Opec; Back to... (Continued)

national oil companies (NOCs) should be encouraged. It is possible that future OPEC meetings will be held between OPEC NOCs and not the oil ministries. Also an organization for natural gas producing and exporting countries could be set up to construct a meaningful relationship betwen oil and gas communities. Regional trade arrangements within the Middle East and between the Middle East and Central Asian oil producing and exporting countries might help to increase the trade of oil products and petrochemicals, oil transit and transportation networks. Further, OPEC should set a target price of oil based on a single Persian Gulf crude oil or a combination of different crudes exported from the region. It is not in the long- term interest of the oil market that the world price should be determined through the trading of the Brent/Ninian blend, North Sea crudes with a combined production rate of around 800 thousand barrels per day. OPEC must also take a united stand against the industrialized countries which discriminate against oil even if they attempt to justify such policies with reference to global warming or the environment as a whole. Lastly but most importantly, OPEC member states must work out ways and means to eliminate sources of tension among the Middle Eastern countries. The oil market is not the forum for OPEC and the Persian Gulf countries to settle their political, regional or ideological disputes.

Reduction of... (Continued)

ing programs and the dispatch of energy experts can be tacken into consideration.

The third stage:

Collaborative R & D or demonstration project for improving the energy efficiency of a given district (in this case allocation of large sums of money will be unavoidable).

(2) International coopertation on the part of energy consumers

In the future, the success of each nation's energy conservation policies or programs will largely depend upon the response and participation of diverse consumer groups, because nowadays they have become an actual influence on the issues of energy and environment.

Civil movement for energy conservation in the Repubic of Korea is sporadic in its beginning stage. But, as you know, Japan's "National Movement for Resources & Energy Conservation" and U.S.A.'s "NGO (Non- Governmental Organization) are renowned for their ever vigorous activities.

The activities and experiences of such voluntary groups need to be seriously discussed in the course of promoting international cooperation, as they will play an important role more and more through activated international collaboration and exchange of information and professionals.

of sanctions against Haiti. By and large, however, regionally mandated sanctions have not had the significance of unilateral or U.N.-sponsored multilateral sanctions.

C. Legal effects of multilateral sanctions

Where sanctions are based upon a multilateral authority such as a Security Council mandate under article 41 of the U.N. Charter, the legal effects of the sanctions are, at least in principle, more straightforward than is the case with respect to unilateral sanctions. U.N. member states are required to fulfill in good faith their obligations under the Charter. This obligation would naturally include in particular carrying out mandatory decisions of the Security Council.

The problem with respect to multilateral sanctions has been a practical one. For example, the U. N. mandated sanctions against Southern Rhodesia have largely been viewed as a failure because of the lack of effective enforcement and compliance by the individual member states, including the United States. Coordination of implementation and enforcement of U. N. sanctions through individual member state programs raises serious logistical issues, but continuing institutional experience with such programs may resolve these problems.

IV. Current Trends in Use of Sanctions

Recent administrative practice would suggest that the UNPA now plays a major role in U.S. economic sanctions policy, which appears to have become increasingly mutilateral in its orientation. While this is undoubtedly true in broad terms, this administrative practice also reveals a curious redundancy. In each post-Rhodesian sanctions program (i.e., post-1968), invocation of the UNPA by the United States has been preceded or accompanied by a parallel invocation of the purely domestic authority of the IEEPA as well.

This means that U.S. practice remains fundamentally independent of the U.N.-mardated system of sanctions. One graphic example of the significance of this independence is the enactment of the CLDSA, which represents a significant unilateral exercise of extraterritorial sanctions authority on the part of the United States. Country risk planning must therefore take into account the unilateral position of the United States, as well as the very real possibility of future unilateral action.

V. Policy Implications of Economic Sanctions

A. Attempts to measure the effectiveness of sanctions

One serious policy issue for economic sanctions has been that there is no widely accepted methodology for measuring the effectiveness of sanctions programs. In part, this arises from the difficulty in determining what counts as "effectiveness." Must the overall policy objective -- of which sanctions are only one tool -- be achieved for sanctions to be considered effective? Or should we look more specifically at the instrumental objective of the sanction itself, regardless of whether or not the overall policy objective is achieved? Furthermore, at an empirical level we do not always have adequate data available to measure the relative effectiveness of a sanction. Ongoing research efforts have been directed at this problem, in the hope that the decisions of policymakers to impose sanctions may be better informed.

B. Assessment of cost/effectiveness of unilateral sanctions

Measurement of the relative success of sanctions is further complicated by the cost/effectiveness implications of unilateral sanctions. If state A imposes sanctions on state B, it should take into account the cost to its own business enterprises of compliance with the sanctions, including the loss of current and future business opportunities to enterprises in state C, which may continue to trade with state B. In addition, there may also be systemic costs to the international trade and finance system resulting from the dysfunctional effects of sanctions. In current practice, however, policymakers imposing unilateral sanctions do not appear to take adequate account of these substitutional and systemic costs in deciding whether or not to impose sanctions.

C. Assessment of cost/effectiveness of multilateral sanctions

Measurement of the relative success of multilateral sanctions may involve other cost/effectiveness implications. Subsitutional costs may be minimized if the multilateral sanctions are generally applicable, as is the case in U.N.- mandated sanctions under article 41 of the Charter. Systemic costs may also be ameliorated if there is broad international consensus with respect to the legitimacy of the objectives of the sanctions program. However, since multilateral sanctions programs are implemented at the individual member state level, agency costs and other costs of compliance are often considerable and difficult to coordinate.

VI. Conclusion

Unilateral and multilateral economic sanctions are a fact of life for enterprises involved in international trade and finance. Where the political objectives of the sanctions are viewed as important by the implementing governments, sanctions cannot be ignored by business enterprises. The extraterritorial scope of many unilateral programs and the broad reach of multilateral programs raise serious concerns that enterprises may find themselves inadvertently confronted by sanctions even in transactions that ostensibly involve non-sanctioned third-country nationals. Caution must therefore be the constant companion of enterprises involved in international trade and finance.

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violate the basic rubrics governing the invocation of non-forcible countermeaures under customary principles of international law. Since there is no jurisdictional link between the sanctioning state and the secondary target, there may be no obligation or duty to the state to be breached by the secondary target in the first place. It may also be argued that, given the extreme nature of the exercise of jurisdiction in such a case, the countermeasure is disproportionate **a priori**.

U.S. policy is opposed to such boycotts, though it may be argued that such U.S. sanctions as the Soviet pipeline export controls, imposed in response to martial law in Poland, themselves involved a secondary boycott feature. However, these controls were viewed as unprecedented in U.S. practice, "extend[ing] U.S. export control authority beyond any jurisdictional reach previously asserted", or asserted since then, until the enactment of sanctions against Cuba this year.

2. Conventional law

The exercise of economic sanctions authority may also be affected by conventional law. In principle at least, under such conventional law as the General Agreement on Tariffs and Trade ("GATT") (and its successor, the WTO) certain forms of unilateral trade sanctions imposed by one member state on another member might arguably be a violation of international trade rules. Much the same result might obtain under the Charter of the International Monetary Fund (IMF charter) in the case of unilateral financial sanctions that involve currency restrictions. Regional arrangements may also forbid that use of coercive measures, short of force, intended to "force the sovereign will of another state and obtain from it advantages of any kind."

In fact, however, arrangements under conventional law do not appear to have presented any significant practical impediments to the implementation of U.S. economic sanctions policies. The GATT and the WTO contain self- judging national security exceptions that arguably cover the matter. No comparable exception exists in the IMF charter, but a 1952 decision of the IMF Executive Board established a procedure for the granting of IMF approval of restrictions imposed on security grounds. The procedure has been invoked in a variety of situations, including, for example, the imposition of U.S. sanctions against Iran in connections with the hostage crisis of 1979- 81.

3. Extra-territorial application of unilateral sanctions

Outside conventional arrangements, arguments to the effect that international law prohibits the use of unilateral economic sanctions have remained speculative and without serious practical consequence. Recent efforts in this regard have suggested that the intended extra-territorial effect of such sanctions renders them legally suspect. This extraterritoriality argument has been vigorously disputed by representatives of the U.S. Government, insofar as it denies that a state has the legal authority and jurisdiction to prescribe a rule of law affecting transactions. Nevertheless, the international reaction to the imposition of sanctions by the United States has often been heated, even from allies indirectly affected as host states of foreign-situs branches and subsidiaries of U.S. firms.

III. International Sources of Authority for Economic Sanctions

A. U.N. Security Council mandates

Under Article 41 of the U.N. Charter the Security council has the authority to mandate the imposition of economic and other sanctions in response to a threat to international peace and security. In U.S. practice, section 5 of the UNPA authorizes the President to apply such sanctions against a target country or national thereof in accordance with any mandatory decision by the Council under Article 41. Until recently, this statutory authority was rarely invoked, but in current practice it has become an extremely significant statutory basis for U.S. economic sanctions.

With the withering away of the Soviet Union and the emergence of a more co-operative relationship between the Wahington and Moscow, the stage was set for a resurgence of interest in the mandatory authority of the Security council under Article 41. Thus, the UNPA was invoked by the President to implement Security Council resolutions in response to the Iraqi invasion of Kuwait in 1990. The UNPA was invoked in the April 1992 banning of overflight, take-off and landing of aircraft flying to or from Libya. Also in 1992, it was invoked in connection with sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY). In 1993, the UNPA was invoked as authority in the second phase of the Haitan sanctions. The President has also invoked the UNPA in implementing a 1993 Security Council arms embargo aganst UNITA and Angola, and the May 1994 arms embargo with respect to Rwanda.

Currently, the UNPA serves as at least one of the statutory sources of authority in several major economic sanctions programs. It provides authority for the continoing sanctions agamst Iraq. It is one of the statutory authorities for the Libyan airflight ban. In addition, of course, the UNPA is one of the statutory bases for the arms embargo against UNITA and Angola. and the May 1994 arms embargo with respect to Rwanda.

B. Regional arrangements

Regional arrangements also can be a source of sanctioning authority. Past examples include the Cold War Co-Com export controls against the Soviet Bloc; the early stages of the U.S. - sponsored Cuban embargo; the secondary boycotts under tacken against Israel by Arab states; and, OAS participation in the early stages

IEEPA remains an unrevoked basis of authority for the Iraqi sanctions subsequently broadened by the U.N. Security Council. The IEEPA also serves as coordinate authority, with the UNPA, for the UNITA? Angola arms embargo. The IEEPA is still the sole substantive authority for the January 1995 blocking of terrorist assets.

B. Highlights of the new U.S. Cuban sanctions

Enacted in March 1996, the Cuban Liberty and Democratic Solidarity Act (CLDSA) raises very serious concerns for enterprises involved in international trade and finance. Its direct effects will be felt by enterprises with direct and indirect business interests in Cuba. However, the CLDSA also suggests a renewed interest on the part of U.S. policymakers in unilateral sanctions with broad extraterritorial effects, and this has implications for possible sanctions beyond the Cuba context. Enterprises should therefore be sensitive to the possibility that the United States might activate similar sanctions against other target states in the future.

The principal features of the CLSDA that are of concern to this seminar are as follows. First, the act requires the President to instruct the Secretary of the Treasury and the Attorney General "to enforce fully the Cuban Assets Control Regulations." This would appear to indicate that the Cuban embargo is no longer a sanctions program operated within the President's discretionary authority.

Second, the act prohibits persons subject to U.S. jurisdiction from extending any financing to a foreign or U.S. national "for the purpose of financing transactions involving any property confiscated by the Cuban Government" from a U.S. national. This prohibition does not apply to financing by the owner of the property or the U.S. national claiming the property for certain permitted transactions.

Third, the act authorizes U.S. nationals whose property was confiscated by the Cuban Government to bring suit against any person "trafficking" in confiscated property. For these purposes, "trafficking" includes any transaction involving confiscated property, engaging in any commercial activity using or benefiting from the property, or participating in such trafficking by another person. For example, a third-country national who purchased or financed the purchase or sale of the crop of a confiscated Cuban plantation formerly owned by a U.S. enterprise, or by a Cuban who is now a U.S. national, might find itself subject to suit in U.S. court for "trafficking" in confiscated property. Liability under this cause of action could equal the current fair market value of the property, plus reasonable cost and attorneys' fees. However, liability could equal, if the defendant had prior notice of the U.S. national's claim to the confiscated property.

Fourth, the act requires the Secretary of State to exclude from the United States any alien whom the Secretary determines to have confiscated or to have trafficked in confiscated property. This exclusion provision extends to anyone who is a corporate officer, principal, or controlling shareholder of an enterprise that has been involved in confiscation or trafficking. It also includes anyone who is the spouse, minor child or agent of an excludable person.

These provisions have triggered vigorous criticism from U.S. trading partners, although the liability provisions are not effective until September 1996 at the earliest. The act raises serious questions about its use as a secondary boycott device, by forgetting third country national that trade with Cuba. In addition, the extraterritorial implications of the act are particularly troublesome. Nevertheless, if the act is perceived by the U.S. Congress as effective against Cuba, it is quite possible that similar devices may be applied against other target states as well.

C. Legality of unilateral sanctions

1. Customary international law

Controversy surrounds the use of economic sanctions as a tool of foreign policy. Speculation continues, of course, over whether such sanctions, and in particulay unilaterally imposed sanctions, are legal under principles of international law, or constitute impermissible economic coercion in violation of the sovereign independence of states.

Customary principles of public international law have not had any readily discernible practical effect on U.S. practice with respect to economic sanctions. In part this may be due to the apparent indeterminacy of the law in this regard. As a general matter, one would expect that unilateral economic sanctions, as a species of "non-forcible countermeasure," ought to be invoked by a state only in situations in which the target state has breached some obligation or duty owed to the invoking state. In addition, there should be a demand for redress by the invoking state, which has not been satisfied by the target state, prior to the invocation of countermeasures. Finally, the countermeasures invoked should be proportional to the violation or breach suffered.

The difficulty, of course, is in identifying situations, **post facto**, in which a state has imposed sanctions in violation of this international law rubric; states normally construct at least a colorable justification for the imposition of sanctions. It has been argued that "[t]he frequent use of [economic] sanctions by the United States and many other countries constitutes persuasive evidence that no clear norm exists against them in customary international law."

Some sanctions programs have a secondary boycott effect; that is, sanctions are applied not only against a target state, but also against any person or state that maintains relations or engages in transactions with the target. In a secondary boycott, the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings have no jurisdictional relationship to the sanctioning state. In this sense, the secondary boycott may be said to

tions may appear to be, the basic patterns of response have been remarkably similar, and have been treated as such by the courts.

Section 5(b) of the TWEA delegates to the president the powers of economic warfare that have served as the authority for almost all major economic sanctions programs prior to 1977. Since 1977, the provisions of section 5 have been limited to use during periods of declared war, except with respect to grandfathered programs in existence at the time of the change in section 5. Throughout the pre-1977 period, the TWEA was utilized by the U.S. Government against states which were declared enemies of the United States or which, in situations not involving declared war, had been considered to be engaged in the pursuit of policies otherwise threatening to U.S. interests.

Currently, there are at most two principal sanctions programs operating under the authority of section 5(b) of the TWEA. The first is the Foreign Assets Control Regulations (FACRs). The FACRs were originally promulgated in 1950 and currently impose full economic sanctions on North Korea and its nationals.

The second is the Cuban Assets Control Regulations (CACRs), originally promulgated in July 1963. The CACRs currently impose full economic sanctions on Cuba and its nationals, but they are now authorized directly by the Cuban Liberty and Democratic Solidarity Act of 1996, discussed later in this paper.

2. The Export Adminstration Act

The EAA is not primarily a sanctions authority. To the contrary, congressional findings in the act tend to emphasize the importance of facilitating U.S. export activity, rather than creating the kind of systemic dysfunction that is the purpose of economic sanctions. Similar emphasis on the facilitation of U.S. exports can be seen in the declaration of policy contained in the act.

Nevertheless, the EAA has traditionally provided authority for national security export controls and for foreign policy export controls. These controls have often been invoked in the service of economic sanctions programs. However, within the structure of the EAA itself there are requirements and limitations that make the act marginally less practical as a source of sanctions authority. Indeed, in recent sanctions practice it has not been unusual to find authority for export sanctions delegated to the Department of the Treasury, utilizing the authority of the IEEPA, in preference to the EAA.

3. The International Emergency Economic Powers Act

The IEEPA gives the President broad authority over financial transactions and property in which any foreign country or national has any interest, provided that he first declares the requisite national emergency. With the addition of greater procedural requirements, the IEEPA Was intended to replace the TWEA as the source of statutory authority for economic sanctions in situations of national emergency. It essentially recodifies, for peacetime use, virtually the same range of powers available to the president under section 5(b) of the TWEA.

Since its enactment in 1977, the IEEPA has served as the statutory authority for the most significant U.S. sanctions programs, in absolute dollar terms, since the World War II controls. These include the blocking of Iranian Government assets and the trade sanctions undertaken against Iran as a response to the 1979- 1981 hostage crisis, and the early stages of the U.S. response to Iraq's invasion of Kuwait in 1990. Indeed, in less than twenty years, the IEEPA has been invoked more often than the TWEA had been in the period of almost eighty years since its enactment.

Thus, in November 1979, the Iranian hostage crisis triggered the first use of the IEEPA authority. This authority was deployed in stages--unlike previous TWEA programs-- in a series of executive orders from November 1979 through mid-April 1980 successively increasing the sanctions.

In contrast to these very extensive sanctions, in 1987 the IEEPA was invoked to impose a peculiarly limited set of trade sanctions against Nicaragua and the ruling Sandinista regime. Also in 1985, the President invoked the IEEPA as the authority for a range of sanctions against the government of South Africa, largely in an effort to forestall congressional action. This effort was ultimately unsuccessful; in 1986, Congress enacted the Comprehensive Anti-Apartheid Act of 1986 over the President's veto.

In January 1986, the IEEPA was invoked as the basis for extensive sanctions against Libya. Like the Iranian sanctions, the Libyan sanctions were relatively broad but were imposed in successive executive orders, rather then by a single presidential action. The Libyan sanctions were later expanded as a result of U.N. Security Council resolutions, so that their statutory authority became based in part on the United Nations participation Act (UNPA), to be discussed later in this paper.

In 1988, the IEEPA was invoked as statutory authority for the relatively limited financial sanctions against Panama and the regime led by the military dictator Noriega. These sanctions relied principally on the unilateral authority of the IEEPA, with no role for the UNPA. However, in other major sanctions programs that followed, the IEEPA authority was accompanied or followed by invocation of the UNPA as well. This was the case, for example, in the Iraqi sanctions, the Haitian sanctions, the FRY sanctions and the UNITA/ Angola arms embargo.

There have been two recent exceptions to this trend. The IEEPA has been invoked as the sole substantive authority for the January 1995 blocking of assets of terrorists who threaten the Middle-East peace process; and the March 1995 ban on contracts for the development of Iranian petroleum resources.

Currently, the IEEPA serves as the statutory authority, in whole or in part, for a number of sanctions programs. The IEEPA powers underlie the continuing management of the arbitral process established by the claims settlement entered into with Iran in January 1981, as well as the recent petroleum development ban. It continues to serve as a statutory basis for the Libyan sanctions. The

LEGAL FRAMEWORK OF ECONOMIC SANCTIONS

M. P. F. Malloy, Ph. D.

I. Introduction

Economic sanctions and export controls are a significant component of country risk analysis for any business enterprise involved in international trade and finance. These sanctions and controls represent a peculiar dilemma for business enterprises. The effectiveness of sanctions depends upon their dysfunctional character-- they are effective to the extent that they frustrate the normal expentations of trade and finance with respect to the transparency of national borders. Hence, they are unpredictable, depending as they do on swift interposition disturbing the normal patterns of trade and finance. Yet one must plan for them, and comply with them once they are imposed. Futhermore, in attempting to comply with them, business enterprises often find themselves trapped in a fundamental clash between the conflicting public policies of two or more states-- the sanctioning state, the target state, and often third states that are trading partners of both.

In part, this dilemma is exacerbated by the fact that there exist not only coordinated multilateral sanctions but also significant unilateral sanctions peculiar to individual sanctioning and target states. This naturally complicates country risk analysis. In addition, even multilateral sanctions are implemented and enforced by individual states, and so the details of application of a multilateral sanctions program may vary considerably from state to state.

It is essential, therefore, that business enterprises involved in international trade and finance give specific attention to the possible implications of current and future sanctions programs. In the remarks that follow, I shall discuss the legal framework of unilateral and multilateral sanctions, with emphasis on the extensive practice of the United States.

II. Domestic (Unilateral) Sources of Authority for Economic Sanctions

A. Scope of authority

Three basic statutory authorities have been invoked in support of unilateral economic sanctions programs undertaken by the United States. These are section 5(b) of the Trading with the Enemy Act (TWEA), the Export Administration Act (EAA), and the International Emergency Economic Powers Act (IEEPA).

1. The Trading With the Enemy Act

Originally enacted in 1917, the TWEA is the oldest extant U.S. economic sanctions authority. It has served as the model for U.S. sanctions programs, both as a matter of policy and as a matter of technique, at least since the immediate pre-World War II period. Indeed, the basic features of most of the current programs do not differ materially in technique from the general structure of sanctions imposed over the past 50 years. No matter how dramatic some of the more recent episodes in the history of U.S. economic sanc-