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The prevailing view among commentators (if not among policymakers) is that economic sanctions are a bad idea—bad economics, bad politics, bad law. Just a few minutes in the library turns up articles and books such as *Economic Sanctions: Obstruction or Instrument for World Trade?*[1] (and you can guess the answer); *Ineffectiveness of Economic Sanctions: Same Song, Same Refrain?*;[2] *Feeling Good or Doing Good with Sanctions*;[3] *Altering U.S. Sanctions Policy*;[4] and so on.

Most of the critique of economic sanctions has been directed at so-called "unilateral sanctions," which are sanctions imposed (alone or with the usual allies) by the United States. The fact that the UN Security Council has instituted a plethora of economic sanctions[5] since the automatic Soviet veto melted away in 1991, has taken away one of the arguments against imposition of sanctions, but has generally not converted the opponents of sanctions to supporters of non-forcible measures of international diplomacy.[6]

I. WAR AND SANCTIONS AS ALTERNATIVES: THE CASE OF IRAQ

Within a week of Iraq's invasion of Kuwait in August 1990, the UN Security Council adopted a program of mandatory economic sanctions designed

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1 Abbis J. Ali and Robert C. Camp, *Economic Sanctions: Obstruction or Instrument for World Trade?*, Managerial Fin 66 (1999).

2 Kimberly Ann Elliott and Gary Clyde Hufbauer, *Ineffectiveness of Economic Sanctions: Same Song, Same Refrain? Economic Sanctions in the 1990's*, 89 Am Econ Rev 403 (1999).

3 Ernest H. Preeg, *Feeling Good or Doing Good with Sanctions: Unilateral Economic Sanctions and the U.S. National Interest* (Center for Strategic and International Studies 1999).

4 Dianne Feinstein, et al, *Altering U.S. Sanctions Policy, Final Report of the CSIS Project on Unilateral Economic Sanctions* (Center for Strategic and International Studies 1999).

5 I cannot resist pointing out the two almost completely opposite meanings of the same word: (1) to approve or ratify; (2) to punish.

6 As of August 2003, the Security Council had invoked Article 41 of the UN Charter fourteen times to impose sanctions. Sanction programs were in effect with respect to Afghanistan, Iraq, Liberia, Libya (suspended but not revoked), Rwanda, Sierra Leone, and Somalia.

to induce Iraq to withdraw from what it called its 19th Province.[7] The sanctions did not work, and war became the alternative accepted by the international community.[8] At the end of that war, with Saddam Hussein still in power, the Security Council adopted a massive program of sanctions designed to prevent the rearming of Iraq.[9] For the next twelve years these sanctions remained in place, with the only major modification involving the Oil for Food Program, instituted in 1995.[10]

Russia and France repeatedly urged termination or substantial easing of the sanctions, on the ground that they had failed to bring down the government of Saddam Hussein but had caused massive damage to the civilian population of Iraq. For its part the United States insisted on maintaining the sanctions substantially intact, blaming the Iraqi regime for the suffering of the population.[11] As the United States became disenchanted with sanctions in 2002–03, France, Russia, and Germany suddenly favored continuation of sanctions as an alternative to war. As everyone knows, war trumped.

Does the Iraq story confirm and validate the principal justification for economic sanctions—an alternative to war on the one hand, "business as usual" on the other? In round I, the sanctions unanimously agreed to by the Security Council worked, in the sense that they kept the international community focused on the invasion of Kuwait. Consider what would have happened if the Security Council had gone no further than its first resolution of August 2, 1990, merely "condemning" the invasion and calling upon Iraq and Kuwait to begin

7 Security Council Res No 661, UN Doc No S/RES/661 (1990).

8 In Resolution 678 of 29 November 1990, the Security Council:

> Authorize[d] Member States co-operating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements [prior resolutions demanding complete and unconditional withdrawal from Kuwait] to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

The United States took that as authorization for war and on January 17, 1991, launched the air phase of Operation DESERT STORM. Security Council Res No 678, UN Doc No S/RES/678 (1990).

9 Security Council Res No 687, UN Doc No S/RES/687 (1991).

10 Security Council Res No 986, UN Doc No S/RES/986 (1995). In brief, the resolution permitted member states to import petroleum and petroleum products in return for payment into an escrow account up to a fixed amount. Funds in the escrow account could be used by Iraq to purchase food and medicines for essential civilian needs, under supervision of the United Nations.

11 See, for instance, the following statement by Secretary of State Madeline K. Albright in May 1998:

> [T]he fact that Iraqi children are dying is not the fault of the United States, but of Saddam Hussein . . . . [I]t is ridiculous for the United States to be blamed for the dictatorial and cruel, barbaric ways that Saddam Hussein treats his people.

Quoted in F. Gregory Gause III, *Getting It Backward on Iraq*, 78 Foreign Aff 54, 59 (1999).

"intensive negotiations for the resolution of their differences."[12] But the sanctions did not advance the objective of withdrawal of Iraqi troops from Kuwait, and war became the alternative generally accepted by the international community. In Round II, sanctions worked in the sense that they were a substitute for a war that some, but not all of the international community, thought should have been taken to the end in the spring of 1991. Again consider what would have happened if the Security Council had limited itself in March 1991 to accepting the cessation of hostilities[13] and in April 1991 to a demand that Iraq and Kuwait respect the inviolability of the international boundary between them.[14] There were in fact only two options: erect a massive regime of sanctions, or resume the war. The first option lasted twelve years, the second about six weeks.

As of this writing, it is too early to reach a definite judgment on the outcome. I submit, however, that the Iraq case illustrates the use of force and the use of economic sanctions as alternatives. In situations that one really cares about, it is unpersuasive to be opposed both to the use of force and to economic sanctions.

II. SANCTIONS AND THE COLD WAR: LOOKING BACK

The United States Export Control Act of 1949 entered into effect on February 26, 1949.[15] At that moment the Berlin Blockade was in full force. All civilian rail, road, and barge traffic between Berlin and the Allied zones of Germany had been cut off in June 1948, and West Berlin was being supplied entirely by US and British aircraft carrying food, coal, machinery, and all other necessities.[16] Exactly one year earlier, a bloodless coup in Czechoslovakia had planted that country firmly in the Communist camp, thereby completing the Iron Curtain that was to divide Europe for more than forty years. Italy, and especially Greece, remained vulnerable to threats of Communist takeover. Stalin was in absolute control of the Soviet Union and its satellites (except Yugoslavia). NATO, the North Atlantic Treaty Organization, was in the process of formation.

12 Security Council Res No 660, UN Doc No S/RES/660 (1990).

13 See Security Council Res No 686, UN Doc No S/RES/686 (1991).

14 See Security Council Res No 687, UN Doc No S/RES/687 (1991).

15 Pub L No 11, 63 Stat 7 (1949), codified at 50 USC app §§ 2021–32 (2000).

16 Since most of the readers of this essay will not have been alive at the time (or will have been too young to remember those exciting days), it is worth noting that the Berlin Blockade was instituted thirteen years before erection of the Berlin Wall, which physically separated the Eastern and Western sectors of Berlin from August 1961 until November 1989. The Berlin Blockade lasted 10½ months from June 1948 to May 1949.

A. RUNNING A COLD WAR

From 1949 on for the next four decades, the Export Control Act was the principal instrument for economic sanctions by the United States vis-à-vis the USSR and its allies.[17] The basic scheme under the Export Control Act and its successor statute was that all commercial exports from the United States—of technology as well as of goods—required a license from the Department of Commerce as a condition for leaving a United States port.[18] Most exports could be made under general license regardless of destination; for some products a particular or "validated" license was required, which might or might not be granted depending on the country in question and the proposed end user.

In principle, validated licenses were required for products that might have strategic uses, but of course many products could have both civilian and military uses.[19] Further, as Europe and Japan gradually caught up with the United States in industrial know-how, an increasing number of the products and technology requiring validated licenses for exports were available to the Soviet Union and its allies from other countries, and there were continuing debates over which products should be subject to the requirement of a validated license and under what circumstances such licenses should be granted. Not infrequently, different agencies of the US government took conflicting positions on these issues, with Commerce usually, though not always, leaning toward permitting an export transaction to go through; Defense concerned about strategic uses, such as advances in electronic communications; and State worried about what "signals" a given licensing decision might send to the target countries.

Looked at individually and in retrospect, many of the decisions on the administration of export controls seem unpersuasive, and some downright silly.[20] Viewed as a whole, however, and within the framework of comparing alternative policies, the export control program, it seems to me, does not look so bad. The Cold War between the United States and its allies and the Soviet Union and its allies remained cold for over forty years. From roughly 1948 to 1991, communism did not spread in Europe beyond the borders imposed at the end of World War II, nuclear weapons were never used, and the local wars in the divided nations of Asia—Korea and Vietnam—did not ignite a general

17 Sanctions against the People's Republic of China, North Korea, North Vietnam, and later Cuba were for the most part implemented pursuant to the Trading with the Enemy Act, 50 USC app § 5(b) (2000), administered by the Treasury Department and (with very few exemptions) permitting no trade or financial transactions at all.

18 Export Administration Acts of 1969 and 1979 and various amendments, 50 USC app §§ 2401–20 (2000).

19 Premier Khrushchev once suggested that buttons should be controlled, since they could be used to hold up soldiers' trousers.

20 For instance, a device to harvest sugar beets was denied an export license because it was powered by a V-8 engine that could also be used in a military command vehicle.

conflagration. Of course, one cannot attribute this outcome solely to a program of export controls and denial of strategic products. But would the outcome have been the same if the United States had permitted its industrial companies, investors, banks, and promoters to trade freely with the Soviet Union and its satellites? Could the United States have held together the NATO alliance, both militarily and in connection with the member countries' own programs of control and denial, if it had not shown that it was prepared to make economic sacrifices—that is, lost sales—to counter the communist threat? It seems fair to say that the strategy of economic sanctions as an alternative to military force or "business as usual" was the only alternative.

B. "FINE TUNING"

Another aspect of economic sanctions and US policy in the Cold War was perhaps not appreciated at the outset but became increasingly significant over time. The broad delegation granted to the President by the Export Control Act and its successor statutes enabled the executive branch to divide the world into "country groups" for purposes of export licensing. It was the opposite of most-favored-nation treatment, which has generally governed American trade policy since 1934, with emphasis on imports. But it enabled the United States (not without controversy) to differentiate by use of incentives and disincentives among the different countries comprising what had started out as the monolithic Soviet bloc but gradually attained quite different levels of self-determination within the Soviet orbit.

When the first set of regulations were issued under the Export Control Act of 1949, the world, apart from the United States and Canada, was divided into two groups—the Western Hemisphere (Group O) and all other countries (Group R). Just after the Korean War began in the summer of 1950, a Subgroup A was carved out of Group R to include all communist countries except Yugoslavia, and in effect Subgroup A was further divided after mainland China entered the Korean War in December 1950 by a policy of not issuing any licenses for exports to countries designated under the Trading with the Enemy Act. In 1957, by way of encouragement for its tentative steps away from total dependence on Moscow, Poland was removed from Subgroup A, thus differentiating it from Hungary, whose own tentative steps toward independence had been brutally crushed by Soviet troops. When the United States and Romania held talks on improving relations in 1964, one of the advantages that the United States was able to offer was to place Romania in the same class as Poland for purposes of export licensing. Later, Hungary to some extent slipped its moorings from Moscow, and joined Poland in Group W.[21] By 1982, the

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[21] For an explanation and defense of this policy by the US Secretary of State, see Dean Rusk, *Why We Treat Different Communist Countries Differently*, 50 Dept of State Bull 390 (1964).

world according to the Export Administration Regulations had been divided into eight country groups, ranging from Group P—Peoples' Republic of China; through Group Y—Soviet Union and other Communist states except Hungary, Romania and Poland; to the most severely restricted Group Z—Cuba, Kampuchea (Cambodia), North Korea and Vietnam.[22] Again, I am not suggesting that all of this "fine tuning" was successful, or even sensible. I do submit, however, to borrow from Clausewitz, that sanctions too are a continuation of politics by other means.[23]

III. ECONOMIC SANCTIONS AND INTERNATIONAL LAW

It is evident from the preceding sections that I disagree with those who condemn all economic sanctions. My support for sanctions, however, is subject to an important proviso. Like other actions of states in the international arena, economic sanctions are subject to the constraints of international law. That law as pertinent to unilateral sanctions is comprised, in my view, of two essential elements. *First*, international law imposes limits on jurisdiction to prescribe and jurisdiction to enforce—that is, on extraterritorial application of—a nation's laws.[24] *Second*, international law—yes, customary international law—embraces the doctrine of proportionality, which is almost always relevant in the context of international economic sanctions.[25]

The famous case of the confrontation between the United States and Western Europe over the Siberian Gas Pipeline may serve as an illustration of both propositions and also as another example of the choice between doing nothing (the Europeans' preference) and "doing something"—the decision of the United States. Since almost a full generation has passed since the events of 1981–82, a brief summary of the events is in order.

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22 Export Administration Regulations as of 1982, 15 CFR pt 370, supp 1. As of August 2003, these regulations set out a more complicated system, reflecting some eight rationales for export controls, including crime control, counterterrorism, as well as national security, and regional stability.

23 Carl von Clausewitz, *Von Kriege* (1832). The actual text is somewhat more elaborate, but the common quotation in English reads "War is nothing more than the continuation of politics by other means."

24 See generally Restatement (Third) of the Foreign Relations Law of the United States §§ 401–88 (1987) (see especially introductory note).

25 I do not address here the view once held that any measures taken by a state for purposes of foreign policy or national security are contrary to international law. That view finds some support in Article 16 of the Charter of the Organization of American States of 1948 (Article 19 of the 1967 revision), and also in the Declaration of the UN General Assembly on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, 25 UN GAOR Supp No 28 at 121, 65 Am J Intl L 243 (1979), but is now largely regarded as overtaken by events. See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* 5–6 n 6 (Cambridge 1988).

A. THE SIBERIAN PIPELINE CASE

The background of the confrontation was twofold. On one side, six countries in Western Europe had contracted in 1980–81 with the Soviet Union to build a large-diameter pipeline to carry natural gas from the Yamal Peninsula near the Arctic Circle in Western Siberia to a place in Germany from which the gas was to be distributed by smaller pipelines to utilities in the six countries. The West European countries would finance the project, estimated to cost between ten and fifteen billion dollars, to be repaid with proceeds from the sale of the natural gas. The pipe, compressor stations, and pipe-laying equipment were to be procured, so far as possible, in the states making the loans. For the Soviet Union, the project was a way to earn hard currency and to tap a huge, thus far unused resource base; for the West European countries the project was seen as a way to reduce their energy dependence on the unstable Middle East as well as a way to employ unemployed steel workers in productive tasks.

The United States had no direct role in the project, but having recently completed the trans-Alaska pipeline, its companies had certain technical capabilities difficult to duplicate in Western Europe. Several European companies that had committed themselves to build portions of the pipeline had contracts to purchase components and equipment and to use technology under licenses from American companies such as General Electric, Caterpillar Tractor, and others. Moreover, a number of European subsidiaries of American companies were engaged in portions of the project. The US government, though opposed to the project on policy grounds, had imposed no legal impediments to participation by American companies in supplying equipment or technology to the project.

On the other side, communism was beginning to loosen in Eastern Europe, particularly in Poland. A labor union at a shipyard in Gdansk (formerly Danzig) had gone on strike in August 1980 and had seized the shipyard. The strike had spread throughout Poland, a new popular leader, Lech Walesa, had emerged, and a new movement had been born: Solidarity. For sixteen months, freedom in Poland seemed to grow day by day. Close to ten million people joined Solidarity, a related movement arose among Poland's farmers, and even the Central Committee of the Communist Party held free elections by secret ballot, with the result that only one-tenth of the membership was reelected.

At midnight on Saturday, December 12, 1981, everything changed. Warsaw was ringed by tanks, soldiers manned check points on all major roads, and guards stood outside major buildings with their bayonets fixed. At 6 a.m. Sunday, December 13, martial law and a national emergency were proclaimed. All public gatherings were forbidden, Solidarity's leaders were arrested, telephone lines were cut, and a total news blackout was imposed. The tanks and soldiers now running Poland were Polish, not Russian; in Washington, however, the perception was that the Soviet Union must be behind the crackdown.

In Western Europe, the political leaders deplored the situation in Poland, but (with minor exceptions) imposed no sanctions. President Reagan, in contrast, responded to martial law in Poland by saying, "[W]e're not letting them get away with it."[26]

Within two weeks, the United States put in place a program of export controls and related economic sanctions, both against Poland and against the Soviet Union. The most important sanction concerned the pipeline:[27] all exports from the United States destined to be used for the pipeline, regardless of country of destination or level of technology, would henceforth require a license, and no licenses would be issued. As with other export controls, penalties for violation would include "denial of export privileges" for the firm in question, regardless of its place of establishment or of its place in the chain of export.[28]

The announcement brought about some grumbling from Western Europe, especially from firms contractually obligated to deliver compressors to the Soviet Union that contained components built in the United States, and also from governments irritated about the lack of consultation. There were no vehement protests, however, and no assertion that the United States had transgressed international standards. As a matter of international law, the United States had exercised its territorial jurisdiction to control exports of products and technology originating in the United States.

By the spring of 1982, however, there was no sign that the situation in Poland had improved. Efforts by the United States to persuade the European states to join in sanctions against the Soviet Union and Poland had essentially come to naught. In June 1982, following an economic summit in Versailles, President Reagan decided to tighten the screws. New regulations were issued to include (1) equipment produced abroad by foreign subsidiaries of US companies; and (2) equipment produced abroad by foreign-owned companies under technology licenses issued by US companies.[29] The assertion of

26 News Conference of President Ronald Reagan, Dec 17, 1981, 17 Weekly Comp Pres Docs 1379, 1381 (Dec 21, 1981).

27 Other sanctions included suspension of landing rights in the United States for the Soviet airline, Aeroflot; closing of the Soviet Purchasing Commission in the United States; suspension or non-renewal of licenses for export of high technology items to the Soviet Union; and suspension of negotiations looking to a long-term grain agreement, a maritime agreement and agreements on scientific and cultural exchanges.

28 The controls were announced by President Reagan in his Christmas address of December 23, 1980, and in a follow-up statement a few days later. 17 Weekly Comp Pres Docs 1404, 1406 (Dec 23, 1981).

29 Statement of the President on Extension of US Sanctions, June 18, 1982, 18 Weekly Comp Pres Docs 820 (June 21, 1982), implemented by the Department of Commerce at 47 Fed Reg 27250 (June 24, 1982).

jurisdiction under (1) was not new; it had been asserted by the United States in the past in order to frustrate evasion of US embargoes against China, Cuba, and other countries designated under the Trading with the Enemy Act and its successor statute, though not under export controls.[30] One could fairly say that restraints on the activities of foreign subsidiaries were a subject of continuing controversy between the United States and its allies, neither clearly supported by nor clearly contrary to international law.[31]

The assertion under (2), in contrast, was unprecedented—a new link, based on private licenses between American and foreign companies. The reaction in Europe to this assertion of jurisdiction was quick and uniformly negative. The foreign ministers of the European Community met within a few days and declared: "This action, taken without consultation with the Community, implies an extraterritorial extension of US jurisdiction, which in the circumstances is contrary to the principles of international law."[32] More than that, the governments of Great Britain, France, and West Germany (but not Italy) ordered companies organized in their territories (locally owned as well as those owned by American firms) to carry out their contractual obligations, notwithstanding the prohibition under the US regulations.

Even as the US Department of Commerce was issuing "denial orders" to firms that were continuing to work on the pipeline, thereby making them ineligible to participate in any US export transaction, other parts of the US government were coming to the conclusion that the June sanctions order was untenable. American diplomats seeking agreement on a variety of other issues found that every conversation came down to the Pipelines Sanctions. Instead of focusing on East-West tensions and the bad things happening in Poland, the sanctions had become a major West-West issue, not only pitting the United States against its West European allies but dividing the American business community, the legal community, and the Congress.[33]

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30 For examples of the use of this basis of jurisdiction, as well as a more detailed account of the *Gas Pipeline* case, see Andreas F. Lowenfeld, *Trade Controls for Political Ends* 90–95, 267–306 (Matthew Bender 2d ed 1983).

31 For extended discussion, see Restatement (Third) of the Foreign Relations Law of the United States § 414 (cited in note 24) and the sources there cited.

32 Statement of the Foreign Ministers of the European Community, June 23, 1982, NY Times A1 (June 24, 1982). Subsequently, the European Community submitted a longer *Aide-Mémoire* developing the arguments about violation by the United States of international law, reprinted in 21 ILM 891 (1982). It is worth noting that the legal part of the *Aide-Mémoire* was based largely on American sources, including both the Restatement (Second) of the Foreign Relations Law of the United States (1965) and early drafts of what became the Restatement (Third) of the Foreign Relations Law of the United States (1987).

33 In August 1982, the Foreign Affairs Committee of the House of Representatives approved a bill to terminate the export controls related to the pipeline. When the bill came to a vote in the full House, it failed by only three votes (206-203). An amended version of the bill,

One case related to the pipeline sanctions was actually litigated in Europe.[34] The Dutch subsidiary of an American company had a contract with a French firm to supply geological sensing equipment for use in construction of the pipeline. On orders from the parent company, the subsidiary notified the French company that it would be unable to perform its obligations under the contract. The French company brought suit in The Netherlands for specific performance, and on September 17, 1982, the District Court in The Hague gave judgment for the plaintiff, ordering delivery of the equipment contracted for not later than October 18, on penalty of a 10,000 guilder fine per day of default after that date.[35] Though the court was careful not to exclude all extra-territorial jurisdiction, it stated the general principle that it is not permissible for a state to exercise jurisdiction over acts performed outside its borders and held that none of the grounds for exceptions to the principle was applicable.

By the fall of 1982, the US government was looking for a graceful way out. On November 13, 1982, President Reagan announced that the export controls of December 1981 and June 1982 directed against the Siberia-Western Europe natural gas pipeline would be revoked immediately, in the context of an agreement with the nations of Western Europe on an "enduring, realistic, and security-minded economic policy toward the Soviet Union . . . a victory for all the allies."[36]

Two days earlier General Secretary Brezhnev had died. One day later the leader of Solidarity, Lech Walesa, was released from detention and permitted to return to his family in Gdansk. Whether these events and the revocation of the pipeline regulations were connected either in causation or timing is not known. Nor is it known to what extent, if any, the American sanctions affected Soviet actions vis-à-vis Poland or other East European states. What is clear is that exercise by the United States of jurisdiction over foreign enterprises on the basis of *ownership or control* by a parent corporation established in the United States, already strongly criticized, came under further attack, and has been resorted to more sparingly since that time.[37] Exercise by the United States of jurisdiction

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including a provision for waiver, was subsequently approved by the House but did not come to vote in the Senate.

34 *Compagnie Européenne des Petroles, SA v Sensor Nederland, BV*, Distr Ct, The Hague, Sept 17, 1982, 36 Rechtspraak van de Week-Kort Geding 167, translated in 22 ILM 66 (1983).

35 Id.

36 Radio address of President Reagan of November 13, 1982, 18 Weekly Comp Pres Docs 1475 (Nov 19, 1982). The regulations were formally revoked on November 16, effective November 13, 1982, 47 Fed Reg 51858 (Nov 18, 1982), and denial orders in effect against German, French, Italian, and British firms were vacated on the same day on motion of the Commerce Department. No text of the agreement referred to by President Reagan was ever published.

37 See, for example, Kenneth A. Rodman, *Sanctions beyond Borders: Multinational Corporations and U.S. Economic Statecraft* 3–6 (Rowman & Littlefield 2001).

over foreign *unaffiliated* enterprises on the basis of still thinner links, such as commercial technology licenses, was almost universally condemned, and could not be defended on legal grounds.

No treaty or even joint communiqué emerged to memorialize the holding of the Pipeline Case. But the outcome created an important precedent. Application of economic sanctions abroad was not just a question of power—that is, the threat of denying the huge American market to firms not complying with US regulations. Commonly understood precepts of international law impose limits on the exercise of jurisdiction to regulate conduct outside the regulating state's territory. In formulating the reach of its economic sanctions, a state (typically the United States) must take these precepts into account; violation of the precepts comes at a cost that may well be greater than any advantage gained from defying them.

B. HELMS-BURTON

The lesson of the Pipeline case was only imperfectly learned in the United States. In the early 1990s, following the end of subsidies to Cuba from the now defunct Soviet Union, Fidel Castro changed his country's policy and for the first time encouraged private investment and tourism. Elements of the US Congress, as well as the Cuban-American community, became concerned that investors from France, Italy, Spain, Canada, and elsewhere would take over and refurbish properties that had belonged to American interests or to former Cubans who had become American citizens since the Cuban Revolution three decades earlier.

Further, the proponents of what became known as the Helms-Burton Act[38] (named after its principal sponsors in the Senate and House), were also concerned that the Clinton administration might be growing "soft on Cuba" and might relax the embargo on trade and financial transactions with Cuba that had been in effect with little change since 1962. To simplify a rather complicated piece of legislation,[39] Helms-Burton essentially froze the regulations issued under the Trading with the Enemy Act "as in effect on March 1, 1996," including prohibitions applicable to foreign subsidiaries of a US-based parent corporation.[40] If one believes in executive discretion and fine tuning, this

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38 Formally, the Act was known as the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub L No 104-114, 110 Stat 785, codified at 22 USC § 6021 et seq (2000) (hereinafter the Helms-Burton Act).

39 For a detailed description of the Helms-Burton Act (as well as its legislative and political history) by the present author, see Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 Am J Intl L 419 (1996), reprinted in Andreas F. Lowenfeld, *The Role of Government in International Trade: Essays over Three Decades* (Cameron 2000).

40 Helms-Burton Act § 102(h).

provision is poor policy, regardless of one's views about policy toward Cuba.[41] But so long as it relates only to trade or financial transactions to or from the United States, it does not violate international law. Not so for Title III of the Helms-Burton Act, "Protection of Property Rights of United States Nationals."

The scheme of Title III is to create a right of action in US courts on behalf of any US national who has a claim for property confiscated by Cuba since January 1, 1959, against any person who traffics in such property. The details are somewhat complicated, both with respect to the effective date and with respect to who is eligible to bring the action and when. But the idea is clear: whoever "traffics" in property that once belonged to US nationals is to be confronted with the prospect of litigation in the United States, and of exposure to damages equal in the first instance to the value of the property in question, and if the trafficking continues, to treble damages.[42] "Trafficking," a word heretofore used almost exclusively in reference to dealing in narcotics, is defined to include not only selling, transferring, buying, or leasing the property in question, but also "engaging in a commercial activity arising or otherwise benefiting from confiscated property."[43] Thus the Act contemplates that if an English company that purchases sugar from a Cuban state enterprise and also does business in the United States and therefore is amenable to the jurisdiction of a US court, it would be liable to a US national who could show that some of the English company's purchases consisted of sugar grown on the plantation that the plaintiff once owned. There is no necessary connection between the value of the property on which the claim is based and the value of the transaction on which the assertion of "trafficking" rests.

It seems that the principal purpose of the Helms-Burton Act was not to stimulate litigation in the United States, but to deter nationals of third countries from doing business with and investing in Cuba. Since virtually all commercial enterprises in Cuba were taken over by the government in the years after Fidel Castro came to power, whether they previously belonged to US nationals, Cuban nationals, or third country nationals, any person that dealt with an enterprise that existed prior to January 1, 1959, or with an enterprise that could be regarded as a successor to such an enterprise, stood exposed to litigation in the United States if it did business or otherwise could be found in the United States. Of course, not all such litigation, if it took place, would result in a final judgment against the defendant. Plaintiffs would, it seems, have the burden of proving that defendants were dealing in *their* confiscated property, and there might well be

41 The freeze was made subject to one exception under § 204, which authorizes the President to take steps to suspend the embargo, but only upon submitting a determination to Congress that a transition government, that is, a government without Fidel Castro or his brother, is in power in Cuba. Id § 204.

42 Id § 302(a).

43 Id § 4(13).

different interpretations of what that meant.[44] But no one likes to face a lawsuit with high potential damages, least of all in the United States. And just in case the potential defendant's calculation might result in preferring to continue the commercial relation with Cuba even at the risk of litigation in the United States, Helms-Burton provides that if the proscribed conduct is continued beyond a 90-day grace period, damages are to be trebled.

Given the doubtful prospects of business in Cuba in any event and the huge potential of the American market, the proponents of Helms-Burton were fairly confident that persons who contemplated investment in Cuba or transactions with Cuba would change their minds, and that those who had already made such deals would look for ways to unload their investments or terminate their contracts. To the extent this was true, Helms-Burton was extraterritorial legislation of the worst kind. No one, I submit, could have supported a United States law that read:

> It shall be unlawful for any person or firm, wheresoever located and regardless of its nationality, to do business with or invest in a firm based or organized in Cuba.

Helms-Burton does not quite say that. It is not a prohibition, only a threat of exposure to litigation and heavy damages. But the effect, if it were to be implemented as its proponents hoped, would be the same and, in my view, so would its inconsistency with international law. Many commentators, including the present author, took this position.[45]

The reaction outside the United States, and particularly within the European Community, was similar to the reaction in the Pipeline case. Once more, the United States was exercising extraterritorial jurisdiction on an unprecedented and unacceptable basis. The European Commission drafted and later issued a regulation to prevent European companies from complying with Helms-Burton and to enable them to recover amounts awarded against them by American courts.[46] Moreover, the European Commission on behalf of the European Union brought a formal complaint to the WTO, asserting that Helms-

44 For instance, does sugar grown in 1996 on land that belonged to plaintiff in 1958 qualify as plaintiff's property? What about a hotel built in 1994 on land that once belonged to plaintiff? Or cigars made in Spain from tobacco alleged to be grown in Cuba? I raised these issues thirty years ago in the context of the property in suit coming to the United States. See Andreas F. Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 Am J Intl L 899 (1965). Clearly the litigation problems are more difficult when the property on which the claim is based is not before the court.

45 See, for example, Lowenfeld, *The Role of Government in International Trade* at 400 (cited in note 39); Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J World Trade 4, 5 (1997); also Brigitte Stern, *Vers la Mondialisation Juridique? Les Lois Helms-Burton et D'Amato-Kennedy*, 100 Rev Générale de Droit International Public 979 (1996).

46 See Council Regulation 2271/96, 1996 OJ (L 309) 39, reprinted in 36 ILM 125 (1997). Similar regulations were issued by Canada and Mexico.

Burton violated several provisions of the GATT, and also of GATS.[47] Even though Title III of Helms-Burton included a provision authorizing the President to suspend its application for six months and President Clinton had already done so once, the EU asserted that suspension was not good enough, because the very threat of suits under the Act, like the sword of Damocles, creates a disincentive to investment or long-term trading relationships.[48]

Neither the United States nor the European Union had an incentive to test the reach of Article XXI, the security exceptions provision of the GATT, and eventually an out-of-court settlement was reached.[49] Helms-Burton was not repealed, but both President Clinton and President Bush issued waivers of Title III not strictly within the waiver authority included in the Act. In terms of principle, that is of the limits placed by international law on unilateral sanctions, the Helms-Burton episode confirms the teaching of the Pipeline episode.

IV. SANCTIONS AND GLOBALIZATION

The mention of the GATT and WTO at the end of the preceding section may serve as a transition to this brief final section, which returns to the theme of the symposium. Can frequent resort to economic sanctions—whether multilateral or unilateral—be reconciled with dedication to globalization? On one level, the answer is clearly no. Globalization is opposed to discrimination; sanctions are by definition discriminatory. Globalization is based on removing trade barriers; sanctions mean erecting barriers to trade. How, then, can frequent resort to sanctions be reconciled with the GATT/WTO system, as it has evolved over half a century?[50]

In fact, the GATT system has had hardly any impact on the use of sanctions for political ends, in part because many of the targets of sanctions applied by the Western industrial states were not contracting parties to the GATT at the relevant time—notably the Soviet Union and the People's Republic of China,[51] and in part because there has been a consensus among

47 World Trade Organization, Request for the Establishment of a Panel by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO DOC No WT/DS38/2/Corr. 1 (Oct 14, 1996).

48 Id.

49 See *European Union—United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran Libya Sanctions Act*, April 11, 1997, reprinted in 36 ILM 529 (1997).

50 Of course the GATT/WTO has its own system of sanctions, strengthened in the Uruguay Round by creation of the Understanding on Dispute Settlement. But these sanctions are designed to enforce the WTO's own rules if a measure is not withdrawn after it has been found inconsistent with GATT or a related agreement. At least in theory, and for the most part in practice, such sanctions are outside the present topic—economic sanctions for political ends.

51 Also North Korea, Vietnam, Cambodia, Libya, Iran, Iraq, Hungary, Romania, East Germany, and Bulgaria.

officials and delegates concerned with international trade to keep political disputes from jeopardizing the ever fragile effort to move forward together on an economic agenda.[52]

I think there is still another reason why the GATT/WTO has had little impact on policies of economic sanctions, and why persons (including the present writer) who have spent much of their careers advocating reduction of barriers to trade do not recoil at sanctions if they are applied with discretion and moderation. Putting aside the many and complicated details, the rules of international trade start with the assumption that states are instinctively mercantilist (that is, if not checked they will seek to maximize their exports and minimize their imports). The GATT and related agreements developed over half a century are designed to counter these instincts, in the interest of rational allocation of resources and gain for the international community as a whole.

Economic sanctions for political ends are the opposite of mercantilism. States imposing sanctions—most often the United States, but other states as well—decide to forgo economic gains for themselves and for the system as a whole in order to promote other goals. Export controls deprive the exporting country and its firms of export earnings; restraints on investment deprive investors of economic opportunities and the home country and its citizens of dividends; asset freezes, at least if frequent or long continued, make the state imposing the sanctions less attractive to potential investors. A government that undertakes such measures is asking its firms and its citizens to make sacrifices, on the ground that there are issues more important than economic advantage—aggressive war, systematic violation of human rights, subjugation of dependent territories, sponsoring terrorism, protecting drug trafficking or money laundering, and so on.

Seen in this light, the opponents of globalization ought to appreciate economic sanctions, because they too see some issues as more important than money—global warming, genetic modification of food, and child labor, to mention just a few. The proponents of globalization ought to be skeptical of justifications for imposition of sanctions and of continuation of sanctions imposed long ago. But if the justification is persuasive, if the proposed measure is proportional to the perceived threat, and if there is provision for expiration or at least periodic review of the sanction, the globalists, like the anti-globalists, can accept international economic sanctions, which in any event will continue to hold a place at the intersection of politics, economics, and law.

52 For analysis of Article XXI of the GATT, the "Security Exceptions" provision of the GATT, and a summary of the few cases that have arisen in connections with that article, see Andreas F. Lowenfeld, *International Economic Law* 34–35, 755–64 (Oxford 2002).

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