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Fighting Bad Guys with International Trade Law

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TABLE OF CONTENTS

INTRODUCTION 3
I. THE LINK BUILT INTO GATT: ARTICLE XXI 6
A. *An All-Embracing Exception* 7
B. *License to be a Cowboy?: The Importance and Controversial Nature of Article XXI(b)* 8

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C. Strengthening the Restraints Against Abusive Invocations of Article XXI(b) 15
D. Non-Controversial Provisions of Article XXI 16
E. Challenging the Invocation of Article XXI 18
II. FIGHTING DRUG KINGPINS: THE 1986 NARCOTICS ACT 20
A. The Carrot and Stick Approach 20
1. The Stick: Trade Sanctions 24
2. The Carrot: Certification 25
B. The Vital National Interests Waiver 32
C. An Imperialistic Statute? 34
III. FIGHTING FIDEL: THE 1996 HELMS-BURTON ACT 37
A. Two Themes: The "Overthrow Castro" Act and Its Defensible Features 37
B. Definitions of Key Terms 53
C. Suspension of Sanctions 56
D. Foreign Assistance Sanctions 59
1. Non-Controversial Sanctions 59
2. Controversial Foreign Assistance Sanctions Targeting Third-Party Countries 60
E. Ostracism Sanctions 66
F. Trafficking Sanctions 67
1. Civil Liability for Trafficking 69
a. The Scope and Amount of Liability 69
b. The Problem of Extraterritoriality 78
2. The Wisdom of Imposing Liability for Trafficking 79
G. Exclusion from Entry into the United States 81
IV. FIGHTING THE MULLAHS AND QADDAFI: THE 1996 SANCTIONS ACT 86
A. The Purpose of New Sanctions Against Iran and Libya 86
B. Questioning the Wisdom of New Sanctions Against Iran and Libya 92
C. Six New Sanctions 98
D. The Long Extraterritorial Reach of the Sanctions 101
E. The Investment Trigger Against Iran 103
F. The Investment and Trade Triggers Against Libya 109
G. Duration and Termination of Sanctions 112
H. Waiver and Delay of Sanctions 114
V. THE PRAGMATIC QUESTION: DO NATIONAL SECURITY SANCTIONS WORK? 116
CONCLUSION 121

INTRODUCTION

Foreign drug kingpins, rogue dictators, state-sponsored terrorists. These "bad guys" are the leading threats to America's national security, replacing the old Soviet Union and a China that is no longer "Red." Conceptually, fighting the new bad guys is not as easy as fighting the old threats: "nuking" the Soviet Union or China always remained an option, however foolish. Overwhelming military force, however, was not designed to handle unconventional threats posed by drug dealers and terrorists and may be an inappropriate method of containing or crushing some dictators. Increasingly, the United States is turning to a new unilateral weapon — international trade measures — regardless of opposition from its allies and trading partners.

The United States has used this new weapon three times in the last decade. To fight foreign drug kingpins, the United States enacted the Narcotics Control Trade Act of 1986 ("1986 Narcotics Act").[1] To fight Fidel Castro, the United States enacted the Helms-Burton Act of 1996, formally known as the Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms-Burton Act").[2] To fight Iran's mullahs and Libya's Muammar Qaddafi, the reputed godfathers of international terrorism, the United States enacted the Iran and Libya Sanctions Act of 1996 ("1996 Sanctions Act").[3]

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[1] Pub. L. No. 99-570, § 9001, 100 Stat. 3207-164 (1986) (codified as amended at 19 U.S.C. §§ 2491-2495 (1994)).

[2] Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997)). Guidelines and implementing regulations for the Helms-Burton Act have been published. *See* Cuban Assets Control Regulations; Indirect Financing in Cuba, Civil Penalties, 61 Fed. Reg. 37,385 (1996) (to be codified at 31 C.F.R. pt. 515) (bringing Cuban asset control regulations into conformity with Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996); Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996) (implementing provisions of Act allowing Secretary of State and Attorney General to deny visas to certain aliens); Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996) (summarizing portions of Act discussing persons who knowingly and intentionally traffic in confiscated properties).

For a fascinating consideration of the Helms-Burton Act in relation to the major tenets of liberal international relations theory — namely, promoting economic interdependence, international law, international institutions, and democracy — see generally David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997).

[3] Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 note

The new threats to America's national security and the highly controversial legislation the United States has enacted in response raise a fundamental problem for international trade lawyers who adopt a narrow view of their field. Their field encompasses tariffs, non-tariff barriers, and trade remedies such as anti-dumping, countervailing duty, and escape clause actions. The boundaries of their field are expanding to encompass labor and environmental issues. But national security? What is the relationship between national security and international trade law?

At first blush, no apparent relationship exists between the two. On the one hand, the term "national security" conjures up images of the military, intelligence operations, and a shadowy world of cloak-and-dagger espionage. On the other hand, the term "international trade law" triggers thoughts of a highly technical and arcane set of rules that involves an ever-increasing number of economic sectors and is derived from an international bureaucracy in Geneva — the World Trade Organization ("WTO").[4] Our senior policy makers embody these stereotypes. Few, if any, presidential national security advisors have had much experience with, knowledge of, or even interest in the world trading system. We do not imagine America's great national security advisors like Henry Kissinger or Zbigniew Brzezinski to be operating in the same arena as our great international trade negotiators like Carla Hills or Mickey Kantor.

Stereotypes aside, national security and international trade law are closely linked, and the link has existed ever since the birth of modern international trade law in 1947. The link is contained in the General Agreement on Tariffs and Trade ("GATT").[5] Article XXI of GATT establishes a broad framework for imposing international trade measures for national security purposes. Since 1947, countries have occasionally implemented trade sanctions, sometimes invoking GATT article XXI as a justification.[6]

(West Supp. 1997) (Iran and Libya Sanctions)). The State Department has published guidelines on the implementation of this Act at 61 Fed. Reg. 66,067 (1996).

[4] *See generally* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS (1996) (providing comprehensive treatment of international trade law).

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW — DOCUMENTS SUPPLEMENT 59 (1996) [hereinafter GATT].

[6] *See* Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT*

During the Reagan, Bush, and Clinton Administrations, the United States has exploited this framework to support the unilateral enactment of highly controversial sanctions legislation. The rationale behind this legislation is national security, but virtually all U.S. trading partners balk at this rationale.

This Article critically analyzes GATT article XXI and the three key recent national security sanctions statutes: the 1986 Narcotics Act, the Helms-Burton Act, and the 1996 Sanctions Act. Part I of this Article considers the following question: what constraints, if any, does article XXI place on a WTO Member regarding national security sanctions legislation? Parts II, III, and IV review the three sanctions statutes, respectively, and ask the following questions: How do these statutes operate in practice? Are these statutes justified or are the criticisms leveled by our trading partners correct? Part V considers the effectiveness of national security sanctions. Finally, this Article concludes that America should modify or abandon its use of international trade measures to achieve national security aims.

Three additional conclusions emerge from this Article. First, article XXI's provision regarding the enactment of national security sanctions is a weak restraint on the behavior of WTO Members. Second, while some of the criticisms of the 1986 Narcotics Act, Helms-Burton Act, and 1996 Sanctions Act are legitimate, each act also contains meritorious and overlooked qualities. Accordingly, neither critics nor supporters of these laws are entirely on target. Third, the weight of empirical evidence suggests that national security sanctions, whatever their merits, are ineffectual at best and counterproductive at worst. In the end, a pragmatic rather than ideological approach to linking national security and international trade law may be prudent, and trade policy experts should take a hard look at repealing or revamping these policies.

Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua, 19 LAW & POL'Y INT'L BUS. 603, 614-20 (1987) (chronicling use of article XXI as justification to implement trade sanctions).

I. THE LINK BUILT INTO GATT: ARTICLE XXI

Article XXI sets forth an exception allowing WTO Members to sidestep their GATT obligations for national security reasons.[7] This exception, while rarely invoked explicitly, is highly significant. The United States maintains an arsenal of national security statutes that authorize unilateral trade action.[8] In recent years, the United States has added dramatic new statutes to this arsenal.[9] Without article XXI, inevitable clashes would occur between unilateral measures adopted under these statutes and GATT obligations such as most-favored-nation treatment ("MFN") (article I), tariff bindings (article II), national treatment (article III), and quantitative restrictions (article XI).

Other GATT articles are unable to manage clashes between U.S. statutes and GATT obligations. Article XXXV(1)(b), which allows for the imposition of economic measures such as bans or boycotts, is ineffective.[10] Article XXXV(1)(b) must be invoked by a WTO non-Member against a WTO Member at the time the non-Member joins the WTO, or by a Member against a non-Member at the time the non-Member joins the WTO.[11] Nor could GATT article XXV(5), which explains how to obtain a waiver of GATT obligations in "exceptional circumstances not elsewhere provided for in" GATT, manage these clashes.[12] To obtain a waiver, article XXXV(5) requires a two-thirds majority vote involving more than half of the WTO Members.[13] No exception to this waiver requirement exists for unilaterally imposed national security measures. In sum, article XXI provides the indispensable textual basis in GATT for such economic measures.

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[7] *See* GATT art. XXI.

[8] *See generally* Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715 (1992) (illustrating statutes and unilateral trade actions justified by national security).

[9] *See generally* Anne Q. Connaughton, *Exporting to Special Destinations: Terrorist Supporting and Embargoed Countries*, 748 PRAC. L. INST. 353 (1996) (chronicling recently enacted statutes that allow unilateral trade sanctions).

[10] *See* GATT art. XXXV.

[11] *See id.*

[12] *See id.* art. XXV(5).

[13] *See id.* art. XXXV.

Article XXI states:

> *Nothing* in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which *it* considers *contrary to its essential security interests*; or
> (b) to prevent any contracting party from taking any action which *it* considers *necessary* for the *protection* of its *essential security interests*
> (i) *relating to fissionable materials* or the materials from which they are derived;
> (ii) *relating to* the *traffic in arms, ammunition and implements of war* and to such *traffic in other goods and materials* as is carried on directly or indirectly *for the purpose of supplying a military establishment*;
> (iii) taken in time of war or other *emergency in international relations*; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[14]

This language, coupled with a review of the limited body of GATT jurisprudence on article XXI, reveals four key points. First, it is an all-embracing exception to GATT obligations. Second, article XXI(b), which allows countries to take any action necessary to perfect their essential security interests, is the most important and controversial portion of this exception. Third, in contrast, some provisions of article XXI such as sections (a), (c), and possibly (b)(i) are not, or at least ought not to be, controversial. Fourth, while a non-sanctioning and, in particular, target Member can challenge the invocation of article XXI by a sanctioning Member, this right has no practical importance.

A. An All-Embracing Exception

The first feature of article XXI is that it is an all-embracing exception to GATT obligations. This point is evident from the first word of the article: "nothing." Once a WTO Member relies on article XXI to implement a measure against another

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[14] *Id.* art. XXI (emphasis added). For a discussion of U.N. Charter article 86 relating to maintenance of international peace and security, see 1 WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 609-10 (1995).

Member, the sanctioning Member need not adhere to any GATT obligations toward the target Member. This point is further reinforced by a 1949 decision of the CONTRACTING PARTIES[15] in a case Czechoslovakia brought against the United States under article XXIII of GATT.[16]

In its case before the CONTRACTING PARTIES, Czechoslovakia argued that the United States breached its obligations under articles I and XIII by administrating export licensing and short-supply controls.[17] Instituted in 1948, these controls discriminated among destination countries.[18] The United States justified the controls under article XXI(b)(ii), arguing they were necessary for security purposes and applied only to a narrow group of export goods that could be used for military purposes.[19] The CONTRACTING PARTIES rejected the Czech claim by a vote of seventeen to one, with three abstentions.[20] In so doing, "the Chairman indicated that Article XXI 'embodied exceptions to the general rule contained in Article I.'"[21] While most of the other fundamental GATT obligations were not at issue in this case, it is reasonable to infer from this statement that if the article I MFN rule is excepted, these other obligations would also be excepted.

B. License to be a Cowboy?: The Importance and Controversial Nature of Article XXI(b)

By far the most important and controversial portion of GATT article XXI is section (b). In the article's text, the word "it" refers to the WTO Member invoking sanction measures; the Member has sole discretion to determine whether an action

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[15] *See id.* art. XXXII.

[16] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 602, 606 (discussing Czechoslovakia's request for decision under article XXIII concerning United States's administration of export licensing controls).

[17] *See* David Buchan, *Less Rigid Approach to Central Planning*, FIN. TIMES, Oct. 23, 1985, 1.

[18] *See* Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Non-essential, Non-proliferation Controls*, 8 N.Y. INT'L L. REV. 51, 51 (1995) (arguing that export controls are discriminatory and, thus, contrary to GATT article I).

[19] *See id.* (stating that national security exception is implicit rationale for U.S. export control system).

[20] *See id.* at 65.

[21] WORLD TRADE ORGANIZATION, *supra* note 14, at 606.

conforms to the requirements of article XXI(b). The plain meaning of this word indicates that no other Member or group of Members and no WTO panel or other adjudicatory body can determine for a sanctioning Member whether a measure satisfies the requirements.[22]

Because each WTO Member decides for itself what its "essential security interests" are under article XXI(b), four corollary principles may be developed. These corollaries surely put article XXI(b) among the GATT provisions that come closest to allowing a Member to be a "cowboy" — an independent actor that is able to fend for its own security on the international frontier. First, a sanctioning Member need not give any prior notice of impending or imposed national security sanctions.[23] Second, the sanctioning Member need not justify the sanctions to the WTO or its Members. Third, the sanctioning Member need not obtain the prior approval or subsequent ratification of the WTO or its Members.

These three implications are manifest in a GATT Council discussion about Argentinean import trade restrictions imposed by European Economic Community ("EEC") members,[24] Canada, and Australia between April and June 1982 during the Falkland Islands War.[25] The EEC representative stated that the exercise of article XXI rights "required neither notification, justification nor approval, a procedure confirmed by thirty-five

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[22] *See id.* at 600 (noting that every country has final decision on issues regarding its own security). This interpretation is evident, for example, in the confident statement of the representative from Ghana concerning Ghana's boycott of Portuguese goods when Portugal acceded to GATT in 1961: "each contracting party was the sole judge of what was necessary in its essential security interest [and] [t]here could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests." *Id.*

[23] *See id.* at 605. It was, for example, Cuba, not the United States, who informed the Contracting Parties of the trade embargo imposed on Cuba in February 1962 by the Kennedy Administration, and thereafter the Administration invoked article XXI as its justification. *See id.* In contrast, the Reagan Administration informed the Contracting Parties of its May 1985 prohibition on imports of all Nicaraguan goods and services, and its ban on exports to Nicaragua of all U.S. goods and services other than those destined for the organized democratic resistance. *See id.* at 603.

[24] *See* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 2-14 (1993) (presenting history of European Community development and addition of members).

[25] *See* Gaugh, *supra* note 18, at 68-69.

years of implementation of the General Agreement."[26] After some discussion, the U.S. representative stated in even bolder terms: "The General Agreement left to *each contracting party* the judgment as to what *it* considered to be necessary to protect its security interests. The CONTRACTING PARTIES had *no power* to question that judgment."[27]

The fourth corollary principle distinguishes between threatened and actual dangers. A sanctioning Member may determine that its essential security interests are "threatened by a *potential* as well as an actual danger."[28] Nothing in article XXI(b) requires that a sanctioning Member face a manifest and concrete danger, such as a physical invasion or armed attack, before imposing a national security measure. Do these four corollaries, in fact, mean that article XXI(b) is a license for a sanctioning Member to behave like a cowboy?

Two checks may restrain cowboy behavior. First, in most cases it is politically prudent for a sanctioning Member to give prior notice to other WTO Members and attempt to garner a critical mass of multilateral acquiescence, if not de facto support, before invoking article XXI.[29] Thus, on November 30, 1982, after discussing the Falkland Islands crisis, the CONTRACTING PARTIES adopted the *Decision Concerning Article XXI of the General Agreement* ("*Decision*").[30] Subject to the article XXI:a exception concerning the right to withhold sensitive information, "contracting parties should be informed *to the fullest extent possible* of trade measures taken under Article XXI."[31] When action is taken under article XXI, all contracting parties affected by such action retain their full rights under the General Agreement."[32] To be sure, this first paragraph of the *Decision* is nothing more than a procedural recommendation. It is not an obligation to notify the WTO or its Members because the sanctioning Member decides

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[26] WORLD TRADE ORGANIZATION, *supra* note 14, at 600.

[27] *Id.*

[28] *See id.* (emphasis added) (presenting viewpoint of Ghana in debate of Ghana's boycott of Portuguese goods).

[29] *See id.* at 605-06 (discussing procedures concerning notification of measures under article XXI).

[30] *See id.*

[31] *Id.* at 606 (emphasis added).

[32] *See id.* (discussing U.S. boycott of Nicaraguan goods and services).

whether contracting parties "should be informed" and whether notice is "possible." Moreover, there is no preference expressed as between propter or post hoc notice. However, the first paragraph reflects a consensus that prior notice is not just a matter of courtesy and respect for trading partners but also a means to reduce friction. Presenting the international community with national security sanctions as a fait accompli inevitably leads to quarrels among political allies. Countries opposing the sanctions will typically argue that they share the same end as the sanctioning country, but disagree with sanctions as a means to achieve that end. These quarrels have exploded into major trade rows because the United States has resorted to implementing secondary boycotts of a target country.[33] This tactic not only penalizes the target country, but also alienates entities in third (potentially allied) countries that trade with or invest in the target nation.[34] For present purposes, the key

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[33] *See* E.J. Prior, *House Passes Iran/Libyan Oil Sanctions Act: Bill Widens Split Between U.S. and Allies Over Use of Secondary Boycott Policy*, EXPORT PRAC., July 15, 1996, at 13 (reporting Japanese and European allegations that United States's use of secondary boycott is hypocritical).

[34] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 602-04. To be sure, the United States is not the first WTO Member to resort to a secondary boycott. Countries in the Arab League have maintained a secondary boycott against firms that have relations with Israel. *See id.* at 602. The signatories to the Pact of the League of Arab States, which was entered into on March 22, 1945 at Cairo, are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine Liberation Organization, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen Arab Republic, and People's Democratic Republic of Yemen. *See* 2 FRANK W. SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS § 16-2(a), at 586-87 (1996). Regarding the last two signatories, on May 22, 1990, Yemen became a single sovereign state known as the "Republic of Yemen," and a member of the Arab League. The Arab League has maintained the boycott for many years, though some League members do not adhere to it. This boycott is discussed in the 1970 GATT Working Party Report on the Accession of the United Arab Republic. In defense of the secondary boycott of Israel, the representative from the United Arab Republic stated it was political, not commercial, in nature, and resulted from the "extraordinary circumstances to which the Middle East area had been exposed," including "[t]he state of war which had long prevailed in that area." *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 602. Accordingly, the representative concluded, "It would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country." *Id.* at 602. Interestingly, and perhaps somewhat hypocritically in view of the recent use of secondary boycotts by the United States, the United States enacted blocking legislation making it illegal for American companies to comply with the Arab League boycott. *See* Stuart Anderson, *Unthinking Critics . . . or Undue Sanctions? Blow to Trading Partners*, WASH. TIMES, July 19, 1996, at A21.

point is that while notice is not mandated by article XXI or the *Decision*, it could assume an increasingly important de facto role in reducing trade friction if the United States persists in using increasingly aggressive, innovative, and extraterritorial types of unilateral sanctions.

The second restraint on cowboy behavior is contained in the introductory chapeau to article XXI(b). A sanctioning Member is supposed to determine that its measure is necessary for the protection of its own essential security interests.[35] For the most part, GATT contracting parties have exercised restraint in interpreting these terms, and most WTO Members have been equally cautious. Overall, the number of express or implicit invocations of article XXI remains relatively small. Nevertheless, the potential for abuse exists, and the considerable criticism of recent U.S. sanctions laws would lead some observers to doubt the continuing power of these terms to restrain cowboy behavior. After all, these terms are broad enough to encompass a variety of circumstances, and their factual application is subjective. At the same time, these terms are a gauge by which the world trading community can opine on a sanctioning Member's use of article XXI(b). Put differently, they can help shape world opinion as to whether a sanctioning Member is "crying wolf."

Consider Sweden's global import quota system for certain footwear in effect between November 1975 and July 1977. Sweden argued that the

> decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defense as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[36]

It is true that, as one contracting party said during the discussion of the 1949 Czech action, article XXI covers "goods which were of a nature that *could contribute to war potential*."[37] For instance, it would be reasonable to include a software program or

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[35] *See* GATT art. XXI.

[36] WORLD TRADE ORGANIZATION, *supra* note 14, at 603.

[37] *See id.* at 602 (emphasis added).

hardware device within an export control measure that is not itself used for a military purpose, but which could be converted to that purpose.

However, upon further reflection, the gauge suggested above illustrates why Sweden's argument is outrageous: it is a slippery slope. Would buttons for military uniforms be necessary for the protection of Sweden's essential security interests on the grounds that troops are disadvantaged if they lack appropriate attire? More generally, is article XXI(b) really designed for potential non-military — economic — threats? If so, then America's "Big Three" automakers — General Motors, Ford, and Chrysler — could argue that Japanese auto imports should be banned or severely restricted because of the threat they pose to their market share in the vital passenger car industry. Likewise, India could and has argued that it must enact extraordinary measures against imported food to ensure self-sufficiency, especially in light of India's long-standing border conflicts.[38] These arguments, however, would stretch article XXI(b) beyond recognition, transforming it into a commercial as well as national security exception. The central thrust behind article XXI(b) is to define the requisite link between the American passenger car industry and a threat to our national security interests or between India's food needs and its historical nemeses, Pakistan and China. But these arguments presuppose such a link and, thus, become self-fulfilling. To be sure, in some cases the commercial and national security interests are so intertwined that a bright line between the two interests cannot be drawn.[39] Nonetheless, regular trade remedies condoned under other articles of GATT, most notably the escape clause in article XIX, exist to deal with non-military threats posed by fair foreign competition.

As another example, consider Nicaragua's argument in its action against the United States concerning a trade embargo

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[38] *See* Uli Schmetzer, *50 Years of Freedom, India Thirsts for Progress: A Nuclear Power Where Many People Remain Illiterate, Modern India Is a Diverse Nation Brimming with Contradictions*, CHI. TRIB., Aug. 10, 1997, at 1 (describing long-standing border conflict between India and China); *Pakistan, India Exchange Fire in Escalating Border Conflict*, VANCOUVER SUN, Jan. 29, 1996, at A5 (reporting on border conflict between India and Pakistan).

[39] *See* James R. Wilch, Comment, *GATT and the Half-Life of Uranium Industry Protection*, 10 NW. J. INT'L L. & BUS. 150, 193 (1989) (describing relationship between uranium industry and national security).

that the Reagan Administration imposed in May 1985.[40] Nicaragua urged that the key terms in the article XXI(b) chapeau constitute a self-defense requirement: a Member can invoke article XXI(b) only after it has been subjected to aggression. In the unadopted 1986 report, the GATT Panel decided that its strict terms of reference prevented it from ruling on this argument.[41] However, Nicaragua's argument cannot be correct. If the drafters of GATT intended to include only self-defense cases, then the language of article XXI would have said so expressly and perhaps even referenced the article 51 language in the U.N. Charter.[42] Instead, the drafters used terms that balanced competing interests to demonstrate the meaning of "essential security interests."[43] Moreover, clauses (i), (ii), and (iii) follow the chapeau to article XXI(b), a further indication that actual aggression is not a prerequisite.

These clauses envision the invocation of article XXI(b) to manage nuclear weapons material, arms trafficking, or an international relations emergency. If a sanctioning Member had to wait until a hostile power acquired nuclear weapons, a

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[40] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 601 (contending United States must not enact restrictive trade measures of non-economic agreement).

[41] *See id.* (holding that examination of United States's invocation of article XXI was precluded by its mandate).

[42] *See* U.N. CHARTER art. 51, para. 1 (providing that U.N. Charter does not prevent Member from inherent right of self-defense against armed attack until Security Council has acted jointly to maintain international peace and security).

[43] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 600 (discussing meaning of "essential security interests"). One of the drafters of the Havana Charter stated the following:

> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests," because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance . . . . [T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.

Id.

destabilizing number or type of non-nuclear arms, or a physical invasion, then it would be too late for trade sanctions to protect any Member. In addition, the threat may be orchestrated by a "military establishment," a term broad enough to include not only sovereign governments but also major terrorist organizations or drug cartels.

At the same time, however, implicit in clauses (i), (ii), and (iii), and in the words "necessary," "protection," and "essential security interests," is the concept of a credible threat. Simply crying wolf will not do because article XXI could not have been designed to protect a hypersensitive government any more than tort law protects a hypersensitive plaintiff. Rather, the test should be objective — whether a reasonable government faced with the same circumstances would invoke article XXI. In sum, Nicaragua's unduly restrictive self-defense argument should not be used to limit article XXI. Rather, the implicit concept of a credible threat judged from the objective standpoint of a reasonable and similarly-situated government, coupled with the articulation of specific types of dangers that track one or more of the three clauses, must restrain cowboy behavior.

C. Strengthening the Restraints Against Abusive Invocations of Article XXI(b)

The two restraints discussed in the previous section — giving prior notice to garner support, or at least minimize opposition, to national security sanctions and using the critical terms in the introductory chapeau to article XXI(b) as a gauge of the reasonableness of such sanctions — are not fail-safe devices against cowboy behavior. The world community has yet to produce such devices. Until it does so, the risk of a corrosive effect on the multilateral trading system from abusive invocations of article XXI(b) is real.

One observer suggests this risk cannot be hedged, asserting that "there may be little that can be done about" the "dangerous loophole to the obligations of GATT."[44] This statement is unduly pessimistic. Greater coordination between the WTO and

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[44] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT § 28.4, at 748 (1969). *But see id.* at 752 (suggesting that GATT Working Party will review measures using this loophole).

the U.N. Security Council might ensure the proper use of article XXI(b).[45] For example, a joint WTO-Security Council Committee on National Security Sanctions could be established to render a non-binding and non-precedential opinion in each case. Each case could address two questions. First, does the use of such sanctions comport with the terms of article XXI(b)? Second, are the sanctions reasonable in relation to the threat or actual danger posed?

A more ambitious step would be to encourage the use of national security sanctions only after an appropriate Security Council resolution has been adopted.[46] In addition, if the answer to either of the above two questions is negative, then the joint Committee could render an advisory opinion on counter-retaliatory measures by the sanctioned and adversely affected third-party countries. In sum, it is possible, and indeed may be necessary, to develop checks that preserve the sovereign national security prerogative of individual WTO Members, yet simultaneously highlight threats to the multilateral trading system posed by abusive assertions of this prerogative.

D. Non-Controversial Provisions of Article XXI

GATT article XXI contains three parts that are not, or at least ought not to be, particularly controversial: sections (a), (b)(i), and (c). Article XXI(a) assures a sanctioning Member that it has no obligation to furnish information to the WTO or other Members that "it considers contrary to its essential national security interests."[47] No sovereign country would be willing, or should be expected, to surrender its ability to keep sensitive information confidential, particularly when its disclosure might compromise intelligence sources. This prerogative does, and must, remain in the discretion of each country.[48] In the 1949 Czech

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[45] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 609-10 (discussing article 86 which deals with relationship between International Trade Organization and United Nations). Indeed, article 86 of the Havana Charter, which was not part of GATT, attempted to sort out jurisdiction between the International Trade Organization and the United Nations by granting the latter jurisdiction not only over political matters, but also over economic measures adopted for political reasons. *See id.*

[46] *See id.* at 603 (mentioning Security Council Resolution 502). This situation in fact occurred during the Falkland Islands crisis. *See id.*

[47] GATT art. XXI(a).

[48] The word "it" makes clear that deciding which information is inappropriate for

case, for instance, the U.S. representative to GATT invoked article XXI(a), stating that "[t]he United States does consider it contrary to its security interest — and to the security interest of other friendly countries — to reveal the names of the commodities that it considers to be most strategic."[49] At the same time, invoking article XXI without disclosing any credible evidence of a national security threat may be politically unacceptable.[50] That is, as a political matter, to preclude criticism that a sanctioning Member is crying wolf, article XXI seems to place a de facto requirement on each sanctioning Member to present at least a prima facie case that a real threat exists.

Article XXI(b)(i) concerns national security sanctions necessary to protect against threats from "fissionable materials" or their parent materials. Notwithstanding the introductory chapeau to article XXI(b), which raises interpretive issues discussed above,[51] the particular exception in clause (i) is quite understandable. No sovereign country should concern itself with GATT trade obligations when faced with a nuclear weapons threat. Clause (i) simply states the obvious: protecting oneself against a nuclear weapons threat and, more generally, deterring nuclear weapons proliferation is more important than adhering to the GATT.[52]

Likewise, article XXI(c) states the obvious point, that maintaining international peace and security by performing obligations under the U.N. Charter is more important than adhering to GATT rules. It ensures proper prioritization between the WTO and the United Nations, particularly the Security Council. Accordingly, it is, and should be, irrelevant if trade embargoes or other Security Council sanctions imposed on rogue countries violate GATT obligations to those countries.

Notably, article XXI(c) does not expressly give WTO Members the right to determine whether its terms are met because, in contrast to article XXI(a) and (b), article XXI(c) does not

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disclosure rests with each Member. *See id.* art. XXI(a).

[49] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 601-02.

[50] *See infra* notes 364-68 and accompanying text (discussing political issues surrounding 1996 Sanctions Act).

[51] *See supra* notes 7-50 and accompanying text (discussing article XXI).

[52] *See* GATT art. XXI (stating that nothing in GATT prevents any contracting party from protecting itself against nuclear dangers).

contain the words "which it considers." However, this omission is not surprising. In practice, the Security Council agrees to Charter obligations concerning international peace and security, and the problem of unilateral action is unlikely to arise in this context. For example, in 1966, the Security Council adopted Resolution 232 requiring a trade embargo against Rhodesia (now Zimbabwe),[53] and the resolution was followed by most, if not all, GATT contracting parties.

E. Challenging the Invocation of Article XXI

The relationship between GATT articles XXI and XXIII[54] is not evident from the language of either of these articles. On the one hand, because article XXI does not require notice, approval, or ratification, it would seem to follow that the article does not create a right for a non-sanctioning Member to sue a sanctioning Member. On the other hand, the 1949 Czech complaint against the United States regarding American export controls did result in a favorable decision for the United States under article XXIII(2) as to "whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses."[55] The contracting parties appear to have thought that mere invocation of article XXI did not immunize a sanctioning Member from an article XXIII action. Similarly, in the discussion of the restrictions imposed on Argentina during the Falkland Islands crisis, one party expressed the view that Argentina "reserved its rights under article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI."[56] More generally, the party stated that "the provisions of Article XXI were subject to those of Article XXIII(2)."[57] Not surprisingly, therefore, the above-quoted November 1982 *Decision* specifies that "when action is taken under Article XXI, all

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[53] *See* JACKSON, *supra* note 44, § 28.4, at 751 (discussing Resolution 232 as only known example of measure falling under GATT article XXI(c)).

[54] *See* GATT art. XXIII (concerning complaints about nullification and impairment of benefits and resolution of disputes arising from such complaints).

[55] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 606.

[56] *Id.*

[57] *Id.*

contracting parties affected by such action retain their full rights under the General Agreement."[58]

Thus, a non-sanctioning Member has a right to bring an article XXIII action and invoke the *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*[59] against a sanctioning Member's national security sanction. The basis for the action lies in whether the sanction nullifies or impairs benefits under GATT that otherwise should accrue to the non-sanctioning Member. The resulting action, moreover, may involve nullification or impairment either because the disputed sanction is an outright violation of a GATT obligation[60] or because of the way in which the sanction is applied.[61] Indeed, in virtually every case, a non-violation nullification or impairment claim is likely to have merit because trade damage should not be in doubt if the disputed sanction is at all effective.

However, does the right to bring an article XXIII action mean anything in practice — is a WTO panel or Appellate Body report likely to adjudicate the merits of a non-sanctioning Member's attack on the invocation of article XXI? The answer is almost assuredly negative. As the above textual analysis of article XXI(b) indicates,[62] invocation of the national security exception is a matter left to the discretion of a sanctioning Member. Moreover, realpolitik[63] demands that Members retain this sovereign prerogative even if additional multilateral checks against abuse are adopted in the future. Any attempt by the WTO to encroach on this prerogative of sovereignty would damage it in the eyes of national legislatures.

As a practical matter, a WTO panel, like the GATT panel in the United States-Nicaragua case, would likely interpret its terms of reference narrowly to exclude a ruling on the substantive article XXI arguments. Inevitably, this interpretation would

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[58] *Id.* at 607.

[59] General Agreement on Tariffs and Trade — Multilateral Negotiation (the Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW — DOCUMENTS SUPPLEMENT 397 (1996).

[60] *See* GATT art. XXIII(1)(a).

[61] *See id.* art. XXIII(1)(b).

[62] *See supra* notes 51-52 and accompanying text (analyzing article XXI(b)).

[63] Realpolitik is based upon the realities of national interest and power, as distinguished from theoretical, ethical, or moralistic objectives. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1890 (3d ed. 1986).

displease the complaining non-sanctioning Member, as it did in the Nicaragua case. Nicaragua blocked adoption of the October 1986 report in part because of its failure to make recommendations.[64] To an American litigator, this interpretation ought not to be a surprise. U.S. courts, including the Supreme Court, routinely seek to base a decision on less controversial procedural grounds and thereby avoid more complex and controversial substantive issues. Put bluntly, the 1949 decision of the CONTRACTING PARTIES may prove to be the first and last major substantive ruling on the invocation of article XXI rendered under GATT-WTO adjudication procedures.

II. FIGHTING DRUG KINGPINS: THE 1986 NARCOTICS ACT

A. The Carrot and Stick Approach

Congress and the President have used international trade law not only to deal with the threat to Americans from terrorists, but also to combat the scourge of drugs in American society. As former Secretary of State James Baker suggested, both are national security threats: "there is no foreign policy issue short of war or peace which has a more direct bearing on the well-being of the American people" than the international trade of illicit drugs.[65] Secretary Baker's statement is not hyperbole. The United Nations estimates that the international trade in illicit drugs is worth $400 billion — approximately 8% of world trade — more than the trading in iron, steel, or motor vehicles.[66] There are very few commodities that the United States is more heavily dependent upon foreign countries than drugs. Approximately 95% of the illegal narcotics consumed in the United States is imported.[67] Moreover, about 61% of America's federal prison population is comprised of drug law violators, and each year about 20,000 Americans die from drug-related causes.[68]

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[64] *See* WORLD TRADE ORGANIZATION, *supra* note 14, at 608 (stating that Nicaraguan delegation would not support adoption until counsel made recommendation).

[65] *See International Narcotics Control*, 2 DEP'T ST. DISPATCH 503, 516 (1991).

[66] *See* Stephen Fidler & Jimmy Burns, *Illicit Drugs Trade Is Put at $400 Billion*, FIN. TIMES, June 26, 1997, at 11.

[67] *See International Narcotics Control*, *supra* note 65, at 516 (describing domestic impact of international narcotics).

[68] *See* Martin Wolf, *The Profit of Prohibition*, FIN. TIMES, July 22, 1997, at 12. Ironically,

Worldwide, about 22% of people infected with the HIV virus are intravenous drug users.[69]

Among the particularly severe drug threats to the United States are cocaine and heroin.[70] Both cocaine and heroin are highly addictive.[71] Extracted from the coca leaf, cocaine and its derivative "crack" are stimulants that destroy their addicts within a few months or years while heroin, derived from opium, is a depressant that can be used over decades.[72] Both cocaine and heroin are highly profitable: by one estimate, the wholesale price of a kilogram of cocaine may range from $15,000 to $30,000, and the wholesale price of heroin may range from $180,000 to $200,000.[73] Another estimate tracks the stunning markups at each stage of distribution:

> The price of opium to a Pakistani farmer is $90 a kilogramme. The wholesale price of heroin in Pakistan is $2,870. Wholesale in the United States, heroin is $80,000. The final retail price, at 40 percent purity, is $290,000. Similarly, South American peasants receive $610 a kilogramme for their coca leaves. Cocaine base is $860, while cocaine hydrochloride is $1,500. Wholesale in the United States, at 83 per cent purity, it is worth $25,250. As crack cocaine it is $50,000 to the consumer and as cocaine powder $110,000.[74]

Both drugs originate almost entirely from overseas: Bolivia, Colombia, and Peru account for essentially all of the world's coca cultivation,[75] and the "Golden Triangle" countries of Myanmar

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the fatality figure is less than the annual number of deaths attributed to alcohol or tobacco — 100,000 and 400,000, respectively. *See id.*

[69] *See id.*

[70] *See International Narcotics Control Efforts in the Western Hemisphere*, 6 DEP'T ST. DISPATCH 303, 337 (1995) (providing statement of Robert Gelbard, Assistant Secretary for International Narcotics and Law Enforcement Affairs, before Subcommittee on Western Hemisphere of House International Relations Committee, Mar. 29, 1995); *International Narcotics Control — 1990*, 2 DEP'T ST. DISPATCH 403, 417 (1991) (describing threat of cocaine, "crack," and heroin to American society).

[71] *See* Mohammad Ghanea, *A Retrospective Study of Poisoning in Tehran*, 35 J. TOXICOLOGY 387 (1997).

[72] *See Summary of April 1993 International Narcotics Control Report*, 4 DEP'T ST. DISPATCH 225, 238 (1993) (illustrating switch of drug producers to heroin as drug of 1990s).

[73] *See id.* (highlighting wholesale prices of heroin and cocaine).

[74] Wolf, *supra* note 68, at 14.

[75] *See International Narcotics Control Strategy Report Released*, 6 DEP'T ST. DISPATCH 183, 196-97 (1995) (providing statements of Timothy E. Wirth, Undersecretary for Global Affairs, and Robert S. Gelbard, Assistant Secretary for International Narcotics and Law En-

(Burma), Laos, and Thailand account for 75% of the world's opium production.[76] Most of the balance of the world's opium production occurs in the "Golden Crescent" countries of Iran, Afghanistan, and Pakistan.[77] During the early 1990s, the share of the illicit drug industry in the gross domestic product was 6% in Peru, more than 7% in Colombia, and more than 9% in Bolivia.[78] The most important Burmese and Afghan exports are also drugs.

In an effort to combat the scourge of drugs, Congress amended the Trade Act of 1974 with title IX of the Drug Enforcement, Education, and Control Act in 1986, also known as the 1986 Narcotics Act.[79] The 1986 Narcotics Act is a "carrot and stick" approach to dealing with the problem of illegal drug smuggling into the United States and the threat of foreign-sourced drug production. The 1986 Narcotics Act empowers the President to take unilateral trade actions against a country producing or transporting drugs if that country does not cooperate fully with the U.S. government in keeping drugs out of the United States.[80] These "stick" actions are to be taken as of March 1 of each year.[81] The "carrot" is the possibility of obtaining presidential certification that would exempt a country from trade sanctions.[82]

The carrot and stick approach of the 1986 Narcotics Act reflects an important development in U.S. strategy in the war on drugs. Until Congress passed this Act, the United States concentrated much of its effort on interdiction — intercepting drug shipments during transit from the source countries of the drugs

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forcement Affairs, Mar. 1, 1995). The article also notes that Peru and Bolivia together produce more than 80% of the world's coca, and that Burma is the world's largest producer of heroin. *See id.; see also Summary of April 1993 International Narcotics Control Report, supra* note 72, at 237 (stating that Peru accounts for more than 60% of world coca cultivation, with Columbia and Bolivia comprising majority of remainder).

[76] *See Summary of April 1993 International Narcotics Control Report, supra* note 72, at 238 (discussing opium production in Burma, Laos, Thailand, and Afghanistan).

[77] *See* Grant Peck, *Drug Traffic Moving Along New Asian Routes,* HOUS. CHRON., July 7, 1996, at 26.

[78] *See* Wolf, *supra* note 68, at 12-14 (stating U.N. estimates of percentage of gross domestic product that illegal drug trade comprises in Peru, Bolivia, and Columbia).

[79] *See* Narcotics Control Trade Act, 19 U.S.C. §§ 2491-2495 (1994).

[80] *See id.* § 2492(a).

[81] *See id.*

[82] *See id.* § 2492(b)(1)(E).

to the U.S. border. Interdiction is a game of cat and mouse that raises the cost of doing business for drug producers and traffickers each time a seizure occurs. However, interdiction cannot stem the wave of drug smuggling. As the State Department declared in 1995, "We are not satisfied with simply raising the cost of doing business for the traffickers."[83] The 1986 Narcotics Act reflects what might be called a "source country" strategy. The major source countries of drugs are identified; the weak link in the chain from drug production overseas to drug sales in the United States is attacked, namely the drug crops lying dormant in the field.[84] This strategy is attractive because the bulk of world production of cocaine and heroin is concentrated in a relatively small number of countries.

The 1986 Narcotics Act identifies two target classes of possible unilateral trade sanctions: "major drug producing countries," and "major drug-transit countries."[85] A major drug producing country is defined by the annual output of opium, cocaine base, or marijuana produced in that country. Specifically, it is a country that illegally produces at least five metric tons of opium or opium derivative, 500 metric tons of coca, or 500 metric tons of marijuana during one fiscal year.[86] A major drug-transit country is a conduit for narcotics or a money laundering center. It is a country "that is a significant direct source of illicit narcotic or psychotropic drugs or other controlled substances significantly affecting" the United States.[87] In addition, the country's govern-

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[83] *International Narcotics Control Efforts in the Western Hemisphere*, *supra* note 70, at 338 (furnishing statement of Robert Gelbard, Assistant Secretary for International Narcotics and Law Enforcement Affairs, before Subcommittee on Western Hemisphere of House International Relations Committee, March 29, 1995).

[84] *See Yielding to U.S., Thais Target Opium Fields*, N.Y. TIMES, Oct. 4, 1981, at 21. For a discussion of the source country strategy from the Clinton Administration's perspective, see *Drug Control in the Western Hemisphere*, 7 DEP'T OF ST. DISP. 293, 310-12 (providing statement of Robert S. Gelbard, Assistant Secretary for International Narcotics and Law Enforcement Affairs before Subcommittee on Western Hemisphere of House International Relations Committee, June 6, 1996).

[85] *See* 19 U.S.C. § 2492(b)(1)(C).

[86] *See id.* § 2495(2).

[87] *Id.* § 2495(3)(A). The Secretary of State, after consulting with Congress, established numerical standards and other guidelines for determining which countries are significant direct sources of drugs. *See id.* § 2492(e) (establishing duty of Secretary of State to determine major drug-transit countries). The term "narcotic or psychotropic drugs" is defined either by an applicable international narcotics control agreement, or by the domestic law

ment must either know or be in complicity with drug transporting and money-laundering of significant sums of drug-related profits.[88] To establish a suspect country as a major drug producing country, it is unnecessary to demonstrate that a country's government is involved in producing or trafficking drugs.

1. The Stick: Trade Sanctions

The 1986 Narcotics Act establishes the stick — five sanctions the President must impose on a major drug producing or drug-transit country.[89] Although the sanctions are mandatory in most cases, the President has some discretion whether to impose any or all of the sanctions.[90] First, the President may revoke any preferential treatment afforded to the country's products under the Generalized System of Preferences ("GSP"), Caribbean Basin Initiative ("CBI"), or other preferential scheme.[91] Second, the President may impose an additional duty of up to 50% ad valorem on any or all of the country's products, and he may impose a duty of up to 50% on duty-free products.[92] Third, the President may suspend air carrier transportation between the United States and the country, and may terminate any air service agreement with the country.[93] Fourth, the President may withdraw U.S. personnel and resources that are participating in a service arrangement for customs pre-clearance.[94] Finally, a country whose government is involved in illegal drug trade or that fails to cooperate with U.S. narcotics enforcement activities cannot receive a quota allocation for sugar imports into the United States.[95] In the abstract, these sanctions may not appear

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of the country concerned. *See id.* § 2495(4).

[88] *See id.* § 2495(3)(B)-(C).

[89] *See id.* § 2492 (presenting sanctions available). Some of these sanctions were added to the Act by section 806 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 and section 4408 of the Anti-Drug Abuse Act of 1988. *See id.* §§ 2492, 2495(3)(C).

[90] *See id.* § 2492(a)(6).

[91] *See id.* § 2492(a)(1) (allowing President to deny tariff treatment to any or all of country's products).

[92] *See id.* § 2492(a)(2)-(3). The first and second sanctions apply to imports that are placed into, or withdrawn from warehouse for consumption, during the period the action is in effect. *See id.* § 2492(c).

[93] *See id.* § 2492(a)(4), (d).

[94] *See id.* § 2492(a)(5).

[95] *See id.* § 2493.

particularly severe. In some cases, however, the first and second sanctions may inflict harm on another country and thereby cause it to alter its behavior with respect to drug production or transit.

2. The Carrot: Certification

The 1986 Narcotics Act contains an important exception to these sanctions. The United States will not impose sanctions on a major drug producing or drug-transit country if the President determines and certifies to Congress that, during the previous year, the country "has cooperated fully" with the United States, or "has taken adequate steps on its own," to change its behavior.[96] The four certification criteria[97] are the carrot in the 1986 Narcotics Act because they attempt to compel a major drug producing or drug-transit country to alter its behavior and thereby avoid the stick of trade sanctions.[98] Because there is no definition of "cooperation fully" or "adequate steps," the President has considerable discretion in using the carrot.

First, a major drug producing or drug-transit country must reach a bilateral or multilateral narcotics agreement with the United States and cooperate fully with the U.S. government in satisfying the agreement's goals.[99] The statute contemplates an agreement with specific objectives: to reduce drug production, consumption, and trafficking within the country, and address illicit crop eradication and crop substitution.[100] Under the agreement's terms, a nation must also increase drug interdiction

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[96] *See id.* § 2492(b)(1)(A)(i).

[97] *See id.* (providing that unfavorable tariff treatment shall not apply to countries that adhere to certain drug control practices). These criteria are similar to the criteria set forth in the Foreign Assistance Act of 1961, as amended. Whereas the stick in the 1986 Narcotics Act is trade sanctions, the stick in the 1961 Act is the withholding of U.S. foreign aid from major drug producing and drug-transit countries, and the opposition to loans to such countries from multilateral development banks. *Compare* 22 U.S.C. § 2291j(b) (1994) (providing President with two considerations for certification) *with* 19 U.S.C. § 2492(b)(1) (providing President with four considerations for certification). (The original version of the 1961 Act is Pub. L. 87-195, 75 Stat. 424 (1961)). The certification is due on March 1 of each year. *See* 19 U.S.C. § 2492(b)(1)(A); 22 U.S.C. § 2291h(a).

[98] *See* 19 U.S.C. § 2492(a) (requiring imposition of sanctions upon major drug producing or drug-transit countries).

[99] *See id.* § 2492(b)(1)(A)(i)(I).

[100] *See id.* § 2492(b)(1)(B)(i).

and enforcement, drug education and treatment programs, cooperate with U.S. drug enforcement officials, and participate in extradition, mutual legal assistance, sharing of evidence, and other treaties aimed at drug enforcement.[101] The country must also identify and eliminate illicit drug laboratories, as well as the trafficking of essential precursor chemicals used to produce illegal drugs.[102] If a country has already been designated as a major drug producing or drug-transit country during the previous year,[103] the President similarly cannot certify a country as cooperating fully with the United States unless that country enacts a bilateral or multilateral narcotics agreement.[104] This requirement induces countries to enter into such an agreement.

Second, a country must cooperate fully with the United States to prevent illegal drug sales and transports to U.S. government personnel and their dependents.[105] Unfortunately, the statute does not specify how a country is to prevent drugs from being sold to U.S. government personnel, particularly where a U.S. government official is determined to buy drugs. Certainly, a country cannot be expected to police the behavior of U.S. officials within a U.S. embassy, which is U.S. property, and where U.S. officials may enjoy diplomatic immunity.

Third, before the President certifies a major drug producing or drug-transit country, that country must also cooperate fully with the United States to prevent and punish the laundering of drug-related profits in that country. This requirement may prove especially difficult for smaller countries with limited law enforcement resources and little experience in prosecuting sophisticated white-collar crimes. Money laundering cases typically involve extensive and painstaking investigation. For example, it may be necessary to trace wire transfers of funds among banks around the world, which may require obtaining exemptions from applicable bank secrecy laws.[106] These tasks are likely to require the

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[101] *See id.* § 2492(b)(1)(A)(i)(I), (B)(ii)-(iii), (vi)-(vii).

[102] *See id.* § 2492(b)(1)(A)(i)(I), (B)(iv)-(v).

[103] *See id.* § 2492(b)(1)(C).

[104] *See id.*

[105] *See id.* § 2492(b)(1)(A)(i)(II).

[106] For a discussion of wire transfer transactions and law, see ERNEST PATRIKIS ET AL., WIRE TRANSFERS 3-14 (1993). *See also Cleaning Up Dirty Money*, ECONOMIST, July 26, 1997, at 14 (arguing that bank secrecy laws must be change if more "laundrymen" are to be held

assistance of bank regulators in relevant countries. Further, money laundering is a criminal offense requiring proof that the funds in question were generated by drug sales and that they were laundered.[107]

The final requirement for certification takes aim at official corruption that often is connected with drug production and trade. A major drug producing or transit country must cooperate fully with the United States to prevent and punish bribery and other public corruption that facilitates the production, processing, and shipment of illegal drugs, or that discourages the investigation and prosecution of these acts.[108] This requirement may prove difficult in a country whose government is riddled with corruption. "Clean" government officials may lack the political clout to punish bribery and other corrupt acts by "dirty" officials. Indeed, they may fear for their own lives. Even in a less extreme situation, rooting out corruption may be difficult.

The statute imposes one further requirement to obtain presidential certification, pertaining to a major drug producing or drug-transit country that produces licit opium.[109] The opium producing country must take steps to prevent significant diversion of its licit cultivation and production into the illicit market, maintain production and stockpiles at levels no higher than those consistent with licit market demand, and prevent illicit cultivation and production.[110] This requirement acknowledges the legitimate reasons for producing opium and induces countries to act against the illicit market.

Consider the 1997 certification of Mexico granted by President Clinton under the Foreign Assistance Act of 1961 ("1961 Assistance Act"), as amended.[111] The President certified Mexico

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accountable); *That Infernal Washing Machine*, ECONOMIST, July 26, 1997, at 19 (stating that Switzerland and Cayman Islands made it easier for bankers to report suspect transactions without breaking bank-secrecy laws). For overviews of U.S. and international efforts to combat money laundering, see generally Raj Bhala et al., *Legal Aspects of Money Laundering*, 3 MALAYAN L.J. xxxiii (1991).

[107] *See, e.g.*, 18 U.S.C. §§ 1956-1957 (1994) (identifying specified unlawful activities under 1986 Money Laundering Control Act).

[108] *See* 19 U.S.C. § 2492(b)(1)(A)(i)(IV).

[109] *See id.* § 2492(b)(1)(E).

[110] *See id.*

[111] *See* 22 U.S.C. §§ 2151-2430 (1994). 22 U.S.C. §§ 2291-2291j concern international narcotics control. These sections require the President to prepare a list of major drug pro-

as a full partner in the U.S. war on drugs despite the arrest of Mexico's top anti-narcotics law enforcement official on charges of collaboration with drug traffickers.[112] The House of Representatives voted 251 to 175 against the President's certification,[113] and the Senate voted ninety-four to five in favor of a non-binding resolution criticizing the certification.[114] This

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ducing and drug-transit countries and withhold half of most U.S. government assistance until the President certifies that they have cooperated fully with the United States in the war on drugs. *See id.* § 2291j(a)(1). A country that receives full certification receives the balance of U.S. aid that had been withheld when that country was designated a major drug producing or drug-transit country. All aid (except humanitarian and counter-narcotics assistance) is cut off immediately to a major drug producing or drug-transit country that is denied certification. *See id.* § 2291j(e). Also, the United States must vote against loans from a multilateral development bank for the decertified country, and the country is ineligible for U.S. Export-Import Bank financing and all benefits from the Overseas Private Investment Corporation ("OPIC") other than insurance. *See id.* § 2291j(a)(2). Afghanistan, Myanmar (Burma), Colombia, Iran, Nigeria, and Syria are prominent examples of decertified countries. *See* Rossella Brevetti, *Senators Introduce Resolution to Reverse Administration's Drug Certification of Mexico*, 14 Int'l Trade Rep. (BNA) 410, 410-11 (Mar. 5, 1997) (discussing Senators Corerdell, Helms, and Feinstein's introduction of joint resolution to reverse Mexico's certification as reliable partner on war on drugs); *Sen. D'Amato Introduces Resolution to Deny Mexican Drug Certification*, 13 Int'l Trade Rep. (BNA) 426, 426 (Mar. 13, 1996) (reporting Senate Banking Committee Chairman's introduction of joint resolution denying Mexico certification under Foreign Assistance Act's anti-drug trafficking provision). A major drug producing or drug-transit country that fails to meet the requirements for full certification may receive a "vital national interests" certification, meaning that it would not be in the vital U.S. interests to cut off assistance to that country. Lebanon and Pakistan are examples of countries that have received vital national interests certifications. *See* 22 U.S.C. § 2291j(b)(3); Brevetti, *supra*, at 410-11 (examining requirements for certification and proposed joint resolution to reverse Mexico's certification). Congress can overturn a presidential certification by passing a joint resolution of disapproval within 30 days following the certification. *See* 22 U.S.C. § 2291j(d).

For brief overviews of how the 1961 Act operates, see *International Narcotics Control Efforts in the Western Hemisphere*, *supra* note 70, at 337-42 (providing statement of Robert S. Gelbard, Assistant Secretary for International Narcotics and Law Enforcement Affairs, before Subcommittee on Western Hemisphere of House International Relations Committee); *see also International Narcotics Control Strategy Report Released*, *supra* note 75, at 195-97 (providing statements of Timothy E. Wirth, Undersecretary for Global Affairs and Robert S. Gelbard, Assistant Secretary for International Narcotics and Law Enforcement Affairs).

[112] *See* Brevetti, *supra* note 111, at 410 (discussing Mexico's failure to substantially reduce drug trade and organized crime).

[113] *See House Approves Decertification Delay Measure for Mexico with Conditions Attached*, 14 Int'l Trade Rep. (BNA) 525, 525 (Mar. 19, 1997) (describing Senate vote to reject Clinton administration's certification of Mexico as reliable anti-drug ally while staying certification for 90 days to allow Mexico to respond).

[114] *See* Rossella Brevetti, *Senate Approves Compromise Measure on U.S.-Mexico Drug Cooperation*, 14 Int'l Trade Rep. (BNA) 556, 556 (Mar. 26, 1997) (discussing Senate vote criticism of Mexico's anti-drug efforts).

congressional action was not surprising in the wake of the arrest. While the arrest signified that Mexico was making some progress, many members of Congress questioned the integrity of Mexico's entire law enforcement apparatus. Moreover, by 1996, more than half of all cocaine entering the United States came through Mexico.[115] Mexico had become a major money laundering center even though it had introduced legislation to criminalize money laundering and fight organized crime.[116]

However, the President's certification was foreseeable. The Clinton administration had invested considerable time and money in forging closer ties with Mexico and helping it develop economically through two controversial events: Mexico's inclusion in the North American Free Trade Agreement ("NAFTA") and the multi-billion dollar rescue package[117] arranged for Mexico after its peso crisis. Politically, President Clinton was not in a position to reverse course and impose trade sanctions on Mexico. At the same time, the Republican Congress assuredly did not fail to point out Mexico's shortcomings in the war on drugs.[118] The end result reflected this political stand-off.

The 1961 Assistance Act and 1986 Narcotics Act work in tandem, in a manner analogous to a cross-default clause in an international loan agreement. For example, suppose a country fails to obtain certification and does not qualify for the "vital national interests waiver," discussed below, under the 1961 Assistance Act. Because the certification and waiver criteria are similar to the criteria in the 1986 Narcotics Act, the country should not be certified under the 1986 Narcotics Act. The result would be a loss of foreign assistance and the imposition of trade sanctions under the 1961 Assistance Act.

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[115] *See* Gustavo Gonzalez, *Chile-Drugs: Mexican Drug Cartel Bid to Tap Asian Market Thwarted*, INTER PRESS SERV., August 15, 1997, at 2.

[116] *See Fact Sheet: Cooperation with Mexico — in Our National Interest*, 7 DEP'T ST. DISPATCH 249, 257-59 (1996) (describing steps taken by Mexico to expand enforcement and reform criminal justice system to more effectively combat drug trafficking and organized crime).

[117] *See* Nora Lusting, *Mexico in Crisis, the U.S. to the Rescue: The Financial Assistance Packages of 1982 and 1995*, 2 UCLA J. INT'L L. 25, 25 (1997). The Department of Treasury administered the funds through the Exchange Stabilization Fund. *See id.*

[118] *See* Brevetti, *supra* note 111, at 410-11 (discussing Senators' introduction of joint resolution to reverse Mexico's certification as reliable partner in war on drugs).

The 1986 Narcotics Act provides guidance to the President in administering the above four certification criteria to determine whether the government of a major drug producing or transit country is cooperating fully with the United States, or making adequate efforts on its own in the war on drugs. The 1986 Narcotics Act lists eleven issues the President must consider when evaluating a government for potential certification.[119] First, has the government of that country acted to effect "the maximum reductions in illicit drug production" that the U.S. government has determined to be achievable?[120] Second, has the foreign government adopted judicial and law enforcement measures to eliminate illicit drug production and trafficking, as evidenced by seizures of drugs and illicit laboratories and prosecutions of violators?[121] Third, has the foreign government adopted judicial and law enforcement measures to eliminate money laundering, as evidenced by the enactment of anti-money laundering laws and cooperation with U.S. anti-money laundering efforts?[122] Fourth, has the foreign government adopted judicial and law enforcement measures to eliminate bribery and other forms of public corruption that facilitate drug production and trafficking and discourage investigation and prosecution?[123] Fifth, has the foreign government, as a matter of policy, encouraged or facilitated the production or distribution of illegal drugs?[124] Sixth, does any senior official of the foreign government engage in, encourage, or facilitate the production or distribution of illegal drugs?[125] Seventh, has the foreign government aggressively investigated cases in which a U.S. drug enforcement official has

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[119] *See* 19 U.S.C. §§ 2491-2495 (1994). These 11 issues are similar to the issues raised in the Foreign Assistance Act of 1961, as amended. *Compare* 22 U.S.C. § 2291j(b) (1994) *with* 19 U.S.C. § 2492(b)(2) (highlighting similarities in criteria President considers when determining certification).

[120] *See* 19 U.S.C. § 2492(b)(2)(A) (describing factor President considers regarding certification). Pursuant to the Foreign Assistance Act of 1961, as amended, the U.S. government sets specific numerical reduction targets for each major drug producing country to which the United States proposes to give foreign aid. *See generally* 22 U.S.C. § 2291j(b)(2) (discussing considerations regarding cooperation, including reductions in illicit production).

[121] *See* 19 U.S.C. § 2492(b)(2)(B).

[122] *See id.* § 2492(b)(2)(C).

[123] *See id.* § 2492(b)(2)(D).

[124] *See id.* § 2492(b)(2)(E).

[125] *See id.* § 2492(b)(2)(F).

been the victim of acts or threats of violence, inflicted by or in complicity with a law enforcement officer, and has the government "energetically sought to bring the perpetrators . . . to justice?"[126] Eighth, has the foreign government failed to provide reasonable cooperation to U.S. drug enforcement officials, including the refusal to allow these officials to pursue aerial smugglers a reasonable distance into the airspace of the foreign country?[127] Ninth, has the foreign government revised its conspiracy and asset seizure laws to combat drug traffickers more effectively?[128] Tenth, has the foreign government expeditiously processed U.S. extradition requests relating to drug traffickers?[129] Finally, has the foreign government protected or granted safe haven to known drug traffickers?[130]

While the President must consider these eleven questions in applying the certification criteria, the precise statutory language used to frame several of these questions leaves considerable room for the President to maneuver. For example, the second, third, and fourth questions contain the phrase "to the maximum extent possible."[131] Thus, using the fourth question as an example, the President must decide whether a foreign government has taken measures against money laundering to the maximum extent possible. Similar flexible wording is contained in other questions. For instance, the sixth question uses the term "senior official" but does not define this term; the seventh question asks the President to determine whether a foreign government has investigated cases aggressively and brought perpetrators to justice energetically; the eighth question inquires about reasonable cooperation and a reasonable invasion of airspace; and the ninth question addresses expeditious processing of extradition requests.[132] In sum, while the statute provides the President with a checklist of issues to consider in applying the certification criteria, this subjective checklist invites the President to exercise discretion.

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[126] *See id.* § 2492(b)(2)(G).
[127] *See id.* § 2492(b)(2)(H).
[128] *See id.* § 2492(b)(2)(I).
[129] *See id.* § 2492(b)(2)(J).
[130] *See id.* § 2492(b)(2)(K).
[131] *See id.* § 2492(b)(2)(A)-(D).
[132] *See id.* § 2492(b)(2)(J).

B. The Vital National Interests Waiver

Even if a country is a major drug producing or transit country and even if it fails to meet the four certification criteria, the country may still avoid the stick of sanctions under the 1986 Narcotics Act. This possibility depends upon whether, from the U.S. perspective, sanctions would be counterproductive. The President may determine and certify to Congress that the "vital national interests" of the United States require that it not apply sanctions.[133]

The President must define why imposing sanctions on a particular country that does not meet the certification criteria is counterproductive. In doing so, the President should consider whether imposition of sanctions would, on balance, promote U.S. anti-drug efforts. However, the statutory language allows the President to define the interest at stake to include matters indirectly related to these efforts.[134]

Countries are likely to obtain a vital national interests waiver in five scenarios. For example, in 1987 and 1988, President Reagan found that Laos had failed to cooperate fully with the United States on narcotics control and to take adequate steps on its own. Nonetheless, he gave Laos a vital national interests certification in both years to promote continuing investigations of Americans missing in action and prisoners of the Vietnam War.[135] Plainly, the United States has a unique issue to address with Laos that qualifies as a vital national interest. Second, suppose the non-certified country is a principal U.S. supplier of a precious commodity, and there is no other readily available substitute source. Examples include oil from Saudi Arabia, or certain minerals like uranium from countries such as Russia. The non-certified country's supplier status may effectively

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[133] *See id.* § 2492(b)(1)(A)(ii) (stating inapplicability of subsection (a) to country in which United States has vital national interest).

[134] *See id.* (discussing inapplicability of sanctions to countries in which United States has vital national interest).

[135] *See Global Narcotics Cooperation and Presidential Certification*, DEP'T ST. BULL., Oct. 1989, at 49, 50. (providing statement of Ann B. Wrobleski, Assistant Secretary for International Narcotics Matters, before Senate Foreign Relations Committee); *Presidential Certification of Narcotics Source Countries*, DEP'T ST. BULL., June 1988, at 47, 48-50, (providing statement of Ann B. Wrobleski, Assistant Secretary for International Narcotics Matters, before Senate Foreign Relations Committee).

immunize it from sanctions. Third, suppose the non-certified country could inflict significant economic damage to U.S. businesses through a denial of market access or government procurement contracts. China would be an obvious example of a country that may be too big to penalize. A fourth category of non-certified country is one that might be too dangerous to penalize. Such a country may be able to inflict significant damage to American military and civilian personnel working abroad. Egypt and Turkey might be examples. Finally, consider a country in which the United States has too much invested to sanction. Surely Mexico, a partner in NAFTA, is a case in point.

Certainly, these five illustrations or categories of countries likely to obtain a vital national interests waiver are not mutually exclusive. A country may be fortunate to obtain a waiver of sanctions because more than one of these broader national interests, not directly connected with the drug trade, are at stake. Whatever the reasons for a vital national interests waiver, the President must, in certifying that such interests are at stake, explain these reasons. The President's statement must include a full and complete description of relevant vital national interests if the United States imposes trade sanctions against a major drug producing or drug-transit country.[136] Further, the President must weigh all of the risks at stake.

Plainly, a vital national interests waiver is an important safety valve or escape clause that is also contained in the amended 1961 Assistance Act. In that statutory context, President Clinton has not hesitated to employ the waiver to avoid cutting off most foreign assistance to foreign governments and voting against their requests for loans from multilateral development banks. For example, in 1994, the President did not certify ten of twenty-six countries reviewed; however several of these countries received vital national interests waivers to avoid U.S. sanctions.[137] Lebanon and Afghanistan were among these countries.[138]

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[136] *See* 19 U.S.C. § 2492(b)(1)(D) (providing when President may grant vital national waiver interest to country).

[137] *See Combating International Narcotics Trafficking*, 5 DEP'T ST. DISPATCH 421, 440-44 (1994) (providing statement of Robert S. Gelbard, Assistant Secretary for International Narcotics Matters, before House Foreign Affairs Committee, June 22, 1994).

[138] *See id.* Other countries that received a vital national interests waiver were Bolivia,

The United States based Lebanon's waiver on the need to continue promoting economic and political stability and to avoid a devolution of Lebanon into a chaos similar to that in the 1980s when terrorists held many Americans hostage in and around Beirut.[139] Afghanistan's 1994 vital national interests waiver also was based on the need to promote political order after years of war.[140] In both cases, President Clinton determined that encouraging political stability would be more helpful in promoting counter-narcotics efforts than imposing sanctions.[141] In contrast, the President declined to certify and also could not justify a waiver for Burma, Iran, and Syria, three countries notorious for their involvement or acquiescence regarding drugs and terrorism.

Congress has the last word regarding presidential determinations and certifications regarding both exceptions. It may disapprove a certification and require the imposition of sanctions through a joint resolution.[142] Congress must enact this resolution within forty-five legislative days of the President's certification.[143] Accordingly, any sanctions imposed remain in effect until the President makes a certification excepting a country from sanctions, forty-five legislative days have elapsed, and Congress has not enacted a joint resolution of disapproval during that forty-five day period.

C. An Imperialistic Statute?

Our trading partners may consider the 1986 Narcotics Act to be an imperialistic statute. In defending the certification process under the amended 1961 Assistance Act, the Department of State claims that "[n]arcotics certification is an honest process," "[w]e do not seek to embarrass governments," and "[w]e do not

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Laos, Panama, and Peru. *See id.*

[139] *See* Michael Isikoff, *World Output of Narcotics Soars, Congress Told; Annual State Department Report Notes Undermining of Law Enforcement Efforts*, WASH. POST, Mar. 2, 1990, at A24 (reporting grant of waiver to Lebanon to restore stability).

[140] *See* Elaine Sciolino, *U.S. Pinpoints Nicaragua on Worldwide Heroin Traffic*, N.Y. TIMES, Apr. 5, 1994, at A3 (describing grant of waiver to Afghanistan).

[141] *See id.* (illustrating Clinton's willingness to sacrifice narcotics enforcement for stability in Lebanon and Afghanistan).

[142] *See* 19 U.S.C. § 2492(b)(3) (1994).

[143] *See id.*

want to force them to adopt our standards."[144] Because the certification process under the 1986 Narcotics Act is very similar to that under the 1961 Assistance Act, it may be reasonable to assume that the State Department would defend the 1986 Narcotics Act process in a like manner. However, such a defense is dubious for three reasons.

First, the certification process — how a country can avoid the imposition of trade sanctions — can be highly political. A country may fall victim to trade sanctions, or avoid such sanctions, due to considerations far afield from the war on drugs. The case of Mexico, discussed above, illustrates the point.

Second, the 1986 Narcotics Act focuses and visits blame entirely on drug-supplying countries. It pays no attention to the tremendous demand for drugs by Americans. Consider the statement of former Singapore Prime Minister Lee Kuan Yew:

> Let me give you an example that encapsulates the whole difference between America and Singapore. America has a vicious drug problem. How does it solve it? It goes around the world helping other anti-narcotic agencies to try and stop the suppliers. It pays for helicopters, defoliating agents and so on. And when provoked, it captures the President of Panama and brings him to trial in Florida. Singapore does not have that option. We can't go to Burma and capture the warlords there. What we can do is pass a law which says that any customs officer or policeman who sees anybody in Singapore behaving suspiciously, leading him to suspect the person is under the influence of drugs, can require the man to have his urine tested. If the sample is found to contain drugs, the man immediately goes for treatment. [And, of course, if the drug supplier is caught, then he is hanged.] In America if you did that it would be an invasion of the individual's rights and you would be sued.[145]

The profoundly embarrassing fact is that while Americans constitute no more than 5% of the world's population, we are responsible for about 70% of the world's cocaine consumption and roughly 10% of the world's heroin consumption.[146] Nonethe-

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[144] *Combating International Narcotics Trafficking, supra* note 137, at 442.

[145] TOMMY T.B. KOH, THE UNITED STATES AND EAST ASIA: CONFLICT AND COOPERATION 100-01 (1995).

[146] *See Assessing the Current Trends in Opium Production and Heroin Trafficking*, 3 DEP'T ST. DISPATCH 461, 469 (1992) (furnishing statement of Melvyn Levitsky, Assistant Secretary for International Narcotics Matters before House Select Committee on Narcotics Abuse and

less, a foreign country may be penalized for supplying a substance that a large number of Americans demand.[147] Curtailing demand, in addition to spotlighting supply, might yield improved results in the war on drugs and not antagonize our allies.

Third, even the State Department admits that some governments of drug-supplying countries lack the ability, assuming they have the will, to reduce or eliminate drug production in their territory. Consider the context in which the governments of Laos, Afghanistan, and Burma, all major heroin-producing countries,[148] must lead an anti-heroin campaign. Laos has "a difficult geography, an impecunious central government that has delegated fiscal responsibility to regional entities and thus lost some measure of control, and a dependency on international institutions for external financing."[149] In Afghanistan, years of warfare diverted government attention from the problem of poppy cultivation; without a vigorous central government, Afghanistan fell under the thumb of regional commanders who are akin to feudal warlords.[150] Moreover, Afghanistan is plagued by a "devastated economy and a large refugee population."[151] In Burma, the ruling State Law and Order Restoration Commission is hardly a sympathetic government.[152] Insurgent armies in Burma control the poppy fields in areas largely out of the central government's reach.[153] The Rangoon government

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Control, June 9, 1992).

[147] *See* Joseph B. Treaster, *The 1992 Campaign: Candidates' Records; Four Years of Bush's Drug War: New Funds but an Old Strategy*, N.Y. TIMES, July 28, 1992, at A1 (reporting on penalties for supplying drugs).

[148] *See* Andrew B. Campbell, Note, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385, 393 (1990).

[149] *Assessing the Current Trends in Opium Production and Heroin Trafficking*, *supra* note 146, at 469.

[150] *See id.*

[151] *Id.*

[152] *See* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 50 n.138 (1989) (describing United States's curtailed economic relations with Burma pending political change); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 31 (1996) (describing United States's failed attempts to correct Burma's human rights violations); Thomas K. Ragland, Note, *Burma's Rohinjyas in Crisis: Protection of "Humanitarian" Refugees Under International Law*, 14 B.C. THIRD WORLD L.J. 301, 302 (1994) (describing human rights violations of State Law and Order Restoration Commission).

[153] *See* K.I. Douglas, *War and the Global Opium Supply*, 21 FLETCHER F. WORLD AFF. 121,

allows poppy cultivation in return for peaceful coexistence with these armies.[154]

Imagine the reaction in the United States if our trading partners enacted a converse piece of legislation. This hypothetical bill would mandate the identification and publication of major drug-consuming countries; the United States surely would be blacklisted. Such legislation would require the United States to cooperate fully with its trading partners to reduce drug demand or take steps on its own according to criteria set by our trading partners. These criteria would include creating drug rehabilitation programs, prosecution initiatives, and the commitment of specific budgetary allocations to support these efforts. The criteria also would include enactment of the death penalty for drug traffickers and its prominent advertisement on the U.S. Customs form filled out by all persons entering the United States.[155] Failure to satisfy these criteria could lead to denial of access to our trading partners' markets in key sectors like agriculture, services, and aviation. This hypothetical legislation, if enacted by a trading partner, would undoubtedly provoke outrage in the United States; however, the 1986 Narcotics Act is precisely this sort of legislation visited upon our partners.

III. FIGHTING FIDEL: THE 1996 HELMS-BURTON ACT

A. Two Themes: The "Overthrow Castro" Act and Its Defensible Features

Aside from section 301 of the Trade Act of 1974, as amended,[156] few U.S. international trade statutes have generated as much controversy as the Helms-Burton Act.[157] The language

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128 (1997) (describing Burmese hilltribes' control of poppy fields).

[154] *See id.*

[155] After all, this penalty exists in key trading partners like Malaysia, Indonesia, and Singapore, and (as any traveler to these destinations knows) it is prominently displayed on immigration and customs entry forms to these countries. *See, e.g.*, Sidney L. Harring, *Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs*, 29 COLUM. J. TRANSNAT'L L. 365 (1991) (describing mandatory death penalty for drug trafficking in Malaysia).

[156] *See* 19 U.S.C. §§ 2411-2419 (1994) (amending rights and regulations of Trade Act). For a discussion of section 301 of the Trade Act of 1974, see BHALA, *supra* note 4, at 1059.

[157] *See* 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997). The Act is named after its principal co-sponsors, Republican Senator Jesse Helms of North Carolina and Republican

and legislative history of the Helms-Burton Act indicate that its fundamental objective is to overthrow Fidel Castro's communist dictatorship in Cuba.[158] In this regard, the Act is more aggressive — more offensive and less defensive in nature — than any other U.S. national security sanctions legislation. No doubt many share this objective to overthrow Castro, including congressional critics of the Act[159] and, more importantly, persons in Cuba.[160] Whether international trade law is an appropriate or effective means of achieving this objective, however, is a divisive issue that pits the United States against many of its most important trading partners and divides the ranks of American trade policy makers and observers. The American public is almost evenly split in its opinion about the Helms-Burton Act, with 45% in favor and 48% opposed.[161]

Indeed, the United States has come under intense pressure to modify or repeal the act from its key trading partners, including

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Representative Dan Burton of Indiana. For a section-by-section account of the similarities and differences between the House bill and Senate amendment and the resulting language adopted by a joint Congressional committee, see JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H. CONF. REP. NO. 104-468 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558.

Coverage of the Helms-Burton Act in the business media has been extensive, and space does not permit citation herein of all of the articles. Some of the excellent pieces include: *Biter Bitten: Japanese Firms Acquisitions*, ECONOMIST, Apr. 25, 1992, at 85 (discussing state of Japan's industry); Stephen Fidler, *Comment and Analysis: The Long Arm of American Law*, FIN. TIMES, July 8, 1996 (stating that Helms-Burton Act has angered Cuba as well as other trading partners of United States); Deroy Murdock, *Cuba — This Island of Lost Potential*, WORLD TRADE, Aug. 1997, at 28 (proposing that Helms-Burton Act allows Americans to sue foreign companies that deal with property of American firms nationalized by Castro); Therese Raphael, *U.S. and Europe Clash over Cuba*, WALL ST. J., Mar. 31, 1997, at A14 (discussing U.S. trading partners' anger over Helms-Burton Act); Carla Anne Robbins, *Sherritt Officials to Be Barred from U.S.*, WALL ST. J., July 11, 1996, at A11 (illustrating pressure that United States is putting on Cuban and American allies that trade with Cuba); Anneke van Dok-van Weele, *U.S. Should Quit Bossing Its Friends*, INT'L HERALD TRIB. (France), July 1, 1997, at 10 (criticizing Helms-Burton Act).

[158] *See* H.R. REP. NO. 104-202 (1995), at 22, *reprinted in* 1996 U.S.C.C.A.N. 527, 527 (stating that Helms-Burton Act would take proactive steps to encourage early end to Castro regime and would direct President to support transition to democratic government in Cuba).

[159] *See id.* at 57, *reprinted in* 1996 U.S.C.C.A.N. at 556 (stating dissenting views that agree that Castro "must go" and Cuba must make difficult transition to democracy and free markets, but rightly questioning how to advance U.S. national interest).

[160] *See id.* (arguing that Cuba's real problem is Castro's authoritarian system).

[161] *See Americans Against Helms-Burton by Small Margin*, 14 Int'l Trade Rep. (BNA) 699, 699 (Apr. 16, 1997).

the European Union ("EU"), Canada, Mexico, China, and Japan. For example, three months after the Act took effect, the U.N. General Assembly approved a non-binding resolution calling for an end to all U.S. economic measures against Cuba. One hundred thirty-seven countries voted in favor of the resolution, twenty-five abstained, and just three — the United States, Israel, and Uzbekistan — voted against the resolution.[162] In the fall of 1996, the EU brought a WTO action against the United States concerning the Act.[163] This action prompted the United States to suggest that the WTO had no jurisdiction to determine whether the Act was in America's national security interests under article XXI of GATT.[164] For the time being, the EU has agreed to suspend the action if President Clinton (1) reassures the EU that he will continue to suspend the application of civil liability for trafficking in confiscated property until his term expires in January 2001, and (2) obtains congressional authority to waive the provision excluding aliens, their spouses, and their minor children from the United States who traffic in such property.[165] The EU has accused the United States of not following

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[162] *See U.N. General Assembly Votes for End to Cuba Embargo*, 13 Int'l Trade Rep. (BNA) 1755, 1755 (Nov. 13, 1996).

[163] *See Audit of U.S. Trade Policies Is Generally Favorable, Helms-Burton Questioned*, 13 Int'l Trade Rep. (BNA) 1733, 1733 (Nov. 13, 1996) (discussing WTO members' response to Helms-Burton Act); *EU Takes Action Against U.S. Helms-Burton, D'Amato Acts*, 8 EURECOM 1 (1996) (indicating that EU agreed on October 1, 1996 to challenge Helms-Burton Act in WTO); Guy de Jonquie'res, *EU to Raise Stakes in Trade Law Row with U.S.*, FIN. TIMES, Feb. 3, 1997, at 1 (stating that EU will ask WTO director-general to name members of panel).

[164] *See* Rossella Brevetti et al., *U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle*, 14 Int'l Trade Rep. (BNA) 351 (Feb. 26, 1997); *Cuban Feud*, FIN. TIMES, Feb. 4, 1997, at 21 (stating that EU claims United States's objection to WTO action on Helms-Burton Act could threaten WTO); Guy de Jonquie'res, *U.S. Dodges Brussels Onslaught*, FIN. TIMES, Feb. 21, 1997, at 6; Guy de Jonquie'res & Nancy Dunne, *U.S. Leaves Door Ajar in Row with EU Over Cuba Trade*, FIN. TIMES, Feb. 21, 1997, at 18 (stating that United States would formally object to formation of WTO panel on Helms-Burton dispute).

[165] *See* Lionel Barber & Guy de Jonquie'res, *Brussels and U.S. in Deal to End Cuba Trade Rift*, FIN. TIMES, Apr. 12, 1997, at 1 (stating that Jesse Helms did not believe that Congress would grant President Clinton's request to amend Helms-Burton Act); Guy de Jonquie'res, *EU Delays Clash on U.S. Anti-Cuba Law*, FIN. TIMES, Feb. 13, 1997, at 5 (stating that EU asked WTO to postpone establishment of dispute panel); *EU Suspends Effort to Challenge in WTO Helms-Burton Legislation*, 14 Int'l Trade Rep. (BNA) 742, 742 (Apr. 23, 1997) (stating that WTO action over Helms-Burton Act is waived unless United States takes action under Act against EU companies); Gary G. Yerkey, *EU Said Not Planning to Revive Challenge to Helms-Burton Challenge*, 14 Int'l Trade Rep. (BNA) 1040, 1040 (June 11, 1997) (explaining that EU agreed to suspend its request for WTO panel immediately); Gary G. Yerkey, *U.S., EU*

through on the second commitment; indeed, in June 1997, the House of Representatives approved legislation to tighten the alien exclusion provision by requiring that the State Department report on companies whose officials might be sanctioned under the provision.[166]

To its supporters, the Helms-Burton Act provides a vital safeguard against physical threats to U.S. national security posed by Castro's regime, a reinforcement of the importance private property ownership plays in economic development, and a noble effort to support human rights and civil liberties in Cuba.[167] President Clinton calls the Act "a justified response to the Cuban government's unjustified, unlawful attack on two unarmed U.S. civilian aircraft that left three U.S. citizens and one U.S. resident dead," and a reaffirmation of "our common goal of promoting a peaceful transition to democracy in Cuba by tightening the existing embargo while reaching out to the Cuban people."[168] To its detractors, the Act is an outrageous and

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Approve Plan to Resolve Dispute Over Helms-Burton, Officials Say, 14 Int'l Trade Rep. (BNA) 686, 686 (Apr. 16, 1997) (stating that EU would waive its case in WTO in exchange for United States's amending Helms-Burton Act).

[166] *See EU Warns It Will Reinstate Complaint on Helms-Burton if Congress Tightens Law*, 14 Int'l Trade Rep. (BNA) 1089, 1089 (June 18, 1997); *GOP House Members Press Administration on Helms-Burton Title IV Implementation*, 14 Int'l Trade Rep. (BNA) 1148, 1148 (July 2, 1997).

In July 1997, Stet, an Italian telecommunications group and one of Europe's largest investors in Cuba, immunized itself from suit under the Helms-Burton Act. Stet agreed to pay compensation to America's ITT for its confiscated Cuban assets. *See* Guy de Jonquie'res & Emma Tucker, *Keeping the Lid on Helms-Burton*, FIN. TIMES, July 31, 1997, at 4. Stet benefits from these assets by providing telecommunications services to Cuba, but ITT promised not to sue Stet because of the compensation arrangement. The State Department agreed to exempt Stet from the visa denial provisions of the Helms-Burton Act. *See id.*

[167] *See* H.R. REP. NO. 104-202, at 22-30 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 527-535.

[168] Statement by President of the United States, 32 WEEKLY COMP. PRES. DOC. 479, 479 (Mar. 18, 1996).

The U.S. trade embargo was imposed under the 1917 Trading With the Enemy Act ("TWEA"), Foreign Assistance Act of 1961, and Cuban Democracy Act of 1992. The relevant provision of TWEA under which a trade embargo against Cuba was imposed is 50 U.S.C. app. § 5(b) (1994). The relevant provision of the Foreign Assistance Act of 1961 pursuant to which sanctions were imposed on Cuba is 22 U.S.C. § 2370(a) (1994). The relevant sections of the Cuban Democracy Act is 22 U.S.C. § 6001 (1994). *See also* 22 U.S.C.A. § 6040 (West Supp. 1997) (describing provision of Helms-Burton Act in which Congress acknowledges existing import restrictions on Cuban products); H.R. REP. NO. 104-202, at 34, *reprinted in* 1996 U.S.C.C.A.N. at 539-40 (discussing legislative history of section 6040); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 46 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 561 (expressing

possibly illegal extraterritorial assertion of U.S. jurisdiction,[169] another example of America's annoying tendency to act unilaterally in the world trading system, and a reflection of American naiveté about the efficacy of trade sanctions to achieve political aims.[170] Indeed, the Act's critics in Congress argue that it "marks a radical shift in U.S. foreign policy"[171] that plays into Castro's hands.[172] As the treatment below suggests, the truth about the Act lies somewhere in the middle between these two extreme views.

Proponents of the Helms-Burton Act often understate or fail to articulate arguments in favor of the Act because they are mesmerized by their own anti-Castro rhetoric. While some of the critics' arguments are overstated or rebuttable, some of the criti-

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profound conviction of Joint Committee of Conference that executive branch agencies must be more vigorous in enforcement of certain provisions of U.S. embargo on Cuba).

For overviews of the trade embargo, see generally Annie Swank, *The U.S. Trade Embargo Against Cuba: The Time Has Come to End this Cold-War Relic*, 4 CURRENTS 14 (1995) (discussing history of U.S. embargo against Cuba).

[169] *See, e.g.*, Neil Buckley, *U.S. Extra-territorial Trade Laws Anger EU*, FIN. TIMES, July 30, 1997, at 4 (discussing Stet-ITT-State Department agreement to shield Stet from Helms-Burton Act).

[170] *See* Archie Dunham, *Alternatives to Unilateral Trade Sanctions*, WASH. TIMES, May 25, 1997, at B4 (chronicling past failures of trade sanctions to achieve foreign policy goals).

[171] H.R. REP. NO. 104-202, at 53, *reprinted in* 1996 U.S.C.C.A.N. at 551 (dissenting views).

[172] *See id.* at 57, *reprinted in* 1996 U.S.C.C.A.N. at 556 (dissenting views). Helms-Burton is not without its critics:

> H.R. 927 [*i.e.*, the Helms-Burton Act] is not a status quo bill, it is an extreme bill. It toughens the embargo against Cuba and tightens the noose on the Cuban people. It adopts measures against Cuba harsher than those against the Soviet Union during the Cold War.
>
> . . . .
>
> A policy of contact, dialogue, and exchange with Eastern Europe and the former Soviet Union helped foster a democratic revolution. . . .
>
> Those who favor increased isolation of Cuba have a responsibility to explain why the engagement that helped kill communism in Eastern Europe and the Soviet Union should *not* be the hallmark of our policy toward Cuba.
>
> Throughout the past 36 years, Castro has used two mechanisms to relieve pressure on his regime — letting his people take to the seas and appealing to Cuban nationalism. This bill hands Castro a fresh deck of nationalist cards. . . . This bill, he says, proves that exiled Cubans want to turn the clock back to 1958.
>
> The message should be clear to all: this bill gives Castro new scapegoats to distract the Cuban people from their real problem: Castro's authoritarian system.

Id.

cisms are more powerful than the critics themselves seem to realize. Not surprisingly, neither proponents nor critics are entirely correct, and a more balanced view of the Act is needed. The starting point is to recognize that all international trade lawyers and their clients must live with, or ignore at their peril, the Act's sanctions for as long as Castro remains in power. If the longevity and resilience of China's Mao, the Soviet Union's Stalin, Albania's Hoaxa, and North Korea's Kim Il Sung and Kim Jong Il, are any gauge, then certainly Castro is not planning for retirement in the near future. Indeed, a June 1997 EU report found neither progress in human rights nor movement toward a pluralistic democracy in Cuba.[173]

As a technical legal matter, the Helms-Burton Act is not difficult to understand. The rights and obligations that the Act creates are relatively straightforward, and its provisions are generally clear. However, as intimated above, at a deeper level the Act is difficult to grasp because its emotional and sometimes bombastic language masks a variety of policy goals and associated sanctions. Whether these goals are appropriate and whether the sanctions support the goals, are issues that divide the Act's supporters from its opponents. One approach toward a balanced view of the Act is (1) to identify the underlying policies and the reasons for those policies; then (2) to understand the specific types of sanctions set forth in the Act and consider how they support one or more of the policy goals; and finally (3) to appraise the arguments for and against the sanctions and goals. This three-step approach is adopted below.

The policies underlying the Helms-Burton Act can be placed into three related groups: property, freedom, and physical security. First, the Act seeks to redress American claims regarding property confiscated by Castro's government and more generally support the right of individuals to hold and enjoy private property in Cuba.[174] Second, the Act aims to promote both human

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[173] *See* Joe Kirwin, *EU Report Cites No Progress on Cuba Human Rights Issues*, 14 Int'l Trade Rep. (BNA) 1147, 1147 (July 2, 1997) (discussing Cuba's lack of progress in human rights and democratic reforms).

[174] *See* 22 U.S.C.A. § 6022(6) (West Supp. 1997) (stating that purpose of Helms-Burton Act is to protect U.S. nationals against confiscatory takings and wrongful trafficking in property confiscated by Castro regime); H.R. REP. NO. 104-202, at 22, *reprinted in* 1996 U.S.C.C.A.N. at 527 (stating that Helms-Burton Act would take proactive steps to provide

rights, as set forth in the U.N. Charter and the Universal Declaration of Human Rights, and civil liberties, as understood from an American perspective, in Cuba.[175] Third, the Act attempts to safeguard the United States against physical threats posed by the Castro regime.[176]

These three policies are equally important and, indeed, integrally related; each addresses America's long-term interest in creating an economically robust and politically stable neighbor and trading partner who will not jeopardize national security. A pluralistic political system ensures that an extremist leader — a madman like Iraq's Saddam Hussein — will not plunge a country into war.[177] With a robust economy, a country has too much to lose to risk a reallocation of resources and destruction of property associated with war.[178] The logic, based partly on historical experience from the First and Second World Wars and the Korean and Vietnam conflicts, is that prosperous democracies tend not to go to war with, or threaten violence against, one another.[179] In enacting the Helms-Burton Act, Congress expressed the reasonable view that respect for private property is a prerequisite for economic progress,[180] while economic stagnation breeds instability that could threaten U.S. national

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additional protection for rights of U.S. nationals whose property had been illegally confiscated by Cuban government).

[175] *See* 22 U.S.C.A. § 6022(1) (stating that purpose of Helms-Burton Act is to assist Cuban people in regaining their freedom and prosperity); H.R. REP. NO. 104-202, at 23, *reprinted in* 1996 U.S.C.C.A.N. at 528 (observing that "Fidel Castro is alone in the Americas" and reviewing abysmal human rights record of his regime).

[176] *See* 22 U.S.C.A. § 6022(3) (stating that purpose of Helms-Burton Act is to provide for continued national security of United States against continuing threats from Castro government). These threats encompass terrorism, the theft of property from U.S. nationals, and political manipulation of many Cubans' desire to escape that results in a mass migration to the United States. *See id.*

[177] *See* Hisashi Owada, *International Agenda of Japan for the Nineties*, 84 AM. SOC'Y INT'L L. PROC. 95, 98-99 (1990) (stating that pluralistic political systems ensure political peace).

[178] *See id.* (noting pluralistic political systems produce economic prosperity).

[179] *See* Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167, 207-08 n.124 (1997) (presenting President Clinton's speech to United Nations which emphasized that democracy is rooted in compromise, not conquest).

[180] *See* H.R. REP. NO. 104-202, at 24, *reprinted in* 1996 U.S.C.C.A.N. 527, 529 (arguing that economic development is not possible without private property, and property rights do not exist in Cuba today, hence legislation protects property rights and undermines lawless exploitation of property that jeopardizes prospects for future trade and investment).

security.[181] Likewise, respect for human rights and civil liberties is another prerequisite for economic progress, which, in turn, leads to prosperity and stability.[182] Since 1959, when Castro assumed power, his lack of respect for private property, human rights, and civil liberties has been accompanied by direct and indirect physical threats to, and confrontations with, Americans. These threats, which the Helms-Burton Act expressly states would be acts of aggression,[183] include (1) Cuban government attempts to construct and operate nuclear facilities under sub-standard conditions that, were an accident to occur, would threaten parts of the United States as far north as Washington, D.C. with radioactive poisoning,[184] (2) the operation of intelligence facilities to gather sensitive information that may be used against the United States,[185] and (3) the encouragement of U.S. border control problems by motivating waves of Cubans to escape repression and poverty and seek asylum in the United States.[186] The confrontations include the October 1962 Cuban missile crisis[187] and the February 24, 1996 incident when Cuban MiG fighters deliberately shot down two unarmed private American planes outside of the airspace over Cuba's twelve-mile

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[181] *See Annual Public Review of National Security Threats to the United States: Hearings Before the Senate Select Comm. on Intelligence*, 104th Cong. (1997) (statement of George Tenet, Acting Director, Central Intelligence Agency) (discussing impact of economic stagnation on situation in North Korea and Iran).

[182] *See* 22 U.S.C.A. § 6031(1) (West Supp. 1997) (defining Castro's regime as perpetrating human rights violations and threatening international peace).

[183] *See id.* § 6031.

[184] *See id.* § 6031(3)-(4) (discussing threat to U.S. national security posed by operation of any nuclear facilities in Cuba).

[185] *See id.* § 6031(3) (discussing threat to U.S. national security presented by Cuban intelligence activities).

[186] *See id.* § 6031(4) (discussing threat to U.S. national security posed by mass migration from Cuba).

[187] *See* ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 23-128 (1969) (discussing Cuban missile crisis). The literature on this crisis is voluminous but Robert F. Kennedy's account is one of the most riveting. *See id.*

territorial sea limit.[188] The four crew members aboard, three U.S. citizens and one permanent resident, were killed.[189]

The policy consequences of this logic are obvious. America's long-term national security interest boils down to the simple objective behind the Helms-Burton Act — assisting the Cuban people to replace Castro's communist dictatorship with a transitional government that will eventually lead to a bona fide pluralistic democracy. For evidence of this objective, the statement of the Act's purposes is excellent testimony:

> The purposes of this Act are —
> (2) to strengthen international sanctions against the Castro government;
> . . . .
> (4) To encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers; [and]
> (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba . . . .[190]

The Act contains additional supporting testimony. For instance, the President is authorized to support non-governmental organizations and individuals in their efforts to build democracy in Cuba.[191] Further, in thinly veiled statutory terms, Congress incites the Cuban people to radically change their political and economic status quo.

> The policy of the United States is . . .
> (1) To support the self-determination of the Cuban people.
> . . . .
> (3) *To encourage the Cuban people to empower themselves with a government which reflects the self-determination of the Cuban people.*
> . . . .

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[188] *See* 22 U.S.C.A. § 6046 (condemning Cuban attack on defenseless planes of "Brothers to the Rescue," Miami-based humanitarian organization that was searching for and aiding Cuban refugees in Straits of Florida); Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 32 WEEKLY COMP. PRES. DOC. 479, 479 (Mar. 12, 1996).

[189] *See* Statement by President of the United States, *supra* note 168, at 479.

[190] 22 U.S.C.A. § 6022.

[191] *See id.* § 6039(a) (authorizing President to furnish assistance and other support to such organizations and individuals).

> (4) To recognize the potential for a difficult *transition from the current regime in Cuba* that may result from the initiatives taken by the Cuban people for self-determination in response to the intransigence of the Castro regime in not allowing any substantive political or economic reforms, and to be prepared to provide the Cuban people with humanitarian, developmental, and other economic assistance.[192]

To implement this policy, several provisions in the Helms-Burton Act direct the President to prepare for a post-Castro Cuba. First, the President should develop a multinational economic assistance plan from the United States, other countries, and international financial institutions,[193] and create an administrative apparatus to distribute this aid to a post-Castro Cuba.[194] Second, after a democratically elected government replaces the Castro regime, the President should report to Congress about significant barriers to United States-Cuban trade and the possibility of extending MFN treatment to Cuba, designate Cuba as a beneficiary under the Generalized System of Preferences ("GSP") or program Caribbean Basin Initiative ("CBI"), and negotiate the accession of Cuba to the North American Free Trade Agreement ("NAFTA").[195] Third, once the Castro regime is overthrown, the President should suspend, and eventually end, the U.S. trade embargo against Cuba.[196]

As the above testimony suggests, the Cold War-era technique of CIA-sponsored assassinations of foreign leaders has probably

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[192] *Id.* § 6061.

[193] *See id.* § 6062(a)(1), (e) (directing President to develop plan for providing economic assistance when traditional or democratically elected government is in power). Interestingly, the Act directs the President to communicate the plan to the Cuban people, but does not say when the communication should occur. *See id.* § 6062(f). Presumably, Congress would like the President to communicate the plan even before Castro is overthrown so that the Cuban people have some degree of comfort that foreign assistance will be forthcoming. *See generally* H.R. REP. NO. 104-202, at 26, 36-38 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 530, 541-43 (discussing provisions regarding preparation for inevitable democratic transition in Cuba); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 52-53 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 567-68 (discussing same provisions as H.R. Rep. No. 104-202).

[194] *See* 22 U.S.C.A. § 6063 (describing coordination and implementation of assistance programs).

[195] *See id.* § 6062(h) (providing for reports on trade and investment relations).

[196] *See id.* § 6064(a), (c) (establishing termination of economic embargo).

ended. In its place, economic assassinations occur through unilateral trade action.

> The course of action prescribed by H.R. 927, as amended [*i.e.*, the Helms-Burton Act], preserves U.S. credibility with the Cuban people *as one of the few countries not willing to put aside what it knows about the Castro regime in exchange for mythical market-share.* H.R. 927, as amended, *seeks to break the status quo* by extending an offer of broad U.S. support for a peaceful transition and providing disincentives to investment in Cuba by companies whose ventures might otherwise buoy the regime by exploiting the labor of the Cuban people and the property of U.S. citizens whose property in Cuba was wrongfully confiscated.[197]

In truth, the Helms-Burton Act might as well be called the "Overthrow Castro" Act. That rubric accurately describes how the United States has unilaterally defined its national security interest under article XXI of GATT, and thereby justified the sanction measures set forth in the Act.

The policies concerning property, freedom, physical security, and the bottom-line goal of toppling Castro, also resonate in the congressional "findings." These are dramatic and stunningly blunt statements not normally, if ever, found in an international trade statute. Regarding property, consider section 301 of the Helms-Burton Act:

> (1) Individuals enjoy a fundamental right to own and enjoy property which is enshrined in the United States Constitution.
> (2) The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, *undermines* the comity of nations, *the free flow of commerce, and economic development.*
> (3) Since Fidel Castro seized power in Cuba in 1959 —
> (A) he has trampled on the fundamental rights of the Cuban people; and
> (B) through his personal despotism, he has confiscated the property of —
>
> (i) millions of his own citizens;
> (ii) thousands of United States nationals; and

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[197] H.R. REP. NO. 104-202, at 24, *reprinted in* 1996 U.S.C.C.A.N. at 529.

> (iii) thousands more Cubans who claimed asylum in the United States as refugees because of persecution and later became naturalized citizens of the United States.
>
> . . . .
>
> (5) The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals.
>
> (6) This "trafficking" in confiscated property provides badly needed financial benefit[s], including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus *undermines the foreign policy of the United States* —
>
> (A) *to bring democratic institutions to Cuba* through the pressure of a general economic embargo at a time when the Castro regime has proven to be vulnerable to international economic pressure; and
>
> (B) to *protect the claims* of United States nationals who had property wrongfully confiscated by the Cuban Government.[198]
>
> . . . .

Regarding freedom and physical security, section 2 of the Act contains further "findings" stated in unmistakably combative terms and is highly suggestive of the fundamental goal of overthrowing the Castro regime:

> (1) The economy of Cuba has experienced a decline of at least 60 percent in the last 5 years [*i.e.*, between 1990-95] . . . .
>
> (2) At the same time, the welfare and health of the Cuban people have substantially deteriorated as a result of this economic decline and the *refusal of the Castro regime to permit free and fair democratic elections in Cuba.*
>
> (3) *The Castro regime has made it abundantly clear that it will not engage in any substantive political reforms that would lead to democracy, a market economy, or an economic recovery.*
>
> (4) *The repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights,* have isolated the Cuban regime as the only completely nondemocratic government in the Western Hemisphere.

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[198] 22 U.S.C.A. § 6081 (emphasis added).

(5) *As long as free elections are not held in Cuba,* the economic condition of the country and the welfare of the Cuban people will not improve in any significant way.

(6) The totalitarian nature of the Castro regime has deprived the Cuban people of any peaceful means to improve their condition and has led thousands of Cuban citizens to risk or lose their lives in dangerous attempts to escape from Cuba to freedom.

. . . .

(9) *The United States . . . considers it a moral obligation, to promote and protect human rights and fundamental freedoms* as expressed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

. . . .

(13) The Cuban government engages in the illegal international narcotics trade and harbors fugitives from justice in the United States.

(14) *The Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence.*

(15) *The Castro government has utilized from its inception and continues to utilize torture in various forms (including by psychiatry), as well as execution, exile, confiscation, political imprisonment, and other forms of terror and repression, as [a] means of retaining power.*

(16) *Fidel Castro has defined democratic pluralism as "pluralistic garbage" and continues to make clear that he has no intention of tolerating the democratization of Cuban society.*

(17) The Castro government holds innocent Cubans hostage in Cuba by no fault of the hostages themselves solely because relatives have escaped the country.

(18) Although a signatory state to the 1928 Inter-American Convention on Asylum and the International Covenant on Civil and Political Rights (which protects the right to leave one's own country), Cuba nevertheless surrounds embassies in its capital by armed forces to thwart the right of its citizens to seek asylum and systematically denies that right to the Cuban people, punishing them by imprisonment for seeking to leave the country and killing them for attempting to do so (as demonstrated in the case of the confirmed murder of over 40 men, women, and children who were seeking to leave Cuba on July 13, 1994).

. . . .

(20) The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights

> situation in Cuba and has taken the extraordinary step of appointing a Special Rapporteur.
>
> (21) The Cuban Government has consistently refused access to the Special Rapporteur and formally expressed its decision not to "implement so much as one comma" of the United Nations Resolutions appointing the Rapporteur.
>
> . . . .
>
> (23) Article 39 of . . . the United Nations Charter provides that the United Nations Security Council "shall determine the existence of any threat to peace . . . ."
>
> (24) *The United Nations has determined that massive and systematic violations of human rights may constitute a "threat to peace" under Article 39 and has imposed sanctions due to such violations of human rights in the cases of Rhodesia, South Africa, Iraq, and the former Yugoslavia.*
>
> . . . .
>
> (27) *The Cuban people deserve to be assisted in a decisive manner to end the tyranny that has oppressed them for 36 years, and the continued failure to do so constitutes ethically improper conduct by the international community.*
>
> (28) *For the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States.*[199]

In sum, the above-quoted Congressional findings on the record from the Helms-Burton Act leave no doubt that the Act's primary purpose is to shake up the current Cuban status quo.

The international community already has accepted the use of multilateral economic sanctions to attempt a fundamental change in a target country's status quo that may incite a popular overthrow of the government.[200] But is Helms-Burton's use of unilateral trade action to overthrow a government legitimate? It seems that if a prima facie case in favor of this objective can be made under GATT article XXI, then notwithstanding all of the other obligations in GATT and the Uruguay Round agreements, nothing in the GATT-WTO system forbids such action. Moreover, nothing in this system confers subject matter jurisdic-

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[199] *Id.* § 6021 (emphasis added).

[200] *See* Steve Mufson & Lawrence Ingrassia, *South Africa Looks Capable of Surviving Sanctions for Years — But at a Stiff Price*, WALL ST. J., Sept. 11, 1985 (reporting on economic sanctions against South Africa); Carla Anne Robbins, *Containing Saddam Remains a Challenge*, WALL ST. J., Sept. 20, 1996, at A11 (describing multilateral economic sanctions against Iraq).

tion on a WTO panel, the Appellate Body, or the Dispute Settlement Body to determine whether a case has been made. Indeed, the prima facie case may be necessary not because of article XXI, but rather to persuade other countries of the substantive basis for the action. In this instance, perhaps reasonable minds can differ as to whether Castro's Cuba poses a national security threat to the United States. To concede subject matter jurisdiction would involve an extraordinary ceding of sovereignty inconceivable in the present international political economy. Undoubtedly, there are philosophical grounds, and perhaps even good policy reasons, in favor of a revolutionary shift in subject matter jurisdiction on national security matters, but such arguments are beyond the scope of this Article.[201]

Although the "Overthrow Castro Act" theme resonates throughout the Helms-Burton Act, a second theme emerges, suggesting that several of the Act's sanctions are defensible when critically appraised. That is not to say these sanctions are wise public policy, or that they are invulnerable to criticism on doctrinal grounds. Rather, it is to counterpoint the critics of the Helms-Burton Act, many of whom would have international trade law observers believe that the Act is rotten to the core. In truth, several of its provisions are modest and entirely within the sovereign prerogative of the United States, and even the more controversial provisions are arguably legitimate.

To flesh out these two themes, it is important to understand how the Helms-Burton Act implements the property, freedom, and physical threat policies to hasten Castro's downfall. The Helms-Burton tactic is to impose three distinct categories of sanctions that might be termed "foreign assistance" sanctions, "ostracism" sanctions, and "trafficking" sanctions. Each category is discussed in greater detail below. In brief, foreign assistance sanctions refer to the withdrawal or withholding of U.S. foreign assistance to countries that aid or abet the Castro regime. Ostracism sanctions are measures that further isolate Cuba from the mainstream of the world trading system. Trafficking sanctions

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[201] *See* Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 16 BERKELEY J. INT'L L. (forthcoming Spring 1998) (proposing philosophical argument regarding shift in subject matter jurisdiction).

are liabilities for engaging in transactions in American property[202] confiscated[203] by the Castro regime. All three categories

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[202] *See* 22 U.S.C.A. § 6023(4), (12) (defining "confiscated" and "property"). The term "property" is broadly defined to include any kind of property — real property, personal property, intellectual property, and security interests — and covers present, future, and contingent rights and interests. *See id.* Thus, for example, if the Castro regime confiscated inheritance rights under a will and produced a product in violation of a patent right in a state-owned enterprise, the beneficiary of the inheritance rights and the patent holder might be potential claimants under the Helms-Burton Act.

[203] The definition of "confiscated" obviously relies on another important term: "property." *See id.* The term "confiscated" (or, equivalently, "confiscated property") is commonplace in the Act. *See id.* § 6067(a) (requiring Secretary of State to prepare report on claims held by U.S. nationals regarding property that Castro regime had confiscated); *id.* § 6081 (listing congressional findings on confiscated property); *id.* § 6082 (creating liability for trafficking in confiscated property); *id.* § 6083 (concerning proof of ownership claims to confiscated property); *id.* § 6091 (b) (excluding any alien who has trafficked in confiscated property from United States). It refers to:

> (A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property—
> (i) without the property having been returned or adequate and effective compensation provided; or
> (ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and
> (B) the repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay—
> (i) a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government;
> (ii) a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or
> (iii) a debt which was incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

Id. § 6023(4).

Of course, the terms "confiscated" and "property" refer to property owned by a "United States national." Thus, whether the beneficiary and patent holder in the preceding example actually have a claim under the Act depends on whether they are "United States nationals." Any U.S. citizen, and any other legal entity organized under federal or state law with its principal place of business in the United States, is a "United States national." *See id.* § 6023(15). It is extremely significant that a person need not have been a "United States national" (in particular, a U.S. citizen) at the time the Castro regime confiscated the property. *See* H.R. REP. NO. 104-202, at 31 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 536 (stating that "[p]ersons who were not United States citizens at the time their property in Cuba was confiscated but who subsequently became United States citizens *are included* within the definition of a United States national" (emphasis added)).

Consider a likely example: the factory of a Cuban citizen living in Havana is seized by the government in 1960, and no compensation is paid. The citizen escapes Cuba in 1961 and resettles legally in Miami, becoming a naturalized U.S. citizen in 1970. This person is considered a "United States national" under the Helms-Burton Act. Accordingly, a substan-

of sanctions are designed to tighten the economic noose around Cuba and thereby hasten the demise of the regime. The unstated logic is that the Cuban people are rational actors who will weigh the costs and benefits of Castro's communism and eventually conclude that, on balance, this system impedes their economic and political development. After all, is this calculation not unlike the one made by millions of people in the former Soviet bloc countries? Of course, this logic assumes that, unlike many Iraqi and Iranian citizens, the Cubans populace will not rally around their leader in the face of "America the Bully."

B. Definitions of Key Terms

How the sanction measures operate in practice depends in part on certain key terms. The definitions of three of these terms are relevant to the fundamental objective of the Helms-Burton Act, the overthrow of the Castro regime, and merit discussion at the outset.[204] That is, all three definitions concern the ruling government and none would be necessary but for this fundamental objective.

First, the unqualified term "Cuban Government" refers to "the government of any political subdivision of Cuba, and any agency or instrumentality of the Government of Cuba."[205] While this definition does not expressly refer to the present Castro regime, that implication is clear from the remaining two definitions, a "transition government in Cuba" and a "democratically elected government in Cuba."[206] Both definitions envision a change in the status quo — the removal of Fidel Castro from power — and rely on the President to determine whether the enumerated criteria are fulfilled.

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tial number of Cuban-Americans whose property was taken from them by Castro, and who then fled Cuba for the United States and subsequently became U.S. citizens, are eligible to file suits under the Act.

[204] *See* H.R. REP. NO. 104-202, at 31, *reprinted in* 1996 U.S.C.C.A.N. at 536 (discussing legislative history of key terms).

[205] 22 U.S.C.A. § 6023(5).

[206] *See id.* § 6023(14) (defining "transition government in Cuba"); *id.* § 6023(6) (defining "democratically elected government in Cuba"); H.R. REP. NO. 104-202, at 38, *reprinted in* 1996 U.S.C.C.A.N. at 543-44 (discussing definitions of these terms); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 54-56 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 569-71 (explaining drafting history of these terms).

To qualify as a transition government in Cuba, at a minimum, the President must determine that Cuba has met the following eight criteria: the government has (1) legalized all political activity; (2) released all political prisoners and allowed international human rights inspectors to examine Cuban prisons; (3) dissolved the state secret police apparatus; (4) made public commitments to hold free and fair elections for a new government within eighteen months after the transition government assumes power, an election in which all political parties have full and equal access to the media and international observers supervise; (5) ceased interference with Television Marti and Radio Marti broadcasts; (6) made public commitments and demonstrable progress toward establishing an independent judiciary, respecting internationally recognized human rights as set forth in the Universal Declaration of Human Rights, and allowed for the establishment of independent trade unions; (7) severed all ties with Fidel or Raul Castro; and (8) given adequate assurances that it will allow the speedy and efficient distribution of aid to the Cuban people.[207] In determining whether a government is transitional, the President must examine four additional criteria: if the government (1) is demonstrably in transition from a communist totalitarian dictatorship to a representative democracy; (2) has made public commitments and demonstrable progress toward guaranteeing free speech and freedom of the press, permitting Cuban-born persons to regain their citizenship and return to Cuba, assuring the right to private property, and returning property seized by the Castro regime (or equivalent compensation) to U.S. citizens; (3) has extradited criminals to the United States; and (4) has permitted the deployment of independent human rights monitors throughout Cuba.[208] These criteria are designed to ensure that a post-Castro government will not be a puppet regime within Castro's sphere of influence. In other words, the criteria aim to ensure a bona fide transition to a new political, economic, and social status quo. However, as critics of the Helms-Burton Act point out, the glaring problem is that while each criterion is valid in isolation, the criteria become unrealistic as a multi-factor test. It is unlikely that any

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[207] *See* 22 U.S.C.A. § 6065(a).

[208] *See id.* § 6065(b).

government could meet such criteria after thirty-six years of totalitarian rule and, thus, "ensures that the United States will sit on the sidelines during the transition."[209]

To determine whether a Cuban government is a democratically elected government, the President must evaluate fewer criteria than to determine whether it is a transition government. This fact is not surprising, because doubts about a complete overthrow of the Castro regime would more likely surround a transition government than a democratic government. In brief, a democratically elected government in Cuba is one that the President determines: (1) results from free and fair elections supervised by international observers, in which opposition parties had ample time to organize and campaign and all candidates had full access to the media; (2) respects both human rights and civil liberties; (3) is moving substantially toward a market economic system based on the right to own and enjoy property; (4) is committed to enshrining the principles of regular free and fair elections, human rights, and civil liberties in a constitution; (5) has made demonstrable progress toward establishing an independent judiciary; and (6) has made demonstrable progress toward returning property seized by the Castro regime to U.S. citizens or providing full compensation for such property.[210]

Two remarkable facts about the definitions of a democratically elected government and transition government in Cuba should not go unmentioned. First, these definitions are the first effort in U.S. international trade law to specifically define what kind of new political system the United States seeks in another country. To be sure, some international trade statutes contain political criteria.[211] However, no other statute is so ambitious or majestic in its attempt to define an entirely new form of government for another country. Accordingly, these definitions embody both the noble commitment to freedom supporters of the Helms-Burton Act emphasize and the legal imperialism that antagonists highlight.

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[209] H.R. CONF. REP. NO. 104-468, at 53-54, *reprinted at* 1996 U.S.C.C.A.N. at 552 (dissenting views).

[210] *See* 22 U.S.C.A. § 6066.

[211] *See* BHALA, *supra* note 4, at 531-95, 1281-360 (discussing Generalized System of Preferences with trade and labor issues).

Second, all of the criteria in both definitions, several of which overlap, are based on one value: the rule of law. On the other hand, Castro's regime is an ugly example of the rule of man. Free and fair elections in a pluralistic multi-party democracy, respect for human rights, civil liberties, property rights, and an independent judiciary all function within the rule of law. Why is this value worth promoting? A practical answer to this question comes from Hong Kong. At midnight on June 30, 1997, British administration of the territory ended, and Chinese sovereignty resumed.[212] The international business community's principal fear about the handover continues to be whether China will preserve the rule of law that has been the scaffolding upon which Hong Kong has built its phenomenal successes.[213] It is this scaffolding that allows wealth to be created and spread. Most, if not all, of the criteria in the Helms-Burton Act definitions of a democratically elected government and a transition government are among the criteria the international business community will use to evaluate whether continued and expanded trade relations in Hong Kong are worthwhile. In sum, notwithstanding all of the possible sophisticated philosophical and jurisprudential arguments that justify it, the rule of law is worth promoting in a post-Castro Cuba, as in a post-British Hong Kong, because it is good for business.

C. Suspension of Sanctions

The Helms-Burton Act contains three provisions that allow for the suspension of sanctions. First, the President may suspend the effective date of the Act, which was August 1, 1996,[214] for up to six months, and thereby suspend operation of the entire Act.[215] The criterion for this suspension is based upon the report to Congress that it is "necessary to the national interests of the United States and will expedite a transition to democracy

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[212] *See* Andrew Pollack, *Asian Nations' Hope for Hong Kong Is Business as Usual; Don't Share U.S. Fear of Crackdown on Civil Liberties*, SAN DIEGO UNION-TRIB., July 3, 1997, at A22 (reporting on Chinese takeover of Hong Kong).

[213] *See id.* (reporting on international businesses' misgivings that Chinese rule of law will increase difficulty of conducting business in Hong Kong).

[214] *See* 22 U.S.C.A. § 6085(a).

[215] *See* § 6085(b)(1).

in Cuba."[216] Using the same criterion, the President may suspend the effective date for additional periods of up to six months each.[217] In practice, the authority to postpone the effective date is irrelevant because the President decided on July 16, 1996 not to invoke it;[218] hence, the Act took effect on August 1, 1996.

Second, the President is authorized to suspend foreign assistance sanctions, such as the bar on indirect financing of Cuba, if he determines a transition government has gained control in Cuba.[219] Whenever the economic embargo against Cuba is terminated, the President will lift the bar on foreign assistance sanctions.[220] Heretofore, the President has declined to invoke this suspension authority.

Finally, the President is authorized to suspend the right to bring an action for trafficking in confiscated property for up to six months, if this "suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."[221] In July 1996, President Clinton invoked this suspension authority.[222] In suspending the trafficking sanction, the President must report in writing to Congress that the criteria regarding U.S. national interests and a transition in Cuba are satisfied.[223] In January 1997, and again in July 1997, President Clinton invoked this right-to-sue authority for a further six months.[224] The President can rescind any suspension if it

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[216] *See id.* The President can rescind a suspension if it will expedite a transition to democracy in Cuba. *See id.* § 6085(d).

[217] *See id.* § 6085(b)(2).

[218] *See Statement by President Clinton on Implementation of Helms-Burton Law Issued July 16, 1996*, 13 Int'l Trade Rep. (BNA) 1155, 1189 (July 17, 1996) (stating that President declined to use his authority to postpone effective date); Rossella Brevetti & Peter Menyasz, *Clinton Delays Lawsuits Under Title III of Helms-Burton*, 13 Int'l Trade Rep. (BNA) 1155, 1158 (July 17, 1996) (reporting that President decided to allow Helms-Burton Act to take effect); *White House Fact Sheet on President's Decision*, 13 Int'l Trade Rep. (BNA) 1155, 1190 (July 17, 1996) (explaining presidential authority under title III to postpone effective date).

[219] *See* 22 U.S.C.A. § 6033(b)(1).

[220] *See id.* § 6033(b)(2).

[221] *See id.* § 6085(c)(1)(B).

[222] *See* Brevetti & Menyasz, *supra* note 218, at 1158 (reporting that President decided to suspend right to bring private causes of action for six months.).

[223] *See* 22 U.S.C.A. § 6085(c)(1)(B), (2).

[224] *See* Brevetti & Menyasz, *supra* note 218, at 1158 (reporting that President suspended right to sue for six months); *Canada Weighs NAFTA Action*, 14 Int'l Trade Rep. (BNA) 37, 42 (Jan. 8, 1997); Nancy Dunne, *Clinton Suspends Helms-Burton Again*, FIN. TIMES, Jan. 4,

will expedite a transition to democracy in Cuba.[225] Under the United States-EU agreement discussed earlier,[226] the President appears committed to invoking this authority until his term expires in January 2001.

Interestingly, even if President Clinton's suspension has not defused some of the controversy surrounding the Helms-Burton Act, it has at least allowed the United States and its trading partner critics to relax. However, Congress neither intended nor desired this benefit when it passed the Act.[227] The President sought a criterion for suspending the operation of the trafficking sanction that focused on whether suspension is important to U.S. national interests, including expediting the transition to democracy in Cuba.[228] Congress flatly rejected that proposal, opting to use the term "necessary" so that expediting the transition to democracy would be the "central element of the President's decision."[229] Congress inserted in the legislative history that "under current circumstances [in Cuba] the President could not in good faith determine that suspension of the right of action [under the trafficking sanction] is either 'necessary to the national interests of the United States' or 'will expedite a transition to democracy in Cuba.'"[230] Congress felt that suspension "would remove a significant deterrent to foreign investment in Cuba, thereby helping prolong Castro's grip on power."[231] To vigorous supporters of the Act, the President's decisions regarding suspension have undoubtedly been in bad faith. In reality, perhaps the President was caught off guard by the vehement and widespread criticism of the Act from U.S. trading partners, and, thus, invoked the suspension authority to steer a temporary middle course between proponents and critics.

1997, at 1.

[225] *See* 22 U.S.C.A. § 6085(d).

[226] *See supra* note 165 and accompanying text (highlighting EU agreement to suspend action so long as President Clinton continues to suspend provision on civil liability).

[227] *See* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 65 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 580 (stating that President has power to suspend right to sue if necessary to serve national interest and to expedite transition in Cuba).

[228] *See id.*

[229] *See id.*

[230] *Id.*

[231] *Id.* at 66, *reprinted in* 1996 U.S.C.C.A.N. at 581.

D. Foreign Assistance Sanctions

1. Non-Controversial Sanctions

The Helms-Burton Act uses foreign assistance sanctions to restrict the amount of American capital entering Cuba and, hence, hasten the demise of the Castro regime. For example, no U.S. national, permanent resident alien, or U.S. agency may lend, extend credit, or provide any other form of funding to any person to finance a transaction in confiscated property if a U.S. national owns a claim on that property.[232] Critics of the Helms-Burton Act can hardly view this sanction as controversial. It is simply an act of self-restraint, and the United States is free to channel indirect public and private financing to regimes it finds politically acceptable.

Another illustration of a non-controversial foreign assistance measure concerns general licenses for U.S. families to send funds to their relatives in Cuba. Before reinstituting general licenses for these remittances, Congress urges the President to insist that the Cuban government permit small businesses to operate without restraint, with the right to hire employees, pay wages, purchase necessary supplies, and exercise other rights that will encourage the operation of small businesses in Cuba.[233] This measure is uncontroversial in two respects. First, no sanction is attached. Congress is simply exhorting the President to push the Castro regime to allow some measure of entrepreneurial capitalism to develop; the President is free to ignore the exhortation. Second, the measure is logical. Presumably, the point of sending funds to relatives in Cuba is to improve their standard of living, which is possible if the relatives can invest the funds in a small business and enjoy the resulting profits. The measure, therefore, could help ensure that the Castro regime allows remittances to be put to their intended use.

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[232] *See* 22 U.S.C.A. § 6033(a) (West Supp. 1997).

[233] *See id.* § 6042(1)(A) (requiring President to submit report on assistance to Cuba).

2. Controversial Foreign Assistance Sanctions Targeting Third-Party Countries

Other foreign assistance sanctions in the Helms-Burton Act are somewhat more controversial and target official U.S. aid to third-party countries that support the Castro regime. Essentially, these sanctions present third-party countries with a choice to either cease dealing with Fidel or risk losing U.S. aid.[234] Ultimately, however, even these financial assistance sanctions may be reasonable. Surely the United States is free to establish political criteria, prudent or not, for U.S. taxpayer-financed foreign aid eligibility. Critics of the Helms-Burton Act must yield to realpolitik: this carrot-and-stick approach to modifying the behavior of donee countries has always been a feature of the foreign aid programs of every donor country. Unless a donor country is seized with a fit of unprecedented altruism, the feature is certain to remain.

One illustration of sanctions targeting third-party countries addresses relations between independent countries of the former Soviet Union ("FSU"). To understand this scenario, suppose the Ukraine, or another independent state of the FSU, engages in transactions with Cuba. Specifically, the FSU state assists Cuba through financial aid or technical advice, supports the construction or operation of intelligence facilities in Cuba, and trades goods, including commodities like oil, or services with Cuba.[235] The Helms-Burton Act amends the 1961 Assistance Act to render an independent FSU state ineligible for U.S. government aid if it provides assistance to Cuba, supports Cuban intelligence facilities, or engages in non-market based trade with Cuba.[236] Of these three activities, sanctioning the first two should not be controversial. If the donee country aids an enemy, the United States has a sovereign prerogative to decline to give aid for this

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[234] *See id.* § 6003(b)(1)(A) (allowing President to terminate aid to countries that provide assistance to Cuba).

[235] *See id.* § 6038(a). The Helms-Burton Act requires the President to submit annual reports to Congress (due on January 1) on commercial and military dealings between foreign countries and Cuba and the amount of assistance provided by foreign countries to Cuba. *See id.* This reporting requirement is not limited to FSU countries. *See id.*

[236] *See id.* § 6021 (amending § 498A of Foreign Assistance Act of 1961, 22 U.S.C. § 2295a(a)(11), (d) (1994)).

or any other reason. Indeed, regarding the second activity, the legislative history to the Helms-Burton Act points out:

> With respect to Russian intelligence facilities located at Lourdes, Cuba . . . a senior Russian government official announced in November 1994 that his government was providing $200 million in credits to the Castro regime in exchange for the continued use of that facility. The Lourdes facility is one of the world's largest and most sophisticated intelligence stations, which Department of State and Department of Defense documents say is used to intercept and monitor U.S. commercial satellites, U.S. military and merchant shipping communications, NASA activities, and telephone conversations of U.S. citizens. The [joint congressional] committee of conference notes that the Department of State has assured the Congress that no part of the [Helms-Burton] Act would violate U.S. treaty obligations, nor does any existing arms control treaty prevent the United States from urging Russia to end its use of Cuba as a base for intelligence operations against U.S. interests.[237]

However, sanctioning non-market based trade with Cuba is more problematic because the United States clearly is trying to dictate the terms on which two other sovereign countries trade.

The goal of sanctioning non-market based trade with Cuba is to hasten its economic collapse by forcing the Castro regime to consume precious resources, including hard currency, by paying market prices for imports. However, the breadth of the sanction should not be misunderstood: trade must be non-market based. That is, an FSU country is ineligible for U.S. foreign aid only if it trades with Cuba "on terms more favorable than those generally available in applicable markets for comparable commodities."[238] Examples of non-market terms for exports to Cuba would be charging a concessional price, providing a subsidy, delivering goods or services in advance with no accountability for full payment, not requiring payment for appropriate transportation and insurance costs, or forgiving debt in exchange for an equity interest in property of the Cuban government.[239] An

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[237] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 48 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 563.

[238] *See* 22 U.S.C.A. § 6021 (amending § 498A(b) of Foreign Assistance Act of 1961, 22 U.S.C. § 2295a(b)(5)).

[239] *See id.* (amending § 498A(b) of Foreign Assistance Act of 1961, 22 U.S.C. §§ 2295a(b)(5), 2295b(k)(3)).

example of an off-market term for Cuban imports would be a preferential tariff rate[240] or a countertrade transaction, such as a barter exchange of Russian oil for Cuban sugar. Here, the terms of the transaction are more favorable to Cuba than would be available to Cuba on the free market, resulting in a subsidy to Cuba.[241]

Conversely, nothing in the Helms-Burton Act sanctions trade in non-confiscated property conducted on market terms. This omission is significant because many state-owned enterprises ("SOEs") or newly privatized companies within FSU countries are certain to have trading relationships within the Castro regime based on previous economic ties between the former Soviet Union and Cuba. Yet because many of these FSU entities are likely to be struggling economically, they may be unwilling to trade with Cuba on unprofitable off-market terms. In other words, notwithstanding the Helms-Burton Act, they cannot afford to subsidize Castro, and the Act does not preclude them from earning an arm's length profit from his regime.

In addition to the "non-market based trade" requirement, three further limitations exist on the scope of the financial penalty sanction imposed on FSU countries for dealing with Cuba. First, Congress can elect to continue U.S. foreign aid to an FSU country that assists or engages in non-market based trade with Cuba by disapproving a presidential determination triggering the cessation of aid.[242] Second, the President can continue U.S. aid to an FSU country that supports Cuba's intelligence facilities if the aid is important to U.S. national security.[243] Third, several categories of U.S. aid are immune from cut-off: humanitarian aid; aid for the development of a democratic political system, the rule of law, private sector organizations, and a free market system; and certain educational exchange programs.[244] Plainly, it would be counterproductive to

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[240] *See id.* (stating preferential tariff rates would be "nonmarket based trade").

[241] *See* H.R. CONF. REP. NO. 104-468, at 48, *reprinted in* 1996 U.S.C.C.A.N. at 563 (explaining why more favorable trade is considered subsidy).

[242] *See* 22 U.S.C.A. § 6021 (amending § 498A(b) of Foreign Assistance Act of 1961, 22 U.S.C. § 2295a(b)(5)).

[243] *See id.*

[244] *See id.* § 2295a(d)(3) (describing exceptions to assistance reductions).

the U.S. policy goal of facilitating FSU countries in transition from communism to market capitalism to shut down these aid programs.

The second illustration targets any country that helps Cuba complete construction of a particular semi-finished nuclear power plant. This form of a third-party country foreign assistance sanction is designed to prevent the completion of a nuclear power plant in Juragua, Cuba.[245] Congress expressed profound skepticism in the Helms-Burton Act about the ability and willingness of the Castro regime to operate the Juragua plant in a safe manner that does not threaten the United States, reminding the world about Castro's past nuclear brinkmanship and present threats:

> (1) President Clinton stated in April 1993 that the United States opposed construction of the Juragua nuclear power plant *because of the concerns of the United States about Cuba's ability to ensure the safe operation of the facility and because of Cuba's refusal to sign the Nuclear Non-Proliferation Treaty* . . . .
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> . . . .
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> (3) The State Department, the Nuclear Regulatory Commission, and the Department of Energy have expressed concerns about the construction and operation of Cuba's nuclear reactors.
>
> (4) In a September 1992 report to the Congress, the General Accounting Office outlined concerns among nuclear energy experts about deficiencies in the nuclear plant project in Juragua . . . including —
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> (A) a *lack* in Cuba *of a nuclear regulatory structure*;
>
> (B) the *absence* in Cuba *of an adequate infrastructure to ensure the plant's safe operation and requisite maintenance*;
>
> (C) the *inadequacy of training of plant operators*;
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> (D) reports by a former technician from Cuba who, by examining with x-rays weld sites believed to be part of the auxiliary plumbing system for the plan, found that *10 to 15 percent of those sites were defective*,

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[245] *See* H.R. REP. NO. 104-202, at 35 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 540. Construction was halted in September 1992. However, Cuba, possibly with the assistance of third-party countries such as Russia, seeks to finish the project. *See id.* at 35-36, *reprinted in* 1996 U.S.C.C.A.N. at 540-41.

(E) since September 5, 1992, when construction on the plant was halted, the *prolonged exposure to the elements, including corrosive salt water vapor, of the primary reactor components*;

(F) *the possible inadequacy of the upper portion of the reactors' dome retention capability to withstand only 7 pounds of pressure per square inch, given that normal atmospheric pressure is 32 pounds per square inch and United States reactors are designed to accommodate pressures of 50 pounds per square inch*;

(5) The United States Geological Survey claims that it had difficulty determining answers to specific questions regarding earthquake activity in the area near Cienfeugos because the Cuban Government was not forthcoming with information.

(6) *The Geological Survey has indicated that the Caribbean plate, a geological formation near the south coast of Cuba, may pose seismic risks to Cuba and the site of the power plant, and may produce large to moderate earthquakes.*

(7) On May 25, 1992, the Caribbean plate produced an *earthquake numbering 7.0 on the Richter scale.*

(8) *According to a study by the National Oceanic and Atmospheric Administration, summer winds could carry radioactive pollutants from a nuclear accident at the power plant throughout all of Florida and parts of the States on the coast of the Gulf of Mexico as far as Texas, and northern winds could carry the pollutants as far northeast as Virginia and Washington, D.C.*

(9) *The Cuban Government, under dictator Fidel Castro, in 1962 advocated the Soviets' launching of nuclear missiles to the United States,* which represented a direct and dangerous provocation of the United States and brought the world to the brink of a nuclear conflict.

(10) Fidel Castro over the years has *consistently issued threats* against the United States Government, most recently that he would unleash another perilous mass migration from Cuba upon the enactment of this [Helms-Burton] Act.[246]

Assuming these Congressional findings are true, they establish a persuasive case of bona fide U.S. security concerns and suggest Congress and the President would be irresponsible to fail to block completion of the Juragua plant. In turn, U.S. efforts to persuade third-party countries to decline to help Cuba to build the Juragua plant seem entirely reasonable. These efforts are

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[246] 22 U.S.C.A. § 6041(a) (emphasis added).

certainly less unilateral or forceful than a U.S. Air Force attack on the plant akin to the Israeli destruction of an Iraqi facility several years ago.[247]

These efforts, embodied in the Helms-Burton Act, involve the imposition of a financial penalty on any country that supports completion of the Juragua plant.[248] As a penalty, the United States would withhold foreign assistance in an amount equal to the aid given by the third-party country to Cuba to help Castro finish the plant.[249] Once again, however, several categories of U.S. aid could not be cut off: humanitarian aid; aid for the development of a democratic political system, the rule of law, private sector organizations, and a free market system; and certain educational exchange programs.[250]

Interestingly, in passing the Helms-Burton Act, Congress opined that the executive branch had been slack in enforcing existing economic sanctions — most notably the trade embargo — against Cuba.[251] Consequently, a suspicious Congress directed the President to: (1) encourage third-party countries to restrict trade and financial relations with the Cuban regime,[252] (2) apply extant sanctions against countries that assist Cuba,[253] (3) direct that the United States deny visas to officials of the Castro regime or Cuban Communist Party,[254] (4) and encourage the Secretary of State to ensure that all U.S. diplomats posted overseas understand and communicate to their foreign counterparts the reasons for the U.S. economic embargo of Cuba, and encourage them to cooperate with the embargo.[255] While

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[247] *See* Burrus M. Carnahan, *Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War*, 86 AM. J. INT'L L. 524, 525-26 (1992).

[248] *See* 22 U.S.C.A. § 6041(b)(1).

[249] *See id.*

[250] *See id.* § 6041(b)(2).

[251] *See* H.R. REP. NO. 104-202, at 32 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 537 (declaring profound concern that executive branch agencies are not vigorous in enforcing certain provisions of U.S. embargo on Cuba or advocating U.S. policy before foreign governments).

[252] *See* 22 U.S.C.A. § 6032(a)(1); *see also* H.R. REP. NO. 104-202, at 24, *reprinted in* 1996 U.S.C.C.A.N. at 529 (noting need to encourage countries to stop "undermining" U.S. trade embargo against Cuba).

[253] *See* 22 U.S.C.A. § 6032(a)(2), (c).

[254] *See id.* § 6032(e).

[255] *See id.* § 6032(b).

the trade embargo may be ineffectual, there is little to criticize in the aforementioned exhortations in the Helms-Burton Act.

E. Ostracism Sanctions

The "ostracism" sanctions in the Helms-Burton Act are designed to further isolate Cuba from the mainstream of the world trading system. Doing so, according to supporters of the Act, will further tighten the economic noose around the Castro regime.[256] Critics argue that implementing a policy that further isolates Cuba will only help Castro by allowing conditions in Cuba to become much worse than they are today.[257] Moreover, even if isolation eventually topples the Castro regime, it only increases the prospect of violent change and the chances of another mass exodus of refugees to the United States. For these reasons, critics argue, no other government agrees with such a draconian isolationist policy toward Cuba and the policy is destined to fail without the support of foreign governments.[258] Thus, critics contend that the ostracism sanctions paradoxically wind up ostracizing the United States and thereby damage our relations with our trading partners.[259] In this regard, the critics are correct.

The ostracism sanctions are straightforward. Until the President determines that Cuba is run by a democratically elected government, the United States will continue to oppose Cuba's admission into any international financial institution, including the World Bank, International Monetary Fund ("IMF"), and Inter-American Development Bank.[260] Likewise, the United States will continue to oppose any attempt to allow Cuba to once again participate in the Organization of American States ("OAS"). In 1961, the OAS member states voted to suspend Cuba from the OAS[261] until democracy takes root.[262] Proponents of the Helms-Burton Act probably are correct in stating

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[256] *See* H.R. REP. NO. 104-202, at 53, *reprinted in* 1996 U.S.C.C.A.N. at 551.

[257] *See id.*, *reprinted in* 1996 U.S.C.C.A.N. at 552.

[258] *See id.*

[259] *See id.* at 53-54, *reprinted in* 1996 U.S.C.C.A.N. at 552.

[260] *See* 22 U.S.C.A. § 6034(a)(1), (c).

[261] *See* H.R. REP. NO. 104-202, at 33, *reprinted in* 1996 U.S.C.C.A.N. at 538.

[262] *See* 22 U.S.C.A. § 6035.

that "it is inconceivable that any OAS member government would consider Cuba to be worthy of active participation in the OAS without first undertaking fundamental democratic reforms."[263] After all, the OAS has recognized "representative democracy as an indispensable condition for stability, peace, and development."[264]

Whereas exile from the OAS is a diplomatic loss of face for Cuba, exclusion from the World Bank and IMF squeezes Cuba's economy, making it difficult, if not impossible, to obtain development funding. Suppose an international financial institution were to approve a loan or other assistance to Cuba over U.S. opposition. The United States would have to withhold the amount of the loan or other assistance from that institution by not contributing to its capital stock.[265] Here, domestic opponents of the Act have a valid concern: withholding funds from the World Bank, IMF, or other international financial institution undermines U.S. leadership of those institutions and consumes precious goodwill toward the United States in those institutions.[266]

F. Trafficking Sanctions

By far the most controversial provisions in the Helms-Burton Act concern trafficking in confiscated property of U.S. nationals. The United States has the sovereign prerogative to give or withhold assistance from individual foreign countries on political grounds, and even from international financial institutions. These sanctions may be unwise because the breaching of commitments fosters ill will. The United States also has the sovereign prerogative to attempt to ostracize Cuba because of its government, though this sanction may be unwise; constructive engagement, which the United States has used in the past against China,[267] may be more effective. Critics of the Helms-

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[263] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 562.

[264] *Id.*

[265] *See* 22 U.S.C.A. § 6034(b) (stating that Secretary of Treasury shall not pay any institution that approves loans or other assistance to Cuba over opposition).

[266] *See* H.R. REP. NO. 104-202, at 53-54, *reprinted in* 1996 U.S.C.C.A.N. at 552 (dissenting views).

[267] *See* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of*

Burton Act consider the imposition of severe civil money damages for trafficking in confiscated property of U.S. nationals to be illegitimate.[268] Equally obnoxious is a denial of entry to the United States because of a tenuous connection to trafficking in confiscated property.

In contrast, to supporters of the Act, the trafficking provisions are rationally calculated or, in the words of the legislative history, "unique but proportionate"[269] measures "intended primarily to create a 'chilling effect.'"[270] "This 'chilling effect' should deny the current Cuban regime venture capital, discourage third-party country nationals from profiting from illegally confiscated property, and help preserve such property until such time as the rightful owners can successfully assert their claim."[271] Further, liability for trafficking exists only after the end of a three-month grace period beginning on the date on which the trafficking provision takes effect.[272] Originally, that date was August 1, 1996,[273] but because President Clinton suspended the application of the trafficking provision,[274] presumably this grace period will not begin to run until the United States lifts the suspension. Accordingly, supporters could contend this liability will hardly come as a surprise to defendants if the threat of liability becomes a reality.

Human Rights on Business Investors in China, 14 NW. J. INT'L L. & BUS. 66, 73-82 (1993) (discussing U.S. policy of constructive engagement towards China).

[268] *See* Peter Morici, *The United States, World Trade, and the Helms-Burton Act*, CURRENT HIST., Feb. 1997, at 87 (stating that Helms-Burton would be difficult to defend under international law).

[269] H.R. REP. NO. 104-202, at 39, *reprinted in* 1996 U.S.C.C.A.N. at 544; *see also* H.R. CONF. REP. NO. 104-468, at 58, *reprinted in* 1996 U.S.C.C.A.N. at 573 (describing right of action as unique but proportionate remedy for U.S. nationals who were targeted by Castro regime when their property was wrongfully confiscated).

[270] H.R. REP. NO. 104-202, at 25, *reprinted in* 1996 U.S.C.C.A.N. at 530; *see also* H.R. CONF. REP. NO. 104-468, at 58, *reprinted in* 1996 U.S.C.C.A.N. at 573 (explaining that one purpose of civil remedy is to discourage persons and companies from engaging in commercial transactions in confiscated property). A civil remedy also deters the exploitation of property confiscated from U.S. nationals. *See id.*

[271] H.R. REP. NO. 104-202, at 25, *reprinted in* 1996 U.S.C.C.A.N. at 530.

[272] *See* 22 U.S.C.A. § 6082(a)(1)(A) (West Supp. 1997).

[273] *See id.* § 6085(a).

[274] *See* Pascal Fletcher, *Israelis Press Ahead with Cuba Venture*, FIN. TIMES, Sept. 22, 1997, at 6.

1. Civil Liability for Trafficking

a. The Scope and Amount of Liability

The statement of civil liability in the Helms-Burton Act is straightforward, sweeping, and applies both retroactively and prospectively:[275] "*any* person that . . . *traffics* in *property* . . . confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any *United States national* who owns the claim to such property."[276] Moreover, the alleged trafficker cannot use what may in some cases be an obvious defense: the act of state doctrine.[277] It is critical to understand that this statement in the Act creates a private right of action for U.S. nationals against traffickers. Such a right is rare in U.S. unilateral international trade action statutes.

Any one of four adjustments to this sweeping statement of liability — modifications to the meaning of "any," "property," "United States national," or the amount of liability — might have rendered the trafficking sanction far less fearsome and,

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[275] *See id.* § 6082(a)(4)(A) (clarifying that actions can be brought regarding property confiscated before, on, or after enactment date of Helms-Burton Act). Various requirements concerning procedures for filing of claims and the election of remedies are set forth in 22 U.S.C.A. § 6082(c), (f)(1) and discussed in H.R. REP. NO. 104-202, at 41, *reprinted in* 1996 U.S.C.C.A.N. at 546.

[276] 22 U.S.C.A. § 6082(a)(1)(A) (emphasis added); *see also* H.R. REP. NO. 104-202, at 40, *reprinted in* 1996 U.S.C.C.A.N. at 545 (summarizing liability for trafficking). As required by the Act, the Attorney General has published a summary of this liability provision. *See* 22 U.S.C.A. § 6082(a)(8); Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996).

The Foreign Claims Settlement Commission issues certificates of a claim of ownership of an interest. In any action brought under the Helms-Burton Act, a court must accept the certificate as conclusive proof of ownership of an interest of property. *See* 22 U.S.C.A. § 6083(a)(1). This Commission was established under the International Claims Settlement Act of 1949, 22 U.S.C. § 1643 (1994). If a Helms-Burton case involves an uncertified claim, the court may appoint a special master (including the Foreign Claims Settlement Commission) to determine the ownership and amount of the claim. *See id.* § 6083(a)(2). In addition, a court will accept as conclusive evidence of ownership or amount a determination as to the validity of a claim or its amount by an international arbitrator where the United States or the claimant submitted the matter for binding arbitration. *See id.* § 6083(a)(3). However, determinations of foreign courts or decrees of foreign administrative agencies are not conclusive evidence of the ownership or amount of a claim. *See id.* The provisions regarding proof of ownership claims to confiscated property are discussed in JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 63-64 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 578-79.

[277] *See* 22 U.S.C.A. § 6082(a)(6).

hence, far less controversial than it is. However, in each case Congress declined to narrow the sanction and thereby defuse some of the controversy it has generated.

First, for example, if only Americans were held liable, then the traffic sanction would hardly raise an eyebrow. Further, critics of the Helms-Burton Act might not have minded if, along with Americans, only officials of the Castro government and Communist Party members were held liable. However, the word "any" in the liability provision, without limitation in the statute or legislative history, obviously puts all foreigners at risk.

Second, if liability likewise pertained to only a narrow class of property interests, then perhaps the sanction would not be so controversial, as it would have little practical effect. However, the broad definition of "property", which includes all real and personal property, securities, intellectual property, and all present and future interests,[278] eliminates this possibility.

Third, if the term "United States national" expressly excluded Cuban-Americans whose property was confiscated before they became U.S. citizens, this limitation would reduce the practical effect of the traffic sanction. But because the definition includes any U.S. citizen, and any entity whose principal place of business is in the United States, this limitation also is excluded. Congress estimates that thousands of U.S. nationals can substantiate a valid claim to Cuban property in a U.S. court.[279] Approximately 6000 U.S. citizens and businesses with outstanding claims against confiscated property in Cuba have filed their claims with the Foreign Claims Settlement Commission; an additional 15,000 U.S. nationals have not filed claims with the Commission but also have had commercial property confiscated in Cuba.[280] Whatever the exact figure, it is clear that the potential number of private rights of action is staggering.

The fourth and final modification that Congress could have made, but did not, concerns the amount of liability. Suppose the civil money damages imposed for violating the trafficking

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[278] *See id.* § 6023(12).

[279] *See* H.R. REP. NO. 104-202, at 39, *reprinted in* 1996 U.S.C.C.A.N. at 544.

[280] *See id.* at 43-45, *reprinted in* 1996 U.S.C.C.A.N. at 549-51 (letter from James L. Blum, Director, Congressional Budget Office, to Hon. Benjamin A. Gilman, Chairman, House Committee on International Relations, July 24, 1995) (discussing benefits of strengthening sanctions against Cuba).

sanction were so insignificant that potential defendants regarded them as merely a cost of doing business. Here too, perhaps no one would care about the sanction because it would amount to a right without a remedy. But, once again, the Helms-Burton Act's language eliminates this possibility. The amount of the liability is the largest of three possible values, plus court costs and reasonable attorneys' fees:[281] (1) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission, plus interest;[282] (2) for an uncertified claim, the amount determined by a court-appointed special master, plus interest;[283] and (3) the fair market value of the property, determined by the greater of the current value, or the value when calculated, plus interest.[284] An amount in controversy less than $50,000, exclusive of interest, costs, attorneys' fees, and treble damages, is deemed de minimis and, therefore, not actionable.[285] Property used for accredited diplomatic purposes is immune from attachment and execution of a judgment under the trafficking sanction.[286] Similarly, a judgment cannot be enforced against the property of a transition or democratically elected government in Cuba.[287]

Treble damages are available to a claimant in two instances, making the specter of liability particularly fearsome. First, if the value used to determine liability is the amount certified to the claimant by the Foreign Claims Settlement Commission, then the claimant may recover treble damages.[288] In light of the re-

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[281] *See* 22 U.S.C.A. § 6082(a)(1)(A)(i)-(ii).

[282] *See id.* § 6082(a)(1)(A)(i)(I). Interest is computed at a statutory rate set forth in 28 U.S.C. § 1961 (1994) from the date of confiscation until the date on which the action is brought. *See id.* § 6082(a)(1)(B).

[283] *See id.* §§ 6082(a)(1)(A)(i)(II), 6083(a)(2); *see also supra* note 282 (defining computation of interest).

[284] *See id.* § 6082(a)(1)(A)(i)(III); *see also supra* note 282 (defining computation of interest).

[285] *See id.* § 6082(b).

[286] *See* 28 U.S.C.A. § 1611(c) (West Supp. 1997).

[287] *See* 22 U.S.C.A. § 6082(d); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468 (1996), at 61, *reprinted in* 1996 U.S.C.C.A.N. 558, 576.

[288] *See* 22 U.S.C.A. § 6082(a)(3)(A), (C)(ii). In the event the United States were to enter into an agreement with Cuba settling claims to confiscated property, certified claimants who had recovered an amount equal to or greater than the amount of their certified claim would not be entitled to any further recovery under the agreement. Claimants who,

buttable presumption that the certified amount should be used to calculate liability, a trafficker is potentially exposed to significant liability.[289] Second, suppose a U.S. national with an uncertified claim learns that a person is about to traffic in that claimant's confiscated property. The claimant should give written notice of his or her intention to commence an action, and demand that the unlawful trafficking cease.[290] Nonetheless, the person traffics in the property. In this instance, the claimant is eligible to recover treble damages for what amounts to a brazen and willful violation of the trafficking sanction.[291]

The distinction between the two classes of potential defendants subject to treble damages is significant. As suggested above, a non-certified claimant cannot institute an action seeking treble damages against the defendant until thirty days after written notice has been provided; this thirty-day period runs from the date on which the claimant posts the notice or delivers it personally to the defendant.[292] During this thirty-day grace period, a cautious defendant will immediately cease trafficking in confiscated property, use the thirty days to research the validity of the plaintiff's claim, and decide upon a course of action. If the defendant ceases trafficking by the conclusion of the thirty-day period, then the defendant can avoid treble damage liability.[293] However, the defendant remains liable, under the normal liability amount rule, for trafficking that occurred between the end of the three-month grace period following the Act's effective date and the time the trafficking ceased.[294] In contrast, a plaintiff with a certified claim is not obligated to give any

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in a Helms-Burton action, recovered less than the amount of their certified claim could recover the balance under the agreement. *See id.* § 6082(f)(2)(A)(i)-(iii).

[289] *See id.* § 6082(a)(2). It is also noteworthy that if actions brought under the Helms-Burton Act are consolidated to satisfy claims, including in the context of a bankruptcy proceeding, U.S. nationals holding claims whose amounts have been certified by the Foreign Claims Settlement Commission are entitled to full payment before any other claimant. *See id.* § 6082(f)(2)(B).

[290] *See id.* § 6082(a)(3)(D)

[291] *See id.* § 6082(a)(3)(B)-(C).

[292] *See* H.R. CONF. REP. NO. 104-468, at 58-59, *reprinted in* 1996 U.S.C.C.A.N. at 573-74.

[293] *See* 22 U.S.C.A. § 6082(a)(3)(B); H.R. CONF. REP. NO. 104-468, at 58, *reprinted in* 1996 U.S.C.C.A.N. at 573.

[294] *See* H.R. CONF. REP. NO. 104-468, at 58, *reprinted in* 1996 U.S.C.C.A.N. at 573 (discussing civil remedy for trafficking).

advance notice to the defendant before commencing an action seeking treble damages. Consequently, a defendant against a certified claimant cannot benefit either from the additional thirty-day grace period or the consequent opportunity to avoid treble damage liability.

This distinction creates an obvious priority for certified claimants. While at first glance this distinction may appear unfair, it is entirely defensible. The legislative history indicates that since the Cuban claims program ended on July 6, 1972, claimants have effectively put Cuban investors on notice of 5911 certified U.S. claims and "[i]nformation regarding whether the claim to a particular property in Cuba . . . held by a certified U.S. claimant is readily available."[295] Conversely, it is only fair that non-certified claimants bear an affirmative duty to provide notice to potential defendants before seeking treble damages; these defendants are unlikely to have a formal and reliable informational mechanism available to them to check whether the property in question was confiscated.

To be sure, five relevant safeguards ensure that opportunists do not abuse the liability for trafficking. First, a U.S. national cannot bring a claim regarding property confiscated before the enactment date of the Helms-Burton Act — March 12, 1996 — unless the national acquired the claim before this date.[296] Otherwise, a secondary market in ownership claims to pre-enactment confiscated property might arise. Second, a U.S. national cannot bring a claim regarding property confiscated on or after March 12, 1996, if the national acquired the claim after the confiscation.[297] Again, a secondary market in ownership claims might arise. Third, neither a U.S. national who could have, but failed

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[295] *See id.* at 59, *reprinted in* 1996 U.S.C.C.A.N. at 574.

[296] *See* 22 U.S.C.A. § 6082(a)(4)(B); H.R. REP. NO. 104-202, at 40 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 545.

[297] *See* 22 U.S.C.A. § 6082(a)(4)(C). Note that the legislative history to 22 U.S.C.A. § 6082(a)(4)(C) incorrectly states that the relevant date by which a U.S. national must have acquired a claim is the date of enactment. *See* H.R. REP. NO. 104-202, at 40, *reprinted in* 1996 U.S.C.C.A.N. at 545-46. 22 U.S.C.A. § 6082(a)(4)(C) logically requires the national to acquire ownership of the claim to the property before the date of confiscation. *See* H.R. CONF. REP. NO. 104-468, at 59, *reprinted in* 1996 U.S.C.C.A.N. at 574 (stating that "with respect to property confiscated on or after the date of enactment . . . an action for damages is precluded only if the claim to the property was acquired by assignment for value after the property was *confiscated*" (emphasis added)).

to, file a claim with the Foreign Claims Settlement Commission,[298] nor a national who did file such a claim but whose claim was rejected by the Commission, may recover under the Helms-Burton Act.[299] Fourth, there is a two-year statute of limitations calculated from the date trafficking has ceased.[300] The fifth safeguard, clarified by the legislative history, concerns "persons or entities that would relocate to the United States for the purpose of using" the trafficking remedy.[301] These opportunists could seek to become "United States nationals" after the date of enactment of the Helms-Burton Act, by incorporating in the United States. However, they are not eligible to make a claim on property confiscated before the date of enactment.[302]

Notwithstanding the above safeguards, the scope and amount of liability for trafficking in confiscated property is broad and, therefore, more controversial because of the terms "any," "property," and "United States national," and because of the potential to recover treble damages. Accordingly, in the sweeping statement of liability quoted at the outset, only the definition of the term "traffic" provides hope to critics of the Helms-Burton Act that the traffic sanction might be narrow and less controversial. The hope is dashed immediately, however, by the broad definition of the term "traffic." A person, entity, or foreign government[303] traffics in confiscated property:

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[298] *See* 22 U.S.C.A. § 6082(a)(1)(A); H.R. REP. NO. 104-202, at 41, *reprinted in* 1996 U.S.C.C.A.N. at 546.

[299] *See* 22 U.S.C.A. § 6082(a)(5)(A)-(B).

[300] *See id.* § 6084; *see also id.* § 6082(a)(5)(C) (prohibiting U.S. national with uncertified claim from bringing action before two years from date of enactment of Helms-Burton Act, *i.e.*, March 12, 1998); *id.* § 6082(h) (concerning suspension and termination of rights upon overthrow of Castro). Regarding 22 U.S.C.A. § 6082(a)(5)(C), an interesting question arises as to whether President Clinton's suspensions of the operation of the trafficking sanction also suspends the prohibition. On the one hand, the President's suspensions affect the entire trafficking sanction, thus suggesting the prohibition is pushed out into the future by the amount of time of the suspensions. On the other hand, Congress was aware of the possibility of one or more suspensions when it wrote this prohibition, and it nonetheless fixed the date as two years from the date of enactment. The latter argument gives full effect to both the suspension and prohibition sections and, thus, seems more appealing than the first argument. Note that the date of enactment is different from the effective date of the Act, which was August 1, 1996. *See id.* § 6085(a).

[301] *See* H.R. CONF. REP. NO. 104-468, at 59, *reprinted in* 1996 U.S.C.C.A.N. at 574 (discussing intended applicability of title and amendments with regard to proper parties).

[302] *See id.*

[303] *See* 22 U.S.C.A. § 6023(11) (defining person as individual, business entity, and gov-

> if that person knowingly and intentionally —
>
> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefitting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.[304]

Aside from the mens rea requirement,[305] that a person must both know she is trafficking and intend to do so, there are precious few exceptions to this definition.

Delivering telecommunications signals to Cuba, however, is one exception to trafficking.[306] This exception ensures that persons can communicate with family, friends, and business contacts in Cuba and allows for the transmission of American television and radio programs to Cuba.[307] This exception includes, of course, Radio and Television Marti as discussed in other provisions of the Helms-Burton Act.[308]

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ernment).

[304] *Id.* § 6023(13)(A).

[305] The term "knowingly" is defined as "knowledge or having reason to know." *Id.* § 6023(9). The Act does not define "intentionally."

[306] *See id.* § 6023(13)(B)(i)-(ii) (stating that term "traffics" does not include delivery of international telecommunications signals to Cuba or trading or holding of securities).

[307] *See id.* § 6023(13)(B)(i) (stating that term "traffic" does not include delivery of telecommunication signals to Cuba); *see also id.* § 6037(a) (directing United States Information Agency to convert television broadcasting to Cuba under Television Marti Service).

[308] *See id.* § 6021(7) (observing that Radio and Television Marti have been "effective vehicles for providing the people of Cuba with news and information and have helped bolster the morale of the people of Cuba living under tyranny"); *id.* § 6037 (converting Television Marti to ultra high frequency ("UHF") broadcasting so it is accessible to larger number of Cubans); *id.* § 6044 (authorizing President to establish exchange of news bureaus between United States and Cuba if, inter alia, Cuban Government agrees not to interfere with movement in Cuba of journalists working for Radio or Television Marti); *id.* § 6065(a)(5) (listing cessation of interference with Radio or Television Marti broadcasts as

Holding or trading publicly-traded securities also does not constitute trafficking.[309] The securities exception is important for investors who purchase shares in companies that may traffic in confiscated property or who purchase shares in mutual funds that, in turn, hold the stocks of such companies. The trafficking sanctions are designed to hit the company that traffics in the confiscated property, but not the individual investor or mutual fund that buys stock in that company.[310]

Transactions and uses of property incident to lawful travel to Cuba are also excluded from the definition of trafficking.[311] This exception makes it logistically possible to travel to Cuba. One can hardly expect to stay in Cuba for more than a day without taking sufficient funds and a suitcase of appropriate personal belongings. It is not clear, however, how far this exception extends. Would it, for instance, cover a businessperson's marketing literature or commercial samples? The exception to trafficking also protects innocent Cubans. The Act does not deem a Cuban citizen and resident who is not an official in the Castro government or Communist Party, but who transacts in or uses confiscated property, to be trafficking in such property.[312]

Notwithstanding these exceptions, the breadth of this definition means that the reach of the Helms-Burton Act extends far beyond U.S. shores. Here lies the heart of the criticism of the Helms-Burton Act: it is an illegitimate extraterritorial extension of American enforcement jurisdiction. For example, a transaction in confiscated property between a Singaporean and French company negotiated, consummated, and performed outside the United States, involving no U.S. parties, and completed in a currency other than U.S. dollars, is snared by the definition of

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one criterion for Presidential determination that government is "transition government in Cuba"); *see also* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 49 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 564 (discussing conversion of Television Marti to UHF).

[309] *See* 22 U.S.C.A. § 6023(13)(B)(i)-(ii) (stating that term "traffics" does not include delivery of international telecommunications signals to Cuba or trading or holding of securities).

[310] *See id.* § 6023(13)(B)(i) (declaring that term "traffic" does not include trading or holding securities publicly traded or held, unless Secretary of Treasury determines person trading is specially designated national).

[311] *See id.* § 6023(13)(B)(iii).

[312] *See id.* § 6023(13)(B)(iv).

"traffic" and is, therefore, subject to sanction. Clause (i) of the Act's definition of the term "traffic" makes clear that the transaction could take virtually any form, regardless of the label the Singaporean and French companies attach to the contract documents.[313] Clause (iii) of the definition denies these companies certain defenses: namely, they dealt in confiscated property only indirectly, they dealt through another party, or they happened to profit from such dealing but did not themselves handle the property.[314]

Indeed, various third parties may be ensnared by clause (iii). Suppose the Singaporean company pays the French company 100 million pounds sterling in the confiscated property transaction by means of a wire transfer through Barclays Bank in London. Barclays Bank earns a fee for processing the wire transfer. Subsequently, the Singaporean company deposits profits it earns from the confiscated property in National Westminster Bank in London. National Westminster earns fees and generates new business as a result of handling the Singaporean company's account. Are Barclays and National Westminster liable under the phrase in clause (iii) that they have participated in, or profited from, trafficking by another person? Certainly, if they did so "knowingly and intentionally," then an aggressive plaintiff might seek to hold them liable.

Certain terms in the definition of trafficking render its potential breadth uncertain, thus causing both fear and resentment among foreign businesses and governments. The term "commercial activity" in clause (ii) of the definition of trafficking relies on a definition of this term set forth in title 28 of the United States Code.[315] Nevertheless, there may be some ambiguities. Would commercial activity include generic advertising or promotion of a business enterprise without express reference to confiscated property? Would it include marketing free services, or

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[313] *See id.* § 6023(13)(A)(i).

[314] *See id.* § 6023(13)(A)(iii).

[315] *See id.* § 6023(3) (referring to 28 U.S.C. § 1603 (d), which defines "commercial activity" as regular course of business conduct or specific transaction or commercial act). The definition examines the nature of the conduct, not the purpose of the conduct. *See* 28 U.S.C. § 1603(d) (1994).

seeking volunteers to provide services? In other words, how specific must the link be between the action and the confiscated property to be considered a commercial activity?

b. The Problem of Extraterritoriality

The above hypothetical suggests a loose analogy between the anti-trafficking provisions and general time-honored criminal law principles. These provisions may be thought of as a global scale civil statute against both the receipt of stolen property and laundering the resulting proceeds. The underlying unlawful activity is knowing or intentional receipt of suspected stolen property — stolen by Castro, of course. The derivative unlawful act is any knowing or intentional involvement in transactions involving the stolen property, which includes laundering profits garnered from business dealings using this property. After all, the analogous criminal law principles are familiar, so the anti-trafficking provisions are consistent with accepted legal concepts.[316]

The problem with the broad reach of these Helms-Burton Act concepts is the resulting global ramifications. In anticipation of the hue and cry from foreign governments, the United States defends the extraterritorial reach of the anti-trafficking provisions in the Act itself. The Act provides a private judicial remedy to U.S. nationals whose property is wrongfully confiscated by foreign nations or their citizens.[317] This defense is adapted al-

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[316] *See* Malcolm Wilkey, *Helms-Burton: Its Fundamental Basis, Validity, and Practical Effect*, 26 A.B.A. INT'L L. NEWS 1, 1 (1997).

[317] *See* 22 U.S.C.A. § 6081. Congress made the following findings:

> (8) The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.
>
> (9) *International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.*
>
> (10) The United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.
>
> (11) To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny

most verbatim from the public international law doctrine of extraterritoriality set forth in section 402(1)(c) of the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*.[318] Section 402(1)(c) provides that a legitimate basis of jurisdiction is the effects principle, which holds that "a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory."[319] Yet, this statement is an American principle, and not universally accepted.[320] Other countries resist and resent an aggressive American use of this principle, and it raises howls of legal imperialism, perhaps rightfully so.

2. The Wisdom of Imposing Liability for Trafficking

Even if the United States can legitimately assert extraterritorial jurisdiction, the wisdom of imposing civil liability for trafficking in confiscated property must be questioned on three grounds. First, if the ultimate goal of the Helms-Burton Act is to overthrow Castro, this liability might not facilitate this goal. The specter of liability means that potential investors in Cuba could never be sure whether a U.S. citizen or an entity incorporated in the United States could claim a piece of property.[321] Therefore, the very investors needed to promote the development in Cuba of a free market economy and pluralistic democracy "will be skittish about making financial commitments."[322]

Second, if other countries were to impose a rule against trafficking in confiscated property, then it might be more difficult

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> traffickers any profits from economically exploiting Castro's wrongful seizures.

Id. (emphasis added).

[318] *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

[319] *Id.*

[320] *See id.* § 402 cmt. d (admitting that "[c]ontroversy has arisen as a result of economic regulation by the United States," and that *Restatement* is taking position in controversy); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 308-09 (4th ed. 1990) (discussing strong reaction from large number of foreign governments to American policies concerning extraterritorial enforcement measures).

[321] *See* H.R. REP. NO. 104-202, at 55-56 (1995), *reprinted in* 1996 U.S.C.C.A.N. 527, 554 (dissenting views) (discussing uncertainty bill creates regarding foreign property and American investors).

[322] *See id.*

for Americans to protect their overseas investments in countries other than Cuba. Suppose a former communist bloc country, such as Bulgaria, enacted a liability rule similar to that in the Helms-Burton Act. Bulgarians could then sue American investors in Bulgarian courts over any investment in a disputed property — a property in which a Bulgarian held an ownership claim. As a result, "no bilateral property agreement would be safe from subsequent litigation."[323] In contrast to imposing liability for trafficking, international commercial arbitration under an accepted set of rules and procedures would effectively resolve disputed property claims in overseas investments and, thus, avoid an upward spiral of litigation in individual countries.

Finally, imposition of liability for trafficking in property confiscated in Cuba exalts the claims of former Cuban property owners over the claims of all others who have experienced confiscation in third-party countries. There is absolutely no reason to believe "those who lost property in Cuba are more deserving than those who lost property in Germany, Eastern Europe, Vietnam, or Russia."[324] In brief, the Helms-Burton Act liability provision is unequal justice.

While the third criticism is theoretically appealing, it is at least partly rebutted by two practical facts. First, the United States is not trying to overthrow governments in Germany, Eastern Europe, Vietnam, or Russia. The previous regimes that were anathema to U.S. national security interests have long since been replaced by governments that, to one degree or another, attract political sympathy and economic assistance.[325] In addition, those persons who lost property in Cuba represent a uniquely solid and vocal block of voters, particularly in Florida, a state rich with electoral college votes.[326] Certainly a candidate

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[323] *Id.*

[324] *Id.* at 55, *reprinted in* 1996 U.S.C.C.A.N. at 553.

[325] *See id.* at 54-55, *reprinted in* 1996 U.S.C.C.A.N. at 553 (commenting on painful transition to democracy in Russia and Eastern Europe).

[326] *See* Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 914-15 (1995) (noting that both candidates in 1992 presidential election proclaimed support for Cuban Democracy Act in response to block of influential voters in Florida that appeared to dictate U.S. policy toward Cuba).

as politically shrewd as President Clinton was aware of this fact when he sought re-election in 1996.

G. Exclusion from Entry into the United States

An essential feature of sovereignty is that a nation is able to control its borders.[327] Logically, the United States has the right to exclude any person or class of persons it chooses from entry into the United States. In the Helms-Burton Act, the United States has chosen to exclude

> any alien who the Secretary of State determines is a person who, after March 12, 1996 —
>
> (1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a United States national, or converts or has converted for personal gain confiscated property, a claim to which is owned by a United States national;
>
> (2) traffics in confiscated property, a claim to which is owned by a United States national;
>
> (3) is a corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national; or
>
> (4) is a spouse, minor child, or agent of a personal excludable under paragraph (1), (2), or (3).[328]

The exclusion rule is mandatory: subject to three exceptions, the U.S. Secretary of State[329] must deny an entry visa to anyone in the above four categories, and the Attorney General must exclude anyone in these categories from the United States.[330]

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[327] *See* James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 419 (1994) (supporting fundamental notion that sovereignty controls borders).

[328] 22 U.S.C.A. § 6091(a) (West Supp. 1997). For purposes of excluding aliens, the terms "confiscated" and "traffics" are defined in 22 U.S.C.A. § 6091(b)(1)-(2), respectively. These definitions are very similar to the definitions of these terms quoted and discussed earlier. *Compare id.* § 6023(4), (13) *with id.* § 6091(b)(1), (2) (highlighting identical language for definitions of terms "confiscated" and "traffics").

[329] *See* H.R. REP. NO. 104-202, at 57, *reprinted in* 1996 U.S.C.C.A.N. at 555 (dissenting views) (stating consular official's actual job is to prevent undesirable persons from obtaining visas).

[330] *See* 22 U.S.C.A. § 6091(a) (using phrases "*shall* deny a visa" and "*shall* exclude" (em-

Moreover, Congress asserts in the legislative history that this exclusion rule is not an idle threat. It "expects the Departments of State and Justice to enforce these restrictions vigorously and, at the very least, to immediately incorporate [*sic*] the names of all persons known to U.S. embassies and other agencies" who come within the categories of excludable persons into "computerized records that are regularly consulted by consular officials when issuing visas."[331]

The far-reaching scope and, to critics, the obnoxious nature, of the Helms-Burton Act is evident from the third and fourth categories of excludable aliens. Consider this hypothetical: a woman is an assistant vice president (one of a hundred assistant vice presidents) in a Malaysian plantation company involved in a joint venture with an Australian agribusiness to cultivate pineapples in Cuba. Her husband is a law professor at the University of Malaya in Kuala Lumpur, and they have a two-year-old daughter. In 1960, the Castro regime confiscated the land on which the pineapples are now cultivated. The regime seized the land from a Cuban who has since escaped to Miami and become a U.S. citizen. The acts of trafficking (for example, the export of pineapples from the property) occurred after the date of enactment of the Helms-Burton Act. The assistant vice president did not choose the property in Cuba where the pineapples grow. Rather, other corporate officers in her company were responsible for site selection as well as for the associated contract negotiations between the Malaysian and Australian companies and the Cuban government. Suppose further that the assistant vice president and her law professor husband have a twenty-two-year-old nephew graduating from the College of William & Mary in Williamsburg, Virginia. Accordingly, she and her husband apply for a visa to enter the United States and attend the William & Mary graduation ceremony. Under clause (3) of the exclusion rule, the Malaysian assistant vice president must be denied entry into the United States. Under clause (4), her law professor husband and baby girl must be denied entry into the United States. This result is, plainly, obnoxious. The exclusion rule "is so

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phasis added)).

[331] H.R. REP. NO. 104-202, at 42, *reprinted in* 1996 U.S.C.C.A.N. at 548.

broadly written that it would capture *entirely innocent people.*"[332] Indeed, because of earlier actions taken by others, the rule may punish people who follow all applicable local laws when purchasing property.[333]

To be sure, this criticism is overstated because it implies that the exclusion rule creates strict liability. Regarding the second category of excludable aliens, a mens rea requirement exists. While the plain language of the exclusion rule does not require a person to have engaged in the proscribed conduct in a knowing or intentional manner, the definition of the term "traffics" contains an intent requirement that is applicable to the exclusion provisions.[334] Because the third category of excludable aliens uses the term "trafficking," it also contains the same mens rea requirement. Likewise, because the fourth category incorporates the second and third categories by reference, the fourth category contains this requirement insofar as the excluded person is a spouse, minor child, or agent of a person listed in the second or third categories. Only the first category eschews use of the term "traffics," focusing instead on the initial confiscation of property. Consequently, as a technical matter, there is no mens rea requirement for a person in the first category, or for the spouse, minor child, or agent of a person in the first category. In practice, however, it is hard to imagine confiscation of property that is not knowing or intentional.

If the hypothetical is altered slightly to involve a Canadian or Mexican businessperson, the objectionable result in the above hypothetical of the Malaysian businesswoman and her family may well violate the North American Free Trade Agreement ("NAFTA"). The Mexican and Canadian governments could argue that the exclusion rule violates NAFTA which limits the restrictions countries can place on business travel.[335] Here too,

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[332] *Id.* at 57, *reprinted in* 1996 U.S.C.C.A.N. at 555 (dissenting views) (emphasis added).

[333] *See id.*

[334] *See* 22 U.S.C.A. § 6091(b)(2)(A); H.R. REP. NO. 104-202, at 42, *reprinted in* 1996 U.S.C.C.A.N. at 547 (explaining that alien must "knowingly and intentionally traffic" in confiscated property for alien to be excluded).

[335] *See* H.R. REP. NO. 104-202, at 57, *reprinted in* 1996 U.S.C.C.A.N. at 555 (dissenting views). The opponents of the Act argue that the exclusion rule violates NAFTA and the Uruguay Round Trade Agreement, which allow countries to restrict business travel only for public health and national security reasons.

the criticism is somewhat overstated. It assumes that U.S. national security concerns are entirely without merit.

Critics of the Helms-Burton Act would have fewer provisions to attack if Congress had been more judicious in choosing the categories of aliens it sought to exclude from the United States. Yet the statute sets forth only three grounds for excepting an alien from the exclusion rule: when trafficking is ongoing, but not new or different from the original trafficking acts that occurred before March 12, 1996, the date of enactment;[336] a finding by the Secretary of State that the person needs medical treatment in the United States;[337] or a finding by the Secretary of State that the person needs to appear in federal district court to answer an accusation of trafficking in confiscated property of a U.S. national.[338]

When he signed the Helms-Burton Act, President Clinton carved out a fourth exception to the exclusion rule: the Act cannot restrict diplomats traveling to the United States or the United Nations.[339] Curiously, the legislative history to the Helms-Burton Act indicates that an alien will not be excluded if the Secretary of State finds that admission "is in the national interests of the United States."[340] However, nothing in the statute's plain language, or even a liberal interpretation of this language, supports a national interests exception from the exclusion rule.

As a practical matter, perhaps the most potent criticism of the exclusion rule concerns its enforceability. Critics of the Helms-Burton Act rightly point out that the exclusion rule complicates

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> This is not a theoretical concern. . . . [A]n executive for a Canadian company could be barred from entering the United States because his or her company had some involvement with confiscated property in the 1960s — perhaps before the executive was born. The Canadian and Mexican Governments consider this provision to be a violation of NAFTA, and have said they will initiate dispute-settlement proceedings against the United States if it is enacted.

Id.

[336] *See* 22 U.S.C.A. § 6091(d)(2); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 104-468, at 66 (1996), *reprinted in* 1996 U.S.C.C.A.N. 558, 581.

[337] *See* 22 U.S.C.A. § 6091(c).

[338] *See id.*

[339] *See* Statement by President of the United States, *supra* note 168, at 479.

[340] H.R. REP. NO. 104-202, at 42, *reprinted in* 1996 U.S.C.C.A.N. at 547-48.

the issuance of visas because consular officials will have to make visa decisions without the benefit of complete information on those confiscated property transactions.[341] The Immigration and Naturalization Service ("INS") would have an unbelievably complex task to organize a thorough, up-to-date, and secure computer database accessible to all U.S. consular officials worldwide. No doubt Congress had this type of database in mind when it enacted the exclusion rule. Even if the database existed, the exclusion rule would require U.S. consular officers to ask every visa applicant everywhere in the world new questions:

> [The exclusion rule] is not limited to Cuban property issues — it applies to property issues worldwide. A consular officer will have to ask all visa applicants:
>
> > Have you ever bought property?
> > Can you prove that the person you bought it from did not confiscate it from someone else?
> > Can you prove that the person they bought it from did not confiscate it from someone else?
> > Are you a principal shareholder in a company that owns property? If so where is it, who owned it before, and can you prove it wasn't confiscated?
>
> The questions go on and on. No matter what the answers, the consular officer will have no basis for evaluating the information provided — and no ability to enforce the law.[342]

The criticism that the exclusion rule is unenforceable[343] is especially poignant in light of other, arguably more important, demands on consular and INS officials. Both are overwhelmed by the task of stemming the flow of illegal aliens, drug traffickers, convicted felons, and terrorists into the United States.[344] Attempting to enforce the Helms-Burton exclusion rule seems an imprudent allocation of consular and immigration resources.

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[341] *See id.* at 55, *reprinted in* 1996 U.S.C.C.A.N. at 553 (dissenting views).

[342] *Id.* at 56-57, *reprinted in* 1996 U.S.C.C.A.N at 555 (dissenting views).

[343] *See id.*

[344] *See id.*

IV. FIGHTING THE MULLAHS[345] AND QADDAFI: THE 1996 SANCTIONS ACT

A. The Purpose of New Sanctions Against Iran and Libya

National security is the obvious stated purpose behind the 1996 Sanctions Act.[346] As President Clinton summed up when signing the legislation, Iran and Libya are "two of the most dangerous sponsors of terrorism in the world."[347] Moreover, each country is widely reputed to be seeking the acquisition of nuclear, biological, and chemical weapons. The aggressive language of the congressional findings in sections 2 and 3 of the Act reveals the perceived national security threats with respect to Iran and Libya:

> Sec. 2. Findings.
> (1) The efforts of the Government of Iran to acquire weapons of mass destruction and the means to deliver them and its support of acts of international terrorism *endanger the national security* and foreign policy interests of the United States . . . .
> . . . .
> (4) The failure of the Government of Libya to comply with Resolutions 731, 748, and 883 of the Security Council of the United Nations, its support of international terrorism, and its efforts to acquire weapons of mass destruction constitute a threat to international peace and security that *endangers the national security* and foreign policy interests of the United States . . . .

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[345] A mullah is an Islamic teacher and religious leader. *See* WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 1484 (3d ed. 1993).

[346] Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C.A. § 1701 note (West Supp. 1997)). The Department of State has published guidelines on the implementation of the Act at 61 Fed. Reg. 66,067 (1996).

The Act is sometimes referred to as the "D'Amato Act," after Senator Alphonse D'Amato of New York, who introduced the original bill. Because the entire Act is codified as a note to 50 U.S.C.A. § 1701, references below to provisions in the Act are to the sections in the Act as set forth in the note. The legislative history to this Act is contained in two House Reports. *See* H.R. REP. NO. 104-523(I) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296 (accompanying original version of H.R. 3107); H.R. REP. NO. 104-523(II) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311 (accompanying bill as enacted). In general, these House Reports offer few insights beyond what is already obvious from the language of the Act.

[347] Gary G. Yerkey, *President Clinton Signs into Law Legislation to Punish Foreign Firms Investing in Iran, Libya*, 13 Int'l Trade Rep. (BNA) 1273 (Aug. 7, 1996).

> Sec. 3. Declaration of Policy.
>
> (a) . . . The Congress declares that it is the policy of the United States to *deny Iran the ability to support acts of international terrorism* and to fund the development and acquisition of weapons of mass destruction and the means to deliver them *by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.*
>
> (b) . . . The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including *ending all support for acts of international terrorism* and efforts to develop or acquire weapons of mass destruction.[348]

The highlighted language bespeaks the theory behind the Act. A direct connection exists between (1) profits earned by the Iranian and Libyan governments made possible by foreign investment in the development of the petroleum resources[349] in these countries, and (2) the threat to U.S. national security arising from Iranian- and Libyan-sponsored terrorism and their efforts to obtain certain weapons. As Undersecretary of State Peter Tarnoff testified with respect to the 1996 Sanctions Act, "a straight line links Iran's oil income and its ability to sponsor terrorism, build weapons of mass destruction, and acquire sophisticated armaments."[350] In brief, these rogue governments use some of their petroleum industry profits to fund terrorist activities and buy materials for nuclear, chemical, and biological

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[348] 50 U.S.C.A. § 1701 note (West Supp. 1997) (Iran and Libya Sanctions, Sec. 3. Declaration of policy) (emphasis added).

[349] "Petroleum resources," the heart of the target of the sanctions against Iran and Libya, refer (somewhat circularly) to "petroleum and natural gas resources." *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 14. Definitions).

[350] H.R. REP. NO. 104-523(I), at 9, *reprinted in* 1996 U.S.C.C.A.N. at 1298.

weapons.[351] The Act aims to constrict their key funding source and thereby constrain their threatening activities.[352]

To apply and enforce these sanctions in support of U.S. national security interests, the Act carefully defines the terms "act of international terrorism," "develop" and "investment." An act of international terrorism is an act that (1) is "violent or dangerous to human life," (2) violates federal or state criminal laws or would violate these laws if committed within federal or state jurisdiction, and (3) "appears to be intended" to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by assassination or kidnaping."[353] The terms "develop" and "development" are used only in the context of petroleum resources and refer to the exploring, extracting, refining, or transporting of these resources.[354] Investment focuses on three specific activities within the petroleum industry undertaken after August 5, 1996 (the date of enactment), under an agreement with the governments in Iran or Libya. These three investment activities are: developing Iranian or Libyan petroleum resources, or guaranteeing another person's agreement to develop these resources; acquiring an equity interest (*i.e.*, buying shares) in the development of Iranian or Libyan petroleum resources; and receiving royalties, earnings, or profits from the development of Iranian or Libyan petroleum resources.[355] The definition of "investment" is further qualified because it does not include any agreement to buy or sell goods, services, or technology.[356] However, this qualification is confusing because it may conflict with one of the aforementioned three investment

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[351] *See generally* Zbigniew Brzezinski et al., *Differentiated Containment*, 76 FOREIGN AFF., May-June 1997, at 20, 27. It is worth underscoring the breadth of "national security" concerns encompassed by the Act. Two prominent former national security advisors, Zbigniew Brzezinski and Brent Scowcroft, argue the Act should focus more narrowly on the quest for nuclear weapons capability, which is "[t]he single most worrisome aspect of Iran's behavior." *Id.*; *see also* Edward Mortimer, *The Satanic Dialogue*, FIN. TIMES, May 21, 1997, at 28 (stating that Iran is attempting to develop weapons of mass destruction, including nuclear bombs and long-range missiles).

[352] *See* H.R. REP. NO. 104-523(I), at 13-14, *reprinted in* 1996 U.S.C.C.A.N. at 1302-03.

[353] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 14. Definitions).

[354] *See id.*

[355] *See id.*

[356] *See id.*

activities. For example, suppose a company develops the Iranian petroleum industry by selling drilling equipment to the government of Iran. The qualification suggests the sale is not an investment.

As with the other two Acts discussed in this Article, the stated purpose of the 1996 Sanctions Act is to safeguard national security. However, it is less obvious why Congress and President Clinton enacted new sanctions against Iran and Libya. Pursuant to the International Emergency Economic Powers Act of 1977 ("IEEPA"), the United States already has a trade embargo against Iran and Libya.[357] Why enact another statute? Given existing embargoes, what types of novel sanctions could possibly exist, and what purposes could any further sanctions possibly serve?

One answer to these questions is that the 1996 Sanctions Act is a secondary boycott, whereas IEEPA trade embargo is a primary boycott. IEEPA trade embargo imposed against Iran and Libya is a primary boycott because the United States forbids U.S. citizens from importing goods or services from, or exporting goods or services to, the target countries. The essential nature of a primary boycott is that it is an act of self-restraint by the boycotting country and concerns only the boycotting country and the target country.[358]

A secondary boycott involves not only the boycotting and target countries, but also third-party countries. A secondary boycott attempts to limit the extent of economic dealings of third-party countries with the target country.[359] The 1996 Sanctions Act not only reinforces America's primary boycott but, more importantly, imposes a secondary boycott against Iran and Libya. It levies penalties against U.S. and non-U.S. citizens and businesses alike that invest in the Iranian and Libyan petroleum industries. Like the Helms-Burton Act, the 1996 Sanctions Act also contains a secondary boycott measure that bars U.S. and

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[357] *See* Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1994)). For a discussion of IEEPA and the Iranian and Libyan embargoes, see HOUSE COMM. ON WAYS & MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 167-70 (Comm. Print 1997).

[358] *See* Barbara J. Anderson, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811, 811-15 (1984) (elaborating on use and effectiveness of secondary boycotts).

[359] *See id.*

non-U.S. persons from trafficking in confiscated property and denies entry into the United States to non-U.S. persons engaged in trafficking.

This economic distinction between primary and secondary boycotts is evident from a petroleum development transaction involving Conoco, Inc., an American oil company, Total S.A., a French oil giant, and Iran. In early 1995, Conoco reportedly initialed a $1 billion contract with Iran to develop oil fields around Iran's Sirri Island. In response, President Clinton invoked IEEPA to prohibit U.S. persons from financing, managing, or supervising the development of Iran's petroleum resources.[360] This response was a primary boycott and it successfully forced Conoco to withdraw from the contract.[361] However, to the dismay of Congress and Clinton Administration officials, Total S.A. picked up Conoco's abandoned contract, agreeing to develop the Sirri Island oil fields in a $600 million contract.[362] In enacting a secondary boycott against Iran and Libya, Congress sought to discourage such opportunistic behavior in disregard of U.S. national security concerns.

In addition to implementing a secondary boycott, the second reason Congress passed the 1996 Sanctions Act was to respond to two incidents involving terrorists allegedly supported by Iran and Libya. The first incident was the July 1996 explosion of a Trans World Airlines Boeing 747 jetliner flying from New York to Paris which killed all 230 passengers and crew. Despite considerable speculation that a terrorist bomb caused the explosion,[363] to date there is no evidence to suggest terrorist involvement.

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[360] *See* Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995).

[361] *See* Bushan Bahree, *Total of France Takes Iran Deal, Ignoring U.S.*, WALL ST. J. EUR., July 14, 1995, at 3.

[362] *See* H.R. REP. NO. 104-523(I), at 9-11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1298-1300; Gary G. Yerkey, *EU Files Formal Protest with U.S. Over Law Penalizing Foreign Firms with Ties to Iran, Libya*, 13 Int'l Trade Rep. (BNA) 1315, 1316 (Aug. 14, 1996).

[363] *See* Nancy Dunne & Robert Corzine, *Politics Sets Tone for Trade Barriers*, FIN. TIMES, July 25, 1996, at 4 (noting widespread suspicion in United States that terrorist bomb, possibly of Iranian or Middle Eastern origin, involved in TWA jetliner explosion); Laurie Lande, *Congress Seeks End to Libya, Iran Ties by Foreign Firms*, WALL ST. J., July 24, 1996, at A16 (observing that congressional fears about terrorism increased following TWA explosion, and authorities investigated whether terrorists may have caused crash).

In retrospect, Congress may have overreacted to the incident. Indeed, a *Financial Times* editorial observed that "U.S. assertions about Iran's role in terrorism remain unproven."[364] The *Economist* intoned that while Iran is the prime suspect when international terrorism is directed against American interests, evidence has yet to be produced.[365] The United States' suspicions regarding Iran's part in terrorism remain unproven.[366] In brief, the Iranian government may be nasty, but our trading partners do not believe that it is the godfather of international terrorism. To be sure, article XXI(a) of GATT does not require a WTO Member to divulge information that would compromise its essential national security interests.[367] As the *Financial Times* suggests, however, the United States must prove at least a prima facie case if it expects its European allies to sign on to the secondary boycott.[368]

A second incident that apparently provoked congressional reaction was the June 1996 bombing of a Saudi Arabian apartment building that housed U.S. military personnel.[369] The bombing killed nineteen American service personnel, and it was widely thought that Iranian terrorists orchestrated the incident.[370] Once again, no credible evidence of Iranian involvement exists. To the contrary, the perpetrators may well have been Saudi dissidents.[371]

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[364] *Handling Iran*, FIN. TIMES, Aug. 8, 1996, at 17.

[365] *See Handling Iran: The West Has to Find Something More than Lecture but Less than Economic Sanctions*, ECONOMIST, Mar. 16, 1996, at 17 (stating that Iran is prime suspect behind terrorism).

[366] *See Handling Iran, supra* note 364, at 17 (asserting that while Iran has participated in terrorism in past, United States cannot prove that Iran is engaged in terrorism at present).

[367] *See* GATT art. XXI(a).

[368] *See Handling Iran, supra* note 364, at 17 (stating that United States's assertions of Iran's terrorism remain unproven).

[369] *See* Bruce Clark, *U.S. Split on How to Handle Iran*, FIN. TIMES, Apr. 17, 1997, at 8 (reporting details about bombings).

[370] *See id.* (reporting that Iranian terrorists were suspected behind bombing).

[371] *See* M.E. Ahrari & Brigid Starkey, *Polarity and Stability in the Post-Cold War Persian Gulf*, 21 FLETCHER F. WORLD AFF. 133, 144 (1997) (discussing Saudi government crackdown on Shi'i opposition to majority rule following November 1995 and June 1996 bombing incidents in Saudi Arabia).

B. Questioning the Wisdom of New Sanctions Against Iran and Libya

Similar to the Helms-Burton Act, many of America's closest military allies and most significant trading partners condemn the 1996 Sanctions Act precisely because it is a unilateral effort at a secondary boycott.[372] In their eyes, a secondary boycott gives the sanctions an unwarranted, perhaps illegal, extraterritorial effect.[373] Put bluntly, critics of the Act see it as a U.S. attempt to bully others into complying with a unilaterally-imposed sanctions regime.[374] Worse yet, the American secondary boycott is quite rightly viewed as hypocritical. The United States balked at the Arab countries' attempt to enforce a secondary boycott of Israel; indeed, the United States enacted blocking legislation making it illegal to comply with the boycott.[375] Now, however, the United States expects compliance with its secondary boycott of Iran and Libya. Finally, critics note that the secondary boycott is an anti-American flag around which Iranian mullahs and Colonel Muammar Qaddafi can rally their people,[376] as Castro has attempted to do vis-á-vis the Helms-Burton Act.[377] Thus, ironically, the boycott may reinforce the very behavior of the Iranian and Libyan governments that the United States seeks to alter.

These criticisms raise the practical problem of the efficacy of the Act: can it achieve its stated purpose of safeguarding national security, given intense opposition from America's friends? Two

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[372] *See Canada Criticizes U.S. Iran-Libya Law as Unsupportable Extraterritoriality*, 13 Int'l Trade Rep. (BNA) 1316, 1316-17 (Aug. 14, 1996) (reporting EU condemnation of 1996 Sanctions Act); Yerkey, *supra* note 362, at 1315-16 (reporting Canadian displeasure with Act).

[373] *See Canada Criticizes U.S. Iran-Libya Law as Unsupportable Extraterritoriality*, *supra* note 372, at 1316-17 (reporting on Canadian and EU challenge to extraterritorial imposition of trade policy).

[374] *See id.* (relaying European Trade Commissioner's comment that Iran and Libya Sanctions Act of 1996 allows one country to dictate foreign policy of other countries).

[375] *See supra* note 34 and accompanying text (highlighting U.S. legislation in response to Arab League secondary boycott of Israel).

[376] *See, e.g.*, Roula Khalaf, *U.S. Sanctions Are Gadaffi's Greatest Fear: Threats to Oil Shales Worry the Libyan Leader and Help Him Manipulate Opinion at Home*, FIN. TIMES, Oct. 30, 1996, at 4 (noting that sanctions are convenient tool for Qaddafi and have perverse effect of bolstering Libyan leader and reinforcing deep resentment of United States).

[377] *See U.S. Bids to Help Fund Democracy in Cuba*, CARRIBEAN UPDATE, Mar. 1, 1997 (reporting Castro referring to Helms-Burton Act as attempt to enslave Cubans).

Congressmen, who voted in favor of the 1996 Sanctions Act, neatly summarize the argument that a unilaterally-imposed secondary boycott cannot work:

> [W]e are concerned that the bill [H.R. 3107, the initial version of the Act] could be counterproductive to the goal of increasing multilateral economic and political pressure on Iran.
>
> The sanctions in the bill will penalize foreign firms for commercial activity which, though objectionable to us, is legal in their home countries. We understand that other governments are likely to charge that the bill's import and government procurement sanctions, at a minimum, violate trade and other international agreements to which the United States is a party.
>
> [O]ther governments have already notified us that they object to these measures on sovereignty grounds. Past experience suggests they will take blocking measures. Retaliatory measures against U.S. trade, perhaps authorized by international adjudicatory bodies, are also possible.
>
> Our concern here is not that we may offend our allies, for we object to their unwillingness to adopt tougher measures to isolate Iran [and Libya] economically and politically. Our concern is more practical: The United States cannot adequately pressure Iran's [or Libya's] economy alone. A strong adverse reaction by other governments to a U.S. effort to penalize their firms will put us at odds with some of our closest friends. That could ultimately reduce, rather than increase, multilateral cooperation on Iran [and Libya].
>
> We believe recent history is instructive. Western efforts to confront another dangerous country — the former Soviet Union — were set back in 1982 when the United States tried to sanction firms participating in the development of a Soviet gas pipeline.
>
> The target of U.S. pressure in 1982 was subsidiaries of U.S. firms, yet the reaction in Europe was intense. And U.S. sanctions did not achieve their goal: the sanctions were not sustainable, and the United States ultimately had to lift them. The bill before us today would hit foreign firms. We can expect at least as strong a response.[378]

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[378] *Additional Views of the Honorable Lee H. Hamilton and the Honorable James P. Moran*, in H.R. REP. NO. 104-523(I), at 20 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1309; *see also* Toby Roth, *New Iranian-Libyan Sanctions Will Only Hurt U.S.*, WALL ST. J., Aug. 6, 1996, at A14 (arguing that Act will isolate United States from other governments whose help United States needs to contain threats from Iran and Libya).

Of course, the force motivating some of the critics, particularly those in Europe, is economic self-interest. As a European Commission spokesperson admitted, "Europe is energy dependent on these nations [Iran and Libya]" and "can't afford to seriously hurt our economies because of a [sanctions] strategy that hasn't proved to be effective."[379] Iran and Libya supply more than 20% of the European Union's oil and gas.[380] Iran is particularly vital as the world's third largest exporter of oil.[381] Business ties between Iran and Germany are close. Iran's leading trading partner is Germany, with roughly 170 German companies, including Siemens AG and Mannesmann AG, doing business in Iran, and Iranian governmental and private entities owing roughly $8.8 billion to German businesses.[382]

Despite these economic facts about Iran, as a tactical matter, the 1996 Sanctions Act might have been less controversial in Europe if it had omitted Libya. Ties between Europe and Libya, especially in the petroleum resource industry, are closer than between Europe and Iran.[383] The only European oil company to have significant direct investments in Iran's petroleum resource industry is Total.[384]

Moreover, as of this writing, only Total has challenged the Act. In September 1997, Total and its two consortium partners — Malaysia's Petronas and Russia's Gazprom — signed a contract with the National Iranian Oil Company. The contract calls for the consortium to invest $2 billion to develop part of the South Pars natural gas field, located near Iran's maritime border with Qatar.[385] Production is scheduled to start in 2001.[386] The

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[379] Laurie Lande, *Congress Seeks End to Libya, Iran Ties by Foreign Firms*, WALL ST. J., July 24, 1996, at A16.

[380] *See* Gary G. Yerkey, *President Clinton Signs into Law Legislation to Punish Foreign Firms Investing in Iran, Libya*, 13 Int'l Trade Rep. (BNA) 1273, 1274 (Aug. 7, 1996).

[381] *See* Bruce Clark, *U.S. Applauds European Stand on Iran*, FIN. TIMES, Apr. 12, 1997, at 3.

[382] *See Trading with Terrorists*, WALL ST. J., Aug. 27, 1996, at A12; Greg Steinmetz, *EU Unlikely to Impose Embargo on Iran*, WALL ST. J., Apr. 14, 1997, at A2 (elaborating upon Iranian debt to German companies).

[383] *See Libya's Trans-National Oil System Keeps Expanding*, APS REV. DOWNSTREAM TRENDS, Aug. 18, 1997, at 4 (reporting on Europe's extensive involvement and investment in Libya).

[384] *See* Clark, *supra* note 381, at 3.

[385] *See* David Owen & Guy de Jonquie'res, *Total to Defy U.S. with $2bn Deal to Develop Iran Gas*, FIN. TIMES, Sept. 29, 1997, at 1.

[386] *See id.*

Clinton Administration has threatened to impose sanctions on Total under the Act, but France has warned of serious consequences, and the EU has said it will resurrect its complaint in the WTO against the Helms-Burton Act if sanctions are imposed.[387] Quite possibly, the United States will waive sanctions if France takes a tougher stance against Iran with respect to terrorism and chemical, biological, and nuclear weapons. The Total contract should not surprise the Clinton Administration. Iran has 15% of the world's proven natural gas reserves, second only to Russia's reserves; thus, foreign companies are anxious to develop Iran's reserves.[388] Further, as the *Financial Times* pointed out, "Total is fast developing a reputation for targeting output from 'outlaw' countries such as Iraq, Libya and Burma — although [Total] chairman Thierry Desmarest has claimed it is just that 'the Lord put the reserves in places that are a bit hot on political grounds.'"[389]

In contrast to the more modest dealings in Iran, several European companies in addition to Total, such as Agip of Italy, Repsol of Spain, OMV of Austria, Petrofina of Belgium, and Lasmo of the U.K., either have dealings in Libya's industry or have explored Libya's potential reserves.[390] For Italy in particular, participating in a secondary boycott of Libya's petroleum resource industry would be impossible in the short- or medium-term because Italy buys 30% of its oil from Libya.[391] Thus, notwithstanding the Total deal, the 1996 Sanctions Act might have been more favorably received in Europe if the Act had omitted Libya.

Leaving Libya out of the Act might also have been in the long-term strategic interest of the United States. At present, the principal U.S. access to Caspian Sea oil is through Russia.[392]

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[387] *See* Gerard Baker et al., *U.S. Attacks Total's $2bn Iran Deal*, FIN. TIMES, Sept. 30, 1997, at 1.

[388] *See* Virginia Marsh, *Other Investors Watch and Wait*, FIN. TIMES, Sept. 30, 1997, at 9.

[389] *See* Owen & de Jonquie'res, *supra* note 385, at 1.

[390] *See* Corzine & Dunne, *supra* note 363, at 4 (revealing oil companies involved in Libya).

[391] *See* Lorraine Woellert, *Allies Complain of "Chilling Effect,"* WASH. TIMES, Aug. 6, 1996, at A1.

[392] *See* Robert D. Kaplan, *Why the U.S. and Iran Will Be Friends Again*, WALL ST. J., Feb. 10, 1997, at A18.

However, Russia has yet to demonstrate it will be a stable democratic market economy. Iran could provide non-Russian access to Caspian sea oil. If Islamic extremists overtook Saudi Arabia, the importance of such an alternate access route would increase.

The Act, however, is not uniformly unilateral in nature. It "urges" the President to undertake diplomatic efforts both in international fora such as the United Nations and bilaterally with U.S. allies "to establish a multilateral sanctions regime against Iran," limiting the development of its petroleum resources and thereby inhibiting its efforts to sponsor acts of international terrorism.[393] Curiously, there is no comparable provision in the Act concerning Libya. The President must report periodically to Congress regarding the results of these diplomatic efforts.[394] The President must also list the countries that have and have not agreed to undertake sanctions measures against Iran.[395]

There is a possible link between diplomatic efforts to establish a multilateral sanctions regime against Iran and the unilateral sanctions imposed by the United States. The President may waive the investment trigger sanction against Iran if a country "has agreed to undertake *substantial measures*, including economic sanctions" that will undermine Iran's efforts to support international terrorism.[396] Neither the Act nor the legislative history explains what constitutes substantial measures. It is a matter left to presidential discretion.[397] However, substantial measures would conceivably include participation in a multilateral sanctions regime arranged as a result of the President's diplomatic

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[393] 50 U.S.C.A. § 1701 note (West Supp. 1997) (Iran and Libya Sanctions, Sec. 4. Multilateral regime).

[394] *See id.*

[395] *See id.* The President must report to Congress 90 days after August 5, 1996 on whether and extent to which EU, Korea, Australia, Israel, and Japan have imposed sanctions on Iran and Libya, and the disposition of any GATT or WTO panel decision on such sanctions. *See id.* Additionally, the President must report to Congress on, inter alia, his efforts to persuade other countries to pressure Iran to (1) cease its support for international terrorism and its attempts to acquire nuclear, biological, and chemical weapons, and (2) withdraw diplomats who participated in the 1979 takeover of the U.S. embassy in Tehran. *See id.* (Iran and Libya Sanctions, Sec. 10. Reports required).

[396] *See id.* (Iran and Libya Sanctions, Sec. 4. Multilateral regime) (emphasis added). The President must notify Congress of the waiver at least 30 days before the waiver takes effect. *See id.*

[397] *See id.*

efforts.[398] If so, then the nationals — the individuals and businesses from that country — participating in the regime would also be eligible for a sanctions waiver. It clearly would be unreasonable for the Act to target nationals in the secondary boycott of Iran when their country is participating in multilateral sanctions against Iran. Conversely, an enhanced sanction must be imposed on nationals of a country that does not qualify for a sanctions waiver. Thus, the failure of a country to participate in a multilateral sanctions regime against Iran could cause its nationals to bear a double burden: the denial of a sanctions waiver and the imposition of an enhanced sanction.

In fairness to supporters of new sanctions against Iran and Libya, the European governments' passive reaction to terrorism is sometimes maddening. In 1992, four Kurdish opposition leaders were killed in a Berlin restaurant named Mykonos.[399] In April 1997, a Berlin court convicted four perpetrators of the Mykonos assassinations.[400] In the verdict, Judge Frithjof Kubsch declared: "The Iranian political leadership is responsible,"[401] and specifically identified Mr. Ali Fallahian, Iran's chief of foreign intelligence, as orchestrating the Mykonos murders.[402] Fol-

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[398] *See id.* (stating that Congress urges President to use diplomatic efforts to establish multilateral sanction regime).

[399] *See EU Ignores U.S. Request to Take Economic Measures Against Iran*, 14 Int'l Trade Rep. (BNA) 787, 787 (Apr. 30, 1997) (reporting that German court found Iranian government officials conspired to kill four Kurdish opposition leaders). For media accounts of the case and its aftermath, see *EU Suspends "Critical Dialogue" with Iran; Ending Ties Is Weighed, Dutch Official Says*, 14 Int'l Trade Rep. (BNA) 706, 706 (Apr. 16, 1997) (asserting that EU suspended dialogue with Iran as result of Iranian authorities' link with assassination of Kurdish leaders); Frederick Studemann & Lionel Barber, *EU Adopts Tougher Attitude over Iran*, FIN. TIMES, Apr. 11, 1997, at 1 (reporting that United States welcomed Berlin court's conviction of Iranian authorities); Frederick Studemann, *Germany Puts Dialogue with Iran on Hold*, FIN. TIMES, Apr. 11, 1997, at 5 (declaring that suspension of dialogue with Iran is dramatic twist in Germany's foreign policy).

[400] *See* Robin Allen, *Khatami Set to Take Reins in Iran*, FIN. TIMES, Aug. 2, 1997, at 2 (reporting on convictions).

[401] Greg Steinmetz, *Ruling on Killing Spurs EU to Curb Links with Iran*, WALL ST. J., Apr. 11, 1997, at A11.

[402] *See* Allen, *supra* note 400, at 2; *Kurdish Opposition Radio Welcomes German Arrest Warrant for Minister* (BBC radio broadcast, Mar. 20, 1996) (discussing Fallahian's indictment for orchestrating bombings of Mykonos cafe in Berlin). Amazingly, Mr. Fallahian visited Bonn in October 1993 at the official invitation of Mr. Bernd Schmidbauer, the security advisor to Chancellor Helmut Kohl, and even toured the Munich offices of Germany's intelligence services. Later, on March 18, 1996, he was indicted by German prosecutors for having masterminded the murders. He has yet to stand trial on the charge. *See* Philip Golup, *Berlin*

lowing this verdict, the EU suspended its policy of "critical dialog" with Iran, and all EU members (except Greece) recalled their ambassadors from Tehran.[403] However, not one European country enacted trade sanctions.[404]

C. Six New Sanctions

Because it attacks terrorist activities by limiting the available profits that fund such activities, the sanction mechanism in the 1996 Sanctions Act is predictable. The Act seeks to bar new investment in the Iranian and Libyan petroleum industries above a certain threshold. The Act lays out six specific sanction measures.[405] The President is required to impose two or more of these measures on an individual or "sanctioned person" who violates the Act.[406]

First, the President may direct the U.S. Export-Import Bank to deny approval of any guarantee, extension of credit, or insurance in connection with the export of goods or services to a sanctioned person.[407] Second, the President may decline to issue a required license to allow the export of sensitive goods or technology to a sanctioned person.[408] Third, the President may prohibit any U.S. financial institution — either a commercial or investment bank or an insurance company[409] — from lending or providing credits in excess of $10 million in a twelve-month period to a sanctioned person unless the funding is to support humanitarian activities.[410]

The fourth type of sanction is relevant only if the sanctioned person is a financial institution. The sanctioned financial institution may not be allowed to serve as a repository of U.S. govern-

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Court Ruling Puts EU's 'Critical Dialogue' with Iran at Risk, ASIA TIMES, Apr. 14, 1997, at 9.

[403] *See* John Lancaster, *New Iranian Regime, Arab Neighbors Show Signs of Easing Tense Relations*, WASH. POST, Sept. 20, 1997, at A15; Philip Golup, *supra* note 402, at 9.

[404] For an excellent discussion of the strains Iran places on the relationship between the United States and Germany, see generally Charles Lane, *Germany's New Ostpolitik*, 74 FOREIGN AFF., Nov.-Dec. 1995, at 77.

[405] *See* 50 U.S.C.A. § 1701 note (West Supp. 1997) (Iran and Libya Sanctions, Sec. 6 Description of Sanctions).

[406] *See id.* (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions).

[407] *See id.* (Iran and Libya Sanctions, Sec. 6. Description of sanctions).

[408] *See id.*

[409] *See id.* (defining "financial institution").

[410] *See id.*

ment funds — it cannot maintain Treasury tax and loan accounts into which tax revenues are deposited and maintained on behalf of the U.S. government.[411] The Federal Reserve may also disqualify the institution as a primary dealer in U.S. government debt instruments; the disqualification means the institution cannot participate directly in open market transactions in Treasury bills, notes, and bonds, held through the Federal Reserve Bank of New York.[412]

The fifth sanction applies only to persons that are or seek to be U.S. government contractors. The President may bar the U.S. government from procuring goods or services from the sanctioned person.[413] If the President chooses to impose this sanction, then the Act requires him to abide by the Uruguay Round Agreement on Government Procurement. In practice, this means that the President will eschew imposing sanctions on "eligible products," defined according to the Agreement in U.S. law.[414]

Finally, the President may restrict imports from the sanctioned person into the United States. In doing so, the President must act in accordance with the powers set forth in IEEPA.[415]

Does the differential impact that particular sanctions might have suggest a disparity between the aggressive rhetoric surrounding the Act's purpose and the strength of the Act's measures used to combat terrorism and its supporters? Given the

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[411] *See id.*

[412] *See id.* If a financial institution loses its authority to hold Treasury tax and loan accounts and its primary dealer status, then for purposes of the President's imposing two or more of the six sanctions the financial institution has received not one but two sanctions. A curious point about this fourth sanction is the relationship between the President and the Federal Reserve. The Federal Reserve is an independent agency of the U.S. government and, in general, does not take orders from the executive branch. *See* Bernard Schwartz, *A Decade of Administrative Law*, 32 TULSA L.J. 493, 496 (1997). Yet presumably Congress intended the possibility that the President might order the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York to deny designation to, or revoke the prior designation of, a financial institution as a primary dealer. Surely Congress would not have wanted to see the Federal Reserve thwart a sanction the President thought appropriate in the interests of national security.

[413] *See id.* (stating that United States cannot procure goods or services from sanctioned person).

[414] *See* 19 U.S.C. § 2518(4) (1994) (listing eligible products pursuant to Agreement); H.R. REP. NO. 104-523(II), at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1316.

[415] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 6. Description of sanctions) (stating that President may act under International Emergency Economic Power Act to restrict imports).

strong rhetoric, Congress probably did not foresee a limp-wristed set of sanctions. To the contrary, it must be inferred that Congress provided the President with discretion to choose two or more sanctions so that the President could exploit, or not exploit, the vulnerabilities unique to a sanctioned person.

For a large number of companies, the fifth and sixth sanctions are potentially draconian. Designating a company as ineligible to receive U.S. government procurement contracts or barring its exports from the U.S. market could cause irreparable harm to the company. At the same time, the six sanctions are not equally fearsome in every case. For example, a sanctioned company might rely on Japanese or European banks for most of its funding. Thus, barring U.S. banks from extending credit to the company would have little effect on its activities developing Iran's or Libya's petroleum resources. Even a company that obtains most of its funding from U.S. banks may be able to substitute lenders and rely on Japanese or European financing. If this substitution occurs with little or no increase in the sanctioned company's cost of funds, then the sanction ends up hurting only the former U.S. bank lenders who involuntarily surrendered the company's business.

Conversely, because buying and reselling Treasury securities can be highly profitable, a sanctioned financial institution that is a primary dealer in U.S. government securities could be seriously damaged if the Federal Reserve revoked its primary dealer status. As another example, a sanctioned company may rely on a U.S. government license to export sensitive high-technology equipment to China for the majority of its revenues. Failure to receive the requisite export clearance could mean the company would go bankrupt if it could not obtain the equipment from a non-U.S. source. Accordingly, the President could punish this person revoking its lucrative status. It seems implicit in the Act that Congress expects the President to investigate thoroughly the business situation of a particular person and then choose the most appropriate mix of sanctions.

Because of the potentially serious damage that sanctions can cause, perhaps the most important practice point about the 1996 Sanctions Act is that clients may seek and rely upon official guidance. The Act invites companies to seek an advisory opinion from the Secretary of State as to whether a proposed transaction

would run afoul of the Act and thereby subject the transactor to liability.[416] A company relying in good faith on a Secretary of State's advisory opinion that determined the proposed transaction to be lawful is free to engage in the transaction and is immune from sanctions.[417] Of course, the company should take care not to deviate in practice from the terms of the transaction that it presented to the Secretary of State and which the Secretary approved.

D. The Long Extraterritorial Reach of the Sanctions

The secondary boycott imposed by the 1996 Sanctions Act against Iran applies to "any person." This term is defined as any individual, corporation, partnership, other business entity, or successor entity[418] that the President determines has carried out one of several prohibited activities.[419] The word "any" is particularly noteworthy, because it implicates non-U.S. persons, thus rendering as extraterritorial the potential scope of the secondary boycott sanctions under the Act.

The extraterritorial scope of the sanctions is even wider because of two conditions. First, sanctions may be imposed on a parent or subsidiary of a person if the parent or subsidiary engages in a prohibited transaction with actual knowledge.[420] Second, sanctions may be imposed on an affiliate of a person who is controlled in fact by that person and engages in a prohibited activity with actual knowledge.[421] Thus, the 1996 Sanctions Act

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[416] *See id.* (Iran and Libya sanctions, Sec. 7. Advisory opinions).

[417] *See id.* (stating that those who rely on advisory opinions will not be subject to sanctions). With respect to investments in Iran, seeking advice is particularly important. Even though section 5(e) of the Act requires the President to publish in the *Federal Register* a list of all significant publicly tendered Iranian oil and gas projects, "the fact that a project does not appear on the list does *not* indicate that the project is immune from or, . . . any less vulnerable to, sanction . . . ." H.R. REP. NO. 104-523(II), at 15, *reprinted in* 1996 U.S.C.C.A.N. at 1317.

[418] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 14. Definitions) (defining parties to whom Act applies).

[419] *See id.* (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions).

[420] *See id.*

[421] *See id.* The Department of State guidelines on the implementation of the Act clarify that for corporate parents, "engages in" refers to the facilitation and authorization of entry into a prohibited contract. For subsidiaries, it refers to actual participation in the implementation of the contract. *See* Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067, 66,068 (1996) (defining sanctions on subsidiaries for

is an excellent example, along with the Helms-Burton Act, of the long reach of America's claimed extraterritorial jurisdiction over unilateral trade actions.[422]

The only caveat to sanctioning the parent and subsidiary is the mens rea requirement of actual knowledge.[423] The only

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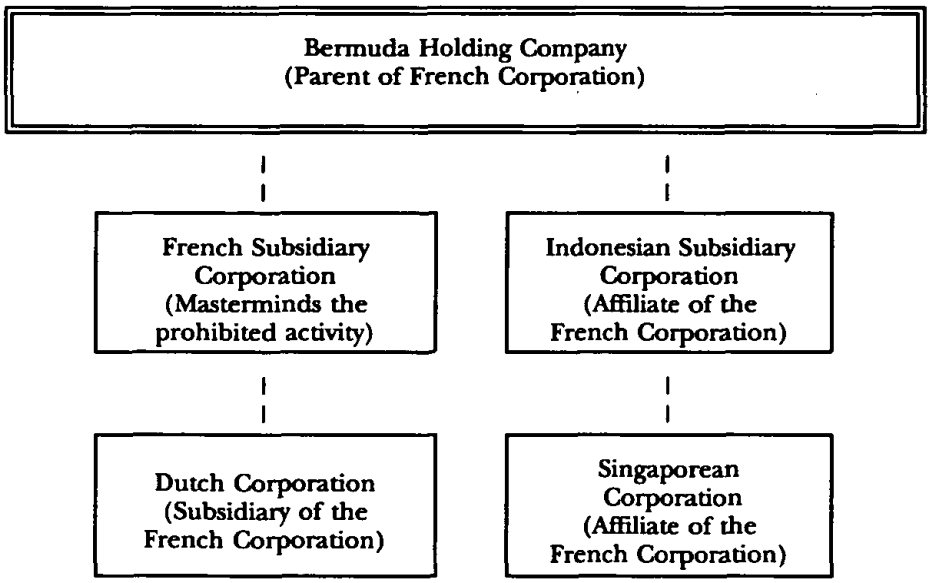
Iran and Libya Sanctions Act).

[422] To underscore why this long reach is dramatic and controversial, consider the following example. Assume a French corporation, which has a Dutch subsidiary, is owned by a holding company incorporated in Bermuda. The holding company, which is a shell and in fact is controlled by senior managers of the French corporation, also owns a company incorporated in Indonesia. The Indonesian company, in turn, owns a company incorporated in Singapore.

Like the Bermuda holding company, the Indonesian and Singaporean companies are controlled in fact by the French corporation. No Americans work for any of the companies. Accordingly, the organizational structure is as follows:



Assume the French company engages in a prohibited activity. It masterminds the operation and, thus, is sanctioned under the Act. Assume further that all of the other entities participate in the prohibited activity, though some in minor respects, with actual knowledge. Because they are affiliates of, and controlled in fact by, the French corporation, the Indonesian and Singaporean companies also are sanctioned. As the parent of the French corporation, the Bermuda holding company is sanctioned. As the subsidiary of the French corporation, the Dutch corporation is sanctioned. The names of all of these sanctioned entities will be published in the *Federal Register*. *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions) (stating that President requests Federal Register to publish names of those sanctioned).

[423] *See* Marc. C. Hebert, *Unilateralism as a Defense Mechanism: An Overview of the Iran and Libyan Sanctions Act of 1996*, 5 U. MIAMI Y.B. INT'L L. 1, 16 (1997) (proposing knowledge that investment enhances development of resources, rather than knowledge that

caveat to sanctioning the other affiliates is the mens rea requirement plus the control-in-fact requirement.[424] In many cases arising under the 1996 Sanctions Act, it will be difficult for U.S. authorities to satisfy these requirements. Moreover, it is not clear whether a parent, subsidiary, or affiliate can have actual knowledge imputed to it if different officials in the parent, subsidiary, or affiliate had partial knowledge but no single official had a "bird's eye" view of the entire operation. Nor is it clear whether a parent, subsidiary, or affiliate can have actual knowledge if it is willfully blind to the engagement in the prohibited activity.[425] Despite these uncertainties, however, the possibility of sanctions is real and, therefore, it is quite appropriate that foreign corporations and their governments are concerned about the long arm of the Act.

E. The Investment Trigger Against Iran

Several types of transactions will trigger U.S. imposition of two or more of the above-discussed sanctions. The 1996 Sanctions Act spells out one prohibited direct foreign investment transaction. The transaction entails (1) an investment worth $40 million or more, (2) made on or after August 5, 1996 (the date of enactment), (3) with actual knowledge, where (4) the investment "directly and significantly" contributes to the enhancement of Iran's ability to develop its petroleum resources.[426] Engaging in this activity triggers sanctions that, absent a waiver, must be imposed.

Examples of direct foreign investment transactions that probably would violate the Act follow from the definition of "investment."[427] This definition identifies three categories of illegal transactions. The first category covers entry into a contract to

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investment violates Act, is necessary for sanctions).

[424] *See id.*

[425] There is substantial case law on money laundering regarding both of these uncertainties, and possibly U.S. authorities or corporate counsel might seek to analogize to this law. *See, e.g.*, United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (holding aggregate knowledge of corporate components constitutes corporation's total knowledge of particular operation).

[426] *See* 50 U.S.C.A. § 1701 note (West Supp. 1997) (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions).

[427] *See id.* (Iran and Libya Sanctions, Sec. 14. Definitions) (defining "investment").

take responsibility for developing Iranian petroleum resources, or a contract to guarantee another company's agreement to develop these resources.[428] Contracting to build an oil rig or pipeline or providing engineering consulting services would also surely fall in this category.

The second category concerns acquisition of an equity interest in an Iranian petroleum resources development company.[429] Accordingly, an oil company could violate the Act by purchasing shares in another company that, in turn, develops Iranian petroleum resources. An example of this violation may have occurred when Petronas, Malaysia's state oil company, acquired a 30% stake in a $600 million project to develop the Sirri A and E oil fields in the Persian Gulf.[430] To date, the United States has not imposed sanctions in this case.

Legislative history regarding the second category states that portfolio investments are not covered by the sanction mechanism.[431] Thus, for example, absent some other applicable prohibition, nothing in the Act bars a mutual fund from investing in an oil company's equity or debt securities that itself is involved in the development of Iranian petroleum resources and which runs afoul of the Act. What is not clear, however, is the test for distinguishing direct from portfolio investments. Does the distinction depend on the nature of the investor — an oil company versus a mutual fund; the extent of control the investor has over the company responsible for developing petroleum resources; controlling influence over management decisions and the right to appoint members of the board of directors; the size of the investment; majority versus minority stake? As indicated

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[428] *See id.* (stating first category of illegal investment is contracting to develop Iranian petroleum resources).

[429] *See id.* (stating second category of illegal investment is acquiring interest in such development).

[430] *See* James Kynge, *Malaysia Angered by U.S. Sanctions Threat*, FIN. TIMES, Nov. 1, 1996, at 6 (asserting that United States has no right to impose extra-jurisdictional sanctions on other countries); *U.S. Embassy Denies Sanctions Are Planned Against Malaysian Oil Firm for Iranian Dealings*, 13 Int'l Trade Rep. (BNA) 1698, 1698 (Nov. 6, 1996) (reporting U.S. government denial of intention to impose sanctions).

[431] *See* H.R. REP. NO. 104-523(II), at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1318 (stating that House Ways and Means Committee does not intend that sanctions would extend to portfolio investments made by any other person in sanctioned person).

earlier, the safest strategy for dealing with these questions is to seek an advisory opinion from the Secretary of State.[432]

The third class of illegal direct foreign investment transactions concerns the receipt of royalties, earnings, or profits from the development of Iranian petroleum resources.[433] As in the previous category, the precise boundaries of this category are uncertain. Typically, earnings and profits would be received from an equity interest in a petroleum resource development project. But might this interest be characterized as a portfolio investment? A company responsible for a petroleum development project would pay royalties for the sale or license of patented technology. Presumably, a patent holder must take care not to sell or license technology to a company for use in the Iranian petroleum resource sector.

Congress anticipated the possibility that businesses might seek to circumvent the $40 million investment trigger sanction by structuring a transaction in amounts less than $40 million. Accordingly, the prohibited activity also includes any combination of investments of at least $10 million each, which, in a twelve-month period, add up to or exceed $40 million.[434]

Congress also anticipated the possibility that the investment trigger sanction might not induce other countries to develop their own sanctions against Iran. Therefore, it included a stick — the possibility of an enhanced sanction.[435] If a country agrees to impose economic sanctions and other substantial measures to inhibit Iran's efforts to support efforts of international terrorism, then the President may waive application of the investment trigger sanction to individuals and businesses from that country.[436] However, if a country has not undertaken

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[432] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 7. Advisory opinions) (illustrating issuance of advisory opinions).

[433] *See id.* (Iran and Libya Sanctions, Sec. 14. Definitions) (detailing third class of illegal foreign investments).

[434] *See id.* (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions) (describing imposition of sanctions with respect to Iran).

[435] *See id.* (Iran and Libya Sanctions, Sec. 4. Multilateral regime) (allowing President to apply enhanced sanctions). The President is required to report to Congress regarding any country to which the enhanced sanction is applied. *See id.*

[436] *See id.* (allowing President to waive sanctions if country agrees to support sanctions against Iran). The President must notify Congress of the waiver at least 30 days before the waiver takes effect. *See id.*

substantial measures in this regard, then the President will apply a mandatory enhanced sanction to individuals and businesses from that country.[437] The enhancement consists of lowering the threshold that triggers the sanction.[438] Instead of a $40 million aggregate limit on petroleum resource investments, the limit drops to $20 million.[439] Likewise, the $10 million limit applicable to combinations of investments drops to $5 million. Hence, it becomes illegal to make a combination of investments of at least $5 million each that, in a twelve-month period, equal or exceed $20 million.[440]

The existence of reasonably specific definitions of the terms "investment," "develop," and "petroleum resources," and Congress's anticipation of certain problems should not suggest that enforcement of the 1996 Sanctions Act is mechanical. To the contrary, there are important unresolved issues. For example, the Act does not provide any guidance as to what a "direct and significant" contribution to the development of Iran's petroleum resources would be. The President, therefore, has considerable discretion to impose the mandatory investment trigger sanctions. In fact, the President must render a case-by-case judgment for each suspect investment to determine whether it is both direct and significant in nature. Political considerations will almost certainly play some role in these cases.

For example, in July 1997, the Clinton Administration announced it had no objections under the Act to the construction of a $1.6 billion natural gas pipeline linking Turkmenistan and Turkey via Iran.[441] The pipeline, according to Secretary of State Madeleine Albright, was "a way to help Turkey and Turkmenistan."[442] Turkey, of course, is an important U.S. ally; with respect to Turkmenistan, the United States has been "keen to wean the former Soviet republics away from their economic

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[437] *See id.*

[438] *See id.*

[439] *See id.* (noting lower threshold that triggers sanction).

[440] *See id.*

[441] *See* Charles Clover, *Azerbaijan Looks to U.S. to End Sanctions*, FIN. TIMES, July 28, 1997, at 4 (speculating on United States' shifting view of pipeline politics); Charles Clover & Robert Corzine, *U.S. Decision Sparks a New Round of Pipeline Politics*, FIN. TIMES, July 31, 1997, at 4 (discussing United States's non-opposition to pipeline).

[442] Clover & Corzine, *supra* note 441, at 4.

dependence on Russia."[443] As a legal matter, the decision may be defended because the pipeline will not help develop Iranian petroleum resources — the pipeline will carry Turkmen, not Iranian, natural gas.[444]

To alter the example, suppose a country bordering Iran builds a natural gas pipeline up to its border with Iran, and buys natural gas from Iran that will be transported in the new pipeline. Does the transaction trigger the investment sanction? The question is not hypothetical because Turkey is engaging in exactly this sort of transaction.[445] In August 1996, just days after the Act took effect, a newly-elected Islamic government in Turkey signed a twenty-two-year, $20 billion natural gas contract with Iran.[446] Under the contract, Iran agreed to sell roughly 140 billion cubic feet of natural gas per year to Turkey beginning in 1998.[447] The gas will be delivered in a new pipeline consisting of two parts. A 680-mile portion will run from the Turkish-Iranian border into Turkey and will cost $1.2 billion.[448] A 170-mile portion will run from the border into Iran and cost $300 million.[449] Turkey is responsible for building its portion of the pipeline, while Iran is responsible for building the portion on Iranian soil.[450] The Turkish government asserts it is not providing any assistance to the Iranians to build the pipeline.[451] The United States has warned Turkey that the transaction could violate the Act,[452] but Turkey

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[443] *See id.*

[444] *See It Will Burn Nicely, Anyway: Turkey and Iran: A Gas Pipeline Across Iran*, ECONOMIST, Aug. 2, 1997, at 30 (explaining that in theory, Iran will receive only transit revenues to avoid conflict with Act).

[445] *See* Steven Erlanger, *Turkey-Iran Gas Deal: A Test of U.S. Law on Terror?*, N.Y. TIMES, Aug. 13, 1996, at A7; *Turkey Sets Iran Gas Deal, Says It Doesn't Defy Ban*, WALL ST. J., Aug. 12, 1996, at A1; Gary G. Yerkey, *U.S. Continues to Study Iran-Turkey Energy Pact to Determine Whether It Violates U.S. Trade Law*, 13 Int'l Trade Rep. (BNA) 1353, 1353 (Aug. 21, 1996).

[446] *See Turkey Sets Iran Gas Deal, Says It Won't Defy Ban*, *supra* note 445, at A7.

[447] *See id.* There are discrepancies in media accounts of the exact amount of natural gas Turkey will purchase each year. Two reports, for example, state that Iran will supply 105 billion cubic feet beginning in 1999, and the volume will rise to 350 billion cubic feet by 2005. *See id.*

[448] *See id.*

[449] *See id.*

[450] *See* James M. Dorsey, *Iran-Turkey Gas Deal to Test New U.S. Law*, WALL ST. J. EUR., Aug. 13, 1996, at A2.

[451] *See id.*

[452] *See id.*

has a plausible defense. The contract is nothing more than a trade deal — an exchange of natural gas for money — and the Act does not prohibit trade deals. Nothing in the contract calls for a Turkish investment in Iran's petroleum resource development.

Turkey also has political factors in its favor. The United States values Turkey's participation in the North Atlantic Treaty Organization ("NATO") and the continuing use of Turkish military bases. Not only did these bases play an important role in the Gulf War, but they were also used to enforce the "no-fly" zones over Iraq.[453] Furthermore, the United States is wary of provoking anti-American Islamic extremists in Turkey. Thus, it seems quite unlikely that the United States will interpret the Iran investment trigger language in the Act in such a way as to reach Turkey's contract.

In the end, how the United States treats the transaction may not matter because the Turkey-Iran transaction will be difficult to complete. The proposed pipeline route traverses rugged terrain and hostile Kurdish territory.[454] Moreover, Turkey has alternate sources of natural gas, such as Russia, Algeria, Qatar, and possibly Egypt if a so-called "peace pipeline" from Egypt through Israel, Lebanon, and Syria is built.[455] However, the United States will be confronted with several other transactions that fall in the "gray" area between investment and trade. One probability will be natural gas supply agreements between Iran and India, Iran and Pakistan, and Iran and Turkmenistan.[456] After all, Iran has the second largest natural gas resources after Russia, and it is eager to develop these resources for export purposes.[457] Surely the threat of U.S. sanctions will not intimidate Iran into halting this development.

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[453] *See* Terry Atlas, *U.S. Finds Gulf War Still Isn't Over: Clinton Sends Warning to Hussein with Second Volley of Missiles*, CHI. TRIB., Sept. 4, 1996, at A1.

[454] *See* Bhushan Bahree, *Iran Takes Economic Steps in Response to U.S. Curbs*, WALL ST. J., Aug. 14, 1996, at A3 (discussing Iran's plan to sell natural gas to Europe and Turkey).

[455] *See* John Barham, *Turkey to Crack Down on Illicit Oil Trade with Iraq*, FIN. TIMES, Sept. 1, 1997, at 2 (reporting on other sources of natural gas for Turkey).

[456] *See, e.g.*, Robert Corzine, *Turkmenistan Defies U.S. Over Iran Gas*, FIN. TIMES, Jan. 21, 1997, at 4 (discussing Iran's deal to supply natural gas despite U.S. objections).

[457] *See Iran Says Project Opposed by U.S. Will Earn $45 Billion*, ENERGY ALERT, Oct. 14, 1997, at 12.

Another gray area is the distinction between an investment contract and a service contract. Suppose Turkey had agreed to provide routine maintenance on an Iranian natural gas pipeline. Would this constitute a prohibited investment? Guidelines on the implementation of the Act published by the Department of State suggest five inquiries to pursue to draw the distinction.[458] First, does the provider of management services put capital at risk? Second, does the provider receive a share of income or profits from the development? Third, does the provider receive an equity stake in the petroleum resources? Fourth, does the provider receive compensation based on investment performance? Finally, does the provider receive a share of the assets upon dissolution of the enterprise? An affirmative answer to these questions suggests the contract is a prohibited investment. However, it is not entirely clear how the U.S. government might resolve a case where some, but not all, of the inquiries are answered in the affirmative.

F. The Investment and Trade Triggers Against Libya

The 1996 Sanctions Act spells out two prohibited activities regarding Libya that would trigger U.S. imposition of two or more of the above-discussed sanctions. The first, an investment trigger, is identical in virtually all respects to the investment trigger for Iran. It is illegal for any person to (1) make an investment worth $40 million or more, (2) with actual knowledge, that (3) directly and significantly contributes to the enhancement of Libya's ability to develop its petroleum resources.[459] The only difference between the Iranian and Libyan investment triggers is that no waiver exists for the Libyan trigger and, therefore, neither do enhanced sanctions. The President does not possess the authority to waive the Libyan investment trigger if a country agrees to undertake substantial measures against

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[458] *See* Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067, 66068 (1996) (listing factors that determine whether contract for management services is investment rather than service contract); *State Department Issues Guidance Clarifying Iran-Libya Sanctions Law*, 13 Int'l Trade Rep. (BNA) 1967, 1967 (Dec. 18, 1996) (discussing State Department guidelines for implementing Iran-Libya sanctions).

[459] *See* 50 U.S.C.A. § 1701 note (West Supp. 1997) (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions).

international terrorism.[460] That authority applies only to the Iranian investment trigger.[461] As a result, the stick to encourage other countries to adopt measures against Libya — the imposition of the enhanced sanction — cannot cause financial pain.

The reason for this distinction between Iran and Libya is not apparent from the statute or legislative history. Business reality is the most likely explanation. As suggested earlier, European companies have far more extensive dealings in the Libyan than the Iranian petroleum industry. As a result, Congress probably realized there was little hope of inducing a multilateral sanctions regime against Libya beyond the measures already adopted in U.N. resolutions and, therefore, little point in applying the enhanced sanction.

The second prohibited activity concerns trade with Libya in sensitive military items. The President must impose two or more of the above-discussed sanctions if a person engages in the following transaction: (1) exports or transfers to Libya, (2) with actual knowledge, (3) of goods, services, or technology denied to Libya under U.N. Security Council Resolutions 748 or 883, and (4) these exports significantly and materially contribute to Libya's ability to develop its petroleum resources, maintain its aviation capabilities, acquire chemical, biological, or nuclear weapons or a destabilizing number of advanced conventional weapons, or enhance Libya's military capabilities.[462] While the prohibited transaction mentions petroleum resources and aviation, the clear thrust of the criteria concerns weapons.[463] In essence, the trade trigger is a unilateral measure adopted by the United States to reinforce the multilateral arms embargo already implemented by the United Nations. Neither the Act nor its legislative history casts doubt on the sincerity or efficacy of the U.N. Security Council measures. However, the very existence of the trade trigger sanction must be seen as just that:

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[460] *See id.* (stating that President may waive Iranian investment trigger, with no similar provision for Libya).

[461] *See id.* (discussing investment trigger for inhibiting Iranian activities).

[462] *See id.* (discussing sanctions for prohibited transactions).

[463] *See id.* (concluding sanctions were response to Iran's acquisition and threatened use of weapons and Libya's failure to comply with U.N. resolution mandating reduction of weapons).

congressional skepticism of the willingness of some countries and their nationals to forsake profits and cease arms dealings with Libya. Essentially, the trade trigger says to the world: "The United States agrees with the multilateral measures against Libya, but just to ensure compliance, the United States has its own secondary boycott to keep everyone in line."

As with the investment trigger that contains the flexible but undefined language "directly and significantly contribute[s],"[464] the trade trigger uses the phrase "significantly and materially."[465] Again, this undefined phrase gives the President considerable maneuvering room in deciding whether to impose sanctions. Likewise, both triggers contain the same mens rea requirement of actual knowledge.[466] Thus, the proof problems of actual knowledge noted earlier regarding the investment trigger are certain to recur in the context of the trade trigger.

An obvious question is why Congress chose to include a trade trigger for Libya, but not for Iran. After all, this choice means that the secondary boycott of Iran is narrowly tailored to petroleum resource investments, whereas the secondary boycott of Libya includes these petroleum investments plus exports in a wide array of other goods and services. The legislative history explains the reason for the differential treatment of the two countries.

> In the case of Iran, the [House Ways and Means] Committee believes that it will be more effective to impose sanctions on companies that invest in Iran's oil and gas resources . . .
>
> However, the Committee did not believe it was wise to include a requirement in the bill [H.R. 3107, the final version of the Act] that the President sanction trade with Iran (the so-called "trade trigger") *because the cost to U.S. interests of imposing such a broadly based secondary boycott would be too high.*
>
> *For example, monitoring international trade with Iran, especially in common goods like drill pipe and drill bits, would be a difficult if not an unworkable task. The number of trade transactions will be significantly higher than the number of investment contracts and the flow of components impossible to trace. The incidence of sanctions required by the trade trigger would be greater. The Committee believes*

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[464] *Id.*

[465] *Id.*

[466] *See id.*

> *it would be so high as to cause serious damage to our relations with trusted allies.* By contrast an investment trigger is more workable for the President and more potent when applied. Equipped with an investment sanction the President is in a better position to convince countries trading with Iran to join the U.S. in denying Iran the opportunity to earn hard currency from its petroleum resources.
>
> *Libya represents a different case by virtue of multilaterally agreed trade sanctions adopted by the United Nations Security [Council] Resolutions,* which prohibit trade in weapons, aviation equipment, and oil equipment significant to the refining sector. For Libya, the bill establishes a mandatory sanction framework for violations of the internationally agreed regime.[467]

In sum, the different economic histories and geopolitical circumstances account for the different treatment of Iran and Libya.

G. Duration and Termination of Sanctions

Any sanction imposed under the 1996 Sanctions Act must remain in effect for at least one year from the date imposed.[468] In general, the Act establishes a minimum two-year duration for sanctions.[469] However, the Act also allows for the possibility that the President may determine and certify to Congress that the sanctioned person is no longer engaging in a prohibited transaction and has provided reliable assurances that it will not knowingly violate the Act in the future.[470] In this event, the President may lift the sanctions, subject to the requirement that they remain in effect for at least a year.[471] In effect, this requirement ensures the imposition of a minimum penalty and prevents a sanctioned person from skirting sanctions by temporarily ceasing an illegal activity and providing a disingenuous assurance of future compliance.

The Act lays out two further bases for terminating sanctions that, unlike the focus on the sanctioned person, allow for termination if Iran and Libya reform their behavior. First, the

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[467] H.R. REP. NO. 104-523(II), at 14-15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1317 (emphasis added).

[468] *See id.* at 18, *reprinted at* 1996 U.S.C.C.A.N. at 1320.

[469] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 9. Duration of sanctions; Presidential waiver).

[470] *See id.*

[471] *See id.*

requirement to impose sanctions will cease to exist if the President determines and certifies to Congress that Iran no longer supports acts of international terrorism, and has abandoned its efforts to obtain nuclear, chemical, and biological weapons, and ballistic missiles and launchers.[472] Second, the requirement to impose sanctions will terminate if the President determines and certifies to Congress that Libya has satisfied the requirements of U.N. Security Council Resolutions 731, 748, and 883.[473]

If the President refuses to make any of the three aforementioned determinations and certifications, then the sanctions may remain in place for considerably longer than two years. How much longer, however, is not clear. The Act contains a sunset provision stating that the Act lapses five years after the date of enactment, which was August 5, 1996.[474] However, one reading of this sunset provision is that it precludes the imposition of new sanctions after August 5, 2001, but not the continued enforcement of sanctions imposed prior to that date. Thus, at least in theory, there is no fixed termination period on sanctions.

This possibility raises an interesting problem: while a decision to impose sanctions is not reviewable by any court,[475] could a sanctioned person challenge the sanctions long after the United States imposed them if reasonable grounds exist to believe their continuation is unwarranted? The answer seemingly depends partly upon how a court defines the statutory words "to impose." Do they refer narrowly to the initial presidential decision to impose sanctions, or do they also encompass a refusal by the President to determine and certify that the criteria for terminating sanctions have been met?

The presence of a sunset provision should not give false hope to critics of the Act that it will become legal history after August 5, 2001. Congress clarified its reason for the sunset provision in the legislative history to the Act. The House Ways and Means Committee never intended the Act to be permanent.[476] Even

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[472] *See id.* (Iran and Libya Sanctions, Sec. 8. Termination of sanctions).

[473] *See id.*

[474] *See id.* (Iran and Libya Sanctions, Sec. 13. Effective date; sunset).

[475] *See id.* (Iran and Libya Sanctions, Sec. 11. Determinations not reviewable).

[476] *See* H.R. REP. NO. 104-523(II), at 19 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1322.

in this sensitive policy area, five years is sufficient time to gauge how effectively the Act achieved its objectives.[477] The Committee believes "it will be important for Congress to revisit the issue in five years and to evaluate the behavior of Libya and Iran and the effectiveness of this bill."[478] In other words, a renewal of the Act appears to be as likely a scenario as its termination.

At the same time, the sunset provision should encourage U.S. petroleum companies because of the diverse underlying national security considerations of the Act. At some undetermined point in the future, possibly when new political leaders assume control in Iran and Libya, the United States will abolish the sanctions because they will no longer be necessary. In the meantime, nothing in the Act prevents U.S. petroleum companies from maintaining and cultivating business contacts in these countries. As long as the Act remains in place, a farsighted U.S. company should endeavor, to the extent politically possible, to network in Iran and Libya. Indeed, Mobil Oil, Amoco, and Conoco appear to be positioning themselves for the inevitable post-sanctions era. In May 1997, they sent mid-level officials to an Iranian-sponsored energy conference in Isfahan.[479]

H. Waiver and Delay of Sanctions

The 1996 Sanctions Act provides three circumstances under which sanctions may be waived. First, the President can waive the imposition of sanction if a waiver "is important to the *national interest* of the United States."[480] This waiver authority appears to be quite broad; it is not limited to a national security interest, but rather can be invoked for any sort of national interest. The legislative history indicates that the President might consider use of this waiver authority if the imposition of sanctions would threaten U.S. intelligence sources and methods, hinder the international cooperation and the international obligations of the United States, or lead to unacceptable costs to U.S.

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[477] *See id.*

[478] *Id.*

[479] *See* Daniel Pearl, *U.S. Oil Firms Attend Conference in Iran*, WALL ST. J., May 12, 1997, at A11.

[480] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 9. Duration of sanctions; Presidential waiver) (emphasis added).

economic interests.[481] For example, the President could find that imposing sanctions is contrary to national interest because it would result in an unacceptably high loss of sales or profits to U.S. businesses or cost too many Americans their jobs.

The only real constraint on the President's national interest waiver authority is that he must report to Congress about the waiver determination at least thirty days before the waiver takes effect.[482] The report must discuss certain specifically listed items, such as a description of the illegal transaction, an estimate of the extent to which the transaction helped Iran or Libya, and a discussion of how the President would handle a repeat offense by the sanctioned person.[483]

Second, the President can waive sanctions if the imposition would harm the U.S. government's ability to obtain critical goods and services. Regarding defense procurement, the United States need not and should not impose sanctions upon a person who is a sole source supplier of an essential defense article or service if (1) there is no readily or reasonably available alternative source, or (2) the defense article or service is being provided under an existing contract and is essential to the national security of the United States.[484] Similarly, regarding non-defense related items, the President can waive sanctions for persons supplying medicines, humanitarian items, spare parts, component parts, or information technology essential to U.S. manufacturing that provides routine servicing and maintenance on products without another readily or reasonably available source.[485] In short, this waiver of authority ensures that a U.S.-imposed secondary boycott of Iran or Libya does not eventually damage the Pentagon or U.S. manufacturers.

Finally, as discussed earlier, nationals of a country may escape sanctions if their country has "agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran's

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[481] *See* H.R. REP. NO. 104-523(II), at 18, *reprinted in* 1996 U.S.C.C.A.N. at 1320-21.

[482] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 9. Duration of sanctions; Presidential waiver).

[483] *See id.*

[484] *See id.* (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions).

[485] *See id.* It should be noted that the statute incorrectly numbers the items in subsection (f), omitting an item (5). *See id.* The correct numbering should finish with item (6), which should cover medicines.

efforts" to sponsor acts of international terrorism.[486] This waiver possibility does not apply to Libya.

To restate, the President's determination to impose sanctions is not reviewable by any court.[487] Consequently, it is impossible for a sanctioned person to delay imposition by attempting to bog down the President in a lawsuit. However, the Act sets forth conditions that are largely under the control of the President and the government with primary jurisdiction over the sanctioned person, under which imposition may be delayed for up to 180 days. By allowing for delayed imposition of sanctions, Congress provided an avenue to soften the unilateral blow of the Act.

Specifically, Congress urges the President to consult with the government that has primary jurisdiction over a person the President determines to be liable under the Act immediately after he makes that determination.[488] In order to do so, the President can delay implementation of sanctions for up to ninety days.[489] Sanctions need not be imposed if, after consultation, the President determines and certifies to Congress that the foreign government has taken effective actions to terminate the foreign entity's involvement in the illegal transaction.[490] The President can delay implementing sanctions for a further ninety days if he determines and certifies to Congress that the government "is in the process of taking" these actions.[491]

V. THE PRAGMATIC QUESTION: DO NATIONAL SECURITY SANCTIONS WORK?

Clearly, the United States has not been, and will not be, shy about enacting legislation authorizing unilateral trade action against another country in the interest of national security. These invocations of statutory authority must be judged by more

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[486] *See id.* (Iran and Libya Sanctions, Sec. 4. Multilateral regime).

[487] *See id.* (Iran and Libya Sanctions, Sec. 11. Determinations not reviewable); H.R. REP. NO. 523(I), at 17 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1306.

[488] *See* 50 U.S.C.A. § 1701 note (Iran and Libya Sanctions, Sec. 9. Duration of sanctions; Presidential waiver).

[489] *See id.*

[490] *See id.*

[491] *See id.* The President must report to Congress on the status of consultations and any additional 90-day delay. *See id.*

than their appropriateness in the post-Uruguay Round multilateral trading system, and their consistency with the rules of that system. After all, from this perspective, the judgment is rather obvious: the language of GATT article XXI is not a serious constraint on the use of national security sanctions, and only the good faith of WTO Members to avoid abusive invocation in the interests of the multilateral system provides some measure of a GATT-based constraint.

Rather, a practical issue emerges from the earlier discussions of trade remedies in support of national security aims. The United States's use of national security sanctions ultimately must be judged by a bottom line question: does unilateral action in support of national security aims work? The empirical evidence concerning unilateral action pursuant to statutes other than section 301 of the Trade Act of 1974 suggests that such action is not nearly as effective as its advocates would hope or believe.[492] Indeed, unilateral trade action often has a negative effect on the U.S. economy.

One recent study, conducted by the Institute for International Economics, examined the impact of unilateral U.S. sanctions imposed against twenty-six countries, including Cuba, Iran, Libya, and Burma.[493] It concluded that in 1995, the sanctions cost the United States between $15 and $20 billion as a result of lost exports and higher-priced substitute import sources and between 200,000 and 250,000 lost export-related jobs.[494] These self-inflicted wounds are sure to worsen with the tightened unilateral ban on new U.S. investment in Burma.

> The day after a prohibition on new U.S. investments in Burma was announced, the heads of several [non-U.S.] oil companies operating in the country sat down to dinner at one of Rangoon's new luxury hotels. They were salivating — but not because of the succulent lobster on offer that evening.

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[492] *See supra* note 170 and accompanying text (discussing unilateral statutory actions).

[493] *See* Robert Corzine & Nancy Dunne, *U.S. Business Hits at Use of Unilateral Sanctions*, FIN. TIMES, Apr. 16, 1997, at 10 (discussing Institute of International Economics study).

[494] *See id.*; *see also* Gary G. Yerkey, *U.S. Sanctions Against Other Countries Cost Exporters Up to $19 Billion, Study Says*, 14 Int'l Trade Rep. (BNA) 736, 736 (Apr. 23, 1997) (discussing Institute for International Economics study).

> Instead, they were discussing how to carve up exploration rights held by U.S. companies, rights the U.S. companies will most likely have to give up under the new rules . . . .
>
> In the absence of the U.S. companies, "it's all there for the taking. No project will not be taken up," says an executive with a Malaysian conglomerate.[495]

Interestingly, the Institute for International Economics study triggered the creation of a coalition of 440 U.S. companies and trade associations called "USAENGAGE."[496] The mission of USAENGAGE is to "fight the imposition of unilateral sanctions by the United States."[497] As its chairperson, Donald V. Fites, the chief executive officer of Caterpillar, Inc., states, "the evidence is clear . . . [that] [t]he proliferation of U.S. unilateral sanctions undermines American leadership and competitiveness, costs U.S. jobs, and results in significant losses to the economy."[498] Recently, USAENGAGE supported congressional legislation that would curb U.S. use of unilateral sanctions.[499] The legislation would require an assessment of the economic impact and likelihood of success of such sanctions before they are imposed, and authorize the President to waive sanctions if they are not in the U.S. national interest.[500] Any sanctions imposed would be reviewed annually and lapse after two years unless renewed by Congress.[501]

A second recent study, conducted by the National Association of Manufacturers, reviews sixty-one laws or executive actions ordering unilateral U.S. sanctions against thirty-five foreign countries — including Cuba, Iran, Libya, and Burma.[502] Those thirty-five nations represent 42% of the world's population, or 2.3 billion potential consumers of U.S. goods and services in export markets worth $790 billion annually.[503] "[I]n only a handful of

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[495] Ted Bardacke, *Burma — The Sick Man Gets Sicker*, FIN. TIMES, Apr. 29, 1997, at 6.

[496] *See* Yerkey, *supra* note 494, at 736.

[497] *Id.*

[498] *Id.*

[499] *See* Nancy Dunne, *U.S. Industry Tries to Curb Sanctions*, FIN. TIMES, Oct. 24, 1997, at 16.

[500] *See* Nancy Dunne, *U.S. Companies Plan Attack on Sanctions*, FIN. TIMES, Sept. 15, 1997, at 4.

[501] *See id.*

[502] *See* Claude E. Barfield & Mark A. Groombridge, *Unilateral Sanctions Jeopardize U.S. Economic and Diplomatic Interests*, BARRON'S, Oct. 13, 1997, at 70.

[503] *See* Gary G. Yerkey, *Unilateral Sanctions Target $790 Billion Potential Export Market a*

cases can it be argued that the sanctions changed the behavior of the targeted governments."[504] Thus, "[u]nilateral sanctions are little more than postage stamps we send to other countries at the cost of thousands of American jobs,"[505] and they "give U.S. companies the 'stigma' of being unreliable trading partners."[506] The obvious conclusion is that while these sanctions may make some Americans feel good, they do not work.

Both studies might well have added two other key concluding points. First, unilateral trade actions rarely have positive diplomatic results to offset the costs they impose on the U.S. economy. To date, for instance, the ruling regimes of Cuba, Iran, Libya, and Burma have made no significant changes in their policies. Typically, unilateral action turns an already recalcitrant regime into an outright defiant that attracts both admiration and sympathy from many in the Third World.

Second, unilateral trade actions have no effect on trade imbalances. To be sure, national security or human rights concerns motivate some unilateral actions. But a nagging concern about imbalances also plays a role in such actions. The truth that must be acknowledged is that macroeconomic factors are the key determinant of the direction and size of the U.S. trade balance.[507] Our chronic trade deficits are caused by variables such

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Year, Study Finds, 14 Int'l Trade Rep. (BNA) 421, 421 (Mar. 5, 1997).

[504] *Id.*

[505] Yerkey, *supra* note 503, at 422 (quoting Jerry Jasinowski, President, National Association of Manufacturers).

For another study discussing the economic consequences on the United States of unilateral sanctions, see PRESIDENT'S EXPORT COUNCIL, UNILATERAL ECONOMIC SANCTIONS: A REVIEW OF EXISTING SANCTIONS AND THEIR IMPACTS ON U.S. ECONOMIC INTERESTS WITH RECOMMENDATIONS FOR POLICY AND PROCESS IMPROVEMENT (1997) (concluding that negative economic impact on United States from unilateral sanctions could be reduced if United States more skillfully designed sanctions and avoided extraterritorial measures and secondary boycotts).

[506] *See* Yerkey, *supra* note 503, at 422 (paraphrasing Tracy O'Rourke, Chairman and Chief Executive Officer, Varian Associates, Inc.). However, another study, conducted by the American Chamber of Commerce in Japan, concludes that "[o]nly 13 out of 45 U.S.-Japan trade agreements signed since 1980 have succeeded in helping U.S. businesses penetrate the Japanese markets, while 10 accords were failures." Toshio Aritake & Mark Felsenthal, *Only 13 of 45 Accords with Japan Succeeded in Market Access, Business Group Reports*, 14 Int'l Trade Rep. (BNA) 76, 76 (Jan. 15, 1997). Many of these accords were negotiated "under the gun" of an actual or threatened section 301 action.

[507] *See* THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 53-54 (1994) (discussing role of macroeconomic factors in trade imbal-

as "relative rates of economic growth, fiscal and monetary choices at home and abroad, tax, savings, investment and exchange rate policies made individually or collectively around the world, and the internal cultures of important U.S. industries."[508] To say that unfair trade barriers are not the principal obstacle to U.S. exports is an understatement. In fact, "unfair trade practices account for only 5 to 15% of the trade deficit."[509] Suppose Japan removed all of its unfair trade barriers. At best, the bilateral U.S. trade deficit with Japan might decline by approximately 8 to 14%.[510]

It is also important to appreciate that a trade deficit also results from non-economic factors, such as social and cultural attitudes and perceptions of product quality. For instance, many Japanese consumers have traditionally been reluctant to buy rice from California, in part because they feel it is inappropriate in sushi and other Japanese cuisine. During the heated 1995 auto parts dispute, some Japanese officials remarked that U.S. car manufacturers did not make right-hand drive vehicles for the Japanese market and were generally of inferior quality to Japanese cars.[511] A unilateral trade action cannot alter foreign ob-

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ance). Bayard and Elliott elaborate on their reasoning:

> [T]rade policy cannot correct trade imbalances. For instance, if resources in an economy are fully employed, export promotion may affect the composition of a country's exports but is not likely to increase the level of exports. If Country A's economy is not at full employment, or if trade barriers in Country B raise that country's level of saving or reduce its domestic investment, trade policy may raise the level of Country A's exports. But with floating exchange rates, again there will be little impact on the trade balance because Country A's currency will appreciate, causing exports to decrease and imports to increase. Fundamentally, the trade balance is a macroeconomic phenomenon, determined by the balance between saving and investment by government, industry, and citizens, and it is usually not significantly affected by trade policy . . . .

Id.

[508] Paula Stern, *Reaping the Wind and Sowing the Whirlwind: Section 301 as a Metaphor for Congressional Assertiveness in U.S. Trade Policy*, 8 B.U. INT'L L.J. 1, 2 (1990).

[509] Steven R. Phillips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?*, 22 VAND. J. TRANSNAT'L L. 491, 551 (1989).

[510] *See id.*

[511] *See* BHALA, *supra* note 4, at 1144-52 (elaborating on United States-Japan trade conflict and eventual agreement with regard to automobiles). *See generally* Tracy M. Abels, Comment, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467 (1996) (analyzing United States-Japan auto dispute); William E. Scanlan, Comment, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding:*

servations and attitudes regarding American goods. Finally, according to evidence from USAENGAGE, America's unilateral economic sanctions contribute to the U.S. trade deficit simply by virtue of foregone export opportunities.[512]

In sum, unilateral trade action persists despite considerable evidence demonstrating it is ineffective, and often counterproductive. Nevertheless, this evidence has not prodded U.S. trade policy officials or jurists to rethink their fidelity to unilateral trade actions and is unlikely to do so in the foreseeable future.

CONCLUSION

National security and international trade law are inextricably linked. By virtue of GATT article XXI, the link is written into the constitution of modern international trade law. However, the link is not one between two equal forces. Article XXI provides little effective restraint on WTO Members from enacting national security sanctions legislation. Put bluntly, even in the international trade law constitution, international trade law is subordinated to national security.

The United States is exploiting this subordinate relationship. In the post-Soviet Union, post-Red China era, it is threatened by new groups of bad guys — drug kingpins, rogue dictators, and state-sponsored terrorists — who are less monolithic and more diffuse than the old bad guys. The United States is confronting this threat by deploying international trade law measures, including secondary boycotts, as a weapon. Unfortunately, America's companies, allies, and trade partners are being hit by friendly fire. The weapon is neither outrageous nor splendid. Neither supporters nor critics of the weapon are entirely on target with their arguments. But it does not appear to be particularly effective. Because its operation causes so much controversy and its results are modest at best, the burden now falls on U.S. trade policy makers to modify or scuttle the weapon.

The Japan-United States Auto Parts Dispute, 45 KAN. L. REV. 591 (1997).

[512] *See Sanctions Contribute to Trade Deficit, Group Says*, 14 Int'l Trade Rep. (BNA) 1113, 1113 (June 25, 1997).