

FOREWORD

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Debate over the utility of economic sanctions remains brisk and their use has certainly not diminished. In our recent book, *Economic Sanctions Reconsidered* 3d edition, my colleagues and I examined 204 episodes over the past century and concluded that, in about one-third of the episodes, economic sanctions succeeded to some degree in achieving their foreign policy goals.¹ The one-third rate may not seem terrific, but it does contradict the common statement that “sanctions never work.” We found that the success of economic sanctions depends on various factors—including the type of goal sought, the economic and political context in the target country, and the manner in which the sanctions were implemented. For practitioners, the important question is how to design sanctions so they work better.

Since the end of the Cold War, sanctions policies have shifted dramatically. The decline of super power rivalry coupled with the force of globalization changed the objectives and geographic locus of sanctions and introduced new players into the game: non-state actors (both benign non-governmental organizations (“NGOs”) and malign terrorists and drug traffickers) along with different layers of government (notably Congress, and many states and cities). Sanctions policies have consequently targeted a wider spectrum of issues such as ethnic strife, civil chaos, human rights, democracy, narcotics trafficking and terrorism. Authors in this symposium issue delve into the new aspects and deliver a wealth of thoughtful analysis.

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¹ GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 158 (3d ed. 2007).

Reflecting its role as economic, political and military super power, the United States has long been the predominant sender country. The incidence of U.S. unilateral actions has fallen dramatically since the Second World War, but economic sanctions remain an important tool of U.S. foreign policy. To carry out its designs in recent decades, the United States often seeks cooperation from other countries.

Since the 1990s, non-state actors, such as Osama bin Laden's al Qaeda network, have increasingly launched attacks against the United States and its allies. The 9/11 attack in 2001 shocked the United States and much of international society, and triggered the "war on terrorism." Iran rose high on the list of the intelligence community and was seen as a danger to the United States and its allies. The Iranian government has funded non-state terrorists, notably Hamas and Hezbollah, and has continued to pursue nuclear weapons. Since 1983, when Iran was implicated in the terrorist bombing in Lebanon, the United States has incrementally raised its barriers on trade and investment with Iran, especially targeting the Iranian oil industry, the country's main source of revenue. In 1996, Congress enacted the Iran and Libya Sanctions Act ("ILSA") which supplemented existing measures with additional restrictions on foreign companies that undertake new oilfield investments in Iran. When terminated with respect to Libya, the act was renamed the Iran Sanctions Act, and extended until December 31, 2011.² However, sanctions have not successfully blunted Iranian determination to develop nuclear weapons and fund terrorists.

In his Article *A New Sanction for a New Century: Treasury's Innovative Use of Banking Sanctions*, Orde F. Kittrie, law professor at Arizona State University, examines the utility of the banking sanctions on Iran. These sanctions are enforced by the Treasury Department. Using banking restrictions, the United States has tried to interrupt Iran's access to normal financial channels in ways that might support nuclear and terrorist activities. The U.S. government has persuaded some foreign governments as well as individual foreign firms to cooperate with these efforts. The active engagement of the Treasury Department has improved intelligence about global financial transactions. As a result, financial sanctions

² KENNETH KATZMAN, *The Iran Sanctions Act (ISA)*, CRS REPORT FOR CONGRESS at 3, available at <http://www.carnegieendowment.org/static/npp/reports/RS20871.pdf>.

are better able to target specific individuals, firms or governmental agencies that might be engaged in misdeeds. Kittrie recommends that more nations should grant their finance ministries the authority to use intelligence with similar goals in mind. There is much to be said for this recommendation: among the 204 sanctions episodes documented in our study, my colleagues and I found that sixty-two episodes entailed a combination of financial and trade sanctions, and that this combination has higher success rates on average than trade sanctions only – 40 percent of the time versus 25 percent.³

Under the Obama administration, the Treasury Department seems likely to maintain this approach. In his written responses, dated January 21, 2009, to members of the Senate Finance Committee, Treasury Secretary-designate Timothy Geithner stated that:

Vigorous sanctions are an essential means for forcing nations that foster terror financing and weapons proliferation to choose between defiance and responsible engagement with the world. . . . I would consider the full range of tools available to the U.S. Department of the Treasury, including unilateral measures, to prevent Iran from misusing the financial system to engage in proliferation and terrorism.⁴

Another noticeable development in U.S. sanctions policies is more extensive use of secondary sanctions. Since the 1990s, the United States, at both the federal and state level, has threatened or invoked secondary boycotts against parties that abetted the target country. For example, the Helms-Burton Act targeting Cuba, and ILSA targeting Iran and Libya, both included provisions to impose sanctions against foreign companies doing business with the target countries. These acts sparked a serious backlash in the European Union, the United Kingdom, and Canada, all of which have commercial interests in the target countries. Some of the objecting countries enacted their own laws to counteract the effect of US

³ HUFBAUER ET AL., *supra* note 1, at 170.

⁴ *Finance Committee Questions for the Record: Hearing on Confirmation of Mr. Timothy F. Geithner to be Secretary of the U.S. Department of Treasury Before the S. Comm. On Finance, 111th Cong. 50, 67 (2009)* (statement of Timothy F. Geithner), available at <http://www.finance.senate.gov/sitepages/leg/LEG%202009/012209%20TFG%20Questions.pdf>

measures, and they threatened to bring a case in the World Trade Organization (“WTO”). But Presidents Clinton and Bush both used their waiver authority to avert an eruption of trade disputes. Today, a recurring question is whether to sanction China because it carries on oil investments in Sudan.

In his Article, *Second Thoughts on Secondary Sanctions*, Jeffrey A. Meyer, associate law professor of Quinnipiac University, explores the legality of secondary sanctions under customary international law. He contends that secondary sanctions can not be categorically dismissed as improperly “extraterritorial” since they are no more impermissible or extraterritorial than conventional primary sanctions. He argues that conventional primary sanctions also seek to change extraterritorial behavior, even when they are applied only against U.S. companies doing business in the target country. Therefore, if secondary sanctions are well-tailored and grounded on “terrnational” principles—the combination of territorial and nationality jurisdiction—meaning that measures regulate only the conduct of the sender country’s nationals within its own territory—they should be, in Meyer’s view, regarded as legally permissible.

Secondary sanctions imposed by state and city governments have raised concerns not only about international legal issues but also about the possible infringement of federal authority. The National Foreign Trade Council (“NFTC”) brought a case against the state of Massachusetts regarding “the Massachusetts Burma law,” adopted in 1996, which prohibited the state from purchasing goods and services from corporations doing business with Burma.⁵ While the U.S. Supreme Court held that federal law preempted “the Massachusetts Burma law,” the Court’s decision was not grounded on constitutional interpretation, but only on the fact that Congress had passed a corresponding (and therefore preemptive) law sanctioning Burma.⁶

In his Article, *Darfur, Divestment and Dialogue*, Perry S. Bechky, visiting assistant professor at the University of Connecticut law school, focuses on state-mandated divestment—one form of

⁵ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

⁶ *Id.* at 388. The Massachusetts law was also challenged in the WTO by the European Union and Japan in 1997, arguing that the law violated the WTO’s government procurement agreement. However, the European Union and Japan suspended the WTO case when the federal lawsuit was filed against Massachusetts by the NFTC.

secondary sanctions—imposed on Sudan for atrocities in Darfur. He addresses constitutional concerns regarding participation of sub-federal governments in the formation of US foreign policy. In 2003, a rebellion started in the Western Sudanese region of Darfur; in response, the Sudanese government mounted horrible attacks against civilians in Darfur. The crisis in Darfur presented a moral challenge to the world.⁷ Citing Darfur in 2006, the United States expanded its sanctions already in place against Sudan. To date, twenty-seven U.S. states, the District of Columbia and twenty cities have all participated in divestment aimed at companies doing business in Sudan. Despite constitutional concerns, the US Congress authorized states to enact these measures when it adopted the Sudan Accountability and Divestment Act (“SADA”) in 2007. Bechky argues that the divestment movements taken by states and cities should be understood as an effort to send a strong message to the federal government and to boost political support for wider action, rather than as a constitutional disturbance to the conduct of U.S. foreign policy.

In his Article, *Using Sociological Theories of Isomorphism to Evaluate the Possibility of Regime Change Through Trade Sanction*, unlike studies that examine trade sanctions in the context of economic theory, Philip M. Nichols, associate professor at the Wharton School of the University of Pennsylvania, takes a new approach. He examines trade sanctions in the sociological view of three mechanisms of institutional isomorphic change⁸—namely normative isomorphism, mimetic isomorphism, and coercive isomorphism. Normative isomorphism stems from professional pressures which spring from similar training and networks. Mimetic isomorphism occurs when one institution mimics another. Coercive isomorphism describes convergence in institutions as a response to incentives which can be either positive or negative.

Nichols seeks to explain the relation between trade sanctions and changes in institutions within the context of these three mechanisms. He takes Cuba as an example and examines why

⁷ While the United Nations has been reluctant to define these atrocities as “genocide” under the Genocide Convention, the United States and some other countries have labeled the crisis as “genocide.” Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), 3d Sess., U.N. Doc. A/Res/260(III) (Dec. 9, 1948), available at <http://www.preventgenocide.org/law/convention/text.htm>.

⁸ Isomorphism refers to similar behavior by organizations facing similar conditions.

Cuban institutions became similar to institutions of socialist countries, notably the Soviet Union. Trade sanctions imposed on Cuba sharply curtailed its interaction with democratic countries. Cuba was thus excluded from participating in the Organization of American States and instead joined the Soviet Union's Council of Mutual Economic Assistance. This increased the migration of Soviet and Eastern European technical advisors and economic planners to Cuba, and led Cuban institutions to become more similar to those in the Soviet Union (normative isomorphism). Isolation also gave Cuba more opportunity to copy the institutions of those Soviet countries (mimetic isomorphism). Nichols also argues that trade sanctions enhanced the incentives offered from socialist countries (coercive isomorphism).

Nichols concludes that this sociological approach suggests that trade sanctions may not produce the expected outcome but even go the wrong direction. My colleagues and I share this conclusion. Our reasons for failure include the proposition that sanctions create their own antidotes both by sparking a nationalist reaction and by prompting powerful allies of the target country to assume the role of "black knights" – both evident features in the Cuban case.⁹

Since the end of the Cold War, conflicts in Africa have raised grave concerns about the collapse of democracy and human rights. The European Union and the United Nations have taken serious actions against strife, mass killings, and despotic leadership in Africa. Reflecting these concerns, both democratization and human rights have become a popular goal in recent episodes. However, in our study, my colleagues and I found that sanctions are often less effective when aimed against autocratic nations than democratic countries.¹⁰ Autocratic regimes are better able to shift the burden of external economic pressure on to the least influential groups in society.

In their Article, *Economic Sanctions, Leadership Survival, and Human Rights*, Christiane Carneiro and Dominique Elden explored the impact of economic sanctions on human rights. They seek to answer how leadership change resulting from economic sanctions might affect human rights. To answer this question, Carneiro and Elden examine four countries: Turkey; Fiji; Pakistan; and Sierra

⁹ HUFBAUER ET AL., *supra* note 1, at 8.

¹⁰ *Id.* at 166–68.

Leone, all subjects of economic sanctions. Carneiro and Elden argue that economic development and democratization may have adverse impacts on human rights since they are often associated with strong leadership which in turn can be accompanied by political repression. Therefore, when economic sanctions aimed at promoting democracy are imposed—in particular, when sanctions target autocracies—the resulting political pressures may adversely affect the level of human rights protection. This is an intriguing proposition and, as the authors note, deserves further inquiry.

This is a fine symposium. Scholars and practitioners alike will find much value in these Articles.