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CHINA SANCTIONS FOR MISSILE PROLIFERATION:
A BUREAUCRATIC COMPROMISE

CORE COURSE III RESEARCH PAPER

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I. INTRODUCTION

On August 26, 1993, the State Department announced that the United States would impose sanctions against China for transferring missile technology to Pakistan in violation of the Missile Technology Control Regime (MTCR), a set of international counter-proliferation guidelines implemented by U.S. law.¹ The formal notice containing details of the sanctions was published on August 27, 1993.² News accounts suggested that the Administration was taking this action "reluctantly."³ State Department officials stressed repeatedly that they were required to take the action by law.⁴ The clear implication was that Congress had tied their hands. The two laws cited as requiring this action are the Arms Export Control Act (AECA) and the Export Administration Act (EAA).⁵

The purpose of this paper is to demonstrate that: (1) the constitutional tension between the Executive and Congress in legislation bearing on this subject was not a factor in the sanction decision; (2) contrary to State Department assertions, the Executive had significant discretion under applicable law; and, (3) the Executive decision was a compromise product of competing interests best explained by Allison's "Bureaucratic Politics Model" of decision-making.⁶

Whether China actually transferred MTCR technology to Pakistan, and whether such a transfer fell within the sanction provisions of U.S. law are beyond the scope of this paper. The focus is on the decision process, not the merits of the decision.

II. CONSTITUTIONAL DEBATE OF NO CONSEQUENCE

The relevant provisions of the AECA and the EAA provide that:

"[I]f the President determines that a foreign person . . . knowingly-
 (A) exports, transfers . . . any MTCR equipment or technology
 that contributes to the . . . development . . . of missiles in a country that is
 not an MTCR adherent . . . then the President shall impose . . . applicable
 sanctions"⁷

The sanctions include varying restrictions on trade between the United States or American companies and the country or entity sanctioned.⁸ These sanctions were not part of the original legislation, but were added by amendments included in the 1991 National Defense Authorization Act.⁹

The Constitutional authority "to regulate Commerce with foreign Nations" rests with Congress.¹⁰

However, when President Bush signed the 1991 NDAA, he commented:

"I have signed the Act notwithstanding the reservations that I have regarding certain of its provisions. I am particularly concerned about those provisions that derogate from the President's authority under the Constitution to conduct U.S. foreign policy."¹¹

One of the objectionable provisions he cited was section 1702, the section which added the sanction requirements to the AECA and the EAA.

Despite President Bush's constitutional objection to the legislation, his administration took action under these sanction provisions at least six times.¹² In no case did the administration raise a constitutional objection or assert independent presidential authority for the action. The same is true for the current administration in this case.

Officials in both the Executive and the Congress indicate that the constitutional disagreement continues.¹³ However, failure by the Executive to raise an objection in this case and Executive comments indicating it was compelled to act by law suggest that the constitutional disagreement was not a factor in this decision. Further, reluctance of courts to review political questions in Executive-Legislative constitutional fights makes it unlikely that the constitutional disagreement can be satisfactorily resolved, and therefore it is unlikely that constitutional disagreements will play a major role in a decision such as the one under review. Therefore, it is more important to examine the asserted basis for the Executive action and other interests that appear to bear upon the decision process.

III. THE CONGRESS MADE ME DO IT!

Constitutional issues aside, the State Department asserts that it had no choice in the matter because the law required it to impose sanctions.¹⁴ A State Department official acknowledged during an interview that different bureaus within the department had competing interests, but he concluded that these interests were irrelevant because the law required the sanctions.¹⁵ Despite these assertions, a closer examination of the law indicates that there is much Executive discretion built into the law.

First, the Executive determines whether there was a knowing transfer of technology covered by the MTCR.¹⁶ Because evidence of such transfers is often circumstantial, the standard of proof applied can

clearly influence whether a violation is found.

Second, even if the Executive determines that a violation occurred, he may waive application of the law if he determines that "such a waiver is essential to the national security of the United States."¹⁷

Third, the Executive determines which of two types of violations occurred. The type violation depends on what was found to be transferred. The extent of the sanctions depends in part on the type violation. In either case, the sanctions preclude the export of certain technology to the sanctioned country or entity.¹⁸

Fourth, the Executive also determines what impact the transfer of the technology had on the receiving country's missile technology capabilities. If he determines that the transfer "substantially contributed to the design, development, or production of missiles" by the receiving country, the sanctions extend to imports of the sanctioned country's goods, not just exports of limited technology to the sanctioned country. (emphasis added)¹⁹ In this case, the State Department indicated publicly that this provision applied only if China shipped complete missiles rather than missile parts.²⁰ A State Department official later acknowledged in an interview that this view represents State Department policy, not a direct legislative constraint.²¹ Thus, when the State Department asserts that it had no discretion, it may be suggesting that its discretion was constrained by law and other outside factors, but clearly its discretion had not been removed by Congress. The possible options available by law to the Executive ranged from no action to much more severe sanctions than those imposed.

Rather than tight legal controls, several external factors appear to have influenced the Executive's decision to sanction China as it did. Several of these factors seem to tug in different directions. The ultimate decision seems to represent a true compromise in the context of Allison's "Bureaucratic Politics Model."

IV. THE BUREAUCRATIC MODEL IN ACTION

A. GENERAL

Allison's "Bureaucratic Politics Model" of decision-making views government actions as political resultants. What happens "results from compromise, conflict, and confusion of officials with diverse

interests and unequal influence."²² Further, the activity leading to the decision "is best characterized as bargaining."²³

The debate over the sanctions in question generally concerns three different, and often competing interests: (1) the strong desire to curb weapons proliferation; (2) the interest in China's economic well-being because of its status as the fastest growing market in the world; and, (3) the interest in our economic well-being and that of our companies likely to be affected by the sanctions. Therefore, government entities and private companies concerned with proliferation, regional stability, economic development, and trade were deeply interested in the outcome.

The concern for the dangers posed by proliferation of missile technology, particularly to a country like Pakistan with apparent nuclear capabilities, supports severe sanctions to exert the greatest pressure on China to alter its dangerous behavior. This is particularly so considering that sanctions previously had been imposed on China in 1991 for similar behavior, and sanctions were lifted after China provided assurances of future compliance with the MTCR.²⁴ By law, if we determined that China's transfer of missile technology to Pakistan substantially contributed to Pakistan's design, development, or production of missiles, sanctions could have extended to prohibiting import of Chinese goods into the United States.²⁵

The interest in China's economic development as a valuable world market, with its resultant stabilizing political impact, argues against sanctions which impede that process. If sanctions are necessary, sanctions limited to precluding China's access to certain technology, rather than broader sanctions designed generally to punish China, more properly serve that interest.

The interest in our economic well-being and that of U.S. companies argues against sanctions which adversely affect U.S. companies or U.S. consumers. Virtually any sanction is likely to have such an impact.

B. THE PLAYERS

In the context of these broad competing interests, several U.S. players with divergent interests seemingly influenced the decision process leading to the sanctions. The principal players included President Clinton, the State Department, the Commerce Department, the Department of Defense, the Congress, the press, and U.S. businesses. Among these players, several contained subparts with competing

interests. The following discussion addresses the variety of factors affecting these players which led to the apparent compromise sanction decision.

C. PRESIDENTIAL IMPETUS FOR SANCTIONS

I. CAMPAIGN POSITION AND PRESS SCRUTINY

Apart from how President Clinton may have assessed the world situation in August 1993, he had taken a very strong anti-China position during the presidential election campaign concerning China's weapons proliferation activities and China's Most Favored Nation (MFN) trading status. His campaign position and press scrutiny in early 1993 concerning his evolving position on China's MFN status and weapons proliferation seemingly exerted strong influence on the course of action pursued in this case.

During the campaign candidate Clinton severely criticized President Bush for extending China's MFN trading status. He remarked that he hoped "Congress [would] move quickly to enact [China MFN conditionality] legislation." (emphasis added)²⁶ Later, the Democratic Party platform provided that "... [The United States should condition] favorable trade terms for China on respect for human rights in China and Tibet, greater market access for U.S. goods, and responsible conduct on weapons proliferation." (emphasis added)²⁷

In early 1993 The China Business Review highlighted the changing face of candidate and President-elect Clinton's MFN stance. It presented Clinton's November 19, 1992 press remarks in which the weapons proliferation concern had dropped out of Clinton's MFN stance.²⁸

Thus, in June 1993 when President Clinton unconditionally extended China's MFN status, and conditioned next year's approval only on China's human rights record, there was likely great pressure created to take tough action on other fronts regarding China's proliferation activities. He seemed to anticipate this. In the report to Congress accompanying the Executive Order extending China's MFN status, President Clinton expressed his "continuing and strong determination to pursue objectives in the areas of nonproliferation and trade, utilizing other instruments available." (emphasis added)²⁹

2. CONGRESSIONAL INTERACTION ON MFN

Congress exerted similar pressure on President Clinton in the MFN decision process. At the time

of President Clinton's MFN decision, two bills were pending in Congress to condition China's MFN status.³⁰ One bill was S. 806 sponsored by Senator George Mitchell and the other was H.R. 1890 sponsored by Representative Nancy Pelosi. Both bills would have conditioned China's MFN status on several factors, including China's weapons proliferation activities. The Wall Street Journal reported the conflict between President Clinton and Congress regarding the status of proliferation as an MFN condition - a problem in need of a solution.³¹

On May 28, 1993 when President Clinton publicly announced the extension of China's MFN status, he specifically recognized Senator Mitchell and Congresswoman Pelosi who were present.³² He then remarked that "[w]e must also address China's role in the proliferation of dangerous weapons."³³ Later in his remarks he noted that the administration was examining reports that China had shipped missiles to Pakistan and that "[i]f we determine that China has in fact transferred M-11 missiles or related equipment in violation of its commitments, my administration will not hesitate to act."³⁴ The Mitchell and Pelosi bills were then withdrawn.

The strong implication is that a compromise was reached. President Clinton avoided legislation constraining his freedom of action in the MFN arena. In return, he agreed to act separately regarding China's proliferation issue.

Thus, there were strong forces at play steering the Clinton administration toward sanctions of some type if China was found to have improperly transferred missile technology to Pakistan. That raises the question regarding what proof will be required to conclude that China has acted improperly.

D. PROOF OF CHINA'S VIOLATION

1. EXECUTIVE BRANCH DISAGREEMENT

As mentioned earlier, evidence of technology transfers is often circumstantial. There is room for differences of opinion and judgment. In early May 1993, the New York Times reported a disagreement among administration officials regarding the adequacy of evidence to support a violation by China.³⁵ Nearly two weeks later the Washington Post reported that new evidence obtained by U.S. intelligence "'strongly suggests' China is continuing to export sensitive missile technology to Pakistan" and that a

senior administration official called the evidence "strongly suggestive but not conclusive."³⁶

Mr. David Barton, Staff Member, House Foreign Affairs Committee, suggested that among those more likely to find insufficient evidence was the Department of Commerce whose mission was primarily to promote trade, although it also has what he perceives as conflicting oversight responsibilities regarding trade of certain items. He found similar sentiment in the economic and regional bureaus at the State Department. Those more inclined to find sufficient evidence included the State Department's Bureau of Politico-Military Affairs. The Department of Defense seemed to present the most unified anti-proliferation stance.³⁷

Although news reports reflected disagreement within the Executive, the Washington Post noted further that "[t]hree sources familiar with the briefing [by intelligence agencies to the Senate Foreign Relations Committee] said it left little doubt that China, despite its public denials, was continuing to ship components for the M-11 ballistic missile to Pakistan."³⁸

2. FURTHER CONGRESSIONAL PRESSURE

Under these circumstances it is reasonable to anticipate strong Congressional influence on the Executive's ultimate evaluation of the evidence and conclusions regarding the existence of a violation. Discussions with State Department and Congressional sources reveal this to be true.

When asked about the Executive's discretion in finding a violation depending how strict a standard of proof it wanted to apply, a State Department official noted that Congress had access to the same intelligence reports. He elaborated further by saying that if the Executive had not found a violation in this case, there would have been a powerful and negative response from the Senate, led by Senator Biden. Although he did not elaborate further, it was clear that there was no desire to have such a confrontation. Further, he personally agreed with the finding of a violation based on the available evidence.³⁹

Mr. David Barton noted that Senator Helms was also a strong advocate for finding a violation and imposing sanctions. In Barton's judgment, Senator Helms' feelings were strong enough and his influence powerful enough in other areas that the administration had reason to be concerned about further delays in the confirmation process for its appointees if it pursued a course other than the one chosen.⁴⁰

The Congressional influence in this matter was clearly strong enough to overcome any contrary positions within parts of the administration.

E. SELECTING THE SANCTION

The "get tough with China" and strong anti-proliferation voices in government prevailed on the issue of finding a violation of law, thus requiring the imposition of sanctions. However, in choosing among possible sanctions, concerns other than proliferation, mostly economic concerns, had much greater influence. Further, in this one component of the problem there seemed to be greater consensus among all the players.

By finding that China transferred missile parts rather than whole missiles or major subsystems, the lightest sanctions applied.⁴¹ No disagreement was detected on this matter.

Even if only missile parts are transferred, however, if such a transfer "substantially contributed to the design, development, or production of missiles" by Pakistan, more severe sanctions are required. These sanctions would extend to China's exports to the United States.⁴² Sanctions of this type could have even greater adverse impact on China than denying it MFN status. Considering the government's position on China's MFN status and its relationship to the proliferation concerns, one would expect little interest in imposing such sanctions.

When asked whether China's transfers had such a "substantial" impact on Pakistan's missile program and whether these additional sanctions had been considered, officials in the State Department, Defense Department, House Foreign Affairs Committee, and Senate Foreign Relations Committee were unanimous in saying that no such sanctions were seriously considered. What is most significant, however, is that none of these officials focused on whether the transfer had a "substantial" impact on Pakistan's missile program. They all focused on the adverse economic impact of such sanctions on the United States.⁴³

Once the decision to impose sanctions was made, selection of the lightest sanctions was not controversial. However, implementing the sanctions has not been so peaceful.

F. IMPLEMENTING THE SANCTIONS

The sanctions imposed require that licenses for transfer of certain missile equipment or technology to China be denied for two years. The controversy concerns the State Department's decision to apply the sanctions to prohibit arrangements between U.S. satellite producers and China for the Chinese launch of U.S.-built satellites.⁴⁴ Hughes Aircraft Company has objected strongly to such an application of the sanctions.

Although satellites themselves are not prohibited from transfer, they often contain parts covered by the sanctions.⁴⁵ Hughes argues that when they contract with China to launch a satellite, Hughes retains control and security over the satellite until it is launched. Therefore, Hughes asserts that they do not transfer anything to China and should not be covered by the existing sanctions.⁴⁶

Lynn E. Davis, Under Secretary of State for International Security Affairs, testified before the House Foreign Affairs Committee on November 10, 1993. In that hearing she was questioned extensively about this issue by Chairman Hamilton and Representative Gilman who both seemed to feel that this application of the sanctions did not make sense. Davis expressed concern that "items in a satellite can be taken out of the satellite and put into a missile."⁴⁷ When specifically questioned about the Hughes Aircraft situation, she acknowledged that China seemed never to exercise control over the satellite and that it served only as the launcher (providing a service, for a fee, to Hughes or its clients). When pressed further about how this could be a transfer of technology to China, her final response was to refer to the interpretation of the law by her lawyers.⁴⁸

According to Mr. Barton, what is further complicating the process is that some satellites are licensed by the State Department and others by the Commerce Department. Under its standard procedures, the Commerce Department does not consider a satellite's components when licensing an arrangement such as that described by Hughes. Thus, if the Commerce Department were free to apply its standard procedures in reviewing its sanction cases, it would not follow the State Department interpretation.⁴⁹

In a State Department interview, the importance of extending the sanctions to the satellites became somewhat clearer. A State Department official, while asserting the legal requirement to apply the sanctions

as it has, added that because of other legislative constraints on trade with China, satellites are about the only item remaining to regulate under the sanctions.⁵⁰ Thus, if the sanctions do not extend to the satellites, the sanctions are rendered virtually useless.

Although consensus was originally reached on imposing the lightest sanctions, it was reached because it permitted some sanctions, which satisfied the antiproliferation advocates, and it offered the least impact on the U.S. economy. However, the battle line on this issue is drawn more narrowly between the antiproliferation forces, who see the sanctions being gutted if we accommodate Hughes, and the economic interests of a few U.S. companies.

Just as important as these competing interests is the environment within which this battle is being fought. China's public reaction to the sanctions and the media coverage it received will undoubtedly influence any change to the sanctions now in place. Although China lodged a strong formal protest concerning the sanctions⁵¹, The New York Times reported that:

"Foreign Minister Qian expressed near-indifference to the Clinton Administration action, arguing that the sanctions would do more harm to the American economy than to China's by preventing up to \$1 billion in equipment sales from American companies."⁵²

Thus any effort to address Hughes' complaint must be sensitive to perceptions that we are such slaves to economic interests that we cannot effectively deal with China through sanctions, as China suggests.

The difficulty this presents is highlighted by the seemingly extreme willingness we have demonstrated to accept virtually any Chinese response as justification to lift the sanctions. An example reported by Newsweek quotes a senior State Department official as saying, "[w]e virtually told the Chinese, 'If the shipment [to Pakistan] was just Ping-Pong balls, tells us.'"⁵³ In addition, Winston Lord, Assistant Secretary of State for East Asia and the Pacific, has shown extreme eagerness to meet with the Chinese to develop a basis to lift the sanctions.⁵⁴

The Congress and the Executive are locked in discussion seeking a solution to this dilemma. Mr. Barton and a State Department official have indicated a strong likelihood that a compromise will be reached in which the State Department and the Commerce Department will each be able to handle the sanctions

according to their own standard procedures. Although this compromise will alleviate the economic impact on some U.S. companies, it will not help Hughes and it will validate an illogical difference in policies between two agencies addressing the same problem—a compromise of the worst sort.

V. CONCLUSION

The decision to sanction China in the manner chosen reflects a negotiated compromise between the interest in nonproliferation and the competing interest in U.S. economic well-being. To the extent that proliferation and economic weakness represent two equal dangers to national security, a compromise which balances both concerns may represent the best solution.

However, the decision process leading to these sanctions does not appear to have been a rational balancing of two perceived equal threats to national security. The competing interests represented in the different executive agencies, and within each agency, which would have been the likely source for such a rational balancing, were not the dominant influence. Rather, the sanction decision seems to be the product of strong competing personal interests in the Executive and the Congress, highlighted by the media.

In the Executive, the President was severely influenced by campaign promises and media scrutiny to act tough despite apparent concerns about the adverse economic impact on the United States. In the Congress, strong antiproliferation forces, notably Senators Biden, Helms and Mitchell and Representative Pelosi, exerted a powerful impetus toward sanctions. The tempering force on the nature of the sanctions reflected less a concern for national security and more a concern for the economic interests of individual constituents.

Although this action reflects less concern with the national security implications of proliferation than is warranted, the extensive patchwork of trade legislation already affecting our relations with China and the absence of multilateral agreements regarding sanctions severely constrained our government's options.

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