Economic Countermeasures in an Interdependent World

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The panel was convened at 10:30 a.m., Friday, April 7, 1995, by its Chair, Peter Trooboff, who introduced the panelists: Laurence Boisson de Chazournes, Assistant Professor at the Graduate Institute of International Studies and the Law School of the University of Geneva; William Hoffman, Chief Counsel for the Office of Foreign Assets Control of the U.S. Department of the Treasury; Shigeo Kawagishi, Professor of Law at Kobe Gakuin University in Kobe, Japan; and Michael Reisman, Professor of Law at Yale Law School.

Remarks by Peter Trooboff*

I welcome you to our panel on “The Costs and Benefits of Economic Sanctions: The Bottom Line.” How could we ask for a more timely and more important set of issues given the news of the past months, weeks or even days? Whether your interest is so-called “rogue” states, nonproliferation or Caribbean stability, economic sanctions enjoy a central focus in the entire debate over how to achieve global order and compliance with international legal norms. Of course, that means that our panel fits right into the overall theme of the Annual Meeting program, “Structures of World Order.”

You all know the headlines of the past months. Whether it be the Conoco deal that was prohibited by the Executive Order of the United States, the proposed D’Amato bills to cut off U.S. trade with Iran and punish U.S. companies that continue to trade with Iran, the Clinton Administration’s announced intention to tighten re-export sanctions against Libya, or the Helms-Burton bill to impose new restrictions on foreign persons who traffic in property confiscated by Cuba. Last Sunday’s New York Times had a story on alleged sanctions-busting, this time through Albania and other nations that border on Serbia and Montenegro. Of course, we all know of the heated debate in the United Nations concerning whether to continue the economic sanctions against Iraq that were imposed at the time of the Kuwait invasion.

Our panel provides an opportunity to get behind the headlines to assess carefully the policy, purposes and responses, the legal regimes and their effectiveness—the bottom line.

Economic Countermeasures in an Interdependent World

Laurence Boisson de Chazournes**

The purpose of my contribution is to discuss several legal questions related to the use of economic countermeasures. By countermeasures, I mean the classical measures of international law taken unilaterally by one state as a reaction against a breach of international law committed by another state. These measures are also known as retentions, reprisals or retaliations. These inter-state measures are distinct from collective countermeasures, also referred to as international sanctions, provided for in Article 41 of Chapter VII of the UN Charter. Among other differences, whereas the resort to individual countermeasures is left to the discretion of each state, sanctions are decided upon by an international organ, the Security Council, and their implementation is mandatory for all members of the United Nations.1

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While there has recently been a revival of economic sanctions, this has not diminished at all the importance of economic countermeasures. Let us keep in mind, for example, that the voting procedure under Chapter VII, especially the veto power of the Permanent Members, might put a bar to the resort to sanctions. In addition, the possibility of applying economic sanctions is circumscribed by the scope of application of Article 39 which requires the existence of a threat to the peace, a breach of the peace or an act of aggression. Even a broad interpretation of this requirement leaves room for individual countermeasures to come into play.

Countermeasures can be adopted for a variety of purposes—political, economic or environmental. They can be adopted to protect individual interests or common interests as protected by *erga omnes* obligations. In an analysis of the legal status of these countermeasures, it is important to examine the costs and benefits of such measures, especially against the background of the ever-growing international economic, social and political interdependence.

In this connection, I will address the following three points. First, economic countermeasures are essentially used as communication tools and their regime under international law is not yet well established. Second, humanitarian considerations are gaining importance and should play a key role in the evaluation of the legality of economic countermeasures. And third, in order to prevent abuses, considerations of fairness should be taken into account.

*Economic Countermeasures as Communication Tools*

Economic countermeasures can be resorted to in order to obtain compensation in case of an impairment of concessions mutually agreed upon, or as a coercive means designed to achieve the cessation of an unlawful act. But, most frequently, they are used as communication tools to express the disapproval by their authors of certain patterns of behavior such as grave and massive human rights violations. In other cases, they are intended to force other states to enter into negotiations or to influence the conduct of negotiations, as can be seen in the areas of the protection of intellectual property rights and of the preservation of the environment. In addition, it is possible that countermeasures serve different purposes at the same time and that the relative importance of each purpose changes over time. This makes it more difficult to assess the legality of economic countermeasures.

As has been stated very clearly in the Air Service Agreement award of 1978, "Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, ( . . . ), each state establishes for itself its legal situation vis-à-vis other states," and it follows that a state might want "to affirm its rights through 'counter-measures." Some international agreements contain restrictions on the use of individual countermeasures. Such is the case with the "Understanding on Rules and Procedures Governing the Settlement of Disputes," adopted as an annex to the "Agreement Establishing the World Trade Organization" (WTO). Another example is the North-American Free-Trade Agreement (NAFTA), which also contains restrictions on the use of countermeasures. Outside these treaty-organized systems, there are still important unsettled questions regarding the regime of countermeasures under general international law. This

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4. 33 ILM 1226 (1994).

5. 32 ILM 612 (1993).
can be shown in the light of three principles: proportionality; dispute settlement; and nonintervention.

As to proportionality, it seems to be commonly agreed that countermeasures should not be out of proportion to the gravity of the internationally wrongful act. The difficulty is in the evaluation of the equivalence of countermeasures with an alleged breach. Use can be made of quantitative parameters as well as of qualitative criteria. Although the former seem to be more promising in terms of precise assessment, trade practice, which relies on a quid pro quo approach, demonstrates that equivalence is an ambiguous notion. The links that have to be drawn between a wide set of economic and monetary factors make it difficult to evaluate proportionality.

The lawfulness of countermeasures is also linked to the recourse to dispute settlement procedures. This issue is very topical and considered as a core issue in the current work of the International Law Commission on State Responsibility. The Special Rapporteur, Gaetano Arangio-Ruiz, took the position that countermeasures cannot be taken prior to the exhaustion of all available settlement procedures, except in certain specific circumstances. This view is generally considered as too restrictive of the injured state’s prerogative to take countermeasures. In this regard, consideration could be given to the possible significance of the practice within international economic organizations and agreements (WTO, NAFTA, for example) in which it is generally provided that countermeasures should be resorted to as a last resort. In any event, while the debate has so far focused on third-party dispute settlement, greater emphasis should be given to negotiations before resorting to countermeasures as a general international law requirement. The risks of arbitrariness and of endangering “justice” would be alleviated.

There is no general prohibition on the use of economic measures for political purposes. However, it is important to note that any economic countermeasures, irrespective of their purpose, have to comply with the customary international law principle of nonintervention. This involves the right of every state to conduct its affairs without outside interference. The nonintervention principle raises questions as to the extent of the domestic jurisdiction of states which might prevent recourse to countermeasures. In this connection, a particularly controversial issue is that of human rights protection (the Chechnya situation, for example). Questions regarding the implications of the principle of nonintervention also arise when economic countermeasures are taken for environmental purposes. In the area of environment, an additional complication is the possible tension between, on the one hand, the principle of nonintervention and, on the other hand, the protection of common goods and common areas. The recent GATT tuna cases gave indications that international law is still reluctant to permit the use of unilateral measures in the environmental area.

**Humanitarian Considerations as Limitations**

This is a very important element in assessing the legality of countermeasures. This issue has not been dealt with sufficiently in the legal writings. Nonetheless, its importance merits examination within the mainstream trends of contemporary international law. Humanitarian considerations impose limitations on the use of economic countermeasures. The restriction of commercial transactions or the interruption of economic assistance may cause

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hardship to the individuals in the country under retaliation, which might not be appropriate under international law.

As far back as 1934, the *Institut de droit international* declared that states should "limit the effects of retaliatory measures on the target state, while respecting at the same time, as much as possible, the rights of individuals." Since then, the international law of human rights has evolved so as to provide for some basic standards to be respected in all circumstances. State practice tends to recognize that some minimum standards cannot be derogated from when countermeasures are applied. Thus, medical care and foodstuffs supplies are generally exempted from countermeasures; but these basic safeguards might not be sufficient to ensure effective respect of human rights.

The interdependence of international society makes the choice of appropriate economic countermeasures more and more complex. They should not impair the rights of individuals, or at the least, they should only entail a reasonable hardship. For many countries, international transactions are of critical importance to the well-being of the people. This is true, for example, as regards energy uses and telecommunication services. One can also refer to disturbances of cultural relations, which might have long-term consequences for the society. All these humanitarian considerations should be taken into account when assessing the legality of countermeasures and selecting the measures to be resorted to.

International remedies play their assigned role in a system that tends to blur the traditional boundaries and makes the world ever more "narrow." Individuals are becoming important actors in the international arena and should accordingly be protected against any arbitrary measure.

*Fairness in the Resort of Economic Countermeasures*

Hardship to individuals is not the only "cost" of the adoption of countermeasures. There are also other costs of a macro-economic nature depending upon the degree of development of a country and the extent of its integration into the world economy. One way of limiting these negative consequences is to consider fairness as a standard to assess the role and the impact of countermeasures. In this respect, fairness should be accounted for to ensure respect for the principle of the nonabuse of rights when resorting to such means. The principle of good faith should also find place in this evaluation.

The implementation of economic countermeasures might widen the gap between unequal partners. This is especially noticeable in the case of economic measures applied on a quasi-permanent basis, that is, temporary measures that tend to be systematically renewed (the *Cuba* case, for example). In that context, the lawfulness of countermeasures should be assessed by the fairness test, taking into account the general pattern of intercourse between two or more states in order to evaluate the disparities and inequalities. This use of the fairness standard would require a more global evaluation of the proportionality of countermeasures and could prevent any significant disequilibrium with long-term consequences.

Fairness would also mean a preference for resort to dispute settlement procedures instead of unilateral actions. This does not mean that a state is prevented from using countermeasures, but that it should, in the first place, try to obtain satisfaction through dispute settlement remedies. This includes negotiations conducted in good faith (as well as efforts at achieving a multilateral consensus on the sanctions to be adopted).

However, in the application of the fairness test, an important factor is the gravity of the breach of international law, which is at the origin of the resort to countermeasures.


Economic countermeasures may be exerted as a first resort in reaction to important violations of international law, such as grave and massive violations of human rights or a grave deterioration of common goods. There is no doubt that fairness encompasses the need to put an end to such violations and to prevent any serious and immediate harm to the international community. In these circumstances, there would not be any abuse of right in taking countermeasures if, at the same time, there was a pursuit of dispute settlement measures and, more specifically, the available multilateral means within the competent international organizations.

GLOBAL MANDATE, NATIONAL LAW: A U.S. PERSPECTIVE ON CHAOS AND CONVERGENCE IN SANCTIONS IMPLEMENTATION

By William B. Hoffman*

Professor Boisson de Chazournes has laid out a very good theoretical construct, which, as most of you are aware, was not read by the people in Congress, the State Department or the National Security Council before adoption of a number of the measures that the United States now has on the books. My purpose here, however, is not to look at U.S. unilateral measures, but to look instead at what has happened since the end of the Cold War and at the opportunity that the global community has had to use Article 41 of the UN Charter to impose multilateral sanctions. Certainly, in the United States, this was viewed by policy makers as a great benefit. Suddenly there was the possibility of more effective sanctions through global cooperation.

The August 2, 1990, Iraqi invasion of Kuwait spawned a growth industry at the United Nations with respect to multilateral sanctions. With the Cold War over, it proved possible to obtain consensus among the Permanent Members of the Security Council for the imposition, pursuant to Chapter VII of the UN Charter, of mandatory economic sanctions against Iraq and occupied Kuwait.1 In the past five years, the Security Council has taken similar action with respect to Libya,2 the Federal Republic of Yugoslavia (Serbia and Montenegro),3 Haiti,4 the UNITA rebels in Angola5 and the Bosnian Serbs.6 Most of these Security Council measures include financial and economic sanctions, such as the blocking of assets and the prohibition of transfers to target persons and destinations, in addition to more typical prohibitions on trade in goods. Sanctions resolutions under Article 41 of the UN Charter, however, are not self-executing; they impose obligations for domestic implementation by member states pursuant to Article 25.

When Iraq invaded Kuwait, there were very few countries in the world that had a standing official agency doing sanctions implementation, such as the United States has in the Office of Foreign Assets Control in the Treasury Department, which is my client. As sanctions were imposed, first under U.S. domestic law permitting unilateral emergency action, and then implementation of the UN Security Council mandate, one of the earliest questions was how to get states up and running with respect to sanctions implementation, and what kinds of problems were we going to have.

* Office of Foreign Assets Control, U.S. Department of the Treasury. Mr. Hoffman’s views are his own and are not intended to represent the views of the Treasury Department or the federal government.

6 UNSC Res. 942 (1994).