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The Arab Economic Boycott of Israel: The International Law Perspective

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THE ARAB ECONOMIC BOYCOTT OF ISRAEL: THE INTERNATIONAL LAW PERSPECTIVE

*Preston L. Greene, Jr.**

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I. INTRODUCTION

Most of the discussion about the Arab economic boycott of Israel has focused on its effect upon United States law. Even when the discussion centers on moral and ethical considerations, the focus remains on the United States. This limited perspective, however, merely reflects the vast global economic interests of the United States. Nonetheless, the extensive analysis of American law and practices has tended to obscure the importance of applicable international norms. This article examines the effects and implications of the Arab boycott upon existing and evolving norms of contemporary international law. To properly analyze the international legal norms, the operative scope of the boycott must be clearly identified. Much of the passion engendered by this issue has stemmed from basic misunderstandings of the boycott's actual application.

II. THE APPLICATION OF THE ARAB BOYCOTT

The Arab boycott of Israel had its genesis in the League of Arab States' (hereinafter "Arab League") Resolution of December 11, 1954. The resolution provides that:

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1. All persons within the enacting country are forbidden to conclude any agreement or transaction, directly or indirectly, with any person or organization (i) situated in Israel, (ii) affiliated with Israel through nationality, or (iii) working for or on behalf of Israel, regardless of place of business or residence.
2. Importation into the enacting country is forbidden of all Israeli goods, including goods manufactured elsewhere containing ingredients or components of Israeli origin or manufacture.
3. Foreign companies with offices, branches or general agencies in Israel shall be considered prohibited corporations for purposes of the prohibition on agreements or transactions.
4. All goods destined for Israel, directly or indirectly, or for persons prohibited by the preceding paragraphs, are considered Israeli goods and therefore subject to the ban on exports as well as transit¹

The Central Boycott Office (CBO) is responsible for the coordination and implementation of these general provisions. The recommendations of its semi-annual regional conferences are passed on to the member governments.² Although the CBO has the principal responsibility for administering the boycott, its recommendations are not binding on member governments. In fact, one of the greatest problems in a legal analysis of the Arab boycott is the inconsistent practices of both the member governments and the CBO itself.³ This lack of consistency is best demonstrated by the CBO's use of its most potent enforcement tool, the blacklist.

The blacklist is a rather erratic list of firms who have run afoul of the CBO's guidelines. Grounds for blacklisting include direct or indirect dealing with Israel or Israeli firms, failure to comply with the proper certification procedures,⁴ and failure to complete CBO questionnaires seeking to ascertain a given firm's relationship with Israel.⁵ The erratic nature of the boycott is further emphasized by

1. League of Arab States, Res. No. 849, Dec. 11, 1954.

2. Turck, *The Arab Boycott of Israel*, 55 FOREIGN AFF. 472, 474 (1977).

3. *Id.*

4. The certification procedure requires anyone engaging in commerce with a participating Arab nation to certify that the goods are not of Israeli origin and do not contain Israeli components. The certificate is a negative certificate of origin. Where one certifies affirmatively the origin of the goods (such place of origin not, of course, being Israel), the certificate is a positive certification of origin. *Id.*

5. It is this aspect of the boycott which American firms have found most vexing; many firms found themselves blacklisted simply for their failure to complete the questionnaire at a time when their volume of trade with the Arab states was minimal if not nonexistent. A simple recitation of the recent increase in volume of trade between American firms and Arab states serves to illustrate the

the fact that even previously blacklisted firms may be "delisted" by complying with the questionnaire.⁶

In view of the rather arbitrary nature of its implementation and the fact that its economic effect upon Israel has been far less pronounced than the popular media would lead one to believe, the boycott's primary value or function is a symbolic one. To a certain extent the Arab boycott of Israel is merely *symptomatic*. Thus, it may be helpful to examine the *causal* factors before attempting to determine the legitimacy of the boycott. Indeed, such an approach is essential as no definitive juridical statement of the boycott's compliance with established norms of international law can be safely pronounced without at least a glance at the motives underlying the creation of the boycott.

The Arab boycott of Israel is a direct response to what the Arabs perceive as the wrongful expropriation of their land for the creation of the State of Israel. The Arabs have defended their prohibition of Israeli goods in Arab states on the ground that their entry would contribute to the realization of Zionist political aims.⁷ The first legal authority for Israel's creation as a Jewish homeland was, of course, the Balfour Declaration, promulgated by the British Foreign Secretary, Sir Arthur Balfour, on November 2, 1917.⁸ The document, amenable to a supportive interpretation by both the Arabs and the Jews, caused no serious alarm among Arabs prior to the 1930s, when Jewish immigration into the area increased considerably.⁹ Yet not until the outbreak of hostilities in the winter of 1947 and the subsequent declaration of independence by Israel on May 14, 1948,¹⁰ did a "state of war" between Israel and her Arab

justifiable concern of firms blacklisted for "errors of omission." In 1971, American exports to the 18 Arab states totaled \$1 billion, in 1975, \$5.4 billion, and in 1976, \$6.9 billion. The Commerce Department estimates that such exports will total \$10 billion before 1980. *Id.* at 475.

6. *Id.* at 476.

7. Arab League Council, Res. No. 16, Dec. 16, 1945.

8. The complete text of the Balfour Declaration reads as follows:

Her Majesty's government views with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of that object, it being understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by the Jews in any other country.

CMD. No. 5479, at 22 (1937).

9. See generally, Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROB. 5 (1968).

10. FUNDAMENTAL LAWS OF THE STATE OF ISRAEL 8 (J. Badi ed. 1961).

neighbors commence. The Arabs have consistently predicated their continuing hostility and belligerence toward Israel upon the existence of war between them.¹¹ Many believe that one of the causes for the 1967 Six Day War in the Middle East was "Nasser's continuous affirmation that a state of war existed with Israel and had existed since 1948 . . ." ¹² To the present day both parties can arguably claim the existence of a state of war.¹³ It is within this framework of historical antagonism that an inquiry into the juridical status of the boycott must begin.

III. THE UNITED NATIONS CHARTER AND ECONOMIC SANCTIONS

Economic boycotts or sanctions may clearly be imposed under international law. The real question is whether the interruption of economic relations between states is compatible with international law. Article 41 of the United Nations Charter states that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations.¹⁴

It is commonly believed, however, that article 41 cannot be properly effectuated in the absence of a preliminary implementation of article 39, which states:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in ac-

11. For a general discussion of the legal conception of a "state of war," see Q. WRIGHT, *A STUDY OF WAR* 8, 685, 689 (1942). See also F. GROB, *THE RELATIVITY OF WAR AND PEACE: A STUDY OF LAW, HISTORY, AND POLITICS* (1949).

12. Wright, *supra* note 9, at 9.

13. Certainly it can be argued that the failure of the Arabs to (1) recognize Israel's existence as a sovereign state, (2) commit themselves to a respect for the freedom of navigation in the waterways of the area for Israeli ships and cargoes, (3) permit free transit of peoples and trade, and (4) assure full political, economic, and cultural intercourse and Israel's continued occupation of Arab territory constitutes a continued state of war between the parties. See Ball, *How to Save Israel in Spite of Herself*, 55 *FOREIGN AFF.* 453, 460 (1977). See also Wright, *supra* note 9, at 9, for a discussion of the positions of the belligerents at the time of the inception of the Six Day War.

14. 2 *REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS* 383 (1955).

cordance with Articles 41 and 42, to maintain or restore international peace and security.¹⁵

Many contend that implementation of article 39 is required for proper implementation of articles 41 or 42.¹⁶ This procedural question was answered affirmatively in a dispute involving Spain and the Franco regime. The Sub-Committee on the Spanish Question¹⁷ concluded that a Security Council determination was a condition precedent to the implementation of article 41, and the draft resolution¹⁸ seeking the severance of diplomatic relations with the Franco regime was thus rejected.¹⁹

Even if one accepts the Spanish holding as representative of customary international practice, there still remains the fundamental question of which of the various enforcement measures should be employed. The issue was forcefully presented to the Security Council in 1949 during its debate on Palestine. A draft resolution authorized the Security Council to appoint a Council committee to examine and report to the Council on the appropriate measures under article 41.²⁰ The text of the final resolution,²¹ however, omitted any reference to article 41, and simply made general reference to chapter VII, which includes articles 39 through 51.²²

15. *Id.* at 333.

16. The text of article 42 is as follows:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations.

Id. at 389.

17. 1 U.N. SCOR, Special Supp., at 1 (1946), U.N. Doc. S/75 (1946).

18. The text of that resolution read:

The Security Council

Declares that the existence and activities of the Franco regime in Spain have led to international friction and endangered international peace and security;

Calls upon, in accordance with the authority vested in it under Articles 39 and 41 of the Charter, all members of the United Nations who maintain diplomatic relations with the Franco Government to sever such relations immediately.

2 REPERTORY PRACTICE OF UNITED NATIONS ORGANS 384 (1955).

19. 1 U.N. SCOR (48th mtg.) 388 (1946).

20. 3 U.N. SCOR, Supp. (Oct. 1948) 72, U.N. Doc. S/1059/Rev. 2 (1948).

21. 3 U.N. SCOR (377th mtg.) 38-43 (1948).

22. Chapter VII of the Charter is entitled, "Action with Respect to Threats to the Peace and Acts of Aggression."

Since chapter VII is devoted exclusively to actions the Security Council may prescribe pursuant to threats or breaches of the peace, the immediate matter of selecting a particular enforcement measure was avoided.

Although the precedential effect of the Security Council's cautious approach in establishing a general norm is minimal, it is, nonetheless, illustrative of the circumspection that must surround any decision to invoke the awesome enforcement measures available to the Security Council. The invocation of economic sanctions in the international community is a serious measure. Economic sanctions are not, however, rendered ineffectual by the Security Council's reluctance to use them. On December 16, 1966, this reluctance was overcome when economic sanctions were imposed upon Rhodesia²³ pursuant to the "interruption of economic relations"²⁴ clause of article 41 and Resolution 232 (1966)²⁵ specifically.

If the sole test for the legitimacy of an economic boycott under existing international law was the presence of express authorization of the Security Council under article 41, the Arab boycott of Israel would be unlawful. Unfortunately, this test is only one factor for consideration in determining international legality. Equally significant are the economic practices of states in the international community.

IV. UNITED STATES BOYCOTTS

The history of economic sanctions by the United States has not been exemplary. America's leading economic position has enabled it to gain the compliance of its weaker trading partners in effectuating political trade controls. Ironically, these ends have been achieved largely by techniques similar to those used in the Arab boycott of Israel.²⁶

The Export Control Act of 1949 authorized the Executive to regulate all exports from the United States irrespective of their ultimate destination.²⁷ Although enacted as a temporary measure during the Cold War period, this Act²⁸ and other American trade

23. 22 U.N. SCOR, Supp. (Jan.-Mar. 1967) 74, U.N. Doc. S/7781 (1967).

24. See text accompanying note 14 *supra*.

25. The operative sections of Resolution 232 (1966) are contained in paragraphs 2 and 5.

26. See generally A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS (1977).

27. 50 U.S.C. app. §§ 2021-2032 (1970) (expired 1969).

28. Upon its expiration in 1969, it became the Export Administration Act, 50 U.S.C. app. §§ 2401-2413 (1970).

control policies persisted despite the demise of their original *raison d'être*.²⁹ The stated congressional policies underlying America's export controls are the advancement of foreign policy interests and the maintenance of control over the export of goods bearing a significant relationship to national security interests.³⁰ The regulations applicable to sensitive items, such as military or paramilitary articles, or advanced technical data or equipment expressly provide for denial of permission to export to nations that threaten national security interests of the United States.³¹

One commentator discussing the restrictive provisions of the Mutual Defense Assistance Control Act of 1951 (Battle Act)³² noted that:

In this Act the policy of the United States is stated to include an embargo on the shipment of a host of strategic supplies, *including petroleum*, to "nations threatening United States security, including the USSR and all countries under its domination." Such a legislatively sanctioned embargo is unabashedly stated to be imposed in order to "(1) increase the material strength of the United States and of the cooperating nations; (2) impede the ability of nations threatening the security of the United States to conduct military operations, and (3) to assist the people of the nations under the domination of foreign aggressors to reestablish their freedom."³³

It is not surprising that a sovereign nation would seek to regulate the export of its strategic military or technological material. American trade controls, however, have had a much broader application. The Treasury Department, through its Office of Foreign Assets Control (OFAC),³⁴ has for some years been responsible for regulating various transactions between the United States and certain designated governments.³⁵ In addition to its general regula-

29. The time has come to re-examine seriously both the Export Control Act and the Treasury Regulations issued under the Trading with the Enemy Act. The question must be asked: Can methods of export controls which were adopted initially as a temporary wartime expedient serve adequately for the future?

Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, 793-94 (1967).

30. 50 U.S.C. app. § 2402(2)(B) & (C) (Supp. V 1975).

31. *Id.* § 2403(1).

32. 22 U.S.C. §§ 1611-1613d (1970).

33. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 611 (1974).

34. 29 Fed. Reg. 3425 (1964).

35. Those designated countries were China, North Korea, Cambodia, and Vietnam. See 31 C.F.R. § 500.201 (1976).

tions, the OFAC promulgated particular regulations for Cuba³⁶ and Rhodesia.³⁷ Items subject to the Foreign Assets Control Regulations include such nonstrategic goods as cooking utensils and clothing.³⁸

Critics of the Arab boycott frequently refer to the proscriptions against the importation of goods manufactured elsewhere that contain components of Israeli origin. Yet the OFAC regulations similarly prohibit the importation of foreign goods containing components originating in a proscribed country.³⁹ The Arab boycott has also been criticized for its extraterritorial scope and the so-called "secondary boycott"⁴⁰ affecting non-Arab and non-Israeli third parties. The United States recognized at an early date that its export control policies would be ineffective without cooperation from friendly countries.⁴¹ In 1949 the United States and six Western European allies,⁴² therefore, joined in a multilateral effort to place controls upon strategic items of trade with the Sino-Soviet bloc. The countries created the Consultative Group to serve as a sort of secretariat. The Group formulated and supervised lists of proscribed items of trade.⁴³ Third party compliance under the Consultative Group regime was, unlike the Arab boycott, based on a mutuality of interests. It is the non-volitional nature of the third party's involvement in the Arab boycott that many find objectionable.⁴⁴

36. Cuban Assets Control Regulations, 31 C.F.R. § 515.101 to 515.809 (1976).

37. Rhodesian Sanctions Regulations, 31 C.F.R. § 530.101 to 530.809 (1976).

38. 31 C.F.R. § 500.204(a)(1) (1976).

39. *Id.*

40. Turck, *supra* note 1, at 474.

41. It has never been supposed that the United States could ensure effective restrictions on the shipment of strategic goods to Communist destinations without parallel controls exercised by other countries, both to restrict strategic exports from those countries and to prevent transshipments of American exports

Berman & Garson, *supra* note 29, at 834.

42. Those six nations were the United Kingdom, France, Italy, the Netherlands, Belgium, and Luxembourg.

43. Berman & Garson, *supra* note 29, at 835.

44. Not all of the extraterritorial aspects of United States control policies are volitional, however; for a contrary view, see J. Corcoran, *Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968). Additionally, the Mutual Defense Assistance Control Act of 1951, ch. 575, § 101, 65 Stat. 644, expressly proscribed the United States from granting military, economic, or financial assistance to any nation which knowingly permitted shipment of any of the embargoed items. It has also been suggested that,

so long as United States concepts of the significance of export controls as a

A related and more significant legal question concerns the extraterritorial jurisdiction to enforce trade control policies. Professor Lowenfeld has maintained that the extraterritoriality of American trade controls are incidental, whereas the Arab boycott has a broader and more profound effect:

Extraterritorial application of the U.S. controls is a side effect—albeit an important one—designed to prevent evasion of the primary restraints on activity by Americans in the United States; the Arab boycott, in contrast, is in very large measure extraterritorial, in that it is designed in the first instance to affect activity carried abroad by non-Arab persons or firms⁴⁵

This view, however, has not been greeted with universal acceptance. Some have maintained that the Office of Export Control has imposed its most severe administrative sanctions upon foreigners for acts committed abroad.⁴⁶

Certainly the most dramatic test of the extraterritorial application of United States trade controls occurred in the French case of *Fruehauf v. Massardy*.⁴⁷ Fruehauf France, although incorporated in France, was controlled by an American corporation that owned a majority of its shares and had a majority of the seats on its board of directors. Fruehauf France contracted to sell certain equipment to another French corporation, who in turn intended to sell the finished products to the People's Republic of China. The transaction would have violated United States regulations prohibiting transactions with specified Communist countries, including the People's Republic.⁴⁸ Pursuant to an order by the United States Treasury Department, the American parent corporation cancelled the contract. The French directors sued their American counterparts, seeking the appointment of a judicial administrator to exe-

foreign policy weapon continue to diverge fundamentally from those of the other members, international strategic controls, apart from a certain hard core of military and paramilitary commodities will be predicated chiefly on superior American industrial know-how

Berman & Garson, *supra* note 29, at 842.

45. A. LOWENFELD, *supra* note 26, at 107.

46. Berman & Garson, *supra* note 29, at 866.

47. [1968] D.S. Jur. 147 (Cour d'appel, Paris); Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579, 583 (1970).

48. Transaction Control Regulations, 31 C.F.R. §§ 505.01-.60 (1972).

cute the contract. The requested relief was granted by the French Commercial Court⁴⁹ and affirmed by the Court of Appeal.⁵⁰

There is little doubt that the decision by the Fruehauf Corporation to cancel the contract reflected the American directors' desire to avoid personal liability under American law. Although the exercise of extraterritorial jurisdiction by the United States in furtherance of its trade control policies has met with increased resistance from the foreign nations affected, it has never been persuasively argued that such extraterritorial application is violative of international law.⁵¹ Although such palpable infringement upon another state's sovereignty does not violate international law, it nonetheless represents an intrusion upon perhaps the most jealously guarded prerogative of all sovereign states—the right of jurisdictional exclusivity over municipal affairs within their own territory.⁵² Not surprisingly, this aspect of the Arab boycott has sparked widespread criticism. Israel's supporters in the United States particularly attack the Arab boycott's effect on third parties. To them, it represents a blatant interference in the internal economic affairs of innocent or neutral parties.⁵³

One commentator writing in defense of the Arab oil embargo of 1973-74 argued that neutral states should refrain from directly or indirectly supplying a belligerent with war material. He further maintained that neutral powers should disallow the use of their territory for the transport of war materials.⁵⁴ This interpretation of a neutral state's obligations necessarily raises the question of what

49. [1965] J.C.P. II 14,274.

50. [1968] D.S. Jur. 147 (Cour d'appel, Paris).

51. Andreas Lowenfeld, then Acting Deputy Legal Advisor, Department of State, writing on the subject stated:

It is true, however, that the United States has been the most ambitious of the major democratic states in trying to regulate international commerce; it has at least a claim to jurisdiction over vast commercial enterprises abroad owned and controlled by American parent companies; and it has tried with fair success to impose various programs of economic denial

With regard to protests from other countries (or from private persons sought to be subjected to regulation), I think one can say that there is little substance to the charge of violation of international law

Lowenfeld, *Book Review*, 78 HARV. L. REV. 1699, 1705 (1965).

52. Craig has stated that:

One of the most sensitive nerves of a sovereign state is its territorial sovereignty. When a foreign government infringes that sovereignty by seeking to control the actions of corporations within the state, contrary to the State's economic and foreign affairs policies, a reaction may be expected

Craig, *supra* note 47, at 597.

53. See generally, A. LOWENFELD, *supra* note 26, at 107-08.

54. Shihata, *supra* note 33, at 614.

constitutes "war materials." Although the commentator focused on warships and ammunition, it would appear that in their boycott of Israel the Arabs take a far less restrictive view. The Arabs have consistently stated that any transnational economic relation with Israel that benefits the Israeli economy also improves her military capability.

The Arab position requires acceptance of two assumptions: that the parties are presently in a state of war,⁵⁵ and that the United States is a neutral in the conflict. Although the Carter Administration has recently been exceedingly circumspect in its efforts to act as an intermediary between the disputants,⁵⁶ it is still difficult to maintain that the United States is a neutral party to the dispute.⁵⁷

Political trade control policies have never been greeted with unanimity within the United States. Despite the Cold War genesis of many of the policies, some still viewed them as counterproductive in the long run. Although there was general support for trade restrictions on "strategic" goods, there were wide divergences of opinion regarding trading restrictions involving nonstrategic goods and the Communist world. Proponents of America's trade control policies felt that even nonstrategic goods strengthened nations that otherwise lacked the necessary economic infrastructure and technological know-how to create a consumer society like the United States. The export of consumer goods to Communist nations enabled those nations to divert their scarce resources to military development.⁵⁸ America's trade control proponents also urged

55. Certainly, if one accepts the view that an absence of a formal peace is tantamount to the existence of a state of war, there exists a state of war between the antagonists.

56. On June 27, 1977, the State Department stated that:

The peace foreseen in these resolutions [United Nations Security Council Resolutions 242 and 338] requires both sides to the dispute to make difficult compromises. We are not asking for any one-sided concessions from anyone

N.Y. Times, June 28, 1977, at 6, col. 3.

57. For illuminating discussions on the rights and obligations of neutral powers, see Convention Respecting the Rights and Duties of Neutral Powers in Naval War, art. 6, *opened for signature*, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545. See also Convention Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 2, *opened for signature*, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540. For discussion of concept of qualified neutrality, see 2 OPPENHEIM, INTERNATIONAL LAW 663 (H. Lauterpacht ed. 1952).

58. Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 848-49 (1970).

that the strengthening of otherwise deficient economies defused internal unrest and thus lessened any pressure for change in those societies.⁵⁹ Advocates of less restrictive controls assert that the failure of the United States to supply nonstrategic goods to the Communist nations actually works to the detriment of American interests. The argument is premised on the fact that the proscribed goods are readily obtainable from other non-Communist nations. Alternatively, they argue that the free flow of goods encourages greater exchange of ideas which can have a powerful liberalizing effect on closed Communist societies.⁶⁰ After approximately two decades, the pendulum appears to be shifting toward open trade and increased competition with the Communist world. Although the spirit of *détente* has certainly encouraged this shift, it would be wrong to attribute so significant a change solely to a vague and intangible concept like *détente*. Attention should be directed to international economic realities. The increased recognition of global economic interdependence has had a singularly profound effect upon America's trade control policies.⁶¹

V. REGIONAL ORGANIZATIONS AND ECONOMIC SANCTIONS

In addition to the United States role in the Arab-Israeli dispute and the broader question of United States involvement in economic sanctions, one must consider the relationship between the economic sanctions of regional organizations and international law. The issue is particularly significant since the Arab boycott of Israel appears to qualify as a regional organization sanction.

The power of the Security Council to authorize economic sanctions is clearly expressed in article 41 of the Charter.⁶² The authority for the General Assembly to impose such sanctions is much less certain. One commentator has maintained that the "competence of the General Assembly in this area is arguable. If the economic measures are coercive, they would fall automatically within the domain of action reserved for the Security Council."⁶³ The same

59. *Id.*

60. *Id.* at 850.

61. This interdependence is especially significant in light of the continued worsening of America's balance of payments deficit. The Department of Commerce reported a \$2.7 billion deficit for August 1977. This figure is second only to the record \$2.8 billion deficit reported for June 1977. *N.Y. Times*, Sept. 27, 1977, at 53, col. 2.

62. See text accompanying *supra* note 14.

63. Bowett, *Economic Coercion and Reprisals by States*, 13 *VA. J. INT'L L.* 1, 6 (1972).

commentator asserts, "[E]qually arguable is the question of the competence of a regional organization to authorize coercive economic measures."⁶⁴ It was further suggested that existing decisional law would seemingly justify the presumption that "coercive" sanctions can be taken solely by the Security Council or by a regional organization upon the express authorization of the Security Council.⁶⁵

There is little, if any, support for the competence of regional organizations to impose sanctions absent a Security Council authorization under the United Nations Charter. With only slight exceptions, article 53 of the Charter expressly proscribes regional enforcement arrangements.⁶⁶ Article 107, cited in paragraph 1 of article 53, merely states that nothing in the present Charter may invalidate or preclude action by a Charter signatory taken against a former World War II enemy and is of no significance to this inquiry.⁶⁷ Although it would appear that Security Council authorization is required before any regional organization under its authority could properly invoke economic sanctions, this has not been borne out in practice.

Pursuant to their determination that the Dominican Republic had taken aggressive actions against Venezuela, the Organization of American States (OAS) resolved to take collective measures against the Dominican Republic.⁶⁸ The OAS severed diplomatic relations with the Dominican Republic and agreed to a partial interruption of economic relations with an immediate cessation of

64. *Id.* at 7.

65. *Id.*

66. Article 53 provides that:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no such enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term "enemy state", as used in paragraph 1 of the Article, applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

2 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 459, arts. 23-54 (1955).

67. 5 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 385, arts. 92-111.

68. Statement of Aug. 20, 1960, 43 DEP'T STATE BULL. 356 (1960).

trade in arms and war implements.⁶⁹ This was not the only time the OAS imposed sanctions without an express authorization from the Security Council.⁷⁰ In January 1962 the OAS resolved to cease all arms trade with Cuba⁷¹ as a means of responding to Cuba's "introduction of communism" into the Western Hemisphere.⁷² The OAS action, though in apparent conflict with article 53 of the United Nations Charter, was in conformance with article 6 of the Inter-American Treaty of Reciprocal Assistance.⁷³ Pursuant to OAS authorization, the October 1962 "quarantine" of Cuba was declared. Although the interruption of economic relations with the Dominican Republic and the "quarantine" of Cuba both conflicted with article 53, it has not been seriously maintained that either action violated international law. In fact, they have been defended as consistent with both international norms and the United Nations Charter generally.⁷⁴

The main defense to the asserted inconsistency with article 53 is that neither action was an "enforcement" action as defined by the article. One theory was that the severance of economic relations was similar to the severance of diplomatic relations and therefore could be effectuated without prior Security Council authorization.⁷⁵ While such a theory might be persuasively advanced in defense of individual state action, it cannot support a collective denial of economic relations to another state adopted by a regional organization.⁷⁶ It is precisely because the OAS action was taken

69. *Id.*

70. Halderman, *Regional Enforcement Measures and the United Nations*, 52 GEO. L.J. 89 (1963).

71. Resolution of Jan. 30-31, 1962, 46 DEP'T STATE BULL. 282 (1962).

72. Halderman, *supra* note 70.

73. Article 6 provides:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

62 Stat. 1681 (1948), T.I.A.S. No. 1838, 21 U.N.T.S. 77.

74. Halderman, *supra* note 70.

75. This theory was advanced by the Ecuadorian representative in defense of the OAS response during the Dominican matter. 15 U.N.SCOR (893d mtg.) 12 (1960).

76. This same argument was advanced by the representatives of the United Kingdom also defending the OAS action respecting the Dominican Republic:

collectively rather than individually that it is without, or beyond, the competence of the regional organization. Such collective action is arguably within the ambit of article 53. The burden is on the party taking such action to show that it did not come within the purview of article 53. Thus, the OAS action is presumptively governed by the express injunction of article 53, which states: "[N]o such enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."⁷⁷ This presumption is not sufficiently rebutted by an assertion that the presumed lawfulness of individual action, a fortiori, creates a presumption of legality for collective actions. Perhaps in recognition of the fragility of this line of reasoning, the supporters of the OAS action have sought other means of defending the legality of "enforcement" measures undertaken by regional organizations.

Another approach for avoidance of Security Council authorization pursuant to article 53 is the "tacit charter Amendment" theory.⁷⁸ The theory seems to be based upon a Security Council resolution on the diplomatic and economic sanctions by the OAS against the Dominican Republic. Rather than confer ex post facto authorization on the OAS sanctions, the resolution merely took note of them.⁷⁹ The OAS members preferred not to address the issue directly, and they consequently emphasized the need for Council recognition of the necessity of granting sufficient latitude to regional organizations to permit direct and independent response to regional problems that pose grave and immediate threats to their security and stability. During the Security Council debate on the OAS resolution imposing an arms embargo on Cuba, similar arguments were advanced to dispense with the need for Council authorization.⁸⁰ Interestingly, the Legal Advisor for the Depart-

There is nothing in international law in principle, to prevent any State, if it so decides, from breaking off diplomatic relations or instituting a partial interruption of economic relations with any other State. These steps, which are the measures decided upon by the Organization of American States with regard to the Dominican Republic, are acts of policy perfectly within the competence of any sovereign state. It follows, obviously, that they are within the competence of the members of the Organization of American States acting collectively

17 U.N. GAOR, Supp. (No. 2) 52-57, U.N. Doc. A/5202 (1962).

77. See text accompanying *supra* note 66.

78. See Halderman, *supra* note 70, at 105.

79. *Id.*

80. *Id.* at 106.

ment of State regards article 53 as having been tacitly amended. In his view the Security Council's responsibility for dealing with threats to the peace is "primary," though not "exclusive."

It is clear that in certain situations a regional threat to the peace may be so serious and immediate that resort to the Security Council for proper authorization may be precluded. The wisdom of tacitly amending a Charter provision as vital as article 53 is less clear. Presumably, its restrictive language was designed to deter swift responses to coercive measures, whether military or economic. The language of article 53, which seeks to centralize the authority for the imposition of coercive sanctions, is *integral* to the spirit of the Charter. Its primary purpose is to maximize the use of peaceful means of conflict resolution and minimizing the legal opportunities for the use of coercive measures. Certainly the modification of so vital and integral a provision should not be accomplished in a manner so contrary to the normal constitutive process.

VI. THE INTERNATIONAL LEGITIMACY OF ECONOMIC SANCTIONS

One commentator has attempted to develop a set of guidelines for determining whether a particular economic sanction comports with international law.⁸¹ He suggests that the following forms of economic coercion would violate basic international legal norms:

1. economic coercion in violation of specific treaty commitments such as those found in treaties of trade and commerce; treaties on transit rights, air services and fisheries, multilateral treaties on telecommunications, trade (GATT, for example), monetary policy; and treaties establishing Free Trade Areas or Economic Unions;
2. economic coercion in violation of general principles of international law such as freedom of the seas, principles of State responsibility for acts economically harmful to aliens, and possibly principles such as those regulating the utilization of international rivers, and
3. economic coercion in violation of the principles of non-intervention.⁸²

In formulating the above criteria, the commentator was keen to point out that since states are competitive and self-interested, the question of intent becomes increasingly important.⁸³ Thus, the mere fact that one state's economic activity is injurious to another

81. Bowett, *supra* note 63, at 7.

82. *Id.* at 2, 3.

83. *Id.* at 5.

is not sufficient to impose legal culpability upon that state; it must be shown objectively that the activity was intended to achieve the injurious result. To justify resorting to economic reprisals in self-defense, a state must prove the claim of self-defense. A state must show that its actions were taken in response to tortious actions of another state that immediately threatened its security under circumstances leaving it without any other adequate means of protection. The reaction should not unreasonably exceed the harm posed by the acting state.⁸⁴

The Arabs consistent justification of their boycott on the grounds of a continuing war⁸⁵ would seemingly be bolstered by a showing that the boycott is a legitimate reprisal in self-defense. Claims that the Arab oil embargo of 1973 was a proper or justified reprisal have been rejected. It has been argued that there is no reason to assume that the use of the oil "weapon" against the United States, Japan, and the Netherlands was necessary to stimulate serious negotiations between Israel and the Arabs.⁸⁶ The oil embargo was instituted prior to the Arabs' attempts at exhausting all other "alternative means of protection"⁸⁷ and was an action in excess of the "necessities of the case."⁸⁸ Whether the embargo was in fact disproportionate to the exigencies of the situation, there can be little doubt that it did achieve at least its minimal desires.

Faced with the major "supply shock" of the October 1973 oil embargo and the overall cutback in Arab oil production, the immediate reaction of practically every importing country was to engage in a competitive scramble for oil supplies, coupled with offers to adopt its Middle East policy to Arab demands.⁸⁹

The oil embargo has accelerated the quest for a permanent peace in the Middle East, and to that extent, one can argue that the embargo served a useful, though painful, function.⁹⁰ In any assessment of the legality of the Arab boycott of Israel, one inevitably returns to the seemingly insoluble Middle East crisis. If a state of

84. *Id.* at 7.

85. See text accompanying *supra* notes 11 & 12.

86. Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410, 424 (1974).

87. Bowett, *supra* note 63, at 9-10.

88. *Id.*

89. Levy, *World Oil Cooperation or International Chaos*, 52 FOREIGN AFF. 690, 696 (1974).

90. For an interesting discussion of the relationship between economic dependency and national foreign policy, see generally Okita, *Natural Resource Dependency and Japanese Foreign Policy*, 52 FOREIGN AFF. 714 (1974).

war exists, the Arab boycott has some general support. If the economic reprisals were enacted prior to a bona fide attempt at exhausting all other avenues for a pacific resolution, the reprisals cannot be legally justified. Furthermore, if the reprisals are disproportionate to the necessities of the situation, they would likewise be legally impermissible.

Regrettably, the world's foremost economic power, the United States, has not been exemplary in its use of its trade control policies. Indeed, United States practice has been cited as a prime justification for the present Arab actions.⁹¹ The precedents of the OAS have likewise served to legitimize economic sanctions by regional organizations in apparent contradiction of the express prescription of article 53 of the United Nations Charter. Any eradication of the present economic boycott of Israel will first depend on the creation of a permanent and meaningful peace in the Middle East. Second, the international community must formulate criteria for the proper initiation of economic sanctions and must limit the authorities competent to invoke or sanction them. Implicit in the scheme is the power to counteract any sanctions improperly invoked.

91. See generally Shihata, *supra* note 33, at 591.