

POLITICS BEFORE BUSINESS: A STUDY IN RISK ANALYSIS BY A MULTINATIONAL CORPORATION

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1. BACKGROUND

ENSERCH Corp. is a diversified energy, engineering and construction company headquartered in Dallas, Texas. Through our various subsidiary companies, we presently do business in sixty-five foreign countries. With the exception of our oil and gas exploration activities, we normally do not take any equity position in any overseas product. Yet this fact neither reduces nor eliminates the kinds of risks we are addressing this afternoon.

A considerable portion of my time is spent in risk-avoidance, that is, helping senior management identify risks sufficiently in advance so that appropriate protective action may be taken. Contract language or risk insurance may provide such protection in some cases, but in others it may be possible only to monitor risk. In the extreme cases, risk may be judged too high, and we will abandon an opportunity.

The Iranian revolution¹ gave impetus to the profession of political risk analysis for a number of multinational corporations. The revolution caught ENSERCH Corp., and a number of other multinationals, by surprise. While we had been performing political risk analysis prior to the revolution, we, like a number of other firms, might have called it something else.

We initiated a more formalized approach to political risk analysis in response to Iran. We also broadened our approach and, when evaluating new prospects or expanding opportunities for management, began to examine not only political risk, but financial and commercial risk as well. Moreover, we went beyond the limits of normal political risk analysis by attaching appropriate weight to those risks unique to ENSERCH because we are a U.S. company. Our list of risks unique to U.S. firms includes the following:

- 1) the Foreign Corrupt Practices Act (FCPA);²

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¹ See N.Y. Times, Feb. 13, 1979, at 1, col. 6.

² 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (1988).

- 2) boycotts, especially the Anti-Arab Boycott;³
- 3) the extraterritorial reach of U.S. laws;
- 4) the act of state doctrine;⁴
- 5) U.S. human rights policy;
- 6) U.S. anti-terrorism policy;
- 7) export controls;
- 8) economic sanctions; and
- 9) the linkage between trade and politics.

We would also add to this list the more intangible risk deriving from the historic inconsistencies of U.S. foreign policy.

We accord these kinds of risks as much weight as we would accord, for example, leadership succession crises. I would emphasize that senior management is not to arrive at a decision regarding a proposed opportunity unless and until a country risk analysis is completed and given the same consideration as the project economic analysis.

Country risk analysis is strictly subjective, and there is no alternative. We deal in informed judgment, however, and an acceptable degree of confidence in our process has emerged over time.

Our effort to assess risk normally culminates in a relatively brief—usually about ten pages—final report that identifies the key risks, discusses each risk in limited detail, and recommends a protective course of action for each risk. A simplified matrix expresses in terms of degree of risk our summary evaluation of the country as a place to do business. We do not, however, advise senior management to avoid country A and instead look for business in country B; that is not the purpose of the exercise. Our purpose is to make a judgment about a particular project to be carried out by a particular subsidiary in a particular country. We do not go beyond those parameters.

As time has passed, we found that the manager in the field, who watches the daily bottom line, was less concerned about political risk than we previously had thought. We began to understand that our managers would appreciate accurate forecasts of possible devaluations or changes in currency controls. In response, we established a separate financial risk assessment program which has allowed us to give more attention to risks such as delays in payment, devaluation, and inability

³ See NAT'L J., June 18, 1977, at 962. In 1976, the United States passed legislation prohibiting U.S. cooperation with the Arab boycott of companies that do business with Israel. *Id.*

⁴ "The act of state doctrine precludes the courts of this country from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory." BLACK'S LAW DICTIONARY 32 (5th ed. 1979). See also, e.g., *Sancho Panza v. Republic of Cuba*, 376 U.S. 398 (1964).

to convert and repatriate.

This program provides for tracking six financial risk indicators, including debt service ratios, the reserves-to-imports ratio, currency competitiveness, and import incompressibility. We have a computer data base that dates back eleven years for each of the six financial risk indicators; to the extent possible we use the same information the host country employs when it makes financial decisions. Interpreting computer-generated trend charts allows us to make respectable judgments on financial risk. We conduct postmortems annually to see how well we are doing, and our level of success is quite high. Eighty-five percent of the devaluation forecasts over a twelve-month period for a total of twenty-six countries were within fifteen percent of the actual devaluation.

2. CODES OF CONDUCT

With this analysis as a general background, let me now turn to the issue of sanctions, export controls, boycotts, foreign payments and other constraints that, taken together, form a code of conduct for the multinational. My intention is to briefly describe how one multinational—ENSERCH Corp.—attempts to accommodate itself to this body of laws, regulations, and policies that clearly affect the conduct of business abroad.

How do we feel about these laws, regulations, and policies? Let me put it this way: We do not make foreign policy, we only implement it. We must be prepared to make sacrifices—in the form of lost markets—in support of policies in which we may or may not believe. In the collective mind of the United States Department of State, foreign policy interests have to supercede the rights of private enterprise.

Certain of these constraints, in particular the FCPA⁵ and the Arab Boycott,⁶ are clearly set forth in the law, and they should not surprise the well-prepared multinational. Other risks and disincentives, such as economic sanctions, reflect governmental policies which change in response to the political realities of the day.

2.1. *International Boycotts*

ENSERCH Corp. has developed very specific guidelines for our employees on how to respond to international boycotts. Moreover, we conduct an ongoing program to ensure that employees are kept current

on anti-boycott developments.

The process begins with our Statement of Procedure—International Boycotts. Personnel turnover mandates that this Statement be circulated regularly, and it is up to local management to ensure that all those who have any involvement with trade, transportation, or finance related to any boycotting country read and sign the Statement.

To facilitate coordination of activities, each subsidiary company has a designated International Boycott Coordinator. ENSERCH corporate staff work with these coordinators, who are then responsible for getting out the message in their own areas. Our corporate staff updates the coordinators concerning boycott developments on an annual basis.

Where do the major problems arise? Here are some of the difficult areas:

- 1) communicating messages to the last individual in the link, for example, the shipping clerk who completes the required daily statements or certifications made in connection with any company transactions, and making certain that he or she understands the rules of the game;
- 2) addressing the concerns of foreign subsidiaries who feel unjustly constrained by having to comply with U.S. laws;
- 3) encountering individuals in the boycotting countries themselves intent on pursuing every letter of the boycott regulations;
- 4) having companies provide the boycotting countries with more information than they require and, in so doing, conflicting with U.S. law; and
- 5) addressing disparities between what the boycotting manuals may say and what the boycotting countries may accept in practice.

We have found that working with our foreign subsidiaries on the matter of boycotts has been perhaps the most difficult issue for us.

2.2. *The Foreign Corrupt Practices Act*

Our procedures to ensure strict adherence to the FCPA⁷ operate in

⁷ The FCPA amended the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1988) (current version), to make it unlawful for those issuers covered by the Securities Exchange Act "to make certain payments to foreign officials and other foreign persons, to require such issuers to maintain accurate records, and for other purposes." FCPA, Pub. L. No. 95-213, preamble, 91 Stat. 1494 (1977) (statute codified at 15 U.S.C. §§ 78m-78dd-1, 78dd-2, 78ff (1988)). Violations of the Securities Exchange

very much the same way as our procedures concerning boycotts, although the internal audit is probably more strict regarding accuracy of compliance. Financial accounts are very closely scrutinized.

If a subsidiary is wholly-owned or controlled in fact, subsidiary employees are incorporated into our adherence procedures. If a subsidiary is not controlled in fact, we apply the "dog gets one bite" rule. If we find that someone has misbehaved regarding foreign payments, we stop any dealing with him or her, for it is likely that he or she will misbehave again. When we purchased the assets of a foreign corporation in the 1970s, we discovered that one does not "buy" past violations. The problem in this transaction was to educate the new people who were slow—or reluctant—to respond. Violations were discovered by our auditors, and we had to go to the Securities and Exchange Commission (SEC).

The problem lies in divergent corporate cultures. The culture at ENSERCH Corp. is very conservative and risk-averse, while the corporate culture of our subsidiaries was developed in the Middle East, a foreign environment where, in the early days of the oil industry in particular, a premium was placed on initiative, imagination, and innovation. The people in these industries were most certainly not of the "establishment," but they were the kind of people firms trying to get a business established would want at their disposal. This exemplary entrepreneurship had to be contained and made to conform.

For most multinationals, foreign agents who play a role in seeking out and securing new business represent a vulnerability as well as an asset. Consultants are also subject to background investigations. We often employ the resources of the Washington office in these investigations.

Background checks that are inadequate due to time and money constraints are an ever-present source of discomfort. We often find ourselves asking, "What have we missed?" Background checks conducted by the White House are the source of some comfort, although they often miss something in a political appointee's background that may subsequently prove embarrassing. This is true even though the White House has considerable facilities at its disposal.

Finally, we look to local legal counsel to provide guidance to our local operations and to ensure that host country exchange controls are observed.

Through our written procedures we make a particular effort to

explain, to the required degree of detail, what constitutes permissible and impermissible behavior. The categories of behavior we seek to evaluate include gratuities; tips and facilitating payments; social amenities; and gifts and entertainment.

Under the FCPA, two questions remain despite the clear criminality of bribing foreign government officials: "What constitutes bribery?" and "Who is a government official?"⁸ I would like just to address the latter question.

The question "Who is a government official?" is not academic at all.⁹ Not long ago, a U.S.-based, medium-sized, international oil company faced the problem of trying to confirm that an individual who received sizeable fees was a private businessman, not a government official.¹⁰ The payments had been made generally for assistance in securing supplies of crude oil at a time when such supplies were tight. Well-placed U.S. individuals outside the transactions at issue opined that Mr. Y would probably be regarded as a foreign government official for FCPA purposes.¹¹ Another outside source believed that Mr. Y was a government official because the so-called "Blue Book"¹² listed Mr. Y as his embassy's Counsellor for Political Affairs. Yet another legal source found that there were no violations of the FCPA.¹³

Does possession of a diplomatic passport and a car with diplomatic tags, and a listing in the Blue Book, make one a government official? Is one a government official even if these privileges are provided to a citizen by his government merely as a courtesy to help with individual business dealings?

⁸ See 15 U.S.C. §§ 78dd-1 (1988).

⁹ The Foreign Corrupt Practices Act defines a foreign official as anyone who acts in an official capacity for or on behalf of a foreign government. 15 U.S.C. § 78dd-1(f)(1).

¹⁰ See in particular a series of articles in the *Washington Post* on the questionable payments made by Orin E. Atkins, the chairman and chief executive officer of Ashland Oil Co., to—among others—consultants who were close to the Sultan of Oman and may have been foreign officials. Mintz, *Scarce Oil, Disputed Deals—and a Corporate Revolt* (pt. 1), *Wash. Post*, Aug. 9, 1987, at H1, *Ashland Oil: The Middle East Connection* (pts. 2 & 3), Aug. 16, 1987, at H1, Aug. 23, 1987, at H1. Also see the report submitted to the Securities and Exchange Commission by Kirkpatrick, Lockhart, Johnson & Hutchison, the law firm retained by Ashland Oil to conduct an independent investigation into the matter (May 19, 1983) (SEC File No. 1-2918).

¹¹ See sources cited *supra* note 10.

¹² The "Blue Book" is the common name for the State Department publication containing the names of the members of the diplomatic staffs of all missions and their spouses. The list is revised quarterly. See, e.g., U.S. DEP'T OF STATE, DIPLOMATIC LIST (Nov. 1987).

¹³ See sources cited *supra* note 10.

2.3. *Export Controls*

As we are often painfully aware, the United States controls export goods and technology for reasons of national security, foreign policy, and shortage of supply.¹⁴ Export controls rarely affect ENSERCH Corp., and when they do, it is usually for reasons of foreign policy or national security. We are almost never affected because of short domestic supply.

By their nature export controls are highly controversial.¹⁵ United States policymakers seem to have the misguided impression, which in the view of some Europeans borders on arrogance, that the United States is the sole repository of technological innovation.¹⁶ I do not believe the United States is arrogant. If Americans are guilty of anything, it is that we consistently underrate the abilities of other nations to get things done.

The U.S. business community has been heavily impacted by the imposition and extension of export controls that do not adequately account for, among other things, the adverse effects on the export performance of the United States, the reputation of the United States as a reliable supplier, and the impact of export controls on U.S. exporting companies and their employees.

The General Accounting Office's report to Congress in August 1986 underscored that the purpose of foreign policy-based export controls is simply to demonstrate U.S. opposition to the policies of other countries and that, while these controls impose few—if any—costs on target countries, they impose costs on U.S. business.¹⁷ The politician with good intentions may value symbolism, but symbolism does not help meet payrolls. Nor does it support the competitiveness of the United States.

I must also add at this point that the U.S. business community deeply resents any inference that selling to the U.S.S.R. represents nothing more than greed taking priority over concern for the national security of our country. We live in a world that is becoming increasingly interdependent. If in the 1990s competition for buying power re-

¹⁴ Export Administration Regulations, 15 C.F.R. §§ 368-399 (1980) (to be transferred as amended to 15 C.F.R. ch. 7).

¹⁵ See *Export Controls*, BUS. WEEK, Dec. 11, 1989, at 75.

¹⁶ See, e.g., Jones, *California Graphite Fights for Prepreg Exports*, METALWORKING NEWS, Oct. 30, 1989, at 30 (U.S. company protests export controls that prevent complaining company from selling its machine to Eastern bloc countries, while foreign competitors are already doing so); Goldbaum, *More Curbs on Weapons Precursors*, CHEMICAL WEEK, Oct. 18, 1989, at 22.

¹⁷ GEN. ACCT. OFF., EXPORT CONTROLS, ASSESSMENT OF COMMERCE DEPARTMENT POLICY AND LEGISLATION (Report to Congress) (1986).

places the Cold War rhetoric of competition for human minds,¹⁸ will we be able to maintain our world position without grasping the implications of the transition from an innovative society to a services-oriented society?

2.4. *Economic Sanctions*

Economic sanctions have come to play a major role in the conduct of U.S. foreign policy. American readiness to link trade and politics, and to use trade as reward or punishment, clearly distinguishes the United States from other industrialized countries; the majority of these other countries are reluctant to make that link.

Our government views economic sanctions as an integral part of peaceful measures that can be taken to deter states from supporting terrorism, from abrogating human rights, or from conducting acts of military aggression. Some nations, such as Libya, Cuba, Iran, and South Yemen, are longstanding targets of economic sanctions. Others, including the Soviet Union and Poland, are intermittent targets, depending on whether our relations happen to be blowing hot or cold.¹⁹ Still others, such as South Africa, Nicaragua, and Panama, are newcomers.

A ban on virtually all trade and financial transactions with Libya was imposed at the beginning of 1986 because of Libya's continuing link with and support of terrorist activities.²⁰ It is highly questionable whether the withdrawal of U.S. oil companies from Libya has engendered any particular change on Libya's part. Libya's current financial difficulties reflect almost entirely the decline in the world price of oil, not actions taken by the United States.

Earlier in this symposium we heard about the use of Section 232 of the Trade Expansion Act of 1962²¹ to demonstrate that rising oil imports threatened to impair our national security.²² The fear that oil

¹⁸ Recent political developments in Eastern Europe may open a whole new market for U.S. business. See Jaffe, *Wall of Opportunity?*, FORBES, Jan. 22, 1990, at 156; *East Bloc Incomes Could Double by 2000, Economists Say*, Reuters Business Report, Jan. 17, 1990.

¹⁹ But see sources cited *supra* note 19.

²⁰ On January 7, 1986, President Reagan announced the imposition of U.S. economic sanctions against Libya and ordered all Americans in Libya to leave the country. The next day, he froze all Libyan assets in the United States. These actions were taken in response to alleged Libyan support of terrorist actions. N.Y. Times, Jan. 9, 1986, at 1, col. 6.

²¹ 19 U.S.C. §§ 1801-1982 (1988).

²² See Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resource*, 11 U. PA. J. INT'L BUS. L. 235 (1989).

exports to the United States might be cut off for political or economic reasons is real, and justified by the past actions of certain suppliers. Oil sales have never been stopped simply because sellers ran out of oil.

Oil, like food, is quite correctly viewed as a strategic commodity whose continuous supply is regarded as absolutely essential to almost any nation's well-being. The United States may be an oil importer, but historically it has been a grain exporter. Importing countries have come to depend upon the United States as a supply source, but we have cut off these supplies when it has served U.S. national interests. For example, the United States has abruptly halted all soybean sales to Japan. The soybean is basic to the Japanese diet, and over the years Japan had become heavily dependent upon the United States as a supplier. Without warning, the United States in 1973 instituted an embargo because of domestic crop shortages.²³ A better-known example is our willingness to reward the U.S.S.R. with access to our corn and wheat for perceived good behavior, or to withhold deliveries as a form of punishment.²⁴ Should we then be surprised and angry when nations that have no other weapons at their disposal withhold a commodity—such as oil—from our market when they deem our actions unacceptable?

The ban on U.S. oil imports from Libya has been essentially meaningless, since the oil has simply gone to other markets.²⁵ This fact did not, however, keep the administration from imposing a ban on the import of oil from Iran. Iranian oil imports were banned by an Executive Order, issued October 29, 1987, specifically restricting Iranian oil from entering the U.S. mainland, U.S. territories, and U.S. possessions such as the Virgin Islands.²⁶ The United States imposed the embargo because of continued Iranian military aggression in the Persian Gulf.²⁷

The volume of Iranian oil exports to the United States surprised the Administration. Imports had averaged approximately 250,000 bar-

²³ N.Y. Times, June 28, 1973, at 1, col. 3.

²⁴ On January 4, 1980, President Carter decided to withhold 17 million tons of grain ordered by the Soviet Union. See Morgan, *Carter Decision on Grain Sure to Affect the Soviet Diet*, Wash. Post, Jan. 5, 1980, at A6. For a discussion of the economic and political effects of the embargo, see *Who's Hurt Most by Grain Embargo?*, U.S. NEWS & WORLD REP., Jan. 21, 1980, at 31.

²⁵ The United States decided on March 10, 1982, to prohibit imports of Libyan oil and to ban exports of oil and gas technology to Libya. The State Department explained that the restrictions had been imposed because of "a continuing pattern of Libyan activity which violates accepted international norms of behavior." Anderson, *U.S. Cuts Off Aid to Libya Restricts Trade*, UPI Press Release, Mar. 10, 1982 (Wash. News). For a discussion of why the ban would be ineffective against Libya without cooperation, see Platt's Oilgram News, June 6, 1986, at 2 (U.S.).

²⁶ Exec. Order No. 12,613, 3 C.F.R. § 256 (1987), reprinted in 50 U.S.C.A. § 1701 (West Supp. 1989).

rels per day in the first seven months of 1987, including 620,000 barrels per day in July alone. This amount represented an increase from an average of 190,000 barrels per day for 1986.²⁸ The growth in Iranian oil imports doubtless reflected discounting by Iran in an effort to move as much crude as possible. Iran needed revenues with which to carry on the war with Iraq and was selling in a crude-surplus market.

Former Secretary of Energy John S. Herrington noted at the time the embargo on Iranian oil went into effect, however, that unless U.S. allies cooperated, our sanctions would have little practical effect on Iran.²⁹ And the necessary cooperation has unfortunately been minimal.

These "feel-good" acts cost nothing in times, such as today, when crude oil is in worldwide surplus, although they may cause importers to scramble a bit to line up other suppliers. A real dilemma exists when the United States places sanctions on oil purchases at a time when supply and demand are in balance. Few politicians seem willing to forbid the purchase of a particular crude when such action might lead to shortages at home or at least a jump in oil prices that would impact the Northeast and low-income bracket consumers more heavily than others.

3. SOUTH AFRICA

The U.S. multinationals in South Africa have been confronted for a number of years with demands to comply with the Sullivan Principles.³⁰ Since 1986, they have also been pressured to comply alternatively with a set of Fair Labor Standards outlined by the U.S. government.³¹ The U.S. multinationals have responded by committing over \$200 million and considerable time to training, community development programs, and other activities to help improve the future for the black South African.

²⁸ Platt's Oilgram News, Oct. 28, 1987, at 4 (U.S.).

²⁹ Herrington emphasized that the embargo would be "effective in direct proportion to the cooperation we get from the allies." He stated, "We must have large-scale participation . . . Without the participation of Japan, West Germany and Italy [the embargo] won't be effective." *Id.* See also Kempster, *U.S. Urges Allies to Join Iran Embargo*, L.A. Times, Oct. 28, 1987, § 1, at 10, col. 1.

³⁰ The Sullivan Principles were developed by the Rev. Leon H. Sullivan, a Philadelphia minister, in 1978. The Principles are a set of fair employment standards outlining equality in pay, employment opportunity, and access. See Note, *North Carolina South African Divestment Statute*, 67 N.C. L. REV. 949 n.3 (1989). Rev. Sullivan has since repudiated the Principles. *Id.* at 949 n.3 (citing Barnaby, *Sullivan Asks End of Business Links with South Africa*, N.Y. Times, June 4, 1987, at A1, col. 1). The Principles are codified at 22 U.S.C. § 5034 (Supp. V 1987).

³¹ The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987), requires covered employers to pay their employees a minimum hourly wage and over-

Some would have these companies leave South Africa as a way of showing our displeasure at its slowness in dismantling apartheid. Now, I ask you, will racial discrimination go away if we go away? Of course not. Nevertheless, many U.S. multinationals have judged the future in South Africa to be uninviting and have chosen to disinvest.

Although current economic sanctions have failed to move South Africa to reduce racial discrimination, there is, as we feared, considerable pressure in Congress to impose new, stricter penalties. It is difficult for a politician, particularly in an election year, to be seen as not favoring punitive actions against apartheid. At the same time, the Administration has indicated that it will veto further sanctions, believing that they might only make life more difficult for the oppressed and cause South Africa to harden its stance.

Apartheid is morally wrong and politically unacceptable. But what about the value of sanctions? One commentator has observed:

The administration is required annually by the 1986 sanctions law . . . to report on its policy towards South Africa. The general finding has been that the U.S. sanctions against South Africa were not an effective way to end apartheid, and that sanctions had not moved South Africa any closer toward ending racial separations.³²

In the months subsequent to the imposition of sanctions on South Africa, U.S. companies have stood by and watched others, especially Japan and West Germany, step in to take advantage of our reduced presence. Once again, the linkage of trade and politics is working against the U.S. business community.

4. EXTRATERRITORIAL REACH

Perhaps the most persistent source of tension between the United States and Europe has been, and continues to be, the extraterritorial reach of U.S. laws.

The last great battle over extraterritorial reach was fought in the early 1980s, when the United States extended its embargo on equipment for a Soviet gas pipeline to foreign subsidiaries.³³ The immediate

³² *U.S. Says Sanctions Don't Harm S[outh] Africa*, J. Com., Apr. 13, 1989, at 5A, col. 1.

³³ In response to the declaration of martial law in Poland, President Reagan banned the sale of U.S. technology to the Soviet Union. This embargo was expanded, in retaliation to continued repression in Poland, on June 18, 1982 to include foreign subsidiaries and licensees of U.S. firms. Morgan, *Pipeline Sanctions Toughened; Reagan Disregards European Hopes in Anti-Soviet Move*, Wash. Post, June 19, 1982, at

and highly vocal European reaction³⁴ emphasized the embargo's unilateral, retroactive, and extraterritorial character.

The failed U.S. attempt to halt construction of the West Siberia-Europe gas pipeline by utilizing an embargo and applying extraterritorial reach to foreign subsidiaries of U.S. companies need not be reviewed in detail at this point. Suffice it to say that it was an international relations and public disaster, even though the United States had good intentions. (We did not want our friends and allies in Europe to become overly dependent upon an unreliable supplier.)

While the U.S. sanctions delayed its completion, the pipeline was built nevertheless. Domestic compressors were installed instead of compressors supplied by foreign manufacturers, and we now find ourselves considering the implications of inadequate domestic compressors. Without proper compression, the gas flow will decline, and deliveries of gas to Europe may fall behind schedule. Thus, unreliable supply—the very situation we sought to prevent—may come about because of our well-intended but misguided policies.

Several years later, the United States instituted tight sanctions on Libya³⁵ but did not attempt to extend these sanctions to include foreign subsidiaries. The general failure of the gas pipeline embargo and the degree of European reaction to the embargo probably accounted for the U.S. strategy vis-à-vis Libya.

ENSERCH had its own encounter with extraterritorial reach in the very early 1980s, when we attempted to acquire the Davy Corporation, Great Britain's largest engineering company. The attempted takeover was quickly referred to the Monopolies and Mergers Commission, which recommended against the proposed merger largely because the Commission objected to the implied extraterritorial reach of U.S. laws.³⁶ It also singled out in particular the Anti-Arab Boycott and the FCPA.³⁷ The Commission concluded that having to adhere to the anti-boycott and foreign payment measures would limit the business pros-

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³⁴ See *West German Chancellor Discontented with U.S. Extension of Embargo against Soviet Union*, Xinhua General Overseas News Serv., June 25, 1982; *New Restrictions on Technology Exports Draw Protests*, UPI Press Release, June 24, 1982 (Wash. News); *Mitterand Angered by Reagan Policies*, UPI Press Release, June 23, 1982 (Int'l); *Temko, U.S. Curbs on Moscow Jolt Major Allies*, Christian Science Monitor, June 22, 1982, at 1; *Lewald, West Germany Evaluates Legality of U.S. Moves against Siberian Pipeline*, Platt's Oilgram News, June 20, 1989, at 1 (Int'l); Morgan, *supra* note 35, at A1.

³⁵ See *supra* note 20 and accompanying text.

³⁶ MONOPOLIES AND MERGERS COMM'N, ENSERCH CORPORATION AND DAVY CORPORATION LIMITED (Sept. 1981) (published in London by Her Majesty's Stationery Office).

³⁷ See *supra* notes 2-3.

pects for Davy.

5. THE NEED FOR A CONSISTENT UNITED STATES FOREIGN POLICY

The multinational finds it very difficult to develop foreign marketing strategies when U.S. foreign policy is changing constantly. Recent examples in Angola, Syria, the Sudan, and Benin come to mind.

5.1. Angola

Assistant Secretary of State Crocker remarked in early 1986 that U.S. oil companies should "think about" withdrawing from Angola.³⁸ His remarks were probably intended to put pressure on Angola to work more constructively toward a negotiated peace settlement. They also doubtless reflected frustration that progress had been too slow. In contrast, the Department of State had said eighteen months earlier that business participation in Angola was in the long-term interests of both nations.³⁹ But in subsequent months the State Department shifted its position as a result of the escalation of the war, increased Soviet involvement, and the failure to obtain a negotiated settlement.⁴⁰

In the summer of 1986, the United States was admonishing U.S. firms to consider U.S. national interests before committing their resources to Angola.⁴¹ And Senator Robert Dole was seeking a trade embargo on Angola as late as the summer of 1987. (The Administration did not support this initiative because it recognized the significant losses U.S. companies in Angola would suffer).⁴²

My main point is that the planning and marketing strategies of multinationals require a reasonable degree of stability if they are to be implemented successfully. This stability is not limited to foreign markets, but includes stability—in the form of consistency—in foreign policy. The bends and U-turns of U.S. foreign policy make for a road map which often leads multinationals to economic misfortune.

³⁸ See Gwertzman, *U.S. Is Urging Chevron to Quit Angola*, N.Y. Times, Jan. 29, 1986, at A15, col. 4. Crocker stated that companies operating in Angola "should be thinking about U.S. national interests as well as their own corporate interests as they [make] their decisions." *Id.*

³⁹ *Id.*

⁴⁰ Potts, *Chevron's Purchase of Gulf Brought Assets and Headaches; Inherited Angola Holdings Causing Troubles from Right Wing*, Wash. Post, May 31, 1987, at H3.

⁴¹ Gwertzman, *supra* note 38.

5.2. Syria

In November 1986, the Department of State informed U.S. oil companies that it was inappropriate for them to participate in Syria's oil sector and asked them to voluntarily cease operations in the country.⁴³ This request resulted from Syria's alleged involvement in terrorism and had no force of law. The threat of formal sanctions, however, remained present. One company complied,⁴⁴ but none actually left. Indeed, during the embargo one U.S. company won a very sizeable contract to develop oil production facilities in Syria.⁴⁵ It is notable, however, that the trade sanctions imposed by our government did allow for contract sanctity and were not extraterritorial in scope. In early September 1987, the Department of State withdrew its ban because of Syrian efforts to distance itself from recognized terrorist groups.⁴⁶

This calls to mind George Shultz's characterization, made some time ago, of constantly-changing U.S. foreign policy as "light switch diplomacy." For Syria, the lights were off for ten months⁴⁷ and then came back on. The oil companies were, thus, faced with a major decision in November 1986: whether to respond to the interests of the U.S. government or to protect their investments. The risk existed that Syrian support of terrorism would deepen. More restrictive sanctions certainly would follow, as in Libya. All might then be lost. In this instance, however, those who chose to stick it out were correct.

5.3. The Sudan

Chevron Oil Corporation ordered all non-essential personnel out of the Sudan in April 1986, because of terrorist activity.⁴⁸ Sufficient staff remained behind to continue operations and meet contract commitments. Most of the U.S. embassy staff was also evacuated. The evacuation of dependents and non-essential staff was tempered by the need not

⁴³ See Platt's Oilgram News, Nov. 17, 1986, at 1 (Int'l).

⁴⁴ *Id.*

⁴⁵ Brown and Root, a U.S. engineering firm, won a \$70 million contract to develop two oil fields in Syria. *Syrian Oil Field Order Goes to U.S.*, Financial Times, Apr. 16, 1987, at 5, col. 3.

⁴⁶ Greenberger, *Oil Companies Are Cleared by U.S. for Syria Business*, Wall St. J., Sept. 14, 1987, at 17, col. 3.

⁴⁷ Shultz, as president of the Bechtel Corporation, called the U.S. government's use of foreign trade as a tactical instrument of foreign policy "light switch diplomacy." He said that the belief that "individual trades can be turned on and off like a light switch" to induce changes in domestic and foreign policies of another government has resulted in the erosion of U.S. goods in world markets "as our trading partners increasingly see evidence that we cannot be counted on as a reliable supplier." Shultz, *Light-Switch Diplomacy*, BUS. WEEK, May 28, 1979, at 24.

⁴⁸ See Platt's Oilgram News, Apr. 25, 1986, at 3 (Int'l).

to appear to be pulling out of the Sudan because of terrorist threats.

Seven months after the evacuation, staffers were allowed to return.⁴⁹ Renewal of relations between the United States and the Sudan was based on signs that the Sudan had distanced itself from Libya.

5.4. Benin

Benin is an even more recent example. A headline in the May 20, 1988, *New York Times* read as follows: "U.S. Accuses Benin of Abetting Libyan Terrorism."⁵⁰ Does this mean that we might expect some kind of sanctions against Benin if the situation worsens? Should I warn our operations in that country? Would we be well-advised to hold off on any new commitment until the situation clarifies? Do we stand by while foreign competition moves in, unimpeded by such considerations?

6. CONCLUSION

The absence of international cooperation continues to impede U.S. willingness to impose sanctions when jaw-boning fails. Too often we are out there all alone.

And that brings me to my concluding thought, which is based on a column that appeared in the *Kansas City Times* several years ago and was subsequently expanded into a popular book. It is entitled *All I Really Need to Know I Learned in Kindergarten*⁵¹ and reads as follows:

All I really need to know about how to live and what to do and how to be I learned in kindergarten. Wisdom was not at the top of the graduate-school mountain, but there in the sandpile at Sunday School. These are the things I learned:
 Share everything.
 Play fair.
 Don't hit people.
 Put things back where you found them.
 Clean up your mess.
 Don't take things that aren't yours.
 Say you're sorry when you hurt somebody.
 Wash your hands before you eat.

⁴⁹ Tyler, *U.S.-Sudan Ties Back to Normal, Libya's Influence Diminishes, Evacuated Americans Return Home*, Wash. Post, Dec. 2, 1986, at A21.

⁵⁰ Sciolino, *U.S. Accuses Benin of Abetting Libyan Terrorism*, N.Y. Times, May 20, 1988, at A3, col. 1.

⁵¹ R. FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN* 48 (1986).
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Flush.

Warm cookies and cold milk are good for you. . . .

Take a nap every afternoon.

When you go out into the world, watch for traffic, hold hands, and stick together. . . .

And then remember the Dick-and-Jane books and the first word you learned—the biggest word of all—LOOK.

Everything you need to know is there somewhere. The Golden Rule and love and basic sanitation. Ecology and politics. . . .

Think what a better world it would be if we all—the whole world—had cookies and milk about three o'clock every afternoon and then lay down with our blankies for a nap. Or if all governments had as a basic policy to always put things back where they found them and clean up their own mess.

And it is still true, no matter how old you are—when you go out into the world, it is best to hold hands and stick together.

Hold hands and stick together. This is good advice for the young and the old, but it is ignored in the real world by nations that place self-interest above everything else. Unless that changes—which it won't—the marginal influence of sanctions, embargoes, and other constraints will be more than offset by penalties imposed upon U.S. business. It is, after all, politics before business.