me reasonableness is the test against which, for example, the pipeline issue should be measured. Once that test is applied, whatever the result, there is less of a conflict. The United States would understand better the European reaction as a legal matter and the Europeans would not say quite so flatly that the sanctions are a violation of international law. A plea for reasonableness is something that is easier to make in a law school forum than, for instance, at the Security Council of the United Nations. But that is the effort we are trying to make.

*Dean Mundheim*

Thank you Andy. I want to pick upon one thing. I am reluctant to characterize the Iranian assets freeze as an example of successful sanctions, and I don't recall Bob Carswell categorizing it in precisely that way. My own assessment is that the primary importance of the freeze was the availability of a bargaining chip to use once Iran had decided for other reasons to release the hostages, because a successful negotiation requires something to give to the other side. But I do not think the asset freeze actually drove Iran to the bargaining table.

*Professor Kravis* (Economics Department, University of Pennsylvania)

Mr. Lowenfeld's comment that the results of an embargo were ambiguous seems to be a congenial subject for an economist. I think the effects of an embargo have to be considered as raising the cost to its target of carrying on business as usual. The extent to which those costs are raised depends upon the relative size of the entities imposing the embargo and its object. Rhodesia was a fairly small country and the embargo was being imposed by many other countries, probably the preponderant economic and productive world powers. Yet, Rhodesia was able to carry on for quite some time despite what was supposed to be a total embargo. Channels could always be found, and Rhodesia used these to buy imports that she wanted, but at a higher price; Rhodesia found channels for her usual exports but she had to take lower prices. In the case of a small Latin American country like Chile, the effect of an American embargo alone would have been more substantial and if there had been a similar cohesive embargo by all the industrial countries, results would have been produced more quickly.

The embargoes are not cost-free to those imposing them and where one country imposes an embargo on a very large country, it may be damaging itself more than the other country. In general, countries are very loath to change their policies under pressure, and the Soviet Union or the United States can withstand many cost increases. It is questionable whether the economic effects of an embargo achieve any substantial result. If the embargo is intended to make a political statement, that is different, but if economic effects are expected, you are very likely going to be disappointed.

*Mr. Shestack*

I think both Mr. Marks and Mr. Taft have taken a rather narrow compass of foreign policy. The foreign policy of the United States not only seeks to advance national security, but trade and human rights, as Mr. Maslen concedes. The three are linked. As a member of the U.S. Delegation in Madrid during the Helsinki Conference, I emphasized that progress with respect to security and trade regarding the Eastern bloc could not come without progress in human rights.

Human rights has been declared by Congress to be part of the foreign policy of the United States, and under the Foreign Assistance Act [58] the United States cut off military aid to Argentina and Chile. Mr. Marks is dubious whether that had any effect, but that doubt is not shared by people in the human rights community. Argentina had been engaged in the practice of "disappearance", and some 15,000 people had disappeared. As a result of bilateral pressure from the United States and the United Nations, they sharply reduced that pratice, through they have not cured it. There was also progress in Chile, Paraguay, and Uruguay.

I see double standards in that the United States is now applying a different human rights standard to the Eastern block than to the authoritarian governments in Latin America. That has been justified, as Mr. Taft did, by military or national security considerations. That really raises Lou Schwartz's point. If you analyze it, there is really no national security involved in giving military aid to Argentina. The Defense Department did not object when military aid to Argentina was cut off during the Carter Administration and did not find any overriding national security concerns then. This Administration found national security concerns until the Falkland Islands crisis occurred, when they were willing to bypass those concerns. From a human rights viewpoint, it makes very little difference to the mother of someone who has disappeared whether the abduction was done by an authoritarian government or a totalitarian government. The panel has focused on foreign policy with respect to exports and imports, but has taken into consideration few of the other elements of foreign policy which Mr. Maslen included in his talk. Human rights is an integral part of U.S. foreign policy declared by Congress, which certainly has a role.

*Mr. Marks*

First, I share your view about Argentina. It is basically a despicable regime and I am all for cutting off military assisitance to it. I feel that economic assistance is quite different. I worked on human rights problems in the Carter Administration, and think that the human rights legislation passed by Congress is largely ineffective in promoting human rights. It was impossible to administer by the State Department as seen by an endless series of irrational *ad hoc* decisions, almost any one of which was indefensible when compared

with another one. The human rights policies of both the Carter and Reagan Administrations are equally foolish, although on opposite ends of the spectrum. There is no need to become the champion and best friend of an Argentine regime, as Alexander Haig did, or to become a world nag, as I think President Carter did.

The real question is when does it make sense to use export controls to attempt to influence behavior. We cut off military assistance to Argentina and Chile out of a sense of moral outrage, not because we really believed it would promote positive change or affect their behavior. Argentine behavior and Chilean behavior have moderated for reasons having to do with their economies and internal politics and needs. We did not serve any useful U.S. purpose by sending $400 million in sales of generators to Germany, away from Westinghouse in the United States. That is my only point in addressing the Argentine and Chilean situations.

*Professor Schwartz*

The last three speakers have provided material for what I want to say. We have heard of ineffectual sanctions, of double standards, of harming ourselves. For me this points to an important aspect of sanctions as protest, those which may not accomplish economic penalties but express our views. Protest is a kind of suprarational concept. As lawyers, as academics, we are rationalizers. But deep down the springs of behavior are irrational, and if a President is given a mandate with seventeen mutually inconsistent guides to policy, the thing that is going to determine the policy is irrational. A person who sets fire to himself to protest a course of action is self-destructive and not rational, but he is making a statement of some sort. Much of the activity that we have been reviewing today strikes me as having that dimension. I honestly do not know how to reconcile the fundamental irrationality of many of our most important decisions with our equally fundamental commitment to rationality. It may be that compelling ourselves and others to rationalize will set some limits to the self-destructive tendencies of pure protest. But as human beings we should not fool ourselves, and mask our rationality and irrationality totally with this superstructure.

*Dean Mundheim*

Perhaps on that warning note we ought to close for the day.

## Notes

[1] Pub. L. No. 96-72, 93 Stat. 503, 50 U.S.C. §2401 (Supp. III 1979).

[2] 15 C.F.R. 385.2(c) (Jan. 1, 1982).

[3] 47 Fed. Reg. 141 (Jan. 5, 1982).

[4] 47 Fed. Reg. 27, 250 (June 24, 1982).

[5] 47 Fed. Reg. 51, 858 (November 18, 1982).

[6] Trade Act of 1974 §§401-410, 19 U.S.C. §§2431–2440 (1976 & Supp. V 1981).

[7] Trade Act of 1974 §402, 19 U.S.C. §2432 (1976 & Supp. V 1981).

[8] *See* S. Rep. No. 1298, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7338 (the amendment is "inteded to encourage free emigration of all peoples from all Communist countries (and not be restricted to any particular ethnic, racial or religious group from any one country)").

[9] Trading with the Enemy Act, 50 U.S.C. app. §§1–44 (1976 & Supp. IV 1980).

[10] International Emergency Economic Powers Act, 50 U.S.C. §§1701–1706 (Supp. IV 1980).

[11] Foreign Assitance Act, 22 U.S.C. §2403(c) (1976 & Supp. V 1981). Parallel provisions prohibit development assistance, 22 U.S.C. §2151n (Supp. V 1981) and security assistance, 22 U.S.C. §2304 (1976 & Supp. V 1981) to such human rights violators.

[12] Evans Amendment, 12 U.S.C. §635(6)(9)(C) (1976 & Supp. V 1981).

[13] *See generally*, 50 U.S.C. app. §§2401–2420 (Supp. IV 1980).

[14] 50 U.S.C. app. §§2031–2032 (West 1951) (expired 1969).

[15] 50 U.S.C. app. §§2401–2413 (1976) (expired 1979).

[16] *See generally*, 15 C.F.R. §§371.1–.22 (1982).

[17] *See generally*, 15 C.F.R. §§372.1–.13 (1982).

[18] Export Administration Act §§5(d) & 2(6), 50 U.S.C. app. §§2404(f)(1) & 2401(6) (Supp. IV 1980).

[19] *Id.* §2404(f)(1).

[20] *Id.* §2401(6).

[21] *Id.* §§2402, 2405.

[22] *Id.* §2405(b).

[23] *Id.*

[24] *Id.*

[25] *See Raoul Massardy et autres, Soc. Fruehauf-France v. Mme. Solvet et Soc. anon. des Automobiles Berliet*, Cour d'àppel de Paris (14e Ch.), II Gazette du Palais 86 (1965).

[26] *Id.*

[27] *See* 22 U.S.C. §2370 (1976 & Supp. V 1981).

[28] *See* Gas Pipeline: Comments of the European Community as Regards the Measures Taken by the U.S. Government, Brussels, August 12, 1982.

[29] *See* Order Temporarily Denying Export Privileges (Dresser (France) S.A.), 47 Fed. Reg. 38, 170 (Aug. 30, 1982). *See also Dresser Industries, Inc. v. Baldridge*, 549 F. Supp. 108 (D.D.C. 1982) (order denying preliminary injunction).

[30] Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27, 250 (1982) (to be codified at 15 C.F.R. §8376, 379, 385).

[31] *See Comments, supra* note 28, points 30 and 31, at 14. *See also* Bull. E.C. 6-1982, point 2.2.44 (Meeting of Ministers of Foreign Affairs, 21 and 22 June 1982) and Note of July 14, 1982, *Comments* point 1, at 1.

[32] Revision of 15 C.F.R. §385.2(c), 47 Fed. Reg. 27, 252 (1982).

[33] *Id.* §385.2(c)(1).

[34] *Id.* §385.2(c)(2).

[35] Addition of paragraph (a)(4) to 15 C.F.R. §379.8, 47 Fed. Reg. 27, 251 (1982).

[36] *Id.* §379.8(a)(4)(i).

[37] *Id.* §379.8(a)(4)(iii).

[38] *Id.* §379(a)(4)(ii).

[39] *See Amendments, supra* note 30.

[40] *See* S. Rep. No. 169, 96th Cong., 1st Sess. 6, 7, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1147, 1153–54.

[41] U.N. Charter art. 2, para. 4.

[42] O.A.S. Charter, art. 19, 2 U.S.T. 2394 (1948) (art. 16), *renumbered* 21 U.S.T. 659, 662 (1970).

[43] Approved by G.A. Res. 2675 (XXV), G.A.O.R. Supp. (No. 28) at 121, Doc. A/8028 (1970).

[44] *See United States v. American Telephone & Telegraph,* 552 F. Supp. 131 (D.D.C. 1982), 51 U.S.L.W. 2109 (Aug. 24, 1982), *aff'd mem. sub. nom. Maryland v. United States,* 51 U.S.L.W. 3632 (Mar. 1, 1983).

[45] *See supra* note 44.

[46] *See* Restatement of the Foreign Relations Law of the United States §27 (1965).

[47] *See* Restatement of the Foreign Relations Law of the United States (Revised) §418 (Tent. Draft #2, 1981).

[48] Restatement of the Foreign Relations Law of the United States §40 (1965).

[49] Restatement of the Foreign Relations Law of the United States (Revised) §403 (Tent. Draft #2, 1981).

[50] –U.S.–, 72 L. Ed. 2d 765 (1982).

[51] Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States–Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

[52] *See* Carswell, *Economic Sanctions and the Iran Experience,* 60 Foreign Affairs 247, 248 (Winter 1981/82).

[53] Trade Expansion Act of 1962 §232, 19 U.S.C. §1862 (1976 & Supp. V 1981) ("Safeguarding National Security").

[54] *See supra* text accompanying notes 9–24.

[55] *See supra* notes 46–47.

[56] Fair Labor Standards Act of 1938, 29 U.S.C. §§201–219 (1976 & Supp. V 1981).

[57] *See supra* note 49.

[58] *See supra* text accompanying notes 11 and 12.