

D'AMATO IN A CHINA SHOP: PROBLEMS OF EXTRATERRITORIALITY WITH THE IRAN AND LIBYA SANCTIONS ACT OF 1996

TIMOTHY S. DUNNING

1. INTRODUCTION

The United States is waging a war on terrorism. The weapon is the Iran and Libya Sanctions Act of 1996 ("ILSA" or "Sanctions Act"),¹ the primary target of which is neither terrorism nor its sponsors. Congress, seeking constriction of the petroleum industries of Iran and Libya, intends to compel U.S. trading partners to comply with the enforcement mechanisms of U.S. foreign policy. The unfortunate reality of ILSA simply is that it unilaterally allocates the burden of paying for the enforcement of U.S. foreign policy by means of a boycott leveled against foreign countries and companies otherwise beyond the jurisdiction of the United States.

Jurisdiction is central to evaluating the efficacy of ILSA. ILSA, not surprisingly, incited disapprobation within the international community.² Criticism of Congress and its dubious progeny universally focused on the extraterritoriality of the Sanctions

¹ Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (1997)). Also referred to as the D'Amato Act after proponent Senator Alfonse D'Amato, R-New York, ILSA received presidential approval on August 5, 1996. See Kees Jan Kuilwijk, *Restrictions Hit Traders*, FIN. TIMES (London), Oct. 10, 1996, at 19.

² See, e.g., Bruce W. Nelan, *Taking on the World*, TIME, Aug. 26, 1996, at 26 (citing Canada, Mexico, and the European Union ("EU") as critical of the U.S. legislation imposing boycotts). Representatives from member states of the Association of Southeast Asian Nations ("ASEAN") reproached the United States for threatening sovereignty and restricting trade with the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Solidarity Act") and ILSA. See Yang Razali Kassim, *US-Europe Rift Augurs Well for WTO*, BUS. TIMES (Singapore), Nov. 5, 1996, at 13. The ASEAN includes Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 580 (2d ed. 1995). Economic ministers from New Zealand and Australia also joined the ASEAN criticism of the Sanctions and Solidarity Acts during a meeting in Jakarta in September of 1996. See Yang Razali Kassim, *US Softening Towards WTO May Not Last*, BUS. TIMES (Singapore), Sept. 27, 1996, at 17.

Act.³ Although simple rhetoric is a significant element underlying this reproach of ILSA, claims of untoward extraterritoriality directed at the Sanctions Act essentially challenge its viability at the fundamental level of jurisdiction.

The problem of extraterritoriality, however, is not simple; rather, it is a pervasive issue for international law continually amplified by the inevitable and increasing interdependence of national economies.⁴ Such interdependence perforce will lead to clashes of national policy and claims of extraterritoriality. The international economy thus faces the daunting task of weathering legislative battles among nations, which often may only be restrained by the participants themselves. Although less than a free-for-all, this environment is unpredictable and, therefore, costly for those parties, both nations and their business entities, forced to navigate it.

The U.S. Congress has demonstrated eagerness to oblige other nations and their business interests to carry out its foreign policy goals. Legislation like ILSA and the similarly contentious Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Solidarity Act")⁵ represent both a projection of U.S. domestic

³ See, e.g., Tom Buerkle, *Bitterness over U.S.-EU Trade Deal Proves It a Truce, Not a Settlement*, INT'L HERALD TRIB., Apr. 15, 1997, at 6; Andrew Hill, *EU Condemns Cuba Sanctions but Delays Retaliation*, Reuter Business Report, Sept. 8, 1996, available in LEXIS, News Library, Curnws File (quoting Irish Foreign Minister Dick Spring's statement regarding the EU Foreign Ministers' "absolute opposition to legislation with extra-territorial effects").

⁴ See, e.g., Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 193 (1996) ("Increasing international economic interdependence is obviously becoming a growing challenge to governments, which are frustrated by their limited capacities to regulate or control cross-border economic activities.") (citation omitted); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 17, 24-25 (1996); Manfred Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AM. J. COMP. L. 505, 522 (1997).

⁵ The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. § 6021 (1997)). The Solidarity Act sanctions foreign nations, businesses, and citizens choosing to invest or operate in Cuba. See generally Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325 (1995-96). For a debate over the viability of the Solidarity Act, see generally Brice M. Claggett, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act: Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 434-40 (1996); Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD)*

politics into the realm of international trade⁶ and a willingness by Congress to employ secondary boycotts⁷ on foreign trading partners and their nationals to achieve foreign policy preferences.⁸ Although ILSA may represent a costless act of political expediency or some form of catharsis for recent tragedies to members of Congress, it is problematic due to its international effects irrespective of its legality in an international system.

This Comment will view the extraterritoriality problem with respect to ILSA based not on jurisdictional legality but upon its impact on foreign trading partners. These effects represent the

Act: Congress and Cuba: The Helms-Burton Act, 90 AM. J. INT'L L. 419, 419 (1996).

⁶ President Clinton initially expressed reservations about ILSA, which was signed with an extravagant public ceremony and much rhetoric suggesting that Clinton's assent was an act of "domestic political expediency." Vahe Petrossian, *US Escalates War of Words Against Iran*, MIDDLE E. ECON. DIG., Aug. 30, 1996, at 2, 3. Further, suspicion of terrorist involvement in the July 1996 crash of a TWA 747 in the Long Island Sound and possible links between Iran and the June bombing of a U.S. military barracks in Saudi Arabia, which resulted in the deaths of 19 U.S. military personnel, provided additional political pressure during the presidential campaign race that precluded anything but approval of ILSA. See, e.g., Nancy Dunne & Robert Corzine, *Politics Sets Tone for Trade Barriers*, FIN. TIMES (London), July 25, 1996, at 4 (suggesting that suspicion of terrorism in the crash of TWA 747 left President Clinton with no choice but to sign ILSA); Steven Erlanger, *Standoff with Iraq: The Strategy; Crumbling Walls: U.S. Effort to Isolate Both Iran and Iraq Is Fraying Badly*, N.Y. TIMES, Nov. 11, 1997, at A10 ("American policy makers have told some allied diplomats privately that if it were not for the 1996 law—and concern that Iran will be proven responsible for the truck-bomb attack on Khobar Towers in Saudi Arabia, which killed 19 American servicemen—Washington would be reviewing its Iran policy.").

Special interest groups were also instrumental in the passage of ILSA. The America Israel Public Affairs Committee ("AIPAC") assisted the drafting and lobbying for passage of ILSA. See Jeffrey L. Snyder, *ILSA Perplexes Foreign Firms*, NAT'L L.J., Oct. 7, 1996, at C1; see also Hillel Kuttler, *Clinton Signs Bill to Punish Companies Dealing with Iran, Libya*, JERUSALEM POST, Aug. 6, 1996, at 1 (noting that AIPAC "had made the bill a top priority" and "hail[ed] its signing" into ILSA).

⁷ Secondary boycotts occur when any foreign country excludes another country from certain trading rights and benefits due to that country or foreign national engaging in certain commercial activity with a third country. For example, "state A says that if X, a national of state C, trades with state B, X may not trade with or invest in A." Lowenfeld, *supra* note 5, at 429.

⁸ Both ILSA and the Solidarity Act employ the secondary boycott, "historically opposed by U.S. policymakers," as the primary means to restrict economic development in Iran, Libya, and Cuba. Snyder, *supra* note 6, at C1. It is interesting to note that the United States employed this failed technique once before during the U.S. Pipeline Embargo of 1982. See *infra* Section 2.2.2.2.

true difficulty with ILSA and with all extraterritorial legislation. Unprincipled legislative battles fought in the arena of world trade will be costly to the entire trading system and to its participants. Cold War unilateralism certainly cannot succeed in a global system that is both increasingly interdependent and dependent upon interwoven national economies. Such an environment is hostile to unilateralism.

Section 2 of this Comment, in an effort to determine an analytical framework for the viability of the secondary boycott established in ILSA, discusses extraterritoriality along with sovereignty. This Comment will argue that the extraterritorial nature of a state's act ultimately will not be dispositive in determining its utility; rather, the extent of extraterritoriality and its associated costs, together with its effects, will be determinative. These effects will be discussed in Section 2 with respect to the offensive or defensive nature of extraterritorial legislation. Section 3 provides an overview and discussion of relevant portions of ILSA. Section 4 analyzes the viability of the Sanctions Act and concludes that it will probably be ineffective. Additionally, Section 4 offers a modest recommendation for congressional reasonableness.

2. AN ANALYTICAL FRAMEWORK FOR EVALUATING THE EXTRATERRITORIALITY OF THE IRAN AND LIBYA SANCTIONS ACT

Extraterritoriality involves "the right to prescribe law, enforce law, and adjudicate conflict outside the territory of a particular state."⁹ Public international law confronts this issue when policies or, more pointedly, enforcement of national policies, collide.

2.1. *Extraterritoriality and Sovereignty*

Extraterritorial application of a nation's laws often produces an instinctive reaction born of a perceived infringement on the sovereignty of another nation. This perception is grounded in the territorial theory of law that presumes that regulatory rights are limited by territorial boundaries that create "a neat division of

⁹ Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 235 n.20; see also BLACK'S LAW DICTIONARY 588 (6th ed. 1990) (defining extraterritoriality as the operation of laws "upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws").

power in the world.”¹⁰ The international acceptance of nonmilitary coercion or persuasion, which usually takes the form of an economic sanction,¹¹ increasingly limits this principle of sovereignty. Nations often employ direct or primary boycotts and other economic sanctions to achieve political goals.¹² Sanctions either may be coordinated among several nations or executed by one state against another.¹³ Nations often do not view these sanctions as a violation of a country’s sovereignty partly because they are directed against some form of “unacceptable conduct.”¹⁴ More importantly, economic sanctions, although coercive to a degree,¹⁵ simply represent the refusal of a nation to exercise its rights of commerce or to allow its citizens to do the same with respect to the targeted country regardless of the number of participant nations.¹⁶

¹⁰ CARTER & TRIMBLE, *supra* note 2, at 737.

¹¹ See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162, 1167 n.12 (1987) (citations omitted) (reporting that widespread use of sanctions by nations indicates acceptance of sanctions by the international community).

¹² See *In Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 126 (June 27), the World Court found that economic sanctions including a trade embargo, elimination of economic aid, and reduction of a sugar quota did not violate the principle of nonintervention. See Carter, *supra* note 11, at 1167 n.12 (noting the approval of economic sanctions by the World Court in *Nicaragua v. United States*).

¹³ See Carter, *supra* note 11, at 1169.

¹⁴ Jeffrey K. Powell, Comment, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT’L ECON. L. 957, 985 (1996); see also Lowenfeld, *supra* note 5, at 429 (“[A] primary boycott does not usually raise issues of international law, because the boycotting state is exercising its jurisdiction in its own territory or over its own nationals.”).

¹⁵ See Carter, *supra* note 11, at 1166 (discussing the use of economic sanctions as a method to change a foreign policy).

¹⁶ See Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT’L L.J. 429, 443 (1995) (“[T]rade boycotts and embargoes are not contrary to public international law in the absence of treaties to the contrary . . .”).

More problematic are attempts to destabilize a nation’s government. Historically, the United States has frequently used this tactic. For example, in the 1980s, U.S. foreign policy sought to destabilize the Sandinista government in Nicaragua. See Carter, *supra* note 11, at 1171. More recently, in December 1995, Congress earmarked \$18 million to support covert destabilization of the government of Iran. See Kenneth R. Timmerman, *Clinton Offers Iran a ‘Frank Dialogue’; Tehran Views Gesture as Weakness*, WASH. TIMES, June 24, 1996, at A1.

The conceptual validity of sovereignty is controversial.¹⁷ Nevertheless, at some fundamental level, however defined, some territorial authority for a nation must exist. A state must at least have the ability to control its physical boundaries. Beyond this static baseline of territorial sovereignty exists a dynamic "bundle" of rights and duties that may be exchanged and often differ from state to state.¹⁸ This concept of sovereignty recognizes the opportunity for the application and enforcement of extraterritorial legislation in the international community.¹⁹ "Ultimately, . . . sovereign states can, without violating international law, take actions which have effect in the territory of other states."²⁰

2.2. *Defensive vs. Offensive Extraterritoriality*

The increasing interdependence of national economies in the global system will intensify conflicts of law and policy. Thus,

¹⁷ See Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399, 404 (1994) (discussing criticism of the concept of sovereignty).

¹⁸ See *id.* at 402 (citing J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107 (1994) (discussing the various meanings of sovereignty)); see also Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 752-56 (1997) (describing the "bundle of sticks" concept of modern sovereignty).

¹⁹ See Taylor, *supra* note 18, at 762. Nations mutually can accept arbitration decisions as binding, which represents a willingness to sacrifice certain rights in exchange for more predictable trade relationships. See, e.g., Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1491 ("U.S.-E.C. Agreement") (noting the importance of agreements for the efficient operation of interrelated markets); Robert Hudec, *Strengthening of Procedures for Settling Disputes, in REMAKING THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AGREEMENTS FROM AN ASIA-PACIFIC PERSPECTIVE* (H. Corbet ed., 1995) ("After almost fifty years of GATT history . . . most GATT governments identify a mutual self-interest in maintaining respect for GATT legal obligations."). For a recent discussion of the U.S.-E.C. Agreement and extraterritorial application of U.S. antitrust laws, see generally Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality"*, 17 U. PA. J. INT'L ECON. L. 909 (1996).

"The customary international law rule of sovereign immunity illustrates the central importance of state sovereignty in the modern world. The restrictive theory of such immunity, on the other hand, demonstrates the need to accommodate respect for foreign sovereign rights to new circumstances, such as state trading." Baade, *supra* note 16, at 440.

²⁰ Baade, *supra* note 16, at 440.

preclusion of extraterritorial legislation altogether could produce an unacceptable isolation of trading blocs due to the inability of nations to protect their markets in a free trade regime.²¹ Conversely, haphazard assertions of extraterritoriality could produce equally harmful results.²² When considering extraterritoriality, the legitimacy of the principle should not be questioned;²³ rather, the principal inquiry should be whether its effects are acceptable. Extraterritorial legislation may be loosely grouped into offensive and defensive categories according to the type of targeted activity.

2.2.1. *Defensive Extraterritoriality*

Broadly, defensive extraterritorial legislation²⁴ seeks to protect economic rights within the country of origin. The doctrine of comity²⁵ often governs this form of legislation. International public law recognizes extraterritoriality in certain situations in which one nation, applying comity, permits another nation to assert its jurisdiction with an understanding of reciprocity and a

²¹ This outcome is readily identifiable in the area of antitrust enforcement. See *infra* Section 2.2.1.1.

²² See James P. Rhatican, Comment, *Hartford Fire Insurance Co. v. California: A Mixed Blessing for Insurance Antitrust Defendants*, 47 RUTGERS L. REV. 905, 955-56 (1995) (warning that prolific antitrust enforcement and failure to include comity considerations could alienate the United States from its trading partners and render it a "commercial police officer").

²³ The Supreme Court, precluding a consideration of validity, has declared that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). See generally James Mathieu, Note, *The Supreme Court's Not So Clear Statement in: Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 21 BROOK. J. INT'L L. 939 (1996) (discussing the incoherent judicial treatment of extraterritorial application of U.S. law).

²⁴ U.S. law has not always had extraterritorial reach. The dominant theory of application at the turn of this century as expressed by Justice Holmes was that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

²⁵ The Supreme Court defined the doctrine in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

"Comity" . . . is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience

certain amount of goodwill.²⁶ Comity is most effective when the laws of the nations involved do not collide or the relative interests of these nations weigh heavily toward the party asserting its jurisdiction.²⁷ Defensive legislation often addresses the extraterritorial activity of a foreign entity (including another nation) having an impact within the governable territory of the enacting nation.²⁸

2.2.1.1. *Extraterritoriality and Competition Law*

The most common situations involving defensive behavior by nations occur in the context of competition law.²⁹ "Most, if not all, [U.S. allies and trading partners] have competition laws" and, despite a mutual recognition of the need for multilateral cooperation, the "intractable difference over extraterritoriality has generated friction between otherwise friendly governments."³⁰ Take, for example, the controversial issue of treble damages under the Clayton Act of 1912.³¹ These triple damage awards, applicable to commerce with foreign nations,³² particularly pique U.S. trading

²⁶ See Peter Durack, *Australia: Conflicts and Comity*, in ACT OF STATE AND EXTRATERRITORIAL REACH 41, 43 (John R. Lacey ed., 1983).

²⁷ See *id.*

²⁸ This action is an example of negative comity. See Himelfarb, *supra* note 19, at 914 & n.24.

²⁹ Although primarily a judicial innovation, U.S. antitrust legislation carries a presumption of extraterritoriality. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that antitrust legislation applies to foreign insurance companies); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6, (1986) (discussing the application of the Sherman Act to the conduct of foreign nations when such conduct affects U.S. commerce); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (stating that the monopolization or restraint of commerce that occurs in foreign countries is still within the reach of the Sherman Act). U.S. antitrust law thus answered market abuses occurring within the United States. See Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 298 & n.4 (1996). As the need for defensive measures to reduce the domestic impact of activities from abroad became more recognizable and the United States was dragged from isolationist idyll, the judiciary answered the call. See *id.*

³⁰ Durack, *supra* note 26, at 41; see also Himelfarb, *supra* note 19, at 947-55 (recognizing the need for harmonization of competition laws between the United States and the European Union).

³¹ See 15 U.S.C. §§ 12-27 (1997). Treble damages under the Clayton Act triple the amount awarded for an antitrust violation in actions brought by private parties or the federal government when standing as an injured plaintiff. See *id.* § 15.

³² See *id.* § 12.

partners.³³ The United States increasingly has broadened the definition of nationality of corporations to establish prescriptive jurisdiction over entities organized under the laws of other nations whether they are subsidiaries of U.S. corporations, parent companies of subsidiaries within the United States, or corporations otherwise under control of U.S. citizens through investment ownership.³⁴ Such expansive jurisdictional doctrine necessarily will produce more opportunities for international conflicts.

"Blocking"³⁵ statutes and "claw-back"³⁶ provisions represent the primary legislative responses to U.S. antitrust enforcement. These statutes are multifarious, but their common goal is to prevent or obstruct enforcement of extraterritorial competition law.³⁷ Many such statutes historically were enacted on an ad hoc basis to counter narrowly assertions of prescriptive jurisdiction by the United States in particular industries or specific cases.³⁸ A

³³ The United Kingdom regards "treble damage proceedings as penal and more on a par with criminal proceedings than with normal civil actions." William Knighton, *Britain: Blocking and Claw-Back*, in ACT OF STATE AND EXTRATERRITORIAL REACH, *supra* note 26, at 54.

³⁴ See *id.* at 52 (noting that the United States will, in some cases, assert jurisdiction over foreign corporations with only 25% ownership by U.S. shareholders).

³⁵ Blocking statutes include a broad category of legislation intended to block assertions of extraterritorial jurisdiction and limit their effects. See, e.g., Competition Act, ch. C-34, § 82(c) (1985) (Can.) (decreeing that foreign judgments that adversely affect competition or trade in Canada do not have to be implemented); see also Deborah A. Sabalot, Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 276-79 (1982) (listing various blocking statutes enacted in response to U.S. antitrust enforcement).

³⁶ Claw-back legislation allows a party against whom the court awards antitrust damages to bring an action for recovery of noncompensatory elements, such as treble damages, of a judgment. See Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.). This English claw-back provision partly rests upon the long-standing presumption that "the penal law of one country cannot be taken notice of in another." Baade, *supra* note 16, at 438 (quoting *Ogden v. Folliott*, [1790] 3 T.R. 726, 733 (K.B.)).

³⁷ See R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO. WASH. J. INT'L L. & ECON. 315, 325 (1995).

³⁸ See Durack, *supra* note 26, at 45 (listing Australia, Belgium, Canada and its provinces of Ontario and Quebec, Denmark, Finland, France, Germany, Italy, the Netherlands, New Zealand, Norway, Sweden, and the United Kingdom as having passed ad hoc blocking legislation); see also Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 67 (1992) (discussing the enactment of foreign legislation to block extraterritorial application of U.S. law).

protectionist element lurks beneath the sovereignty rhetoric accompanying passage of such blocking statutes

Several nations recently have enacted general blocking statutes which are much broader than ad hoc legislation.³⁹ These acts generally proscribe, either wholly or in part, compliance with foreign tribunals in any matter.⁴⁰ Identifying a protectionist motivation behind these statutes is difficult. Ad hoc blocking statutes often may concern protecting or subsidizing a particular industry,⁴¹ whereas general statutes reflect mostly a nation's economic and foreign policy decision to defend its autonomy.⁴²

General blocking statutes intuitively may appear to pose a much greater impediment to international trade and agreements than the more limited ad hoc legislation. The greater scope of general statutes, however, requires that nations approach obstructing extraterritoriality carefully. Certainly, legitimate activities, such as extradition or some antitrust actions, must be permitted to pass through this protective screen. In this respect, general blocking statutes may be seen as a legislative attempt to respond to several competing pressures, such as: concern over preserving determination of economic policy, interests of other nations in preventing anticompetitive behavior having an impact within their borders, and the overarching desire to accommodate these interests within an international system that increasingly seeks normalization of economic activity.

Blocking statutes present a particularly difficult problem for international public law. They juxtapose the interests of one state affected by anticompetitive conduct abroad and the interests of another state in protecting its territorial sovereignty. Both enforcement of extraterritorial protection laws and blocking statutes are defensive measures that pose a conflict of laws problem rather than a violation of customary international law.⁴³ A comity regime requiring reciprocity and compromise much like multilateral trade agreements may adequately protect both the interests of

³⁹ See, e.g., Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.).

⁴⁰ See, e.g., Foreign Extraterritorial Measures Act, R.S.C. ch. F-29, §§ 3, 5(1)(b) (1984) (Can.).

⁴¹ See Price, *supra* note 37, at 324 (noting that the purpose of blocking statutes is to protect the viability of an industry from foreign forces).

⁴² See Durack, *supra* note 26, at 45 (discussing the enactment of blocking statutes for general defensive reasons).

⁴³ See *id.* at 43.

the state affected by anticompetitive conduct and of the state protecting its territorial sovereignty. Certainly, attempts at such agreements have been made, but the principal example between the European Union ("EU") and the United States met with little success.⁴⁴ International trade agreements are probably the proper and, likely, the most effective mechanism for harmonizing these competing interests.

2.2.1.2. *Multinational Corporations: A Problematic Role in the Difficulties of Extraterritoriality*

The role of transnational corporate actors in the difficulties of extraterritoriality is of noteworthy concern. Corporate misconduct is a problem inherent in an international system governed by agreements rather than force of law.⁴⁵ The Supreme Court often faces criticism for failing to combat corporate transgressions by applying territorial restrictions to health and safety,⁴⁶ and environmental and labor laws.⁴⁷ The result is that subsidiaries of U.S. corporations organized under the laws of another country are not subject to often stricter labor and environmental regulations. The Court, however, has not hesitated to extend the extraterritorial reach of U.S. laws in the areas of trademark and securities,⁴⁸ anti-trust, and criminal enforcement.⁴⁹

⁴⁴ See generally Himelfarb, *supra* note 19 (indicating the failure of the multilateral trade agreement between the European Union and the United States).

⁴⁵ See Durack, *supra* note 26, at 43; see also THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990) ("In the international system, rules usually are not enforced . . ."). This loose system of agreements helps explain legislation like the Solidarity Act and ILSA: sprawling transnational commerce makes cooperative enforcement of an embargo difficult, and Congress' answer to this difficulty recently has been unilateral extraterritorial legislation.

⁴⁶ See, e.g., Gibney, *supra* note 29, at 300 n.8.

⁴⁷ See, e.g., *id.* at 300 ("[C]ertain areas of the law, most notably labor regulations and environmental legislation, were, and continue to be, given strict territorial readings.") (citations omitted).

⁴⁸ See, e.g., *id.* at 299 ("[T]he judiciary [] gave a very broad jurisdictional reading to trademark and securities laws . . .") (citations omitted).

⁴⁹ See, e.g., *id.* at 303 ("[A]ny hesitancy in applying and enforcing American criminal law overseas apparently ended some time ago.")

It has been suggested that there is a method to the incoherence: "U.S. law has been applied extraterritorially when that has served the national interest of the United States or its corporate actors, and it has been given a territorial application when a restrictive interpretation would serve those same ends." *Id.* at 304. This criticism, although interesting, may not be entirely accurate. Not

The multinational corporation ("MNC") as a global actor requires regulation to ensure the operation of national commercial laws and to deter the potential for abuse. For example, a MNC may seek to incorporate a subsidiary in a foreign jurisdiction for the purpose of avoiding costly local laws and regulations.⁵⁰ Moreover, nations with disparate enforcement powers and those with relatively undeveloped public law invite transnational abuses as well.⁵¹ Corporations without borders thus require regulation without borders. Without international regulation, MNCs may operate, at their worst, as economic guerrillas beyond the reach of

enforcing labor laws overseas could compromise prices in the United States: if company *X* operating in country *A* with a subsidiary in country *B* can exploit labor conditions in country *B* and produce a cheaper product than its counterpart, company *Y*, can produce in country *A*, then company *X* can undercut the price system in country *A*. Therefore, this coherence argument cannot explain the differing results of such a situation. Although it may be in the national interest to keep consumer prices low, it is not advantageous to encourage the exportation of labor intensive work to other more hospitable foreign countries. Rather, what appears to be at work is a side effect of both the decentralized three-branch system of government in the United States and the federal system in which U.S. states increasingly are able to legislate beyond their state and their national borders. See, e.g., THE FEDERALIST NO. 51 (James Madison); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 45-46 (1995); Moisés Naim, *Clinton's Foreign Policy: A Victim of Globalization?*, FOREIGN POL'Y, Winter 1997-98, at 34, 42 ("Devolution has gone global. From England to India and from Japan to Argentina, Russia, and the United States, power is shifting from federal to state and local governments.").

In *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981), a territorial decision had the potential for disastrous results within and without the United States. The court refused to apply U.S. environmental, safety, and health standards to the sale by Westinghouse of a substandard nuclear reactor to the Philippines that was to be built at the base of an active volcano and sitting atop a fault line. Although a natural disaster would have caused an unnatural one likely resulting in the devastation of the Philippines, including the 40,000 U.S. citizens located at military installations within a 50-mile radius of the site; a restrictive application of environmental guidelines here does not seem to serve any interest. See also Gibney, *supra* note 29, at 300, n.8 (discussing U.S. resistance to apply U.S. law to enforce environmental, health, and safety regulations abroad by focusing on the *Natural Resources Defense Council* decision).

⁵⁰ See Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 127 (1996) ("[N]either the U.S. government nor U.S. multinational corporations should engage in practices overseas that would be illegal if carried out in this country.").

⁵¹ See *id.* at 125 ("[T]hroughout the Third World... multinational[] [corporations] are essentially governed by no law at all.").

law. Their abusive actions threaten to invite clumsy, overbroad retaliation, such as excessive and unwarranted extraterritorial enforcement activities and blocking statutes.

2.2.1.3. *Effects Analysis*

Anticompetitive behavior and blocking statutes generate inefficiencies. First, raising walls of defensive legislation increases the transaction costs of conducting international business, because determination of the feasibility of ventures under existing legal regimes requires litigation and investigation.⁵² Second, anticompetitive behavior and industry-specific, ad hoc blocking statutes adversely affect international and national price systems.⁵³

Courts in the United States have been inconsistent in applying domestic law to extra-national conduct.⁵⁴ Incoherent judicial approaches to extraterritoriality limit the possibility of determining whether proposed transnational activity will result in a conflict of laws and of evaluating the probability of litigation. One incidental result is the creation of an incentive for foreign entities to settle claims rather than confront the complexities of litigating the issue and face possible sanctions levied upon them by their own governments through blocking statutes for complying with U.S. extraterritoriality provisions.⁵⁵

⁵² Increasing defensive legislation can be anticompetitive in itself by making the cost of conducting certain transnational activities prohibitive. *See supra* Section 2.2.1.1.

⁵³ The distorted effects of anticompetitive behavior are diverse. An international cartel or agreement could operate to inflate prices, in a manner similar to a classic monopoly. Additionally, a corporation or an alliance of corporations could, by absorbing short-term losses, attempt to deflate prices in the domestic market of a specific nation to eliminate competition and colonize the market with its own goods.

Blocking statutes also may distort price systems: “[t]he legal insulation provided by blocking statutes thus functions in a subsidy-like manner because it encourages affected industries to continue to operate as cartels and thereby charge artificially high (or low) prices to maintain their profitability or existence.” Price, *supra* note 37, at 324-25.

⁵⁴ *See generally* Gibney, *supra* note 29, at 301 (discussing the judiciary’s expansive and territorial interpretations of extraterritoriality statutes).

⁵⁵ *See, e.g.*, Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 3, 5(1)(b) (1984) (Can.) (establishing a maximum penalty of \$10,000 (Can.) and/or not more than five years in prison for contravening an order to disobey foreign tribunal requests). Therefore, a party subject to a foreign judgment in addition to domestic sanctions essentially must pay a double penalty for a single activity or transaction.

This inefficient settlement incentive simply encourages initiation of more claims due to the increased likelihood of a successful outcome. There are incentives here for parties *and* their counsel to bring such claims because of the attractive possibility of a monetary settlement without engaging in complex international, and therefore expensive, litigation. Further, the fact that a defendant may face treble damages in U.S. courts encourages settlement. Even in nations that have claw-back statutes like Great Britain, a party will be forced to commence an additional action in its own judicial system to reclaim multiple damage awards which may result in an economic nullity.⁵⁶

The importance of this analysis is to understand that a regime of comity may solve many problems associated with extraterritoriality and defensive countermeasures. Addressing the effects of enforcement actions, blocking statutes, and other defensive measures will mitigate much of their attendant difficulties. That is not to say that conflicts will disappear, especially in the realm of competition, but a more principled and coherent regime will be able to combat obstacles to free exchange more effectively rather than entrench them. Offensive legislation like ILSA may not be so amenable.

2.2.2. *Offensive Extraterritoriality*

Offensive extraterritoriality seeks compulsion of a nation to undertake some affirmative act or to refrain from a certain activity. Although similar to the coercive component of defensive extraterritoriality, offensive extraterritoriality does not necessarily respond to internal effects of extranational conduct.⁵⁷ Economic sanctions are a legitimate form of such extraterritoriality.⁵⁸ A recent example is the collective international effort to combat apartheid in South Africa.⁵⁹ This effort is representative of the advantageous and morally justifiable uses of offensive extraterrito-

⁵⁶ See, e.g., Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.) (describing qualifications for seeking recovery of overseas multiple damages awards in the United Kingdom).

⁵⁷ ILSA, for instance, does not respond to any effects in U.S. territory caused by foreign investment in the energy sectors of Iran and Libya. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (1997)).

⁵⁸ See Carter, *supra* note 11, at 1167 n.12.

⁵⁹ See, e.g., *id.* at 1165 (noting the limited scope of sanctions against South Africa and calling for legislative change to promote similar sanctions).

riality in the international system. Difficulties arise when excessive extraterritoriality affects policy making and the economic sovereignty of other nations.

2.2.2.1. *Boycotts and Offensive Extraterritoriality*

The trade boycott is a subcategory of economic sanctions, broadly composed of primary and secondary boycotts.⁶⁰ A nation imposing a primary boycott will restrain its citizens and corporations from trading with a state or group of states.⁶¹ Although certainly coercive, international law permits primary boycotts to achieve foreign policy goals unless they are unreasonable.⁶² Difficulties with such boycotts arise, however, when they include a broad definition of nationality. The United States considers persons under its territorial jurisdiction to include not only its citizens and corporations organized under U.S. laws, but also corporations owned or controlled by such citizens or corporations, which include corporations organized under the laws of a foreign country.⁶³ If country *A* employs a boycott against country *B*, country *A* may attempt to levy sanctions against corporation *X*, organized under the laws of *C* and a subsidiary of corporation *Y* incorporated in country *A*, for failure to comply with the conditions of the boycott even though *X*'s activities are legal in country *C*. This broad assertion of control is an "extended primary boycott," which blurs its distinction from secondary boycotts.⁶⁴

⁶⁰ For an anatomical study of trade boycotts, see Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1367-70 (1976).

⁶¹ See *id.* at 1367.

⁶² "The frequent use of these [economic] sanctions by many countries constitutes persuasive evidence that no clear norm exists against them in customary international law." Carter, *supra* note 11, at 1167 n.12.

⁶³ Cf. 50 U.S.C. § 2405(a)(1) (1994) (extending broad foreign policy control to the President).

⁶⁴ Steiner, *supra* note 60, at 1369. Extended primary boycotts also include proscription of trade involving products with components made in the target country as well as the reexport by foreign entities of products originating from the boycotting state, including products incorporating component parts also originating from the boycotting state. See *id.* The United States has even extended primary boycotts to include products made by licensee corporations in third-party countries. See 50 U.S.C. § 2405(a)(1); Sarah J. Cogswell, Comment, *In the Wake of the Pipeline Embargo: European-United States Dialogue*, 12 FLA. ST. U. L. REV. 73, 76-77 (1984).

The secondary boycott seeks to halt third-party nations from trading with the target country.⁶⁵ This essentially amounts to an infringement on foreign policy making in third-party countries where trading with the target nation is not prohibited. These countries, not surprisingly, resist such application of another nation's foreign policy.⁶⁶ One typical response to secondary boycotts is refusal to obey.⁶⁷ Secondary boycotts technically do not contravene customary international law, because sanctions generally apply only to parties having contacts with the enacting state.⁶⁸ Therefore, secondary boycotts may simply be an application of territorial authority. The potential impact of such boycotts within the territory of third-party nations, however, poses an extraterritoriality problem.⁶⁹

2.2.2.2. *The Case of the U.S. Pipeline Embargo of 1982*

In June 1982, President Reagan enacted an extended primary boycott on the export and reexport of U.S. technology and oil and gas equipment to be used in a natural gas pipeline from the Soviet Union to Europe.⁷⁰ President Reagan justified the boycott as an appropriate response to the imprisonment of the leaders of the Solidarity Movement in Poland and the enactment of martial law in that country in December 1981.⁷¹ European nations reacted strongly to this extraterritorial embargo. Great Britain and France ordered affected parties under its jurisdiction to disobey the trade restrictions, and the European Economic Community sent an official protest to the United States.⁷² President Reagan

⁶⁵ See Steiner, *supra* note 60, at 1368-69.

⁶⁶ See, e.g., *id.* at 1374-84 (discussing the U.S. reaction to the Arab League secondary boycott).

⁶⁷ See, e.g., Carter, *supra* note 11, at 1194 (noting refusal of nations to adhere to the U.S. pipeline embargo in 1982).

⁶⁸ See, e.g., Clagett, *supra* note 5, at 436; Lowenfeld, *supra* note 5, at 429-30.

⁶⁹ See Lowenfeld, *supra* note 5, at 430 (noting that peacetime imposition of a secondary boycott "is contrary to international law, because it seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe").

⁷⁰ See Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (1982) (to be codified at 15 C.F.R. pts. 376, 379, 385); Cogswell, *supra* note 64, at 73.

⁷¹ See Lowenfeld, *supra* note 5, at 432 (citing Statement of President Reagan on U.S. Measures Taken Against the Soviet Union Covering Its Involvement in Poland, 17 WEEKLY COMP. PRES. DOC. 1429 (Dec. 29, 1981)).

⁷² See Cogswell, *supra* note 64, at 79.

ultimately retracted the embargo due to domestic and international pressure and the failure of third-party nations to comply.⁷³

The pipeline embargo represents a direct conflict between U.S. and European law and foreign policy. Although this conflict represents a diplomacy issue rather than a legal one,⁷⁴ the actors caught in the middle are multinational corporations. Any course of action they take will violate either the laws of their third-party nation of incorporation or those of the enacting country.⁷⁵ This is essentially a situation of forced institutional cognitive dissonance⁷⁶ whereby a corporation is compelled to function knowing its actions are both legal and illegal. Companies facing this situation are forced to make a choice, one which may be impossible to execute due to already existing public and/or private legal obligations. The result of this distasteful compulsion may be a future coloring of the afflicted company's interactions, not with the United States, but with its corporations.

2.2.2.3. *Effects Analysis*

Secondary boycotts and extended primary boycotts encounter the same international problems. Resorting to a secondary boycott partly represents the lack of international agreement as to the

⁷³ See Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (1982) (to be codified at 15 C.F.R. pts. 376, 379, 385) *see also* Carter, *supra* note 11, at 1195 & n.130 (stating that President Reagan rescinded the regulations because of heavy allied opposition, pressures from the U.S. business community and Congress, and the regulations' impotence when European companies nonetheless performed their contractual duties).

⁷⁴ See Cogswell, *supra* note 64, at 84.

⁷⁵ See Carter, *supra* note 11, at 1195 n.129 (describing *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, Dist. Ct. at the Hague, *reprinted in* 22 I.L.M. 66 (1983), in which Sensor, a U.S. subsidiary incorporated in the Netherlands, was compelled to honor a sales contract in violation of the U.S. boycott).

For a similar case involving a U.S. corporation and the Arab League secondary boycott of Israel, see the discussion of *United States v. Bechtel Corp.*, Civil No. C-76-99 (N.D. Cal. filed Jan. 16, 1976), in Lionel Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, and United States v. Bechtel Corporation*, 54 TEX. L. REV. 1411 (1976). Bechtel was accused of antitrust violations when he complied with the Arab boycott of Israel by declining to deal with U.S. firms blacklisted under the boycott in the United States. See *id.* at 1412.

⁷⁶ Cognitive dissonance is a "psychological conflict resulting from incongruous beliefs and attitudes held simultaneously." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 223 (10th ed. 1993).

proper policy to employ with respect to the target country.⁷⁷ This can often result in the imposition of blocking statutes which make compliance with the secondary boycott illegal within a nation condemning such economic sanctions. Alternatively, a nation will instruct those within its jurisdiction to ignore the secondary boycott.⁷⁸

The secondary boycott particularly is an unpalatable course of action because it can have a real impact within third-party countries.⁷⁹ Such economic sanctions will influence business decisions within third-party nations and create the potential for inefficient, non-optimal choices by economic actors.⁸⁰ Further, the transaction costs of conducting multinational business activities may rise due to the delay and expense of investigating the potential impact of a commercial transaction running afoul of the boycott, the laws of the business' third-party country of origin, or both.⁸¹ The stakes in such a transaction, of course, depend upon the relative power and economic importance of the enacting nation and of the targeted nation.

3. THE IRAN AND LIBYA SANCTIONS ACT OF 1996

The salient feature of ILSA is that it seeks to impose secondary boycotts on foreign nationals with respect to the energy sectors of Iran and Libya.⁸² These secondary boycotts intend to limit the capabilities of Iran and Libya from sponsoring terrorism

⁷⁷ See Jacques Attali, *A View from Europe (II)*, FOREIGN POL'Y, Winter 1997-98, at 54, 57 (arguing that international law requires consensus rather than unilateral legislation).

⁷⁸ See *supra* Section 2.2.1.1.; see also Cogswell, *supra* note 64, at 79 (noting that Great Britain and France ordered their companies to ignore the U.S. pipeline sanctions). The United States itself has a blocking statute for secondary boycotts against friendly nations. See 50 U.S.C. app. § 2407 (1994).

⁷⁹ See, e.g., Steiner, *supra* note 60, at 1371-72 (noting that requests for submissions in compliance with the Arab boycott may have affected as much as \$4.5 billion worth of transactions). The U.S. banking industry shouldered much of the burden of filing requests for compliance with the boycott. See *id.* at 1392. Thus, compliance with boycott requests may increase the transaction costs of international commercial dealings and perhaps deter some ventures.

⁸⁰ See *id.* at 1391. Secondary boycotts violate "principles of free trade and allocational efficiency" by deflecting "foreign trade from channels that would have been followed in a free market." *Id.* Further, it alters "internal trade relationships" of third-party countries. *Id.*

⁸¹ See *supra* Section 2.2.1.3.

⁸² See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5, 110 Stat. 1541 (codified at 50 U.S.C. § 1701 (1997)).

and acquiring weapons of mass destruction.⁸³ Congressional frustration over the inability of the United States to orchestrate a multilateral and cohesive international strategy with respect to Iran and Libya, in part, appears to drive ILSA.⁸⁴

ILSA requires the President to apply at least two of seven possible sanctions against foreign interests investing either more than \$40 million in one year (or projects of at least \$10 million that exceed \$40 million in the aggregate in one year) in Libya or more than \$20 million in Iran that “directly and significantly” contribute to petroleum developments in these countries.⁸⁵ The sanctions available to the President include: refusal of insurance, guarantee, or extension of credit to a sanctioned person by the Export-Import Bank of the United States;⁸⁶ restriction of export of goods or technology from the United States to any sanctioned person;⁸⁷ prohibition of imports to the United States which are produced by any sanctioned person;⁸⁸ prohibition of U.S. financial institutions from extending loans or credit in excess of \$10 million to any sanctioned person in a twelve-month period;⁸⁹ revocation of the status of primary dealer of U.S. debt instruments for any sanctioned financial institution;⁹⁰ prohibition of a sanctioned financial institution from acting as an agent of the U.S. government or serving as a repository of government funds;⁹¹ and prohibition of government contracts with a sanctioned party.⁹²

⁸³ See H.R. 3107, 104th Cong. § 3 (1996).

⁸⁴ See Iran and Libya Sanctions Act § 4(a) (urging the United States to establish a multilateral sanctions regime against Iran). It is ironic that Congress has selected a unilateral means in the hopes of effectuating multilateral cooperation. The means chosen by Congress have served only to unite the entire European Union over the common issue of U.S. extraterritoriality. See *supra* note 2; see also *A Warning from Ouagadougou*, FOREIGN POL’Y, Winter 1997-98, at 59, 59.

⁸⁵ Iran and Libya Sanctions Act § 5(a), (b)(2). The Sanctions Act requires imposition of sanctions for trade with Libya in violation of United Nations Resolutions 748 and 883. See *id.* § 5(b)(1). The limit of \$20 million imposed on Iran was changed from \$40 million in August 1997. See *Down with Free Trade*, ECONOMIST, Oct. 4-10, 1997, at 50.

⁸⁶ See H.R. 3107, 104th Cong. § 5(1).

⁸⁷ See *id.* § 5(2)(A).

⁸⁸ See *id.* § 5(2)(B).

⁸⁹ See *id.* § 5(3).

⁹⁰ See *id.* § 5(4)(A).

⁹¹ See *id.* § 5(4)(B).

⁹² See *id.* § 5(5).

ILSA seeks to compel foreign nations to impose economic sanctions on the targeted countries by operation of an executive clause.⁹³ The President may waive nationwide imposition of sanctions upon a country's nationals if he produces a report finding that the country in question has imposed economic sanctions on Iran for the purposes of preventing sponsorship of terrorism and the acquisition of weapons of mass destruction.⁹⁴ The language of the Sanctions Act suggests that the President may only waive sanctions if nations similarly restrict development of Iran's energy sector.⁹⁵ The House Ways and Means Committee, however, claims that countries may execute sanctions that differ from the U.S. embargo to meet presidential waiver requirements.⁹⁶ Congress provided the President with an escape clause, however, which allows a waiver of sanctions on nationals on a case-by-case basis if such waiver is "important to the national interest of the United States"⁹⁷

Any imposition of sanctions "under [the Sanctions] Act shall not be reviewable in any court."⁹⁸ Upon request of an interested party, the Secretary of State may issue an advisory opinion as to the legality of any proposed transaction under ILSA.⁹⁹ Further, good faith reliance upon an advisory opinion that states that the inquiring party will not be subject to sanctions will protect the inquiring party from sanctions.¹⁰⁰ In practice, therefore, all parties conducting any borderline transactions will be required to seek an advisory opinion. The advisory opinion and non-reviewability provisions work together to produce an odd result. If two parties engage in the same type of transaction and one requests and receives an advisory opinion declaring the activity acceptable, upon a decision by the President that such activity actually violates ILSA (perhaps due to publicity and pressure by

⁹³ See *id.* § 4(A).

⁹⁴ See *id.* § 8(c).

⁹⁵ See *id.* Congress has determined that Iran's petroleum industry is crucial for providing funds to support its rogue activities. See *id.* § 3.

⁹⁶ "[T]here may be approaches or actions by other countries to inhibit Iran's activities that differ from the current U.S. embargo" Snyder, *supra* note 6, at C12.

⁹⁷ H.R. 3107 § 8(c)(1).

⁹⁸ *Id.* § 12.

⁹⁹ See *id.* § 6.

¹⁰⁰ See *id.*

members of Congress), the party not requesting an advisory opinion will face sanctions while the other party will not. While this potential inconsistency is a minimal effect of ILSA, it exacerbates the more fundamental problems with offensive extraterritoriality of this variety.

4. PROBABLE FAILURE OF ILSA AND A PROPOSAL FOR MITIGATION OF ITS EFFECTS

Although ILSA may not violate customary international law, it is still problematic, because it is unreasonable and has the potential for far-ranging, unintended effects.¹⁰¹ The Sanctions Act provides a useful paradigm of the changing international economic order. Increasing interdependence of economies complicates the formulation and, more importantly, the implementation of foreign policy by nations.¹⁰² Such conflicts are likely to continue and intensify absent efforts to supplement free trade efforts with considerations of reasonableness in international conduct and multilateral attempts to solve international problems.¹⁰³ The concerted international effort to eliminate apartheid in South Africa demonstrates the powerful capability of multilateral efforts to effectuate reform in troublesome nations.

4.1. *Blocking Legislation: Filling the Cold War Power Vacuum*

The United States likely will face a host of responses to its enforcement of ILSA. The European Union drafted legislation protecting its corporations from judgments levied under the Solidarity Act; this countermeasure has been drafted sufficiently broad to mitigate the effects of ILSA as well.¹⁰⁴ Great Britain likely will employ the Protection of Trading Interests Act of 1980¹⁰⁵ to protect its corporations and subsidiaries organized under British law

¹⁰¹ For a discussion of the potential impact of ILSA on financial institutions, see generally Clyde Mitchell, *The New Sanctions Act*, N.Y. L.J., Aug. 21, 1996, at 3.

¹⁰² See *supra* note 4 and accompanying text.

¹⁰³ See, e.g., Attali, *supra* note 77, at 57.

¹⁰⁴ See, e.g., John Roberts, *Europe-Trade: Europe Plans Tough Response to U.S. Sanctions*, Inter Press Service, Aug. 7, 1996, available in LEXIS, News Library, Inpres File (indicating the flexibility of the EU legislation with respect to dealing with the harmful effects of ILSA).

¹⁰⁵ See Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.); see also *supra* notes 36, 39 and accompanying text (describing generally the Protection of Trading Interests Act).

from ILSA.¹⁰⁶ Canada and France have also prepared blocking legislation should ILSA have effects within those countries.¹⁰⁷

These legal salvos suggest a developing trend in international commercial law. There is increasing competition between trading blocs to assert their economic influence in developing nations of which these jurisdictional battles are a part. Recent U.S. attempts to strangulate the Cuban economy and thereby compel democratic reform is instructive.¹⁰⁸ As the United States pursues its alienation policy, the European Union actively is seeking to strengthen its economic ties with the island nation.¹⁰⁹ This juxtaposition is also readily apparent in Iran and Libya. The current political dancing is not unlike the power struggles that pervaded the Cold War, the bipolar international regime marked by the stalemate of nuclear parity between the United States and the former Soviet Union. The United States appears willing to continue unilateral implementation of foreign policy; a tactic much more effective when U.S. allies lived under the specter, whether a reality or a Cold War fiction, of armed confrontation.¹¹⁰

Unilateral directives like ILSA and other assertions of extra-territoriality by the United States coupled with subsequent responses from U.S. trading partners pose an increasing threat to free trade. Further, the United States is compromising its position in its own trading region. Canada initiated a response to ILSA and the Solidarity Act.¹¹¹ Although ILSA has an eye to-

¹⁰⁶ See Roberts, *supra* note 104.

¹⁰⁷ See *id.* (reporting on French legislation intended to block the negative effects of ILSA); see also *US Over-reaches*, PRESS (London), Sept. 4, 1996, at 11 (quoting Art Eggleton, Canadian Minister of International Trade: "[t]he extra-territorial effects of this latest act represent once again an attempt by the US to dictate trade policy to its allies").

¹⁰⁸ See *supra* note 5.

¹⁰⁹ See *Improving Relations Between the EU and Cuba*, RAPID, Nov. 18, 1996, available in LEXIS, World Library, Rapid File. The Economic and Social Committee of the EU produced a twenty-page report advocating conclusion of a trade and cooperation agreement as soon as possible that would allow the EU to take advantage of failing U.S.-Cuba relations and strengthen EU presence in Latin America. See *id.*

¹¹⁰ In fact, such unilateralism failed even during the Cold War during the 1982 Pipeline Embargo. See *supra* Section 2.2.2.2.

¹¹¹ See *Trade, Politics a Volatile Mix*, STRAITS TIMES (Singapore), Sept. 18, 1996, at 28; see also *EU/US: EU Overcomes Danish Reserve to Agree Cuba Retaliatory Measures*, European Report, Oct. 30, 1996, No. 2170, available in LEXIS, News Library, Eurprt File (stating that the European Union possesses a

ward creating a multilateral response to rogue behavior by Iran and Libya, it intends to compel such a response through unilateral economic sanctions. The European Union, which purchases twenty percent of its imported oil from Libya and Iran, likely will not countenance an imposition of sanctions against its companies developing additional sources of energy.¹¹²

4.2. *Economic Sanctions Unlikely to Succeed*

U.S. efforts to isolate Iran and Libya have met with little success. This partly is due to an unwillingness by allies and trading partners of the United States to adopt U.S. foreign policy enforcement mechanisms.¹¹³ The mixed success of such penalties explains another reason for the likely failure of economic sanctions.¹¹⁴

States subjected to economic sanctions have become increasingly resistant to such measures.¹¹⁵ The failure of sanctions to dissuade foreign nationals from engaging in trade with Iran and Libya may be linked to two trends. First, the increasing interdependence of national economies and aggressive expansion of trading blocs combine to make states less dependent upon the United States for trade. Second, other countries are still willing to assist nations under U.S. sanctions.¹¹⁶ During the Cold War, the Soviet Union would often provide assistance to countries at odds with the United States.¹¹⁷ This role currently is occupied more often than not by the EU or its member nations.¹¹⁸ Economic sanctions also have proven less successful when directed at achieving

legal framework to defend interests that may be threatened by ILSA and the Solidarity Act).

¹¹² See Roberts, *supra* note 104.

¹¹³ The EU advocates a policy of "critical dialogue" implemented in 1980 which has also been relatively unsuccessful. See Amir Taheri, Editorial, *To Influence Iran's Mullahs, Speak in One Voice*, INT'L HERALD TRIB. (France), Aug. 15, 1996 ("The American stick and the European carrot, used separately, don't work.").

¹¹⁴ One study calculated that economic sanctions imposed by the United States between 1945 and 1985 succeeded about 40% of the time. See Carter, *supra* note 11, at 1172.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *supra* note 109 (discussing EU efforts to establish economic ties with Cuba); see also Taheri, *supra* note 113 (indicating the EU's plan to assist Iran after ILSA).

more narrow policy goals, such as deterring nations from supporting terrorism.¹¹⁹ Nonetheless, narrow policy goals are more successful when sanctions have immediate effect and when they are levied against nations with smaller economies.¹²⁰

The Sanctions Act will likely fail to curb Iran and Libya's rogue behavior. Because Libya and Iran provide one-fifth of the EU's oil imports, the EU needs to maintain amicable relations with both countries.¹²¹ Further, Libya has steady trading partners in France and Italy, and Iran has significant relationships with Turkey, Germany, and France.¹²² The focus on constricting development of Iran's petroleum industry by ILSA will likely have minimal short-term impact.¹²³ Finally, both Iran and Libya have expanding economies.¹²⁴ The historical success of economic sanctions and all of these factors indicate that ILSA is not likely to achieve its goals.

Over the last four years, the United States has enacted eighty-one laws levying economic sanctions against thirty-six different countries.¹²⁵ This legislative trend indicates a U.S. willingness to sacrifice world trade liberalization to achieve its foreign policy goals. It is arguable that trade liberalization should be the ultimate goal of U.S. foreign policy.

Perhaps much of this legislation is in fact designed to restrain economic competition. It is possible that unilateral sanctions may be enacted to protect large U.S. business interests already prevented from trading with certain countries by leveling the playing

¹¹⁹ See Carter, *supra* note 11, at 1174.

¹²⁰ See *id.*

¹²¹ See *supra* note 112 and accompanying text.

¹²² See, e.g., Roberts, *supra* note 104 (listing companies from Italy, Germany, Spain, France, Belgium, and Austria facing potential U.S. sanctions); Taheri, *supra* note 113 (discussing Iran's ties with Turkey, Germany, and France as well as a shipbuilding contract with Italy in Bandar Abbas).

¹²³ Recent oil price increases will provide Iran with an additional \$1 billion over the next year. See Taheri, *supra* note 113; see also *Energy: U.S. Legislation to Have Limited Impact on Iran Oil Sector*, Inter Press Service, Dec. 12, 1996, available in LEXIS, News Library, Inpres File [hereinafter *Oil Sector*] (claiming that Iran is capable of sustaining its present oil production for the next five-to-ten years).

¹²⁴ See *Oil Sector*, *supra* note 123.

¹²⁵ See Willard Berry, *Why Sanctions Don't Work*, FIN. TIMES, Dec. 1, 1997, at 14.

field.¹²⁶ Such a goal requires compliance by other countries with the policies expressed by these sanctions. Without cooperation, U.S. firms stand to lose valuable opportunities in an extremely competitive sector.¹²⁷ With respect to ILSA, compliance is not and likely will not be forthcoming.

The current response to ILSA by the international community is a combination of disregard and coalition building. Several companies from France, Russia, and Malaysia have agreed to a \$2 billion development of the South Pars natural gas field with Iran.¹²⁸ The deal includes Total SA of France, the Malaysian national oil corporation, Petronas, and the state-owned Gazprom of Russia.¹²⁹ Because this coalition deal includes state-owned companies and operations from different countries, enforcement of ILSA becomes extremely precarious. Coalitions provide more than financing; they presently proffer corporations safety in numbers. This deal highlights an important element of developing international commerce: MNCs are not entirely non-state entities. As the South Pars deal indicates, nations have an interest in ensuring the prosperity of their businesses and are sensitive to encroachments on these operations by other countries.

¹²⁶ However, many U.S. oil companies decry the imposition of sanctions against Iran. See Maher Chmaytelli, *U.S. Oil Firms Left Out, Frustrated as Iran Opens for Business*, Agence France Presse, Mar. 18, 1998, available in LEXIS, News Library, Curnws File. Archie Dunham, the President and CEO of Conoco, declared that the United States must change its "use of unilateral economic sanctions as a foreign-policy tool." *Id.* The failure of U.S. sanctions to encourage its allies to follow suit has prevented U.S. firms from enjoying the benefits of recent market expansion in countries like Iran. See *id.*

¹²⁷ See *id.* "If Washington does come around to the view that its policy is not working, and that the domestic developments in Iran would justify a change of approach, the Europeans will immediately start worrying that U.S. competitors will outsmart them in the battle for contracts." *Id.* (quoting Rosemary Hollis, head of the Middle East Programme at London's Royal Institute of International Affairs).

¹²⁸ See, e.g., Steven Erlanger, *Clinton Hesitates to Punish Nations for Iran Oil Deals*, N.Y. TIMES, Mar. 21, 1998, at A1; *U.S. Official Not Investigating Petronas-Iran Deal*, ASIAN ECON. NEWS, Nov. 24, 1997, available in LEXIS, News Library, Curnws File. Additionally, Bow Valley Energy Ltd. of Canada and the Indonesian outfit, Bakrie Minarak have also signed a \$180 million agreement for the development of Iranian energy products. See Erlanger, *supra*, at A1. Russia's Gazprom has also initiated talks with Iran for other various energy sector projects. See Michael S. Lelyveld, *Russia's Ongoing Iran Deals Anger Sanctions Backers*, J. OF COM., Mar. 23, 1998, at 11A.

¹²⁹ See *id.*; Erlanger, *supra* note 128, at 11.

These international responses are exacerbated by domestic politics in the United States. First, the difficulty with ILSA is that it differs fundamentally from the analogous pipeline embargo¹³⁰ with respect to their points of origin. The Sanctions Act will not be repealed easily: congressional representatives would probably view revocation of antiterrorist legislation as certain political suicide. The pipeline embargo conversely was an act of executive discretion easily discontinued.¹³¹ ILSA does offer some opportunity for presidential discretion, which may serve to mitigate its effects.¹³² Presently, the President is seeking ways to invoke the waivers available in ILSA with respect to the South Pars Deal.¹³³ The reluctance by President Clinton to enforce ILSA demonstrates the political underpinnings of the Sanctions Act. Neither Congress nor the President could politically afford to block passage of legislation at least superficially intended to combat terrorism.¹³⁴ The resulting signals sent to Europe are that the United States is incapable of producing coherent foreign policy,¹³⁵ and, more importantly, that ILSA, because it is effectively being ignored by the President and his administration, may be ignored.¹³⁶

4.3. *U.S. Extraterritorial Legislation and the World Trade Organization: The Future of ILSA Under the WTO Is Bleak*

It appears that ILSA was drafted, at least in part, with the World Trade Organization ("WTO") in mind. The congressional findings cited as reasons for adopting ILSA include attempts by Iran and Libya to acquire and develop weapons of mass destruction as well as the threat to U.S. national security posed by international terrorism.¹³⁷ Although referencing a legitimate concern

¹³⁰ See *supra* Section 2.2.2.2.

¹³¹ See Lowenfeld, *supra* note 5, at 433.

¹³² See *supra* Section 3.

¹³³ See, e.g., Erlanger, *supra* note 128, at 11.

¹³⁴ See *supra* note 6.

¹³⁵ See, e.g., Naím, *supra* note 49, at 34; Lelyveld, *supra* note 128, at 11A ("[T]he right hand of [the U.S.] Iran policy never seems to know what the left hand is doing.").

¹³⁶ Europe, Russia, Canada, Indonesia, and Malaysia all seem content to ignore ILSA and its threat of sanctions. See *supra* notes 121-22 and accompanying text.

¹³⁷ See H.R. 3107, 104th Cong. § 2 (1996).

over terrorism, ILSA, if brought before a WTO panel, likely will not warrant an exemption under the national security escape clause in Article XXI of the General Agreement on Tariffs and Trade ("Agreement").¹³⁸ Such a defense is tenuous at best and will not be received well by any WTO panel. Equally important would be the means by which ILSA seeks to effect its goals. The Sanctions Act employs a secondary boycott affecting private individuals and corporations not a party to any alleged threat to U.S. national security. Article XXI of the Agreement cannot be construed broadly; such an interpretation would render the Agreement and the WTO impotent by seriously undermining their ability to bind member nations to dispute settlement decisions.

4.4. *The Costly Impact of Sanctions Is Diverse and Far-Ranging*

The result of offensive extraterritoriality embodied in ILSA is the actual possibility of increasing the costs of conducting international commercial transactions.¹³⁹ The most common costs asso-

¹³⁸ Article XXI states in pertinent part:

Nothing in this Agreement shall be construed

...

(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.

General Agreement on Tariffs and Trade, Oct. 30, 1947 art. XXI, 61 stat. A-63 (footnote omitted).

¹³⁹ Forcing companies to navigate a minefield of legislation may delay or deter international transactions, or, as has happened recently, companies may engage their host countries to protect their interests, which necessarily delays projects. See *supra* notes 125-29 and accompanying text. The failure likely to result from ILSA has been analogized to the catastrophic U.S. grain embargo of the Soviet Union, which resulted in no foreign policy gains and a loss of U.S. share in the Soviet grain market. See Berry, *supra* note 125, at 14.

ciated with U.S. economic sanctions as reported in a study by the European-American Business Council ("Report") include "a loss of joint venture opportunities, a reduction in U.S. employment, and severed supply relationships."¹⁴⁰ Further, the Report indicated that 80% of the participating firms were harmed by U.S. sanctions, 44% lost business opportunities, and eighteen participating firms reported an aggregate loss of \$1.9 billion due to U.S. economic sanctions.¹⁴¹ Because the United States has to date failed to enforce ILSA, international transactions operate under a looming cloud of unpredictability.¹⁴² Both of these effects are unfriendly to the conduct of international trade and business.

Negative economic impact is only one of the untoward results of ILSA's extraterritoriality. When unilateral legislation goes unheeded in the international community, the goal of curbing rogue behavior will go unmet. Further, it is likely that the people of a targeted nation ultimately will bear the burden of economic sanctions.¹⁴³

One interesting consequence of ILSA is its impact on the ability of the President and his administration to implement foreign policy. First, ILSA makes any attempts by President Clinton to improve relations with Iran extremely difficult. This is a rather unfortunate and untimely result with the indication by new Iranian President, Mohammad Khatami, that Iran may be willing to scale-back confrontation with the United States.¹⁴⁴

Second, the United States needs cooperation from Europe and Russia to deal with ongoing troubles with Iraq and recent events in Serbia.¹⁴⁵ Not only is the President impaired by domestic political agendas,¹⁴⁶ he is also confronted with legislation that, although intended to force the hand of U.S. trading partners, ties his hands in foreign relations while failing to effect any of its stated goals.¹⁴⁷ It is quite clear that ILSA was drafted without

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *See Snyder, supra* note 6 (discussing the lack of clarity within ILSA as to determinations of legality of transactions which will require a case-by-case analysis causing delay and expense before a venture even begins).

¹⁴³ *See Berry, supra* note 125, at 14.

¹⁴⁴ *See Erlanger, supra* note 128, at A1; Lelyveld, *supra* note 128, at 11A.

¹⁴⁵ *See Erlanger, supra* note 128, at A1.

¹⁴⁶ *See Naím, supra* note 49, at 35 (referring to the "primacy Clinton gives to [domestic] political calculations").

¹⁴⁷ *See Erlanger, supra* note 128, at A1.

contemplation of its far-reaching impact,¹⁴⁸ and such legislation must be curbed in the future.

4.5. *A Prospective and Pragmatic Proposal for Solving Problems of Extraterritorial Legislation*

The difficulty with extraterritorial legislation is that, at least to some extent, it is a symptom rather than an ailment. Efforts to liberalize world trade and the increasing economic interdependence of nation-states necessarily lead to such legislative confrontations. A solution to the problem of extraterritoriality is not a quixotic wind mill campaign. Rather, acceptance of the unique structure of international law that operates without binding force should implicate the need for a regime of comity instead of combat, which threatens to undermine a comity regime already in operation by agreement under the GATT-WTO system.

Congress should enact future legislation with consideration of international concerns as well as domestic ones. The influence of electoral politics on acts of Congress may not reasonably be expected to dissipate; it may, however, be restrained. The principle of reasonableness should govern the imposition and enforcement of extraterritorial legislation. *The Restatement, Third, of Foreign Relations Law of the United States* recommends such practice. Nations have the authority, prescriptive jurisdiction, to make laws applicable to conduct without its borders having or intending to have "substantial effect within its territory."¹⁴⁹ Prescriptive jurisdiction is impermissible "when the exercise of such jurisdiction is unreasonable."¹⁵⁰ Reasonableness is determined by a host of fac-

¹⁴⁸ See Berry, *supra* note 125, at 14. "Many legislators seem to believe that voting for sanctions is good politics with little cost Even if sanctions have no effect they still make a statement, say many lawmakers. These views are too often held without any understanding of the harm caused by sanctions" *Id.*

¹⁴⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986). This authority is included under "jurisdiction to prescribe," which permits nations "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." *Id.* § 401(a). Complementing prescriptive jurisdiction is "jurisdiction to enforce," which permits enforcement of and punishment for noncompliance with "laws or regulations" subject to reasonableness requirements under § 403. *Id.* § 401(c).

¹⁵⁰ *Id.* § 403(1).

tors;¹⁵¹ these factors should be considered prospectively when enacting legislation.

ILSA fails under several of these factors. First, foreign investment in development of the energy sectors of the Iranian and Libyan economy does not have a "substantial, direct, and foreseeable effect upon"¹⁵² the United States. U.S. regulation of such investment through a secondary boycott contravenes the "traditions of the international system."¹⁵³ Finally, ILSA regulates investment that other states, chiefly those of the EU, "have an interest in regulating,"¹⁵⁴ and where the "likelihood of conflict with regulation by another state"¹⁵⁵ is imminent.

ILSA offers an opportunity to employ comity to create a diplomatic solution to U.S. problems with its trading partners over extraterritoriality. The President may suspend or withhold enforcement of ILSA for particular countries or individuals if such action conforms with the national interest.¹⁵⁶ The difficulty with this exercise of presidential discretion has several implications. First, it injects more unpredictability into an already chaotic system. Second, this discretion does not erase the actual legislation, which itself is objectionable. Finally, the President's failure to enforce ILSA indicates to other countries that the Sanctions Act may be disregarded.

Senator Richard Lugar has introduced a bill that will provide Congress with guidance in drafting sanctions legislation in the future.¹⁵⁷ This prospective cure cannot prevent the damage caused by ILSA, but it may curb future transgressions by encouraging principled guidance to drafters and requiring sunset provisions in legislation imposing sanctions on foreign countries.¹⁵⁸

5. CONCLUSION

The recent commitment of the United States to unilateral imposition of foreign policy is as much an economic problem as it is

¹⁵¹ See *id.* § 403(2).

¹⁵² *Id.* § 403(2)(a).

¹⁵³ *Id.* § 403(2)(f).

¹⁵⁴ RESTATEMENT § 403(2)(g).

¹⁵⁵ *Id.* § 403(2)(h).

¹⁵⁶ See *supra* note 97 and accompanying text.

¹⁵⁷ See Berry, *supra* note 125, at 14.

¹⁵⁸ See *id.*

a diplomatic one. ILSA probably does not violate any technical norms of international law (all WTO considerations aside), because it simply provides foreign entities with a choice between trade with the U.S. and trade with Iran. However, this simplistic view of the legislation ignores its potential impact. Its offensive nature may produce adverse, indirect economic effects in third-party countries. Further, foreign policy is as interdependent as world economies have become, and any attempt to impose foreign policy on other nations will destabilize recent efforts to liberalize trade.

The United States perforce must tread cautiously when generating international legislation for two reasons. First, the current international system requires a certain amount of mutual respect, comity, to operate because it lacks central authority and control over nation-states. Second, the United States risks becoming an economic pariah at both the level of nation-states and the level of individuals involved in international transactions.

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