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NATURAL LAW, STATE INTEREST, AND ECONOMIC EMBARGOES

ANTONIO JORGE*

Good morning and first of all, thank you for having invited me to participate in this conference. My remarks are going to come from the perspective of a political economist. Therefore, they may seem to you to be somewhat irrelevant to the topic at hand which will be examined by most of you from a legal perspective.

Let me, first of all, bring up a question that may seem startling to many: Why are embargoes presumed to be bad? Obviously, there is a value judgment involved in this matter. If they are presumed in principle to be bad, then there must be something, perhaps the opposite of what an embargo is, that may prove to be good. If there is something that is the opposite of an embargo, that is free trade, free and multilateral trade, unimpeded trade. I want to trace, very briefly, in the few moments that I am going to be sharing with you, the history and development of free trade as a practical and as a theoretical principle, and why ordinarily embargoes are considered to be contrary to the spirit of free trade and opposed to the values that free trade espouses, which are taken to be beneficial to those engaged in that practice.

First of all, I would like to begin by stating that the profession of commerce as such, in the Middle Ages, you can go back to, say, the 13th century, was somewhat suspicious. Profit making itself, St. Thomas Aquinas said, in his *Summa Theologica*, had an element of corruption in it, there was an element of “turpitude” to commerce and profit making. Interestingly, the professional scholastics, mainly Dominicans and Franciscans, were engaged in economic research from the 13th century onwards. By the end of the 15th century, a group of well-known scholars, among them Lessius, Molina, and De Lugo had concluded the opposite: that it was legitimate for a person

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to profit, in every way he could, assuming that conditions in the market, were somewhat, one might say, equitable. In other words, that there was no advantage in favor of any of the trading parties. That is, if there were no monopolies or oligopolies in the marketplace, one would assume then there was a condition of equality and that, therefore, any profit derived from business would be legitimate.

Incidentally, that reasoning goes back to Aristotle. Aristotle in his *Nicomachean Ethics* comes to the same conclusion, i.e., that ultimately in what we would know as a competitive market, profits are legitimate and prices are just, because they are the result of the operation of what we now call supply and demand in an unimpeded market where transactions are completely voluntary and well-informed. So this establishes, one might say, the background to this question. Then we see that this whole problem of commerce, and how commerce is regarded both domestically and internationally, keeps on being developed during the period when the European nation-states were being formed, say, from about the 15th century onwards. We have to refer then to what has been called the mercantilist literature. The interesting thing is that if you look at the this literature during the 16th, 17th, and 18th centuries, especially in countries like Germany, England, and, to some extent, France, you will find that there is a gradual and growing consensus to the effect that trade, both domestic and international is good, in the sense that it benefits all parties involved. Again, as long as trade is competitive in nature, also, as long as all parties to the transaction are well informed, and in so far as there are no great inequalities in power among those engaged in the transactions.

In the above context, I would like to cite some names, people like North, Barbon, Davenport, Yarrington, von Justi, Seckendorff, and others who researched in these areas. Besides, there are some Spaniards who also come to mind, Jovellanos and the Court of Campomanes who did a lot of research in the area. And again, you might say the consensus in this practical literature by professors, policy makers and civil servants, was that trade itself was good because trade produced a net benefit to all those involved in it. In other words, there was a surplus of utility over the pre-trade

condition and, therefore, trade was better than no trade.

This consensus transferred into the international arena and then we see that the academic literature, which eventually complemented or supplemented the mercantilist pragmatic literature, was represented mainly by the British Classical School. Representative names are those of Adam Smith, David Ricardo, Nassau Senior, McCulloch and others, and, in France, the physiocrats and the school of François Quesnay. Again, they came to the same conclusions as the policy makers even though they were intellectually more sophisticated. They engaged in what we would now call pure economic analysis. In other words, they tried to be scientific in their analysis and about their conclusions. Interestingly, and this is something that I would like to emphasize, most of these people, including Adam Smith himself, were natural law philosophers. You will remember that Adam Smith was not a professor of economics, but rather a professor of moral philosophy at Edinburgh University. Generally, these people were mainly members of the Scottish School of philosophy or were British classic economists. The same applies to Quesnay in France and to the British Classical School and its notion of the natural order. Remember that Quesnay, just like Adam Smith and all these natural law doctors that developed their doctrines mainly during the 17th and 18th centuries, and to whom one would have to add other people, like John Locke for example, and Thomas Hobbes, did work in economics properly speaking. Even David Hume was an economist. Again, interestingly, all these thinkers came to the conclusion that under the natural law precepts, trade was beneficial to all concerned. That trade would maximize, as Jeremy Bentham would say later on, the amount of happiness to be shared by all those engaging in voluntary commercial transactions. In other words, even from the utilitarian standpoint, they came to the conclusion that trade was beneficial. As a matter of fact, international trade was conceived to be the counterpart of domestic competitive trade, so the counterpart of domestic free trade was international unimpeded trade. From a natural law standpoint, it is important to note that these men came to the conclusion, as Quesnay and Adam Smith had, that this goodness, one might say, of trade, was part of a preordained system. All of this was part of a

teleological type of institution building and was included in the natural order of society by the mechanism of the invisible hand.

Once more, it is very important to note that to the scientific doctrine of free trade, a normative element, a value judgment was added. Ethically and morally speaking, trade is good and trade is beneficial. Trade is part of the natural order. The Invisible Hand and the Natural Order have preordained trade among people and among nations as a way to foster prosperity. And we find this even in Hugo Grotius, someone who I am sure is familiar to you. And, interestingly, these same thoughts are repeated by someone like von Pufendorf who you are also familiar with, and again Hobbes himself, and by no other that John Locke and even David Hume. So what I am trying to say is that there is, or rather there was, a presumption, that prevailed until probably the 19th century and that was part of the *laissez-faire* doctrine under the ideology of capitalism, that trade was not only beneficial economically speaking, from a utilitarian standpoint, but that it was also natural and good, and part of the natural order of things. So in fact, there was a normative presumption in favor of free trade.

Obviously then, embargoes are a contradiction, an opposition to this assumption. An embargo is an interdiction that may be partial or that may be total; may be imposed by one nation on another, or may be imposed by a group of nations on another nation, and again may be more or less damaging, depending on a number of conditions that we will take a few moments to consider at the close of my remarks. But the main point that I want to make is that an embargo, or in any way the interdiction of trade, would be considered to be contrary to the principles of natural law. And this we especially see in two great thinkers: Vitoria and Suárez. If you read the *History of the Indies*, you will find that one of the main arguments used by the Spaniards, and by Vitoria himself to justify the Conquista, was that the indigenous peoples, the aborigines of these territories of the West Indies, were an impediment to the universality and equality of trade, transportation and commerce that natural law demands.

Let us remember that classic natural law rests on two main principles: universality and equality. And universality and equality

were being, one might say, if not transgressed at least impeded by the fact that these people did not have the level of material civilization that would allow them to engage in international trade. But this argument that was espoused by Vitoria and later by Suárez, we should find very familiar. Because after all, what about the rationale for the Opium Wars in the 19th century against China? Also, what was the justification for Commodore Perry and the black ships that forcibly opened Japan to trade? What justification was stated for Westerners to impose their values and free trade and forcibly open the ports of these oriental nations, Japan and China, to trade with the West other than that supposedly it was good for everyone to do it? Thereafter, it was even acceptable to force people who did not engage in free trade to do so, even resorting to military means for this purpose. So from the Conquista onwards, we see that in effect under the natural law principles of universality and equality, and the application of natural law to the evolving economic life of nations, there is an acceleration of the move from the traditional to the market type of economy. Following upon that, my conclusion is that in natural law doctrine and natural law thinking from Aristotle onwards, until late in the 18th or early in the 19th century, the presumption has been that free and multilateral trade is good. It is not only the best alternative as a method for people to allocate their resources but it is also the optimal way to allocate these resources, according to economic rationality, as the Neoclassical School would put it. But free trade is also good in a normative sense. Therefore, any impediment, any interruption in that optimal practice by definition would be bad. So the conclusion then would be, in principle, that embargoes would be bad or harmful.

Curiously, embargoes and blockades were very common among European nations during the period of the formation of nation-states. Mercantilist states engaged continuously in these practices. By the time of the Treaty of Utrecht in 1713, it is revealing that two of the clauses of the treaty provided for free trade among nations and called for the end of practices that proved to be an obstacle to the free flow of goods among European nations. This is the way in which free trade found its way ultimately into international law. Namely, as a reflection in the end not only on pure human rationality, but as

Suárez himself says, on customary practice. So in fact, it is international law that reflected the normative picture. This is the conclusion that I personally have come to and now share with you.

Now Professor Wiessner asked me to refer to the question of the Cuban Embargo and has provided me with a few additional moments to do so. Originally, it is clear that the recent rationality for the Cuban embargo was that it was a kind of punitive measure, a retaliatory measure, for the confiscation, uncompensated confiscation of American properties in Cuba. Given the fact that the confiscation of those properties still stands and that no compensation has been offered, formally speaking, there would be no reason for lifting the embargo, because the condition that generated the embargo still exists. But second, I would offer another additional reason for the continuance of the embargo and that has to do with American policy itself. No question about it, American foreign policy has been guided by the principles of realism and neorealism. And you can see that very clearly in the relations of the U.S. with the Soviet Union -- also in the thought and *praxis* of people like George Kennan and Walter Lippmann. The theoretical principles of that position were expounded by people like Morgenthau, Gilpin, Kenneth Waltz, and many scholars that have written in this field and have subscribed to the realist and neorealist position. The moralist position, perhaps with the exception of Woodrow Wilson and others like Michael Walzer, has been the exception. President Carter was one who was also an exception to the realist position. But in fact, by and large, you might say that American foreign policy has been guided by realistic and neorealist principles as expressive of the national interest. Realists claim that nation-states have the right to define their national interests, even if others disapprove (remember the Melian dialogue). This position also finds justification or support in the modern natural law doctrine. Read Thomas Hobbes: the sovereign may do as he wishes. Or read Spinoza, again: No one should question the sovereign, and the sovereign can define what is in the national interest. Therefore, if the sovereign can define what is in the national interest, a nation can define its own foreign policy. Or revisit Kant on National Interest and International Law. The former prevails upon the latter.

One way in which the U.S. has justified the embargo has been that it has served to prevent the Cuban regime from spreading its influence to others by denying it the resources to do so. Clearly, the same policy of containment that the U.S. practiced against the Soviet Union, and that was so successful in the end. Consequently, if the true rationality, the true intent of the embargo is to deny economic resources to the Cuban regime in order to at least not facilitate the further spreading of that regime's influence, then from the standpoint of the national interest of the United States, regardless of what others might think, the embargo is perfectly justifiable. To repeat, countries take their own policy positions regardless of what others may think, as long as the benefits to them exceed the costs of displeasing others.

But let's again talk about another point that Professor Reisman also referred to on various occasions in his presentation. It is the question about the consideration of the various effects of the embargo. In this, he sounded to me like St. Augustine and St. Thomas Aquinas in their analysis about the requisites of a just war. There is an analogy between the way in which we reason about embargoes and the way Augustine and Thomas Aquinas reasoned about the just war: elements of proportionality, duration, lesser damage, the two-fold effect, the lesser of two evils, the avoidance of damages to innocent parties, and things of that sort receive due attention. In a similar context, I would like to raise the following question: Has the embargo really damaged the economy of Cuba? Many people assume that, yes, that is the case. But what evidence do we have for that belief? I don't think we have much. My main argument is the following. I had the opportunity to work with some Russian economists here in Miami during the early 90's and wrote a paper for the Russian Parliament on the value, the amount, of the Soviet subsidy to Cuba for almost three decades. I can state that the subsidy could be estimated at about 100 billion dollars in terms of the purchasing power of dollars back during the 80's. Now, that in fact was the equivalent of a subsidy of no less than 3 billion dollars a year to the Cuban economy. A subsidy that was far larger than the annual gross domestic product of Cuba itself. I don't think that any state has ever received a subsidy larger than the value of its own domestic product: but Cuba did receive it. Nonetheless, rationing

has continued in Cuba from 1962 onwards when it was first imposed to this date. How come that despite that huge subsidy, the standard of living of the Cuban people has not improved? What happened to all those resources? So if the embargo, let's assume for the sake of argument, had a negative effect on the economy of Cuba, why wasn't it compensated by more than 100 billion dollars from the Soviet Union that amounted, as we said, to a yearly subsidy of no less than 3 billion dollars?

In spite of that, the amount of rationed goods received by the Cuban people has kept on declining and the price of the rationed goods keeps on increasing, which means that the purchasing power and the consumption level of basic goods by the Cuban people has kept on declining.¹ How come? What happened to those 100 billion dollars? Perhaps that is directly related to the fact that there was in Cuba a change in the nature of the economic and political regime fifty years ago. The country went from a market economy to a centrally planned economy. Could it be that perhaps most of the problems of the Cuban people are associated with that institutional change? Is it not reasonable to think that that is the case given the fact that we now know the magnitude of the economic disaster not only of the Soviet Union, but also that of the Central and Eastern European socialist regimes as well? Should we then perhaps examine the possibility that whatever damage has been brought about, whatever harm has been caused to the Cuban people by the embargo is a result of regime change, substituting the market economy for central planning and political totalitarianism?

One other question to be assessed from a purely economic standpoint is how would we go about computing the damage brought about by the embargo? If you were a neoclassical economist, you would say that the embargo produced a change in the reallocation, i.e., in the assignment of resources in the economic system. That is, there would be a reallocation of resources; resources would be deployed to inferior activities as a result of the embargo, assuming

¹ Remittances from abroad are to be considered differently because they are transfer payment originating outside of Cuba. Those who benefit from them, directly or indirectly, are being collectively subsidized from the exterior.

that they were being allocated rationally before the imposition of the embargo. So, assuming perfect rationality, and assuming optimum resource allocation prior to the embargo, the imposition of the embargo would have forced the reallocation in the assignment of resources. They would have had to be shuffled around, and supposedly these other activities in which resources would be forced would be inferior to the activities that prevailed before the embargo. Therefore there would be a net loss involved, assuming there was full employment to begin with, which in the case of Cuba was not the case. But again, do we have any indication that the embargo brought about a reshuffling in resource assignment that would have resulted in losses to the Cuban gross domestic product? My contention is that this was not necessarily the case. Why? At the time of the embargo, about 60% of the Cuban international trade was taking place with the U.S.; 40% was taking place with European and Asian nations. About 1 or 2 years after the embargo, 92-93% of Cuban trade was taking place with CMEA, which was the socialist common market. Therefore, one might say there was no hiatus in the reallocation of resources. Resources were reallocated rapidly, from relations with the U.S. to commercial relations with the countries of Central and Eastern Europe, mainly the Czech Republic, Hungary and Poland. If that was the case, then why blame the embargo for the net losses if the resources were employed in new economic relations under a *new institutional system that was going to be brought about in any case, regardless of the embargo* given the commitment of Castro to the creation of a so-called socialist society (in actuality one characterized and economic collectivism *cum* political totalitarianism). One might logically conclude that whatever negative effects followed from regime change, that is from the imposition of a new set of institutions and an inferior pattern of resource allocation, is not to be blamed on the embargo, but simply on the fact that Cuba (F. Castro) decided to redefine the nature of the regime, politically and economically speaking. This is consistent with the fact that the countries of Eastern and Central Europe and the Soviet Union were practically stagnant, there was practically no economic growth in them, from about the 80's onwards. This is a fact that has been established beyond any doubt by academic scholars everywhere. That being the case, Cuba was then a victim of regime change and not of the

embargo.

Finally, I would like to make one last observation that refers to something Professor Reisman said before, which caught my attention. Many people tell you that the embargo has not worked in the last forty-some years. Why keep insisting on a failed policy? There are two things that I think are missing from that argument. First of all, there is the implicit assumption that the purpose of the embargo was to topple the Castro regime. But the purpose of the embargo as such was never to overthrow the regime. The objective of the embargo was twofold. First of all, it was intended as a punitive policy resulting from the unilateral and uncompensated confiscation of the assets of U.S. citizens, and secondly, as part of a policy of containment designed to deny resources to a self-declared ideological and active enemy of the United States. This falls perfectly well within the definition of the protection of the U.S. national interest. That is point number one. But then there is a second point that has to do with elementary Aristotelian logic. If a certain proposition proves to be false, that does not mean that the obverse of that proposition is right. Or, as Americans put it in a simpler way: two wrongs don't make a right. So if the embargo does not work, that does not mean that lifting it will make for desired change. What evidence do we have of that? Why would you take for granted that the lifting of the embargo and the creating of a non-embargo situation would result in a better outcome than the one under the previous situation? You have to offer me evidence of that before you can make that affirmation. Speculation as to what kind of society would emerge under a non-embargo Castro-like regime is a fascinating topic of enormous importance to Cubans as well as others. However, this is not the occasion to engage in such conjectures.