DEALING WITH U.S. EXTRATERRITORIAL SANCTIONS AND FOREIGN COUNTERMEASURES

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1. INTRODUCTION

In March 1997, a Canadian subsidiary of Wal-Mart Stores Inc. faced an increasingly common dilemma. United States authorities demanded that it comply with U.S. sanctions regulations by ending sales in Canada of clothing that is manufactured in Cuba. At the same time, Canadian authorities insisted that Wal-Mart Canada Ltd. continue to carry the Cuban-origin products or face fines of up to C$1.5 million for noncompliance with countermeasures designed to neutralize the impact of U.S. sanctions.[1] The company's first response was to remove the items from its stores, but it reversed course within two weeks. After apparently deciding that the risk of liability was more severe under Canadian law, Wal-Mart Canada announced that it was restocking its shelves with Cuban-origin clothing.[2] A U.S. government spokesman later stated that U.S. officials are considering whether or not to take action against Wal-Mart.[3]

This Article reviews U.S. extraterritorial sanctions, countermeasures established by other jurisdictions, difficulties that arise when the two overlap and possible means of dealing with conflicting legal requirements. Section 2 outlines foremost U.S. sanctions that have an extraterritorial scope: (1) embargo regulations,

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[1] Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §7(1)(a) (1985) (Can.) [hereinafter FEMA], as amended by Act to Amend the Foreign Extraterritorial Measures Act, R.S.C., ch. 28, §6 (1997) (Can.) [hereinafter Act to Amend FEMA].

[2] *See Treasury Reviewing Wal-Mart Canada Decision to Sell Cuban-Made Pajamas*, DAILY REP. FOR EXECUTIVES (BNA), Mar. 17, 1997, at A14.

[3] *See* Norman Kempster, *Wal-Mart May Face Sanctions Over Cuban PJs Policy*, L.A. TIMES, Mar. 15, 1997, at D1.

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particularly as they apply to U.S.-owned or controlled foreign companies and to reexports of U.S.-origin items by foreign persons; (2) recent statutes that strengthen extraterritorial sanctions against Cuba, specifically the 1992 Cuban Democracy Act and 1996 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act or "Helms-Burton Act" as it is popularly known; and (3) the 1996 Iran and Libya Sanctions Act, which mandates "secondary boycott" sanctions against foreign persons who pursue major petroleum-related investments in Iran or Libya.

Section 3 reviews countermeasures established by the European Union ("EU"), Canada, Mexico and others in response to extraterritorial U.S. sanctions. The principal elements of these countermeasures forbid compliance with U.S. sanctions ("blocking" provisions), prohibit recognition of judgments under U.S. sanctions and authorize recovery of damages attributable to judgments handed down under U.S. sanctions ("clawback" provisions).

Section 4 describes challenges to U.S. extraterritorial sanctions under international trade agreements and related negotiations to reconcile U.S. and foreign policies. Dispute settlement initiatives have not been pursued to a decision, but negotiations have not succeeded in freeing companies from conflicting national laws. This is true notwithstanding agreements that the United States and the EU concluded in May 1998 that were intended to address EU concerns about extraterritorial sanctions and the United States' desire for coordinated sanctions policies, particularly with respect to Cuba. Key arrangements are contingent on enactment of U.S. legislation to insulate EU persons from the Helms-Burton Act alien-exclusion provisions, but prospects are minimal of such legislation passing the Congress in the foreseeable future.

Section 5 assesses the potential legal liability and other problems for a company that, like Wal-Mart, is caught between the dictates of U.S. sanctions and foreign countermeasures.

Section 6 identifies possible means of minimizing risks of difficulty for companies that might face this conundrum. Careful formulation and implementation of internal guidelines can be of substantial benefit. The first and most important step is to make informed, advance decisions about how to address conflicting legal requirements rather than waiting for problems to arise.

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2. KEY U.S. EXTRATERRITORIAL SANCTIONS

The United States maintains scores of legal measures that are extraterritorial in the sense that they seek to affect the conduct of foreign persons outside the United States. At present, the extraterritorial measures described below attract the most strenuous objections from other countries and are the foremost targets of sanctions countermeasures. They are particularly controversial because they attempt to induce foreign persons abroad to forego economic activity in order to advance the foreign policy goals of the U.S. government. The United States' trading partners complain that these measures unjustifiably encroach on sovereign rights of self-government.[4]

2.1. *Embargo Regulations*

The United States maintains broad trade and investment embargoes against Cuba, Iran, Iraq, Libya, North Korea and Sudan. The principal embargo requirements are embodied in regulations administered by the Department of the Treasury.[5] The embar-

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[4] U.S. sanctions directed at overseas transfers of items based on national security— rather than foreign policy— rationale have not generated as much controversy, presumably due to a consensus among developed countries that controls are needed on such items. Such sanctions include, for example, secondary boycott measures relating to the proliferation of weapons of mass destruction. *See, e.g.*, 22 U.S.C. § 2798 (1994); 50 U.S.C. app. § 2410(c)(1994) (setting forth chemical and biological weapons proliferation sanctions).

[5] *See* Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1998); Prohibiting Certain Transactions with Respect to Iran, 62 Fed. Reg. 44,531 (1997); Iranian Transactions Regulations, 31 C.F.R. pt. 560 (1998); Iraqi Sanctions Regulations, 31 C.F.R. pt. 575 (1998); Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (1998); Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1998); Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (1998). Other regulations administered by the Treasury Department impose sanctions against foreign individuals and entities designated as narcotics traffickers, Narcotics Trafficking Sanctions Regulations, 31 C.F.R. pt. 536 (1998), and foreign individuals and entities designated as terrorists, Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (1998); Terrorism List Governments Sanctions Regulations, 31 C.F.R. pt. 596 (1998); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597 (1998). The Treasury Department also administers a ban on new investment in Burma, Burmese Sanctions Regulations, 31 C.F.R. pt. 537(1998), and the blocking of property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), and a ban on new investment in Serbia, Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, 63 Fed. Reg. 54,576-85 (1998) (to be codified at 31 C.F.R. pt. 586). The Treasury Department has authorized prospective transactions involving property in which the Government of Montenegro has an interest. *See* Federal

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goes' export-related prohibitions are reinforced and broadened in some respects by the Export Administration Regulations ("EAR") administered by the Department of Commerce.[6] The U.S. embargo on Iraq is less of a source of friction with other countries because, unlike the other five, it is in harmony with multilateral sanctions requirements.[7]

The U.S. embargoes are extraterritorial in two important respects. First, the embargoes of Cuba and North Korea purport to preclude foreign companies that are owned or controlled by U.S. persons from conducting business with Cuba or North Korea. This aspect of the Cuba sanctions arose as an issue for Wal-Mart's Canadian subsidiary. Second, the embargo regulations generally purport to forbid foreign persons to export to the embargoed country most items that are of U.S. origin or that contain U.S. content (e.g., U.S.-origin parts). Such third-country transactions are referenced, collectively, as "reexports."[8] While the administering agencies can license these transactions, by and large, the agencies apply a general policy of license denial for embargoed destinations.[9]

Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, 63 Fed. Reg. at 54,584.

[6] *See* Export Administration Regulations, 15 C.F.R. pts. 730-74 (1998). Prior to its expiration on August 20, 1994, the Export Administration Act provided the primary statutory basis for the EAR. Since that time, the EAR have been maintained under the International Emergency Economic Powers Act. Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (1994). Exports andreexports of military-related items ("defense articles" and "defense services") are controlled by the State Department under the Arms Export Control Act, 22 U.S.C. § 2778 (1994 & Supp. II 1996), and the International Traffic in Arms Regulations, 22 C.F.R. pts. 120-30 (1998). The State Department maintains a policy of license denial for shipments to the embargoed countries. *See* 22 C.F.R. § 126.1.

[7] *See* S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 1, U.N. Doc. S/INF/46 (1990).

[8] U.S. regulations are not always clear as to whether the term "reexport" covers third-country exports of items that include U.S. content, but theEAR's definition of the term suggests that it does. *See* 15 C.F.R. §§ 734.2(b)(4), 734.3(a)(3) (1998). In some circumstances, the EAR also forbid thereexport and export from abroad to some locations of the foreign-produced product of controlled technology and software. *See* 15 C.F.R. § 736.2(b)(3).

[9] *See, e.g.*, 15 C.F.R. § 746.2(b) (implementing policy of denial for Cuba). *But see* 15 C.F.R. § 746.4(c) (implementing limited policy of license denial for Libya). As regards trade with Cuba by foreign, U.S.-owned or controlled companies, the policy of license denial is statutorily mandated. *See infra* Section 2.1.1.

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2.1.1. *Application of Cuban and North Korean Embargoes to U.S.-Owned or Controlled Foreign Companies*

The embargo regulations applicable to Cuba ("Cuban Assets Control Regulations" or "CACR") and to North Korea ("Foreign Assets Control Regulations" or "FACR") contain asset-blocking provisions that broadly prohibit business with these countries. These provisions forbid "[a]ll dealings" in property by "any person subject to the jurisdiction of the United States," if such dealings involve property in which Cuba, North Korea or a Cuban or North Korean national has "any interest of any nature whatsoever, direct or indirect."[10] Courts have construed these provisions expansively.[11] The Treasury Department considers them to ban activity with only an attenuated connection to the target country, such as an aircraft lease to a third-country airline if some of the subject aircraft will be used, in part, for routes to and from Cuba.

The extraordinary scope of these provisions derives primarily from the regulations' definition of "person subject to the jurisdiction of the United States"; the phrase embraces not just U.S. citizens and residents, persons in the United States and corporations organized under U.S. law ("U.S. persons"), but also "[a]ny corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by" such persons.[12] By their

[10] Foreign Assets Control Regulations, 31 C.F.R. §§ 500.201(b) (1998) [hereinafter FACR]; Cuban Assets Control Regulations, 31 C.F.R. 515.201(b) (1998) [hereinafter CACR]. The FACR continue to have some applicability to property in which there exists a Cambodian or Vietnamese interest, but the regulations provide blanket authorization for future transactions relating to such property (apart from transactions relating to property blocked in the name of the Exchange Support Fund for the Khmer Republic). *See* 31 C.F.R. §§ 500.570, 500.578.

[11] *See, e.g.*, United States v. Broverman, 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (discussing how China retained an "interest," within the meaning of the FACR, in product that was exported from China to Canada and then to the United States).

[12] 31 C.F.R. § 500.329 (regarding North Korea); 31 C.F.R. § 515.329 (regarding Cuba). Apart from the reexport requirements discussed in Section 2.1.2., the U.S. embargoes against Iran, Iraq, Libya and Sudan generally apply to "U.S. persons," a narrower term which excludes all foreign-chartered companies. *See* 31 C.F.R. § 560.201-.209, .314 (Iran) ; 31 C.F.R. § 575.201-.210, .321 (Iraq); 31 C.F.R. § 550.201-.208, .308 (Libya); 31 C.F.R. § 538.201-209, .315 (Sudan). A U.S. parent company could, however, be prosecuted for actions of its foreign subsidiaries that are contrary to the Iran, Iraq, Libya or Sudan embargoes under principles of agency, accomplice or conspiracy liability if it di-

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terms, then, the regulations ban, for example, a bank operating in and organized under the laws of Spain from guaranteeing a loan to a Cuban firm if the bank is owned or controlled by U.S. persons. This makes the sanctions controversial internationally since, under customary international law, a company is ordinarily considered to be a national of the state under the laws of which it is organized.[13]

In 1975, the Treasury Department amended the CACR to announce that it would, "in appropriate cases," issue licenses for otherwise prohibited trade transactions relating to Cuba by foreign U.S.-owned or controlled companies if specified criteria were satisfied.[14] The new policy facilitated trade between Cuba and overseas subsidiaries of U.S. companies valued at an estimated $718 million in 1991.[15] In 1992, this relaxation of the Cuban embargo was terminated by the "Mack Amendment," a portion of the Cuban Democracy Act which forbids the issuance of licenses pursuant to the 1975 policy.[16]

The CACR and FACR both contain another provision that carries the potential for extraterritorial application of these embargoes. The regulations prohibit "[a]ll transfers outside the United States with regard to any property or property interest

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rects or facilitates those actions. *Cf.* 18 U.S.C. § 2(b) (1994); Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949); Morgan v. United States, 149 F.2d 185, 187 (5th Cir. 1945). *But see* J. Ellicott, *Sovereignty and the Regulation of International Business in the Export Control Arena,* 20 CAN.-U.S. L. J. 133, 136 (1994) (discussing how under an "extreme construction[]" maintained by "some of the regulators in Washington," the regulations preclude a parent company from telling its foreign subsidiary that "it is okay to go ahead" with a transaction that falls within the terms of a prohibition).

[13] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 (1987).

[14] *See* 40 Fed. Reg. 47,108 (1975) (codified at 31 C.F.R. § 515.559 (1976)). According to a Treasury Department official, the agency issued licenses automatically under Section 515.599 provided the regulatory criteria were satisfied. *See* Clara David, *Trading with Cuba: The Cuban Democracy Act and Export Rules,* 8 FLA. J. INT'L L. 385, 387 (1993). The 1975 amendment replaced a qualified general license permitting certain transactions by foreign, U.S.-owned or controlled, non-banking companies with Cuba. *See* 31 C.F.R. § 515.541 (1963-75).

[15] *See* David, *supra* note 14, at 388.

[16] *See* Cuban Democracy Act, Pub. L. No. 102-484, § 1706(a), 106 Stat. 2315, 2578 (codified at 22 U.S.C. § 6005(a) (1994)); *accord* 31 C.F.R. § 515.559(a) (1998). The statute permits the issuance of licenses to foreign, U.S.-owned or controlled companies for contracts executed before October 23, 1992. *See* 22 U.S.C. § 6005(a)(2) (1994); *accord* 31 C.F.R. § 515.559(a)(1) (1998).

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subject to the jurisdiction of the United States" if such transactions involve property in which Cuba, North Korea or a Cuban or North Korean national has "any interest of any nature whatsoever, direct or indirect."[17] The regulations do not define "property subject to the jurisdiction of the United States" other than to identify certain types of securities as examples of such property.[18] The U.S. government could potentially invoke these provisions to seize U.S.-origin or U.S.-owned property that is involved in a transaction relating to Cuba or North Korea even if no person subject to U.S. jurisdiction is involved. Such action would be based on the theory that the property's U.S. origin or ownership renders it subject to U.S. jurisdiction.[19]

2.1.2. *Prohibitions on Reexports by Foreign Persons*

The embargoes uniformly prohibit U.S. persons— individuals who are U.S. citizens, U.S. residents or in the United States and U.S.-chartered companies— to export most goods, technology and services to a sanctioned destination or person regardless of the

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[17] 31 C.F.R. §§ 500.201(b), 515.201(b) (1998).

[18] 31 C.F.R. §§ 500.313, 515.313. The definitions specify that the term includes, "without limitation," securities: (1) issued by the U.S. Government, a sub-federal government or a person within the United States, or (2) for which the instruments evidencing the securities are located in the United States. *See id.*

[19] Some Treasury Department officials have indicated that they construe the CACR and FACR generally not to extend to overseas transactions that do not involve persons subject to U.S. jurisdiction, but this view could change based on political developments relating to Cuba and North Korea. The United States appears, in other contexts, to rely on the U.S. origin of property to bring, in its view, transactions within U.S. prescriptive jurisdiction. In general, the U.S. origin of a reexported item (or the content therein) provides the only apparent basis on which one can argue that the prescriptive jurisdiction exercised through U.S. reexport sanctions is consistent with international law. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 13, at § 431, comment (d) (implying that prescriptive jurisdiction for reexport controls is reasonable due to the U.S. origin of the items). It reportedly has been argued that EAR reexport controls are justified based on the foreign party having consented to the application of the regulations by executing end-use statements and written assurances, which are required for the licensing of some strategic exports. *See* HOMER E. MOYER, JR. & LINDA A. MABRY, EXPORT CONTROLS AS INSTRUMENTS OF FOREIGN POLICY 110-11 (1989). But no such documents are involved in the vast bulk of possible reexport transactions that fall under U.S. sanctions regulations, for example, reexports from Spain to Cuba of U.S.-origin bottling equipment, which are prohibited under 15 C.F.R. § 746.2(a) (1998).

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location from which the export is made (from the United States or elsewhere).[20] To varying degrees, the embargoes also purport to forbid non-U.S. persons from reexporting U.S.-origin items from third countries to sanctioned destinations (and, sometimes, sanctioned governments). These controls can be summarized as follows:

Cuba: The EAR forbid reexports by any person to Cuba of most U.S.-origin commodities, software and technology and such items that contain a super-*de minimis* level of U.S. content.[21] Under the EAR, U.S. content is generally *de minimis* for exports to the embargoed countries if it is ten percent or less of the export's value.[22] As discussed above, the CACR also prohibit reexports to, and other transactions with, Cuba and Cuban nationals by U.S.-owned or controlled, foreign-chartered companies, and these regulations contain no *de minimis* limitation.[23]

Iraq: The Treasury Department's Iraqi Sanctions Regulations prohibit reexports to Iraq, the Iraqi government and entities owned or controlled by the Iraqi government of most goods, technology and services that are "subject to U.S. jurisdiction."[24] As discussed above, the meaning of "subject to U.S. jurisdiction" is unclear but could be construed to comprehend jurisdiction based merely on an item's U.S. origin or incorporation of U.S. content.[25]

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[20] *See* 31 C.F.R. § 515.201(b)(1)(d) (1998) (Cuba); Exec. Order No. 13,059, § 2(a), 62 Fed. Reg. 44,531 (1997) (Iran); 31 C.F.R. 575.205 (1998) (Iraq); 31 C.F.R. § 550.209 (Libya) (listing items in which the Libyan government has an interest); 31 C.F.R. § 500.201(b)(1) (North Korea); 31 C.F.R. § 538.205 (Sudan).

[21] *See* 15 C.F.R. §§ 746.2(a), 734.3(3) (1998).

[22] *See* 15 C.F.R. § 734.4(b). The EAR provide that the Commerce Department will "consider[] favorably on a case-by-case basis" approval of license applications for exports from third countries to Cuba of "non-strategic foreign-made products that contain an insubstantial proportion of U.S.-origin materials, parts, or components" if specified criteria are satisfied. *See* 15 C.F.R. § 746.2(b)(3). In general, this policy does not apply to U.S.-owned or controlled foreign companies. *See* 15 C.F.R. § 746.2(b)(3).

[23] *See supra* Section 2.1.1. The CACR prohibition on transactions with Cuba that involve property subject to U.S. jurisdiction could also be invoked to block any reexport to Cuba, whether or not a U.S. person is involved. *See id.*

[24] 31 C.F.R. § 575.205 (1998).

[25] *See supra* Section 2.1.1. EAR restrictions on reexports to Iraq are generally limited to items otherwise controlled for particular national security and foreign policy reasons, but, again, the Iraqi Sanctions Regulations extend tore-exports of virtually all U.S.-origin items. *See* 15 C.F.R. § 746.3(a) (1998). The

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Iran: The Iran sanctions' reexport ban is more limited. Under the controlling executive order, reexports by non-U.S. persons of goods, technology and services that have been exported from the United States are forbidden if: 1) they are effected "with knowledge or reason to know" that the reexport is "intended specifically for" Iran, the Iranian government or entities owned or controlled by the Iranian government; and 2) such goods, technology or services were subject to a U.S. license requirement for exports from the United States to Iran as of May 6, 1995 or afterward.[26] The broadest license requirements are those of the EAR, which control exports and reexports to Iran of a variety of items for national security and foreign policy purposes, particularly for reasons relating to efforts against terrorism.[27] The executive order exempts from the reexport prohibition administered by the Treasury Department goods and technology that have been: (1) "substantially transformed" outside the United States or (2) as in the EAR, incorporated into a foreign-made product outside the United States and constitute less than ten percent of the value of

Iraq Sanctions Act of 1990, among other things, mandates the continued imposition of the embargo embodied in the Iraqi Sanctions Regulations and generally forbids the issuance of licenses for exports to Iraq under the EAR and other regulations. *See* Iraq Sanctions Act, Pub. L. No. 101-513, §§ 586C, 586G, 104 Stat. 2048, 2051(1990) (codified at 50 U.S.C. § 1701 note (1994)).

[26] Exec. Order No. 13,059, §§ 2(b), 4(d), 62 Fed. Reg. 44,531 (1997). As this Article is completed, the Treasury Department's Iranian Transactions Regulations, 31 C.F.R. pt. 560, have not been amended to render them in full conformity with Exec. Order No. 13,059.

The May 6, 1995 demarcation reflects the effective date of the executive order that first established a comprehensive embargo against Iran. *See* Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). Export sanctions maintained under the national emergency declared in Exec. Order No. 12,957— including those of Exec. Order No. 13,059 and the Iranian Transaction Regulations— are not considered to be license requirements for purposes of determining the scope of the reexport ban established by Exec. Order No. 13,059. *See* Exec. Order No. 13,059, § 2(b)(ii), 60 Fed. Reg. 44,531.

[27] *See* 15 C.F.R. §§ 742.8(a), 746.7 (1998). Apart from the EAR, other regulatory regimes— such as the State Department's International Traffic in Arms Regulations, 22 C.F.R. pts. 120-30 (1998), and the Nuclear Regulatory Commission's restrictions on nuclear exports, 10 C.F.R. pt. 110 (1998)— also imposed license requirements on exports to Iran as of May 6, 1995 and afterward. The Iran-Iraq Arms Non-Proliferation Act of 1992, in conjunction with Iraq Sanctions Act of 1990, generally forbids the issuance of licenses for exports to Iran under the EAR and other regulations. *See* International Emergency Powers Act, 50 U.S.C. § 1701 note (1994); Iraq Sanctions Act, Pub. L. No. 101-513, §§ 586C, 586G, 104 Stat. 2048, 2051 (1990) (codified at 50 U.S.C. § 1701 note (1994)).

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that product.[28]

Libya: The EAR forbid reexports to Libya of most U.S.-origin commodities, software and technology and such items that contain a super-*de minimis* level of U.S. content, although the regulations indicate that licenses can be obtained to reexport some controlled items.[29]

North Korea: Reexport sanctions against North Korea generally mirror those against Cuba.[30]

Sudan: The Sudan sanctions' reexport ban, like the Iran sanctions, is significantly limited. Under the Treasury Department's Sudanese Sanctions Regulations, reexports by non-U.S. persons of goods, technology and services are forbidden only if they are subject to another federal agency's license requirement.[31] Again, the broadest relevant reexport requirements are those of the EAR. Although not comprehensive, EAR controls on reexports to Sudan are, as with Iran, unusually expansive because these countries have been designated as repeated supporters of international terrorism.[32]

U.S. reexport controls applicable to countries other than embargoed destinations generate far less controversy because they are narrowly targeted at transfers of military, "dual use" and other strategic items which are typically subject to similar export controls maintained by other industrialized countries.[33]

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[28] *See* Exec. Order No. 13,059, § 2(b)(ii)(A), (B). Areexport could be subject to a license requirement administered by an agency other than the Treasury Department notwithstanding that it enjoys an exemption under Exec. Order No. 13,059.

[29] *See* 15 C.F.R. §§ 746.4(b)(2), 746.4(c)(2) (1998). The Treasury Department's Libyan Sanctions Regulations do not contain an express reexport prohibition. *See* 31 C.F.R. pt. 550 (1998).

[30] *Compare* 15 C.F.R. § 746.5 (1998) *with* 15 C.F.R. § 746.2. *Compare* 31 C.F.R. § 500.201(b) *with* 31 C.F.R. § 515.201(b).

[31] *See* 31 C.F.R. § 538.205 (1998).

[32] *See* 31 C.F.R. § 742.10. The Secretary of State has determined that the governments of Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria have repeatedly provided support for acts of international terrorism under Section 6(j)(1)(A) of the Export Administration Act, 50 U.S.C. app. § 2405(j)(1)(A). *See* 15 C.F.R. § 742.1(d) (1998). Consequently, broad antiterrorism export controls are mandatory with respect to these countries under section 6(j) the policy of which is continued by executive order notwithstanding the statute's lapse. *See supra* note 6. Antiterrorism controls are of less significance with respect to Cuba, Iraq, Libya and North Korea since the embargoes establish independent, comprehensive bans on exports and reexports to these countries.

[33] Four multilateral regimes pursue coordinated export control policies in

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2.1.3. *Penalties and Enforcement*

The U.S. government enforces the embargo regulations through criminal and administrative sanctions. For example, under the Trading With the Enemy Act and other measures, punishment for willful violations of the embargoes of Cuba and North Korea can include fines of $250,000 and imprisonment for ten years for individuals (including officers, directors, and agents of corporate offenders), and fines of $1 million for companies.[34] The Treasury Department is authorized to issue civil penalties of up to $50,000 for noncompliance with the Cuba and North Korea embargoes.[35] Violations of the other embargoes are punishable through sanctions authorized by the International Emergency Economic Powers Act and other measures.[36]

The U.S. government's ability to prosecute a foreign-chartered company for an embargo violation depends on securing personal jurisdiction over the company. In any event, the Treasury Department sometimes pressures U.S. companies to force their foreign subsidiaries to comply with embargo regulations that extend to all U.S.-owned or controlled entities (now, the

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particular areas: (1) the Wassenaar Arrangement for conventional arms and dual-use goods and technologies; (2) the Australia Group for chemical weapons precursors, organisms of biological warfare significance and precursors; (3) the Missile Technology Control Regime for ballistic missiles and other means of air delivery of weapons of mass destruction; and (4) the Nuclear Suppliers Group for nuclear material and nuclear-related dual-use items. *See, e.g.*, Cecil Hunt & Evan R. Berlack, *Overview of U.S. Export Controls, in* COPING WITH U.S. EXPORT CONTROLS 11, 14-15, 25-26 (Practising Law Institute, ed., 1996).

[34] *See* Trading With the Enemy Act of 1917, 50 U.S.C. app. § 16(a) (1994 & Supp. II 1996); Comprehensive Crime Control Act of 1994, 18 U.S.C. § 3571(b) (1994); Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C.

§ 2332(d) (1994 & Supp. II 1996). Fines can extend as high as twice the pecuniary gain from the offense or loss to a person other than the defendant. *See* 18 U.S.C. § 3571(b) & (d) (1994).

[35] *See* Trading With the Enemy Act of 1917, 50 U.S.C. app. § 16(b) (1994 & Supp. II 1996); Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C.

§ 2461 (1994). Items that are used in connection with violations are subject to forfeiture. *See* 50 U.S.C. app. § 16.

[36] The Iran, Iraq, Libya and Sudan embargoes are maintained under the authority of the International Emergency Economic Powers Act ("IEEPA") and, depending on the embargo, other statutes. The IEEPA authorizes fines and imprisonment of up to $50,000 and 10 years, respectively, and civil penalties of up to $10,000 for violations of IEEPA-based embargoes. *See* 50 U.S.C. § 1705 (1994).

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CACR and FACR). In a famous such instance, Treasury directed Fruehauf, a U.S. vehicle manufacturer, to prevent a shipment of buses by its French subsidiary to the Peoples' Republic of China, then subject to a comprehensive U.S. embargo.[37] Depending on the circumstances, U.S. authorities could bring a criminal prosecution or enforcement action against the parent company of a foreign subsidiary that has violated the regulations based on theories of imputed liability.[38]

Moreover, the Commerce Department imposes administrative sanctions under the EAR against foreign persons over which U.S. forums have no jurisdiction through issuance of "denial orders."[39] Denial orders typically ban shipments and transmissions to the sanctioned person of all EAR-regulated items, which covers most U.S.-origin commodities, software and technology. EAR denial orders are commonly issued against foreign persons for reexport violations.[40]

2.2. *Cuban Democracy Act and Helms-Burton Act*

The Cuban Democracy Act was enacted in October 1992 as part of the National Defense Authorization Act for FY 1993 in response to the Castro Regime's refusal to permit free elections and disregard for human rights standards.[41] Among other things, the Cuban Democracy Act strengthened and expanded embargo policies and authorized sanctions against other countries that provide assistance to the Cuban government.

The Cuban Democracy Act was followed in March 1996 by the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act, popularly known as the "Helms-Burton Act."[42] The Helms-

[37] *See, e.g.*, David, *supra* note 14, at 343 (quoting Professor Harold Maier who, during a panel discussion, stated that France "put Fruehauf France, in effect, into operating receivership until the buses were delivered. Then control went back to Fruehauf U.S.")

[38] *See* Ellicott, *supra* note 12, at 136; 18 U.S.C. § 2(b) (1994); Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1994); Morgan, 149 F.2d at 187.

[39] 15 C.F.R. § 764.3(a)(2) (1998).

[40] *See, e.g.*, ISP International Spare Parts GmbH, 61 Fed. Reg. 31,504 (1996).

[41] *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Title XVII, 106 Stat. 2578, (1992) (codified at 22 U.S.C. §§ 6001-6010 (1994)).

[42] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021-6091

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Burton Act was precipitated by Cuba's act of shooting down two unarmed airplanes flown by anti-Castro activists. Three aspects of the statute are of particular concern to other countries and have fueled calls for countermeasures: (1) provisions that codify by statute and encourage intensive enforcement of the CACR; (2) provisions that provide for a right of action to recover for "trafficking," particularly by foreign persons, in property that was confiscated by the Cuban government; and (3) provisions that bar entry into the United States by natural persons who are "trafficking" in confiscated property and certain related parties.

2.2.1. Strengthening and Codification of Embargo Against Cuba

As noted above, the Cuban Democracy Act's "Mack Amendment" forbids the issuance of licenses for commercial intercourse with Cuba by foreign subsidiaries of U.S. companies,[43] thereby exacerbating the extraterritorial impact of the CACR. The Cuban Democracy Act also restricts trade with the United States through use of vessels that have been used for trade with Cuba or that carry goods in which there exists a Cuban interest.[44]

The Helms-Burton Act mandates that the U.S. embargo of Cuba, including all restrictions imposed by the CACR, "remain in effect" unless and until the embargo is suspended or terminated consistent with statutory procedures.[45] Those procedures make suspension or termination of the embargo contingent on a change of political power in Cuba.[46]

The statute directs the President to instruct the Secretary of the Treasury and the Attorney General to "enforce fully" the CACR.[47] It also reinforces prohibitions against certain activities already banned by the CACR.[48]

(Supp. II 1996)).

[43] *See* 22 U.S.C. § 6005(a).

[44] 22 U.S.C. § 6005(b).

[45] 22 U.S.C. § 6032(h) (Supp. II 1996).

[46] *See* 22 U.S.C.§ 6064.

[47] 22 U.S.C. § 6032(c).

[48] *See* 22 U.S.C. § 6033 (prohibiting indirect financing transactions involving confiscated Cuban property); 22 U.S.C. § 6040 (prohibiting imports of products that are of Cuban origin, contain Cuban content or were located in or transported through Cuba).

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2.2.2. *Right-of-Action Against "Traffickers" in Confiscated Property*

Title III of the Helms-Burton Act would, if implemented (see below), enable U.S. nationals to recover in U.S. courts from persons who "traffic" in property to which the plaintiff has a claim if the property was confiscated by the Cuban government after January 1, 1959.[49] The definition of "trafficking" broadly covers not just dealing in but also benefiting from confiscated property.[50] Damages can equal the value of the claim as assessed by the Foreign Claims Settlement Commission (plus interest), the fair market value of the subject property or triple either of these figures in some circumstances.[51]

There are various limitations on this right of action. Among them, claims acquired from others, and claims that are not certified by the U.S. Foreign Claims Settlement Commission are disfavored in several ways and the amount in controversy must exceed $50,000.[52]

2.2.3. *Denial of Entry to "Traffickers" in Confiscated Property*

Title IV of the Helms-Burton Act directs the executive branch to deny entrance into the United States by aliens who traffic in

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[49] *See* 22 U.S.C. § 6082.

[50] With some exceptions, a person "traffics" in confiscated property for purposes of Title III if that person knowingly and intentionally commits the following actions:

> (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 benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking . . . by another person, or otherwise engages in trafficking . . . through another person,
>
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6023(13).

[51] *See* 22 U.S.C. § 6082(a)(1)-(3).

[52] *See* 22 U.S.C. § 6082(a)(4), (5) & (b).

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confiscated property that is subject to a claim by a U.S. person.[53] This provision also applies to corporate officers of, principals of and shareholders with a controlling interest in an entity that "has been involved in" trafficking in confiscated property that is the subject of a claim by a U.S. national.[54] Spouses, agents, and minor children of persons covered by these provisions are also to be excluded.[55]

The alien-exclusion provisions cover only "trafficking" that occurs after the law's enactment (March 12, 1996).[56] The definition of "trafficking" varies in some respects from the definition that applies to the right-of-action provisions; a congressional report provides that the alien-exclusion definition of "trafficking" is intended to omit "sale or abandonment of confiscated property."[57] While the right-of-action provisions discussed above are limited to property confiscated by the Cuban government after January 1, 1959, no such limitation exists for the alien-exclusion provisions.[58]

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[53] *See* 22 U.S.C. § 6091(a)(2).

[54] 22 U.S.C. § 6091(a)(3).

[55] *See* 22 U.S.C. § 6091(a)(4).

[56] *See* 22 U.S.C. § 6091(a) & (d).

[57] H.R. REP. NO. 468, at 66 (1996). With some exceptions, a person "traffics" in confiscated property for purposes of Title IV if that person knowingly and intentionally commits the following actions:

> (i)(I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property,
>
> (II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or
>
> (III) improves (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), or begins after [the date of enactment of this Act,] to manage, lease, possess, use, or hold an interest in confiscated property,
>
> (ii) enters into a commercial arrangement using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking . . . by another person, or otherwise engages in trafficking . . . through another person,
>
> without the authorization of any United States national who holds a claim to the property.

22 U.S.C. § 6091(b)(2)(A) (Supp. II 1996).

[58] *Compare* 22 U.S.C. § 6023(4) (Supp. II 1996) (limiting the term "confis-

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2.2.4. *Authorization of Sanctions Against Foreign Persons*

The Cuban Democracy Act authorizes the President to withhold from any country that provides "assistance" to the Cuban government: (1) benefits under the Foreign Assistance Act of 1961; (2) aid or sales under Arms Export Control Act; and (3) eligibility for forgiveness or reduction of debt owed to the United States government.[59] "Assistance" is defined as the provision of something of value "on terms more favorable" than those available in the commercial market.[60]

2.2.5. *Implementation*

Liability under Title III of the Helms-Burton Act began inuring to "traffickers" as of August 1, 1996.[61] The President, however, has exercised his statutory authority to suspend the ability to bring suit under Helms-Burton, and that suspension, which must be renewed every six months, remains in place.[62]

In June 1996, the State Department published procedures that govern implementation of Title IV of the Act.[63] Following these procedures, the State Department has notified major shareholders and senior executives of Sherritt International, a Canadian mining

cated" to "seizure" of property or "repudiation" of a debt by the Cuban government taking place "on or after January 1, 1959") *with* 22 U.S.C. § 6091(b)(1) (making no such date restriction on the term "confiscated").

[59] *See* 22 U.S.C. § 6003(b)(1) (1994).

[60] *See* 22 U.S.C. § 6003(b)(2)(A) (1994).

[61] *See* 22 U.S.C. §§ 6082(a)(1), 6085(a) (Supp. II 1996).

[62] *See* Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 32 WEEKLY COMP. PRES. DOC. 1265 (July 16, 1996); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 WEEKLY COMP. PRES. DOC. 3 (Jan. 3, 1997); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 WEEKLY COMP. PRES. DOC. 1078 (July 16, 1997); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1966, 34 WEEKLY COMP. PRES. DOC. 81 (Jan. 16, 1998); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 34 WEEKLY COMP. PRES. DOC.1397-98 (July 16, 1998). The President may suspend the right to bring suit under Title III for six-month intervals upon reporting to Congress that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(c)(2) (Supp. II 1996).

[63] *See* Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996).

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company; senior executives of Grupo Domos, a Mexican telecommunications firm; and, most recently, executives of the Israeli citrus company Grupo B.M. that they and their families are barred from entry into the United States under Helms-Burton.[64] In July 1997, the Italian telecommunications company STET agreed to compensate ITT of the United States for STET's use of the Cuban telephone system on the grounds that it was confiscated from ITT.[65] The agreement was apparently driven by STET's desire to avoid Title IV sanctions, and the State Department indicated that no sanctions would be forthcoming against the company if the agreement were implemented.[66]

The President's suspension of the right to sue under Title III and allegedly tepid implementation of Title IV have generated opposition in Congress.[67] A recently enacted statute requires the Secretary of State to report every three months to Congress on implementation of the alien-exclusion provisions, including lists of persons that the Secretary of State has determined are "traffickers" in confiscated property.[68] Members of Congress are also considering an amendment to eliminate suspension of the right to bring actions under Title III.[69]

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[64] *See* Michael Dobbs, *U.S. Announces Measures Against Canadian Firm*, WASH. POST, July 11, 1996, at A14; WASH. TRADE DAILY, Nov. 18 & 19, 1997, at 2; *Treasury Reviewing Wal-Mart Canada Decision to Sell Cuban-Made Pajamas*, DAILY REP. FOR EXECUTIVES (BNA), Mar. 17, 1997, at A-15 (discussing the four additional Sherritt executives); Gary G. Yerkley, *U.S., E.U. Making 'Significant' Progress in Helms-Burton Law Talks, Aide Says*, DAILY REP. FOR EXECUTIVES (BNA), Mar. 13, 1998, at A-13. The State Department has also forwarded inquiries to several other companies thought to be trafficking in confiscated Cuban property. *See id.*

[65] *See E.C. Says It Does Not Object to STET Settlement with ITT*, DAILY REP. FOR EXECUTIVES (BNA), July 25, 1997, at A-15.

[66] *See* Department of State News Release, Implementation of the Cuban Liberty and Democratic Solidarity Act of 1996, July 23, 1997 (statement of Nicholas Burns).

[67] Preliminary conclusions of a congressional inquiry into the implementation of the Helms-Burton Act reportedly include a finding that Title IV investigations are being delayed by high-level State Department officials. *See Gilman, Hamilton Square Off Over U.S.-EU Helms-Burton Agreement*, INSIDE U.S. TRADE, July 17, 1998, at 6-7.

[68] *See* Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Pub. L. No. 105-277, § 2802 (1998).

[69] *See E.U. Warns It Will Reinstate Complaint on Helms-Burton if Congress Tightens Law*, DAILY REP. FOR EXECUTIVES (BNA), June 12, 1997, at A-34 (quoting Rep. Bill McCollum (R-Fla.)).

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2.3. *Iran and Libya Sanctions Act*

The Iran and Libya Sanctions Act was enacted less than five months after the Helms-Burton Act in August 1996.[70] It was, according to congressional findings, motivated principally by Iran's and Libya's support for terrorism and efforts to acquire weapons of mass destruction.[71] As with portions of the Cuban Democracy Act described above, the Iran and Libya Sanctions Act is a secondary boycott measure which mandates the imposition of sanctions against foreign companies and sometimes their affiliates in response to petroleum-related investment in Iran and Libya and certain other transactions with Libya.[72]

2.3.1. *Triggering Events and Sanctions*

The Iran and Libya Sanctions Act specifies that the President is to impose at least two of seven listed sanctions against foreign persons who, on or after its date of enactment, August 5, 1996, knowingly made an investment of US$40 million or more that "directly and significantly contributed to the enhancement" of Iran's or Libya's ability to develop its petroleum reserves.[73] Regarding sanctions for investments in Iran, the investment threshold is US$20 million as of August 5, 1997.[74] The statute also generally requires imposition of at least two of the seven listed sanctions against persons who, on or after August 5, 1996, knowingly provided to Libya equipment and other assistance (including certain services) as prohibited by U.N. resolutions against Libya if they "significantly and materially" contribute to Libya's military or paramilitary capabilities or contribute to Libya's ability to develop its petroleum resources or to maintain its aviation capabilities.[75]

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[70] *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified at 50 U.S.C.A. § 1701 note (West Supp. 1998)).

[71] *See* 50 U.S.C.A § 2.

[72] *See* 50 U.S.C.A. § 5.

[73] 50 U.S.C.A. § 5(a) & (b)(2).

[74] The Act provides that, for Iran, the $40 million threshold was to drop to $20 million as of the anniversary of the Act's date of enactment with respect to investments by nationals of countries that did not receive a waiver based on their taking substantial steps to impede Iran's efforts to acquire weapons of mass destruction and support terrorism. *See* 50 U.S.C.A. §§ 2, 4(d)(1). The President issued no such waivers.

[75] *See* 50 U.S.C.A. § 5(b)(1) (citing G.A. Res. 748, U.N. SCOR, 47th Sess.,

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The seven types of sanctions from which the President is to choose are: (1) denial of Export-Import Bank assistance for exports to the sanctioned party; (2) denial of licenses for exports to the sanctioned party; (3) proscription on U.S. government procurement of goods or services from the sanctioned party; (4) prohibition on imports from the sanctioned party; (5) ban on loans of more than US$10 million by U.S. financial institutions to the sanctioned parties; (6) prohibition on service by the sanctioned party as a primary dealer in U.S. government bonds; and (7) preclusion of service by the sanctioned party as a repository of U.S. government funds.[76]

2.3.2. *Scope of and Limitations on Sanctions Mandate*

For purposes of triggering sanctions, "investments" include entry into a contract to develop Iranian or Libyan petroleum resources or to supervise or guarantee performance of such a contract, purchase of a share of ownership in such a development, or entry into a contract to share in royalties or profits in such a development.[77] Covered investments do not include the entry into, performance of, or financing of contracts to trade in goods, services or technology.[78]

The State Department, which has assumed the lead in administering the statute, has issued guidance on the question of whether a contract for management services is a potentially covered "investment" or a non-covered "service contract."[79] A series of factors are identified including whether the person involved places capital at risk and receives a share of income or profits.[80]

Sanctions are to be imposed on any person who has "carried out" a triggering event and its successors.[81] They are also to be imposed on parents and subsidiaries of sanctioned companies if they knowingly "engaged in" a triggering event and affiliates that knowingly "engaged in" a triggering event and are controlled by

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3063th mtg., U.N. Doc. S/RES/748 (1992) and G.A. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg., U.N. Doc. S/RES/883 (1993)).

[76] *See* 50 U.S.C.A. § 6.

[77] *See* 50 U.S.C.A. § 14(9) (defining the term "investment").

[78] *See id.*

[79] Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067-66,068 (1996).

[80] *See id.*

[81] *See* 50 U.S.C.A. § 5(c).

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the principal.[82] According to the State Department guidance, "engaging in" a triggering event can, for a parent, include facilitating or authorizing entry into a contract.[83]

The President has some flexibility in determining whether and for how long to impose sanctions. The President can prospectively waive application of the Iran sanctions provisions to nationals of a country if that country has "agreed to undertake substantial measures, including economic sanctions," to deter Iran from pursuing activities relating to terrorism and the proliferation of weapons of mass destruction.[84] In addition, sanctions can be waived in particular cases if, among other things, doing so is "important to the national interests of the United States."[85] The President is also authorized to exempt imports of components that are essential to U.S. products or production from sanctions.[86] Once established, sanctions are generally to be imposed for at least a year.[87] The Iran and Libya Sanctions Act will, by its current terms, expire on August 5, 2001.[88]

2.3.3. Implementation

In January 1997, the State Department fulfilled a requirement of the Iran and Libya Sanctions Act that the President publish a list of significant oil and natural gas projects that have been tendered by Iran.[89]

As of this writing, however, the United States has not imposed sanctions under the Iran and Libya Sanctions Act. In a major test case, the Clinton Administration defied substantial Congressional pressure in May 1998 by waiving sanctions against the French company Total SA and its Russian and Malaysian partners for a US$2 billion investment to develop the Iranian South Pars

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[82] *See id.*

[83] *See* Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067-66068 (1996).

[84] 50 U.S.C.A. § 4(c).

[85] 50 U.S.C.A. § 9(c).

[86] *See* 50 U.S.C.A. § 5(f)(4).

[87] *See* 50 U.S.C.A. § 9(b).

[88] *See* 50 U.S.C.A. § 13(b).

[89] *See* Significant Projects Which Have Been Tendered in the Oil and Gas Sector in Iran, 62 Fed. Reg. 1141 (1997). The State Department observed that "[a] project's inclusion on or absence from the list should not be seen as relevant to a determination on the imposition of sanctions." *Id.*

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natural gas field.[90] This waiver was closely related to political arrangements that the Administration and the European Commission also announced in May 1998 regarding trade and investment issues (see below section 4). The State Department is continuing to monitor other activities under the Iran and Libya Sanctions Act, including plans by the Royal Dutch/Shell Group to build a natural gas pipeline through Iran,[91] development of Iran's Bengestan oil and gas reservoir,[92] and plans by various European companies to undertake petroleum investments in Libya.[93]

Certain congressional leaders have vociferously criticized the Clinton Administration's failure to impose sanctions under the Iran and Libya Sanctions Act. In response to the administration's alleged failure to implement the Act, the foremost congressional critic, Benjamin Gilman (R-NY), Chairman of the House International Relations Committee, has announced his intention to seek elimination of the statute's waiver provisions.[94]

3. SANCTIONS COUNTERMEASURES

3.1. *EU Countermeasures*

The Helms-Burton Act and Iran and Libya Sanctions Act led to the EU's issuance of Council Regulation 2271/96 in November 1996.[95] The regulation applies with respect to the Helms-Burton Act, sanctions provisions of the Cuban Democracy Act, the prohibitions, licensing provisions and penalty provisions of the CACR, and the Iran and Libya Sanctions Act ("Covered

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[90] *See EU, US Avoid Clash on Cuba, Iran Trade Laws*, WASH. TRADE DAILY, May 19, 1998, at 1. The Administration issued a case-specific waiver under section 9(c) of the Act rather than a broad, prospective waiver under section 4(c). *See id.* (regarding "national interest" waiver).

[91] *See* Hugh Pope, *Shell's Planned Iran Pipeline Poses Test for U.S.*, WALL ST. J., Mar. 16, 1998, at A15.

[92] *See* David B. Ottaway & Martha M. Hamilton, *BP Amoco Seeks to Drill in Iran*, WASH. POST, Jan. 30, 1999, at E1.

[93] *See Senators Urge Albright Not to Grant ILSA Waivers for Libya Projects*, INSIDE U.S. TRADE, May 29, 1998, at 14-15 (reporting efforts by several Senators to obtain Administration commitments to sanction such investments in Libya).

[94] *See Gilman Announces Intent to Remove U.S. Ability to Waive ILSA Sanctions*, INSIDE U.S. TRADE, June 5, 1998, at 1-2.

[95] Council Regulation 2271/96, 1996 O.J. (L 309) 1.

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Sanctions").[96]

Regulation 2271/96 introduced four principal countermeasures designed to counteract the Covered Sanctions:

Compliance "Blocking": The regulation forbids EU persons, "actively or by deliberate omission," to comply with requirements "based on or resulting, directly or indirectly, from" the Covered Sanctions "whether directly or through a subsidiary or other intermediary person."[97] The EU Commission is authorized to allow persons to comply with a Covered Sanction in exceptional situations.[98]

Non-Recognition of Judgments: The regulation prohibits the recognition of judgments and administrative determinations that give effect, "directly or indirectly," to the Covered Sanctions "or to actions based thereon or resulting therefrom."[99]

"Clawback" Rights: EU persons engaging in commercial activities between the EU and third countries are empowered to "recover any damages . . . caused to" such persons by the application of a Covered Sanction "or by actions based thereon or resulting therefrom."[100]

Reporting Requirements: The regulation requires EU persons to report to the Commission (directly or through a Member State) within thirty days instances in which "the economic and/or financial interests" of the person "are affected, directly or indirectly," by a Covered Sanction "or by actions based thereon or resulting therefrom."[101]

Regulation 2271/96 specifies that Member State penalties to be imposed for violations of the regulation are to be "effective,

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[96] *See id.*, Annex. The EU countermeasures regulation applies to citizens of EU Member States, residents of the EU (apart from such residents in the country of which they are citizens), other natural persons within the EU, companies incorporated within the EU and persons the vessels of which are registered in an EU member State. *See id.*, art. 11; Council Regulation 4055/86, art. 1(2), 1986 O.J. (L 378) 1. Such persons are referenced herein as "EU persons."

[97] Council Regulation 2271/96, art. 5, 1996 O.J. (L 309) 1.

[98] *See id.*

[99] *Id.* art. 4.

[100] *Id.* art. 6.

[101] *Id.* art. 2. The EU Commission reinforced calls for reports under Regulation 2271/71 in February 1997. *See* Neil Buckley, *E.U. Seeks Help for Helms-Burton Case*, FIN. TIMES, Feb. 27, 1997, at 5.

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proportional and dissuasive."[102] Furthermore, a regulation issued coincidentally with Regulation 2271/96 directs the Members States to take measures that they consider "necessary to protect the interests" of EU persons who are affected by a Covered Sanction "insofar as these interests are not protected" under Regulation 2271/96.[103]

In July 1997, the EU announced that it was initiating an investigation of STET under Regulation 2271/96 in light of the agreement to compensate ITT for STET's use of the Cuban telephone system discussed above in Section 2.2.5.[104]

3.2. *Canadian Countermeasures*

Although it was amended in response to the Helms-Burton Act, Canada's Foreign Extraterritorial Measures Act (the "FEMA") had been in place for over ten years when the Helms-Burton Act and Iran and Libya Sanctions Act were enacted in 1996.[105] Under the statute, countermeasures— including elements largely like those contemplated by EU Regulation 2271/96— are implemented through government orders.

3.2.1. *FEMA Statute*

The FEMA authorizes the Canadian Attorney General to issue orders blocking compliance by "person[s] in Canada" with non-Canadian trade laws that "adversely affect" Canadian trade interests involving business carried on in Canada or that otherwise infringe on Canadian sovereignty.[106] A FEMA order can also "require any person in Canada to give notice" regarding such foreign measures.[107] If a foreign tribunal is exercising jurisdiction in a manner that compromises Canada's trade and sovereignty interests, the Attorney General is authorized to prohibit or restrict the production of records and the giving of information in con-

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[102] *Supra* note 95, art. 9.

[103] Joint Action of 22 Nov., 1996, art. 1, 1996 O.J. (L 309) 7.

[104] *See E.U. Begins Investigation of Italian Firm for Voting E.U. Anti-Helms-Burton Rules*, DAILY REP. FOR EXECUTIVES (BNA), Jul. 31, 1997, at A-2.

[105] *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.) [hereinafter FEMA].

[106] FEMA § 5(1). Such orders require the concurrence of the Canadian Secretary of State for External Affairs. *See id.*

[107] *Id.* § 5(1)(a).

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nection with foreign legal proceedings.[108]

Canada amended the FEMA in response to Helms-Burton in late 1996.[109] The FEMA amendments authorize the Canadian Attorney General to order the non-recognition and non-enforcement of judgements by foreign tribunals under foreign trade laws that "adversely affect" Canadian interests.[110] In addition, the amendments authorize clawback suits by Canadian persons to recover payments made to satisfy judgments handed down under the Helms-Burton Act and other foreign laws that are actionable under the FEMA.[111] Finally, the FEMA amendments authorize the Canadian Attorney General, with the concurrence of the Secretary of State for External Affairs, to maintain a schedule of non-Canadian trade laws that are, in the Attorney General's view, "contrary to international law or international comity," the initial entry on which is the Helms-Burton Act.[112]

As amended, FEMA penalties for compliance with objectionable foreign laws and other violations include fines of up to C$1,500,000 for corporations and C$150,000 for individuals along with imprisonment of individuals for up to five years.[113]

3.2.2. FEMA Order

In October 1992, the Canadian Attorney General issued an order under the FEMA directing Canadian-organized companies not to comply with the "Mack Amendment," which the United

[108] *See id.* § 3(1)(a)-(c). The FEMA authorizes courts to issue warrants for the temporary seizure of any records if there is reason to believe that the Canadian Attorney General's blocking order will be disobeyed, and the records are likely to be turned over to foreign authorities. *See id.* § 4.

[109] *See* Act to Amend the Foreign Extraterritorial Measures Act, R.S.C., ch. 28 (1997) (Can.).

[110] FEMA § 8(1)(a). The amendments establish that any judgment under the Helms-Burton Act is not to be recognized or enforced in Canada. Act to Amend FEMA, § 7(1). Before the 1996 amendments, FEMA non-recognition and clawback provisions related only to antitrust actions.

[111] *See id.* §§ 8(1), 9(1). If a non-recognition order cannot be issued because the judgement was satisfied outside Canada or the judgment is under the Helms-Burton Act, the Canadian Attorney General can issue an order declaring that a Canadian person has clawback rights with respect to the judgment. *See id.*
§ 8(1)(b).

[112] *Id.* §§ 5(1), 8.

[113] *See* FEMA § 7(1).

States enacted that year as part of the Cuban Democracy Act.[114] As discussed above in section II.A.1, the Mack Amendment effectively precluded, as a matter of United States law, U.S.-owned or controlled foreign companies from trading with Cuba by preventing the issuance of requisite licenses under the CACR.[115]

In light of concerns about proposals in the U.S. Congress that led to the Helms-Burton Act, the FEMA order was amended in January 1996 to cover the CACR directly and any other United States measure "having a purpose similar to that of the" CACR (presumably, preventing economic intercourse with Cuba).[116] The amendment broadened the order's blocking provision, and it now specifies that

> [n]o Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States [i.e., the CACR or a similar measure] or with any directive, instruction, intimation of policy or other communication relating to such a measure that the Canadian corporation or [corporate official] has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.[117]

It appears that the order was designed to reach not only U.S. government mandates but also "communications" from U.S. corporate parents to their Canadian subsidiaries to the effect that the

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[114] Foreign Extraterritorial Measures (United States) Order, 1992, 126 C. Gaz. Part II 4049 (1992); *see also supra* note 16 and accompanying text.

[115] *See supra* notes 14-16 and accompanying text. It would seem that the Canadian order should have been directed at the CACR themselves rather than the Mack Amendment to effectuate the goal of blocking the impact of U.S. sanctions.

[116] Foreign Extraterritorial Measures (United States) Order, 1992, amend., 130 C. Gaz. Part II 611 (1996). The amendment clarifies that the order applies with respect to CACR prohibitions on trade in services and technology as well as trade in goods and applies with respect to the CACR ban on business with parties deemed by the Treasury Department to be "specially designated nationals" of Cuba. *See id.* § 2, at 612.

[117] *Id.* § 5, at 613.

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subsidiaries should comply with the U.S. embargo of Cuba.[118] The amended order provides further that the blocking order applies to an "act or omission constituting compliance" with such a measure or communication "whether or not compliance with that measure or communication is the only purpose of the act or omission."[119]

Finally, the FEMA order directs Canadian corporations and their directors and officers to notify the Canadian Attorney General of any "communication" relating to the CACR or a similar measure "from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada."[120]

3.3. *Countermeasures of Other Jurisdictions*

In reaction to the Helms-Burton Act, Mexico enacted the Law to Protect Trade and Investment from Foreign Laws that Contravene International Law in October 1996.[121] The Mexican statute contains several elements included among the EU and Canadian countermeasures. Mexican parties and, oddly, foreign persons acts of whom "produce effects" in Mexican territory are forbidden "to engage in acts that affect trade and investment when such acts are the consequence of the extraterritorial effects of foreign statutes."[122] The Mexican law provides for the non-recognition and non-enforcement of foreign judgments issued under such laws.[123] Mexican parties can pursue clawback claims to recover damages under the extraterritorial foreign laws.[124] Finally, the

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[118] Canada Amends Order Blocking U.S. Trade Restrictions, Gov't of Canada News Release, No. 8 (Jan. 18, 1996). The Canadian government announced that the amended order would "oblig[e] U.S. subsidiaries in Canada to deal on a normal business basis with 'specially designated nationals'" identified as sanctioned persons under the CACR. *Id.*

[119] Foreign Extraterritorial Measures Order, § 6, at 613.

[120] *Id.* § 3(1), at 612.

[121] "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., 22 de octubre de 1996.

[122] *Id.* art. 1. A foreign statute is deemed to have "extraterritorial effects" if its objectives include: (1) blocking trade with or investment in a country to encourage political change in that country; (2) allowing "claiming payments from individuals derived from expropriations" made in such country; or (3) restricting entry into the country that enacted the statute to further the goals of (1) or (2). *Id.*

[123] *See id.* art. 4

[124] *See id.* art. 5.

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statute includes provisions forbidding responses to inquiries from foreign countries under extraterritorial measures and requiring notification to the Mexican government of such inquiries or activities that may be impeded by the foreign laws.[125]

The EU's Regulation 2271/96 was preceded by a series of countermeasures enacted by EU members. The United Kingdom's Protection of Trading Interests Act of 1980, among other things, authorizes the UK Secretary of State to "give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance" with non-UK measures that govern international trade in a way that damages UK trading interests.[126] Other EU members, such as Belgium, Denmark, Finland, France, Germany, the Netherlands and Sweden, reportedly also maintain countermeasures with one or more standard elements such as blocking, non-recognition, clawback and reporting provisions.[127]

4. INTERNATIONAL CHALLENGES TO U.S. SANCTIONS AND EFFORTS TO RECONCILE CONFLICTING POLICIES

In October 1996, the EU initiated World Trade Organization ("WTO") dispute settlement proceedings against the Helms-Burton Act and the U.S. embargo of Cuba. The EU alleged that these measures deny EU members' rights under General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the General Agreement on Trade in Services ("GATS") to export to Cuba and

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[125] *See id.* arts. 2 & 3.

[126] Protection of Trading Interests Act of 1980, ch. 11, § 1 (Eng.). In response to the Mack Amendment, see Section 2.1.1, the UK issued the Protection of Trading Interests Act, 1980, ch. 11, § 1 (3) (Eng.) (US Cuban Assets Control Regulations) Order 1992 to block compliance by U.S.-owned UK companies with the CACR prohibition on trade with Cuba. The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 was issued to reconcile the 1992 order with EU Regulation 2271/96.

[127] *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, 317 (1995) ("To protect [their] sovereignty from outside incursion, many [foreign] governments enacted blocking statutes to prevent compliance with U.S discovery orders within their borders."); *see, e.g.*, Derek Devgun, *Commission Proposes Response to U.S. Cuba Legislation: American Firms That Sue Could Face Retaliation in the E.U.*, EUROWATCH, Sept. 16, 1996.

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trade in Cuban origin goods.[128] The EU also articulated major concerns about the Iran and Libya Sanctions Act but did not include that statute in its WTO case.

The United States pressed the EU to discontinue the panel proceedings on the grounds that the Helms-Burton Act involves foreign policy and national security issues outside the ambit of the GATT 1994 and GATS. There were indications that the United States might defend the measure before the panel through invocation of the GATT and GATS national security exemptions, but, instead, the United States announced upon formation of the panel that it simply would not participate in the case.[129] Concerns emerged that disregard of a panel decision by the United States would undermine the legitimacy of the WTO.

Since the fall of 1996, the United States and the EU have intermittently pursued negotiations regarding EU concerns over the Helms-Burton Act and the Iran and Libya Sanctions Act and U.S. proposals for coordinated sanctions policies. In December 1996, the EU advanced those negotiations by adopting a "Common Position" on Cuba that emphasized an EU policy of securing a transition in Cuba to "pluralist democracy and respect for human rights."[130] The Clinton Administration viewed the Common Position as a positive step that helped justify continued suspension of the right to bring suit under Title III of the Helms-Burton Act.[131]

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[128] *See* Statement by the Representative of the European Communities and Their Member States at the Dispute Settlement Body of the WTO, Oct. 16, 1996; *see also* General Agreement on Tariffs and Trade 1994 *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement] Annex 1B, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND 33 I.L.M. 1167 (1994). Canada and Mexico became third party participants in the EU's WTO challenge. DAILY EXEC. REP. (BNA), Nov. 21, 1996, at A-3.

[129] *See* Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997, at A12. It appears that the Clinton Administration proceeded on the basis that the United States had discretion to determine unilaterally whether the agreements' national security provisions applied.

[130] Common Position of 2 December 1996 defined by the Council on the Basis of Article J.2 of the Treaty of the European Union, on Cuba, 1996 O.J. (L 322) 1.

[131] *See* Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 WEEKLY COMP. PRES. DOC. 3,

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In April 1997, immediately before the due date for the EU's first substantive submission regarding the WTO case, the United States and the EU announced an "understanding" on the basis of which the WTO case was placed in abeyance.[132] The April 1997 accord specified that the United States and the EU would continue discussions with a goal of developing by October 15, 1997 "disciplines and principles for the strengthening of investment protection" and "principles" to "address and resolve" the "issue of conflicting jurisdictions."[133] The United States noted that its "presumption of continued suspension of Title III" of the Helms-Burton Act was predicated on the EU's and other allies' continued "stepped up efforts to promote democracy in Cuba."[134] The document specified that the "U.S. Administration" would seek from Congress the authority to waive Title IV of the Helms-Burton Act.[135] Negotiations continued into the spring of 1998 notwithstanding the parties' failure to meet the October 1997 deadline. The EU's suspended WTO challenge expired in April 1998 in accordance with WTO dispute settlement rules, although the EU remains free to bring a new case.

In May 1998, the United States and the EU concluded a "Transatlantic Partnership on Political Cooperation" ("Partnership Accord") and an "Understanding with Respect to Disciplines for the Strengthening of Investment Protection" ("Investment Understanding"). The Partnership Accord includes limited commitments to forego new extraterritorial sanctions.[136] The Clinton Administration and the European Commission (EU executive body) agreed "not to seek or propose" and to "resist" "the passage of new economic sanctions legislation based on foreign

4 (Jan. 3, 1997). Canada and Cuba issued a"Joint Declaration" in January 1997 which reinforced their bilateral relationship, including commercial aspects of the relationship. *See* Canada-Cuba Joint Declaration on Cooperation on Political, Economic, and Social Issues, Jan. 22, 1997, 36 I.L.M. 210 (1997). This was not viewed with favor by the United States.

[132] European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, April 11, 1997, 36 I.L.M. 529, 530 (1997).

[133] *Id.*

[134] *Id.* at 529.

[135] *See id.* at 530.

[136] *See* Transatlantic Partnership on Political Cooperation, May 18, 1998, ¶ 2(h), *reprinted in EU-U.S. Declaration on Political Cooperation*, INSIDE U.S. TRADE, May 22, 1998, at 23-7.

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policy grounds which is designed to make economic operators of the other [partner] behave in a manner similar to that required of [the partner's] own economic operators."[137]

In return for that commitment, the EU conditionally agreed (as did the United States) in the Investment Understanding to impose certain sanctions against persons who invest in or undertake certain other transactions with respect to property that was confiscated in violation of international law. Unlike the Helms-Burton Act, the Investment Understanding commitments do not apply to past transactions. The sanctions include, among other things, denial of public credit and, in some circumstances, prohibition of the transaction.[138]

The United States and the EU agreed to jointly propose that the sanctions commitments set forth in the Investment Understanding be established as legal obligations as part of the Multilateral Agreement on Investment,[139] which was then being negotiated under the auspices of the Organization for Economic Cooperation and Development. Pending that outcome, the EU simply stated its intention in the Investment Understanding to apply the sanctions "on a policy basis."[140] Furthermore, even this limited commitment is contingent on the United States waiving application of Title IV of the Helms-Burton Act (the alien-exclusion provisions) to EU persons,[141] which would require that the Act be amended. The EU issued a statement indicating that its implementation of sanctions commitments in the Investment Understanding and its continuing to forego a WTO challenge depended not only on a Title IV waiver but also on: (1) the absence

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[137] *Id.*

[138] *See* Understanding with Respect to Disciplines for the Strengthening of Investment Protection, May 18, 1998, § I.B <http://www.eurunion.org/news /invest.htm>. A party to the Investment Understanding is to apply the identified sanctions if: (1) an international tribunal or court of the expropriating state determines that the property was expropriated in contravention of international law; (2) such a determination is made by the parties to the Investment Understanding or under the Multilateral Agreement on Investment (if that agreement is established); or (3) the party itself makes such a determination. *See id.* § I.B.1. Prohibition of the transaction is to be mandatory only upon a finding of illegality under international law by an international tribunal, court of the expropriating state or the parties to the Investment Understanding or under the Multilateral Agreement on Investment. *See id.* § I.B.

[139] *See id.* § II.2.

[140] *Id.*

[141] *See id.* § II.4.

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of sanctions against EU persons under the Iran and Libya Sanctions Act; and (2) continued waivers under Helms-Burton Act Title III (right-of-action provisions).[142] Prospects for securing binding sanctions commitments from the EU deteriorated later in 1998 when the Multilateral Agreement on Investment negotiations ended unsuccessfully.[143]

Moreover, Senator Jesse Helms (R-NC), Chairman of the Senate Foreign Relations Committee, and other congressional supporters of the Helms-Burton Act and the Iran and Libya Sanctions Act responded that the Investment Understanding was insufficient to warrant amending Title IV to allow for an EU waiver.[144] To date, efforts to amend Title IV and thereby bring the Investment Understanding sanctions commitments into force have made little progress. Administration officials are reportedly debating seeking additional commitments or statements from the EU that might facilitate action on Title IV.[145]

In June 1996, Canada and Mexico announced their intention to challenge the Helms-Burton Act under the North American Free Trade Agreement ("NAFTA").[146] They have not pressed forward with the case, however. Canada indicated that it would continue to delay the challenge pending the outcome of the U.S./EU negotiations[147] and has not taken action since the con-

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[142] *See* EU Unilateral Statement, May 18, 1998, <http://www.europa.eu.int/comm/dg01/0518uni.htm>. In its statement, the EU indicated that any new WTO panel that it might bring would challenge not only the Helms-Burton Act but also the Iran and Libya Sanctions Act. *See id.* In a reference to the planned Iran pipeline project discussed above in Section 2.3.3., the EU statement provided that "it is axiomatic that infrastructural investment in the transport of oil and gas through Iran be carried out without impediment." *Id.*

[143] *See* Lawrence J. Speer, *OECD Countries Kill MAI Talks But Say World Still Needs Rules*, DAILY REP. FOR EXECUTIVES, BNA Dec. 4, 1998, at A-9.

[144] *See, e.g., Helms, Gilman Call for Specific Changes to U.S.-EU Sanctions Deal*, INSIDE U.S. TRADE, June 19, 1998, at 1, 18-19 (reprinting a letter from Sen. Jesse Helms and Rep. Benjamin Gilman to Secretary of State Madeleine Albright).

[145] *See Administration, Congress Examining Different Ways to Solve Helms-Burton*, INSIDE U.S. TRADE, Aug. 14, 1998, at 5-6.

[146] *See* Anne Swardson, *Canada Vows Sanctions Against U.S. for Enforcement of Anti-Cuba Trade Law*, WASH. POST, June 18, 1996, at A7; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296, 297 (1993) (citing as its purpose the reduction of trade barriers and the establishment of mutually advantageous trade laws).

[147] *See International Trade: Canada Delays Challenge of Helms-Burton Pending EU Negotiations with United States*, DAILY REP. FOR EXECUTIVES (BNA),

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clusion of the Investment Understanding.

As of February 1999, there are no active challenges to U.S. sanctions under trade agreements, and the Clinton Administration has made limited commitments to resist further extraterritorial sanctions. At the same time, there remains no solid prospect of a resolution that would reconcile U.S. extraterritorial sanctions with the laws of other countries. In this regard, there apparently have been no international negotiations on U.S. trading partners' concerns about U.S. embargo regulations (*e.g.*, the CACRs) or negotiations that might lead to the revocation of sanctions countermeasures.

5. DIFFICULTIES WHEN SANCTIONS AND COUNTERMEASURES OVERLAP

The foremost problem for a firm caught between conflicting U.S. sanctions and foreign countermeasures is, of course, the potential for legal liability. Wal-Mart's Canadian subsidiary faced the possibility of multimillion dollar fines under the U.S. Trading With Enemy Act for sales of Cuban merchandise and the same under the Canadian FEMA for discontinuing such sales. Both statutes also provide for imprisonment of individual offenders.

Depending on the circumstances, foreign countermeasures might provide a defense to prosecution under or civil enforcement of U.S. sanctions in light of the "foreign state compulsion doctrine" of international law. Under the foreign state compulsion doctrine, a country is not to prevent a person from taking action in another country that is required by the laws of that country.[148] Making reference to this doctrine, some U.S. court opinions indicate that a party should not be held criminally or civilly liable under U.S. law for activity in a foreign country that is compulsory under the laws of that country.[149]

Feb. 14, 1997, at A-37.

[148] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 13, § 441(1).

[149] *See, e.g., In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253-54 (7th Cir. 1980) (expressing intent not to "interfere" with foreign sovereign's laws); Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 607 (9th Cir. 1976), *aff'd*, 749 F.2d 1378 (9th Cir. 1984) (refusing to pass on validity of foreign laws); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296-98 (D. Del. 1970) (recognizing foreign compulsion as a valid defense).

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There are several potential impediments to reliance on the foreign state compulsion doctrine. The U.S. Supreme Court has not affirmed use of the doctrine as a defense to criminal or civil actions, and the theory that it should be so applied is derived largely from lower court *dicta*.[150] While the contours of a successful defense are not clear even among lower courts, some have determined that the defense will succeed only if a balance of interests favors sustaining the policy of the foreign country.[151] It also seems clear that a court will intensely scrutinize whether the foreign policy is genuinely mandatory. The Restatement of U.S. Foreign Relations Law specifies that "guidance" or "informal communications" issued by the foreign country are insufficient to support a defense of foreign government compulsion.[152]

Apart from legal liability, the conundrum of overlapping U.S. sanctions and foreign countermeasures can give rise to serious government affairs and public relations problems. Reports indicate that difficulties arose for Wal-Mart when shoppers familiar with the extraterritorial scope of the U.S. embargo noticed clothing with "Made in Cuba" tags in the company's Winnipeg, Manitoba store. Due to public scrutiny, the company was forced to issue statements about its response to the issue (first removal of the products and then their return).[153]

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[150] The foreign state compulsion doctrine has been used successfully as a defense in at least one instance. *See* Interamerican, 307 F. Supp. at 1298 (upholding use of the doctrine in antitrust litigation). *See also* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 453 (2d Cir. 1987) (implying that the foreign state compulsion doctrine could represent a basis for insulation from liability apart from the primary basis relied upon by court). The Federal Court of Appeals for the Ninth Circuit has implied that the doctrine is inapplicable in cases regarding international contract disputes. *See* McGhee v. Arabian Am. Oil Co., 871 F.2d 1412, 1419 (9th Cir. 1989). The Federal Court of Appeals for the Third Circuit has held that the doctrine does not apply to the granting of patents. *See* Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 (3d Cir. 1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979).

[151] *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 903-04 (2d Cir. 1968) (holding that the need to enforce a U.S. subpoena outweighed German interests under bank secrecy law).

[152] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 13, at § 441 cmt. c.

[153] *See* John Urquhart, *Wal-Mart Pulls Cuban Pajamas From Canada*, WALL ST. J., Mar. 6, 1997, at A3; John Urquhart, *Wal-Mart Puts Cuban Goods Back on Sale*, WALL ST. J., Mar. 14, 1997, at A3.

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6. APPROACHES TO MINIMIZING PROBLEMS

Multinational companies— particularly those with operations in the United States and jurisdictions with sanctions countermeasures— are well-served by formulating and implementing a carefully considered approach to minimizing problems under U.S. sanctions and foreign countermeasures.

Companies for whom sanctions and countermeasures are most problematic are typically U.S. multinationals that have subsidiaries in jurisdictions with countermeasures. Some such corporate groups have chosen, for business and other reasons, to have the foreign subsidiary operate wholly independently and without direction from the parent. This model can be useful in insulating the parent from imputed liability for the actions of the subsidiary under agency, accomplice and conspiracy theories, although it will not obviate potential conflict between U.S. and local law vis-à-vis the foreign subsidiary.

Typically, the parent will have some level of operational control over the foreign subsidiary. If so, it is advisable for the company to take steps to exercise that control in a fully informed and thoughtful manner designed to avoid liability under U.S. sanctions and, to the extent possible, minimize difficulties with countermeasures.

Steps that might be considered include the following:

Review Foreign Operations for Potential Exposure Under U.S. Sanctions: The U.S. parent should understand the extent of potential exposure based on a thorough review of the foreign subsidiary's international business activities. It should know, for example, whether there is any prospect that the subsidiary will engage in business with Cuba or Cuban nationals if not constrained from doing so by the parent. U.S. legal requirements should be examined to assess, for example, whether the foreign subsidiary can avail itself of U.S. regulatory exemptions.

Ensure that the U.S. Parent Does Not Direct or Facilitate Noncompliance by the Foreign Subsidiary with U.S. Sanctions: This requires a clear understanding of U.S. law and foreign operations.

Establish Compliance Program Covering Foreign Subsidiary: Even absent conscious direction from the parent to violate the law, the parent invites problems under U.S. sanctions if it exercises operational control over its foreign subsidiaries but fails to

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establish rules and procedures designed to ensure compliance with U.S. extraterritorial requirements.[154] The compliance program should include elements on transaction-specific compliance checks, training regarding sanctions requirements and periodic compliance reviews. Compliance procedures should provide that instances of conflict between the laws of two jurisdictions will be decided by senior management of the subsidiary based on the advice of counsel.

Consider Pursuing U.S. Authorization as Appropriate: U.S. agencies generally do not license activity that is subject to sanctions regulations. Depending on the circumstances, however, the U.S. government might license actions by a foreign entity to avoid precipitating an international dispute. At the same time, seeking a U.S. license might exacerbate exposure for the foreign subsidiary under a countermeasure.

When Sanctioned Countries Are Avoided, Document Business Reasons for Doing So: A foreign subsidiary's avoidance of activity within the scope of U.S. sanctions might be attributable to reasons unrelated to sanctions. The marketing area of the subsidiary might, for example, exclude Cuba for business reasons. For purposes of addressing inquiries under countermeasures, it is useful to be able to produce documentation of such business arrangements that are contemporaneous with their establishment.[155]

Consider Steps to Prevent Participation by U.S. Persons in Foreign Subsidiary's Business: Depending on the circumstances, the management of the foreign subsidiary might be compelled by countermeasures to take action that is in noncompliance with U.S. sanctions. In this regard, the company should bear in mind the risk that liability for sanctions violations can inure to individuals who are U.S. nationals or permanent residents. If there is a significant possibility that the subsidiary will be forced to take action in violation of U.S. sanctions, it would be advisable that there be no U.S. nationals or permanent residents among the sub-

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[154] If the subsidiary is Canadian, it would be prudent to obtain the advice of Canadian counsel on the potential application of the FEMA order's prohibition on certain "communications" relating to the U.S. embargo of Cuba. *See supra* Section 3.2.2.

[155] At the same time, the Canadian FEMA order indicates that its prohibition on compliance with the U.S. embargo of Cuba extends to instances in which acting consistently with the embargo is even partially motivated by the embargo or a related "communication" from a corporate parent. *See supra* Section 2.2.2.

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sidiary's directors, officers and employees.

7. CONCLUSION

Although U.S. extraterritorial sanctions are drawing increasing criticism in the United States and abroad, the prospects for broad repeal of these measures are small. Indeed, it is not unlikely that additional extraterritorial sanctions will emerge in the next few years. At the same time, foreign sanctions countermeasures are likely to remain in place given the Clinton Administration's inability to negotiate harmonized sanctions policies with U.S. trading partners. In these circumstances, precluding legal liability under both U.S. sanctions and countermeasures can be a major challenge, particularly for foreign subsidiaries of U.S. companies.

In many cases, businesses may be unable to resolve this type of conundrum entirely. It is prudent not to ignore the problem, however. Fully informed, judicious planning can reduce risks significantly.

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