My topic is "Economic Sanctions—New Issues in a Post-Cold War, Post-COCOM World." Perhaps the subtitle could be "Opportunities Missed or Seized: Does the Rhetoric Match the Policy?"

March 31, 1994, was a historic day. It was the end of the economic vestiges of the Cold War—it was the last day of the Coordination Committee, COCOM. Some of us have even forgotten what COCOM stood for. After World War II, a consultative group was established among the wartime allies. It had a consultative committee, and this committee was COCOM. The Committee imposed a total embargo on certain items, and other items were to be watched for sales to the Communist world—composed as it was, then, of the Soviet Union, the Warsaw bloc, and ultimately Communist China, North Korea and North Vietnam. As we all know, this evolved into a set of lists—munitions, nuclear and industrial lists. The system did not apply to other countries—it is important to remember that. There was no multinational agreement on transfer of conventional arms, for instance, to other destinations. Each COCOM member had a veto, and of course the United States used it a great deal, particularly in the early days.

Today, when we listen to discussions of COCOM and what it accomplished, it is interesting how modest are the goals that are stated, the objectives being: (1) to increase the cost of goods to the Communist bloc; (2) to slow its acquisition of high-technology goods; and (3) to deny it some products and technology. I recently heard a high-ranking policy maker say, "COCOM is a success: the Bloc never managed to buy a major factory from us." Well, if you define your goals very narrowly, you succeed. From the beginning, of course, the United States had the monopoly, for the United States had the technology. But as postwar Europe, Japan and the rest of the world recovered, that began to change. COCOM refused to extend its jurisdiction to Cuba when the United States wanted to do so in the 1960s. Very soon there was a situation in which the United States was acting unilaterally under the Export Control Act (later the Export Administration Act), even though the COCOM continued to be in place. We had a longer list than they had.

The allies would insist on decontrolling sales, at least to the extent they had discretion, to the Bloc countries. They would bring exception cases to the COCOM. The U.S. administration would usually refuse. Some of that unilateralism of the U.S.-controlled regime was unwound in the late 1960s and early 1970s by then-Senator Mondale. He was one of the first to see that there was something wrong with a world in which the sale of American goods was being restrained when the allies, who now were able to produce these goods, were sometimes unrestrained in what they were willing to sell.

Also, from that same Export Control/Export Administration Act evolved the regulations on the re-export of U.S.-origin goods, on the extension of U.S. controls to foreign-made goods with U.S. content, and on the extension of U.S. controls to foreign-manufactured goods that were the product of data from the United States. That was the Export Control/Export Administration stream, if you will. The other stream grew out of the Trading With the Enemy Act and all the later regulations under that legislation and then the International Emergency Economic Powers Act (IEEPA). It was aimed at reaching the "person subject to the jurisdiction of the United States." This term became the core, the bedrock, of the extrater-
ritorial application of U.S. controls, based on ownership or control of the subsidiaries of U.S. companies. That, of course, was under the Foreign Assets Control Regulations, as they applied to China, North Korea and North Vietnam, and the Cuban Assets Control Regulations applied to Cuba. That "person subject to the jurisdiction" language did not stay on the Treasury export side of the equation based on the Trading With the Enemy Act, however. It crept over into the Export Administration Act. It was what gave rise to the Soviet Gas Pipeline controversy. The turning point in the way we look at export controls came with the pipeline controversy in the early 1980s where, for the first time, that language was applied to foreign subsidiaries of U.S. companies in the United States.

After that, the United States began to pull back from extraterritorial application of controls. The Iran sanctions regulations were not extraterritorial. The United States would jawbone U.S. companies not to have their subsidiaries trade with Iran. The then-Director of the Office of Foreign Assets Control once asked me, when I told him one of my client's foreign subsidiaries was thinking of selling goods to Iran during the hostage crisis that were arguably humanitarian, if I would mind giving him my client's phone number so he could have the Assistant Secretary call him. And I said, "Well, what happens if he calls and they decide they're going to go ahead anyway?" He replied that, in that case, "the next person to call will be the Secretary, and we will work our way up." This was jawboning under the Iran sanctions regime.

Then we go, more recently, to what Ms. Borek has talked about—a new kind of multilateralism that grew out of the Iraq sanctions and then the Yugoslav sanctions. Because these controls were imposed multilaterally through the United Nations, the United States did not impose them on our own industry extraterritorially. We do not apply the Iraq and Yugoslavia sanctions to owned or controlled subsidiaries of American companies.

During this same period, the so-called nonproliferation controls also developed: Australia Group controls on chemical and biological weapons, the Nuclear Non-Proliferation Regime, and the Missile Technology Control Regime. These differ from the COCOM in their ad hoc nature. There are lists that are generally agreed upon; however, the lists are not always the same. There is no permanent administrative machinery, there is no veto, and there is not necessarily prenotification in all cases.

That brings us in quick compass back to March 31, 1994. COCOM disappears. What takes its place? The New York Times, interestingly enough, ran an editorial in early April saying, "Still No Policy on Arms Sales," and pointing out that in effect we do not have anything to take COCOM's place today. We have elements of COCOM still in place, and the lists are still being used by all the member countries.

A negotiation began last fall, at the time the allies decided to terminate COCOM. To that negotiation the United States brought a series of objectives that have not proved to be as successful as I think some in the administration hoped. What the United States tried to do was to get the allies to agree to a new regime that would focus on destinations of concern, called on Capitol Hill, "rogue regimes." These included Iraq, Iran, Libya and North Korea. We said (and our Under Secretary of State for International Security Affairs, Lynn Davis, used these words) that we wanted an "orderly transition" from the old COCOM. We wanted to close it down with care. We wanted a new regime established to respond to new security threats. We do not have it yet. In that negotiation, we sought to convince the allies that there is a continuum between conventional arms transfers and the development of weapons of mass destruction, and that we ought to try to find a regime that covers both. We ought to find a regime that has criteria for granting licenses,
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and prenotification, and presumptions of denial, and all the rest. We ran into a
good deal of resistance to the proposal that was put on the table, as best we know
the negotiation. Most of it has not been put fully on the public record, as far as
I am aware. What I am giving you is gleaned from attending talks that various
members of the administration have given about these negotiations, and from what
has appeared in the press so far.

With the end of COCOM on March 31, the veto is gone. The United States is no
longer in a position to say to its allies, at least as to certain targeted countries,
"No sales will be made there."
It remains to be seen what is going to happen in
the future. We continue to have our unilateral controls for foreign policy purposes
whether they be against Iran, Libya, Syria or others. Other countries have their
control regimes in place with the old list. But will the consultative process occur
in all instances? Certainly with no veto there is no prenotification requirement.

On the Export Administration Act side, we have another series of develop­
ments, since the statute was extended for 18 months to expire in June 30, 1994. The
recognition on the part of the administration of the importance of the relationship
between exports and jobs has resulted in a good deal of effort, at least in the
rhetoric, to improve the Export Administration legislation. The rhetoric was good.
Secretary Brown talked about creating the first comprehensive change in the Ex­
port Administration Act in fifteen years—one that would effectively respond to
the dramatic changes in the world over the past several years. Lynn Davis again
spoke about our need to respond to the new security threat, including the spread
of weapons of mass destruction and sophisticated conventional arms.

The reality is again quite different. The new Under Secretary for Export Control
in the Department of Commerce, William Reinsch, who spent seventeen years on
the Hill working in this area, said in a speech on March 31 that he has "never
seen a wider gap between the private sector and the government in their perception
of the strategic threats we face and the efficacy of controls to deal with them."

He spoke of past failures of controls and about the reflexive use of export sanctions
inappropriately and ineffectively as frustration overcomes rationality. This is a
good way for an administration official to start—by understanding how difficult
this area is.

To its credit, the Clinton Administration has taken a number of very good steps
in the export administration area, such as removing computer controls, raising
the levels and thresholds there and removing the telecommunications controls.

Where do we go from here? What is it we should try to achieve? What is there
to say about extraterritoriality? I suggest that it is well worth looking very carefully
at the legislation that is pending on the Hill to try to replace the existing Export
Administration Act. Let me cite one example of the kinds of provisions that are
in the pending bills. There is the provision in the legislation introduced for the
Export Administration Act by Congressman Sam Gejdenson that deals with the
question of sanctions against foreign persons who violate the Non-Proliferation
Regime. Now, of course, there will be sanctions against U.S. persons; but this
bill provides in addition for sanctions against foreign persons who take actions in
violations of the Non-Proliferation Regime. In attempting to define which entities
will be subject to those sanctions, it starts by saying that the person who committed
the act will be sanctioned; then it adds "any foreign person or United States
person that is a parent or subsidiary or a person or entity that engaged in the act,
if that parent or subsidiary materially and with requisite knowledge assisted in
the activities which are the basis of that determination." So far, so good. That
seems perfectly reasonable—trying to find a link to the parent or subsidiary in-
volvement in the triggering act that gave rise to a violation of the Non-Proliferation Regime. Now, I quote to you from a March 24 letter that was sent to the Chairman of the House Committee on Foreign Affairs, Lee Hamilton, by Department of Commerce Assistant Secretary for Export Controls, Sue Eckert. She is commenting on this bill and is going through it step-by-step to identify which provisions the administration is having trouble with and which it is not. Upon getting to this provision, Ms. Eckert says,

Under the Subcommittee’s draft, a person related to the primary subject of sanctions is sanctioned only if that person assists in the sanctionable activity with requisite knowledge. The Administration’s formulation does not require a finding that the related person assisted. This more rigorous provision could be used to guard against evasion of the impact of sanctions. It could also strengthen sanctions, if limiting sanctions to the particular operating unit involved would have an inadequate economic impact. We therefore urge a test that doesn’t require any assistance at all.

That, I suggest, is a fairly broad sanction provision if you take the administration’s approach. I am not arguing one way or the other on the merits, just suggesting that this may take us back to the same issues of extraterritoriality and the same kinds of serious questions that have given rise to prior controversy.

Finally, where would I go with this? I would suggest three controlling principles in the area that I have been discussing. Principle 1 would be that we will not impose unilateral sanctions unless we are the sole supplier or have agreement from all others to adhere to the same regime. In effect, we would have a double-effectiveness test. First, if we are going to deny goods or technology, we must be satisfied that the goods or services will not otherwise get there under the regime we are setting up. I would have, or at least consider, a second effectiveness test under which I would require an articulation of why the denial of those goods or technologies is going to achieve the stated objective, whether it be a security objective or a foreign policy objective.

Principle 2 would be to consider the renunciation of the application of U.S. controls to foreign subsidiaries, perhaps in the absence of a wartime-type standard. This would be a much stricter standard than the current IEEPA allows today. As a matter of policy, I would argue, we create more foreign policy problems with extraterritoriality than we solve.

Principle 3 would be that we should in all cases try to work, in the first instance, through a coordinated multilateral regime rather than through our own unilateral regime. We would thereby recognize the hidden costs and the difficulties of proceeding under our policy objectives when we do not have major allied producing countries and their manufacturers subject to the same kinds of controls that we have.

Now I realize one can argue with each of these principles. However, I suggest to you that we have the opportunity today, both in terms of the Export Administration Act and in terms of the future of COCOM, to really think about and debate what we are trying to accomplish here, whether for non-proliferation purposes or any other. Instead of quarreling over small details and developing more complicated regimes (which incidentally our allies and their manufacturers and our competitors do not face), we ought to seize the moment, look at the big picture, and see whether we can not redefine our aims so that perhaps when we come back here a year from now, we will have a little better regime to look at.