Vanderbilt Journal of Transnational Law

Volume 31
Issue 1 *January 1998*

Article 1

1998

Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy

Peter L. Fitzgerald

VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 31 | JANUARY 1998 | NUMBER 1

Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy

Peter L. Fitzgerald[*]

ABSTRACT

The extraterritorial application of U.S. economic sanctions and trade controls is a perennial topic of discussion among international trade practitioners and a frequent cause for concern abroad. While long present in one form or another as part of several U.S. trade and export control programs, there has been a resurgence in the use of unilateral extraterritorial trade regulation by the United States following the unraveling of widespread international consensus on who should be the targets for such controls and sanctions as a result of the breakup of the Soviet Union, and the demise of the international Coordinating Committee on Multilateral Export Controls. Moreover, the pressures created by rapidly developing new means of conducting domestic and international commerce online and over the Internet now exacerbate the problems created with these types of controls,

---

* © Peter L. Fitzgerald. Assistant Professor of Law, Stetson University College of Law, St. Petersburg, Florida; B.A. William and Mary 1973; J.D. University of California Hastings College of Law 1976; LL.M. (European Legal Studies) University of Exeter, United Kingdom 1981. Professor Fitzgerald teaches Business Associations, Computer Law, International Business Transactions, and International Trade Regulation. Prior to joining the Stetson faculty, Professor Fitizgerald was a member of the IBM Legal Department.

by vastly increasing both the number of international transactions and the speed with which they are conducted.

The most recent focus of the discussion of unilateral extraterritorial controls in the popular and academic press has been the Helms-Burton Act, which revised the terms of the U.S. embargo of Cuba. The amendments to the Cuban embargo controls that the Helms-Burton Act introduced have generated significant opposition from other countries, such as Canada and the United Kingdom. Additionally, the European Union has expressed its opposition through the initiation of a complaint with the World Trade Organization. Rather than the novel changes brought about by the Helms-Burton Act alone, however, it is the long-standing use of traditional "blacklisting" tools as part of the government's trade regulation and sanctions programs that most clearly highlights the difficulties inherent in unilateral extraterritorial controls. Using the Cuban embargo program as an example, this Article explores the question of the legitimacy of these "blacklisting" measures under international standards, including those advocated and espoused by the United States itself in connection with the Arab League's boycott of Israel. An emerging rule of customary international law, the Article concludes, proscribes the use of blacklisting to conduct international secondary boycotts.

TABLE OF CONTENTS

I. INTRODUCTION 3

II. EXTRATERRITORIAL EFFECT OF U.S. TRADE-RELATED BLACKLISTS 6

A. *The Basic Blacklist Mechanism*.................. 7

B. *The Growth of Blacklisting in U.S. Trade Policy* 11

1. Additional Blacklisting Tools in the Cuban Sanctions 11

2. Other U.S. Trade-Related Blacklists. 14

a. Blacklists in U.S. Economic Sanctions Programs 16

b. Blacklists in U.S. Trade Control Programs 28

C. *Application of U.S. Sanctions and Trade Controls Abroad*.. 35

1. Economic Sanctions and Foreign Subsidiaries or Branches 36

2. Trade Controls and Re-exports 41

III. RESPONSES TO EXTRATERRITORIAL CONTROLS AND BLACKLISTS 48
A. *National Legislation: U.S. Antiboycott Laws...* 49
B. *National Legislation: Foreign "Blocking Measures"* 61
C. *Litigation and Enforcement* 70
1. On the National Level 70
2. On the International Level 78
IV. EMERGENCE OF A CUSTOMARY STANDARD ON SECONDARY BOYCOTTS 87
V. CONCLUSION 94

I. INTRODUCTION

It starts so simply. It's snowing and cold in Quebec, Canada. The midwinter gray clouds cover the town of Duvernay, causing the late afternoon light to simply melt away into evening. Turning from the frost speckled window, Pierre Boileau warms his hands around a steaming cup of coffee before sitting down at his computer. He shuffles some papers and picks up a squarish multicolored cardboard envelope he received, unsolicited, in the morning mail; he tears open the perforation and removes a 3.5 inch black computer disk. Pierre thinks, "Well, this package says I get ten free hours to try out the Internet, so I might as well see what all this online stuff is all about."

Using the cardboard mailer as a coaster for the coffee cup, he turns on his personal computer and feeds the disk into the machine. A triangular icon with the word "Setup" appears on the screen. With a quick flick of his wrist Pierre moves the arrow-like cursor on his computer screen using his computer's "mouse," and "clicks" twice on the setup icon. Instructions flash on the screen, and with a couple more "clicks" Pierre has installed the software on his computer and is ready to "log on" for the first time. He does so by "clicking" on a new triangular icon which appears on his computer screen, labeled "America Online."[1] Another series of

---

1. The scenario described in this introduction is entirely hypothetical. Pierre Boileau's connection to the America Online service is simply being used as an example to highlight the ease with which modern, and especially electronic, business practices can create complex legal issues when dealing with unilateral extraterritorial trade controls. Concrete examples of the problems facing America Online in the hypothetical are discussed later. *See infra* notes 317-38 and accompanying text (Dresser Industries); notes 339-45 and accompanying text (Compagnie Européenne des Pétroles); notes 346-54 and accompanying text (Freuhauf); notes 396-99 and accompanying text (Wal-Mart).

instructions appear, asking Pierre to type in the registration number and password printed on the cardboard mailer, to choose a local phone number in Quebec for the computer to dial for the service, and to provide his name, address, and credit card number. This done, Pierre then "clicks" on the screen where it reads "Sign On," and the computer dials out over the phone lines and makes a connection to the America Online Canada computer service while Pierre takes another sip of his coffee.

When the connection is made, America Online checks the validity of the credit card number, just as any other company might do with a mail order or telephone catalog transaction, and opens an account for Pierre Boileau. Pierre now has access to the Internet. According to the contract that appeared on his screen during the initial setup and sign-on process, which Pierre did not bother to read, he has ten hours free usage of the service.[2] After this trial usage period, Pierre will be charged $9.95 a month for his membership in the service, and $2.95 an hour if more than five hours are spent online in any single month.[3]

This gives America Online just ten hours to avoid a disastrous collision between two irreconcilable sets of laws and policies! Once Pierre's "free" time expires, and money starts to be owed and billed, the company will violate the U.S. Trading With the Enemy Act (TWEA)[4] by engaging in an unapproved financial transaction with an individual the United States considers as a "Cuban agent."[5] America Online Canada will find itself caught

---

2. America Online Canada offered a ten hour trial membership shortly after it was established as a subsidiary of America Online Inc., the U.S.-based parent company, on January 30, 1996. *See* David Bosworth, *America Online Launches AOL Canada with Trial Membership Offer,* TORONTO DM NEWS, Mar. 11, 1996, at Supp.15.

3. These were the rates that AOL Canada offered in its initial offer. Interestingly, the rates were quoted in U.S., rather than Canadian, dollars because the operation of the service was still being run out of the United States. *Id.* Subsequently, AOL Canada revised its pricing to use Canadian currency, and offered two different packages. The revised pricing options provide either 20 hours of online time for C$26.95 per month, with C$3.95 for each additional hour; or five hours for C$13.95 per month, plus C$3.95 for each additional hour. *See AOL Canada Surpasses 100,000 Members,* AOL PRESS RELEASE, Oct. 23, 1996, *available at* <http://www-db.aol.com/corp/news/press>.

4. 50 U.S.C. app. § 1 (1994). The TWEA, passed in 1917 in connection with World War One, provides the legislative basis for the embargoes of both Cuba and North Korea. The Treasury Department's Office of Foreign Assets Control (OFAC) administers these TWEA based embargoes with the Cuban Asset Control Regulations (CACR), 31 C.F.R. §§ 515.101-515.901 (1997), and the Foreign Assets Control Regulations (FACR), 31 C.F.R. §§ 500.101-500.901 (1997). The FACR currently apply only to North Korea, but these same regulations were previously used for the embargoes of Cambodia and Vietnam, as well as for China during the Korean War era.

5. *See infra* note 13 and accompanying text.

between violating the unilateral extraterritorial controls the United States imposes as part of its embargo of Cuba,[6] or the local laws that were passed precisely to prevent the extension of the embargo to reach transactions within Canada,[7] both of which carry substantial civil and criminal penalties for their violation.[8]

America Online is in fact fortunate that its offer includes the "free trial period," which gives it a little time to avoid being inadvertently caught between these two opposing governmental policies. With a different type of offering, it is possible to become entangled in this type of problem as soon as the transaction is completed—before the computers disconnect or the telephone is hung up, before Pierre's coffee even has a chance to get cold. In a world where online transactions are becoming increasingly common, in one form or another, this problem could occur virtually instantaneously and without any warning or notice.

So, with a very simple business transaction, just a couple of "clicks" on a computer connected to the Internet, there is a serious international conflicts-of-law problem that highlights two of the fundamental issues facing international business today and an extremely difficult practical compliance problem. Firstly, this example with Pierre highlights the difficulties that quickly arise when controls are created unilaterally in one country and then applied extraterritorially. The United States is placing increasing reliance on such tools in its trade control and sanctions programs, particularly with regard to blacklist-like mechanisms.[9]

---

6. *See infra* notes 137-41 and accompanying text.

7. For a discussion of Canada's Foreign Extraterritorial Measures Act, see *infra* notes 268-86.

8. Penalties for violating the TWEA include up to ten years imprisonment, criminal fines of $1 million ($100,000 for individuals), and civil fines of up to $55,000. *See* 50 U.S.C. app. § 16 (1994); 31 C.F.R. § 515.701; 61 Fed. Reg. 54936 (1996). Penalties for violating the Canadian Foreign Extraterritorial Measures Act include up to five years imprisonment and fines of up to C$1.5 million. *See* Foreign Extraterritorial Measures Act § 7, *reprinted in* 36 I.L.M. 111, 120-21 (1997).

9. A recent study sponsored by the National Association of Manufacturers stated the following:

> The United States is resorting increasingly to unilateral economic sanctions against a broad range of countries for a wide variety of reasons. A new wrinkle in 1996, apart from the dramatic increase from previous years, was the use of secondary boycott measures, which extended the reach of U.S. Law to overseas companies doing business in the targeted country, angering allies and provoking threats of retaliation. This growing resort to unilateral sanctions departs from a period in the late 1980s of relative restraint, due, in part to the lessons learned during the abortive oil pipeline sanctions against the Soviet Union in 1982 and the grain embargo of 1980.

The resurgence of these unilateral extraterritorial trade regulations is due, in part, to the lack of international consensus on who should be the targets for such controls after the breakup of the Soviet Union and the demise of the international Coordinating Committees on Multilateral Export Controls (COCOM).[10] One incidental result of this trend is a shift in the burden of determining which transactions pose policy difficulties for the government away from licensing officials and onto those conducting the transactions themselves, who must screen their transactions against the blacklists.[11] Secondly, this example also illustrates the difficulty of identifying what standards should be applied to extraterritorial controls to resolve disputes concerning their legitimate use.[12]

II. EXTRATERRITORIAL EFFECT OF U.S. TRADE-RELATED BLACKLISTS

How can an ostensibly domestic transaction between Canadian parties, without any overt connection to international business, much less any dealings with Cuba or the United States, trigger the Cuban embargo? Moreover, how is America Online Canada expected to know that it has a potential connection with the U.S. embargo policy toward Cuba?

See NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-1996, 1 (1997).

10. COCOM was created in 1949 as a forum to establish and enforce a common, multilateral set of East-West trade controls aimed at limiting both military and civilian exports and technology transfers to communist countries. The seventeen member nations that comprised COCOM agreed to disband the organization in 1994. It was replaced by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies in 1997. Additionally, a series of tailored agreements and treaties aimed at imposing limited multilateral controls on the spread of nuclear, chemical, and biological weapons and their associated missile delivery systems were established as the Cold War drew to an end. Unlike the weapons proliferation agreements or the earlier COCOM regime, however, the Wassenaar Arrangement does not establish a common set of trade controls. Instead, it merely seeks to promote the exchange of information among nations regarding sensitive transactions with a vaguely identified set of "rogue" countries. The actual controls to be imposed, if any, are left entirely up to the "national discretion" of the various members of the Wassenaar regime. *See generally* Peter L. Fitzgerald, *Prevention of Liability for Export Control Violations, in* BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY, ch. 14 (1996).

11. *See infra* note 438 and accompanying text.

12. *See infra* Part IV.

A. *The Basic Blacklist Mechanism*

The problem arises in this hypothetical because in the early 1980s the U.S. government decided that Pierre Boileau was acting for, or on behalf of, Cuba in his various dealings.[13] Accordingly, Pierre's name was added to a list of "Specially Designated Nationals" (SDNs) of Cuba, maintained by the U.S. Treasury Department's Office of Foreign Assets Controls (OFAC).[14] This list operates as a type of "blacklist," prohibiting those subject to U.S. laws from engaging in any financial dealings with the named parties without U.S. government approval.[15] The SDN list is used

---

13. As a result of efforts by the Cuban Interest Section in the United States to encourage businesses to circumvent the embargo restrictions by establishing dummy companies in third countries, "two U.S. companies, six Panamanian firms, one Jamaican firm and three individuals," including Pierre Boileau, were placed on the Cuban Specially Designated National (SDN) list on January 7, 1981. Ricardo Escartin, the First Secretary of the Cuban Interest Section, which was then operating out of the Czechoslovakian Embassy in Washington, D.C., was expelled and criminal investigations commenced against the U.S. parties. *See* Reuter N. Am. News, Feb. 11, 1981, *available in* LEXIS, News Library, REUNA File.

14. Pierre Boileau is the only individual whose name appears in the list of Cuban SDNs located in Canada. The other 17 Canadian SDNs are all companies. *See* 31 C.F.R. ch. V, apps. A & B (1997). Interestingly, although the Cuban embargo was imposed in 1963, the SDN lists were not published with the embargo regulations as part of the C.F.R. until 1996. *See* 61 Fed. Reg. 32,936, 32,939, 32,970, 33,021 (1996). Prior to that time, these "blacklists" were made available only on an ad hoc basis by OFAC or by infrequent announcements in the Federal Register. For example, the first publication of the Cuban SDN list in the Federal Register did not occur until 1986. *See* 51 Fed. Reg. 44,459 (1986). The most recent publication of the OFAC "blacklists," on June 27, 1997, includes over 2100 names. *See* 62 Fed. Reg. 34,934 (1997).

15. The CACR prohibits virtually all dealings with Cuba or Cuban nationals, without any geographic limitation.

> All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury . . . by means of regulations, rulings, instructions, licenses, or otherwise if . . . such transactions are by, or on behalf of, or pursuant to the direction of [Cuba] or any national thereof, or such transactions involve property in which [Cuba] or any national thereof, has . . . had any interest of any nature whatsoever, direct or indirect.

31 C.F.R. § 515.201(a) (1997).

The CACR then continues to define "national" to include not only Cuban citizens and business entities, but also foreign entities that are "directly or indirectly" "owned or controlled by" Cuba or Cuban nationals; those who are reasonably believed to "act directly or indirectly for the benefit or on behalf of" Cuba or Cuban nationals; and most significantly, those whom the Secretary of the Treasury "deems" to be a "national" of Cuba. 31 C.F.R. § 515.302 (1997). When the Secretary of the Treasury makes such a designation, the individual or entity becomes an SDN. 31 C.F.R. §§ 515.305 - 515.306 (1997). Thus, the SDN primarily to identify individuals and entities outside of the embargoed target destination, in this case Cuba, who are nonetheless acting for the target destination.[16] In blacklisting these parties in third countries, the U.S. government effectively brings indirect dealings through intermediaries within the scope of its ban on direct dealings with the embargo target itself.[17] Parties that are in the United States, or amenable to U.S. personal jurisdiction, do not need to be, and seldom are, named in the SDN list because they already are obligated to follow the embargo laws and regulations and may be directly punished for any violation.[18]

Thus, the value of the SDN designation to the U.S. government is not as a sanction to punish those who are

---

designation extends the basic prohibition of the CACR to third parties who may not otherwise be identified with Cuba or Cuban citizenship. *See also* American Airways Charters, Inc. v. Regan, 746 F.2d. 865, 867 n.2 (1984).

16. The OFAC SDN lists have also sometimes been used to identify specific parties *within* an embargo target destination. For example, there are currently more than thirty Cuban "SDNs" listed with addresses within Cuba itself. *See* 31 C.F.R. ch. V, app. B (1996). This practice, however, is criticized as being largely redundant with the broader geographic control, *i.e.*, there is no need to specifically list the names of parties in country X if all dealings with country X are embargoed; whereas the listing of parties in countries A, B, and C who are acting for country X may logically be of value in controlling *indirect* transactions with country X. Alternatively, listing SDNs with addresses within the target country may also be useful if the economic sanctions impose less than a complete embargo, as is the case with OFAC's Narcotics Trafficking Regulations aimed at Colombia. *See* Narcotics Trafficking Sanction Regulations, 62 Fed. Reg. 9959 (1997) (to be codified at 31 C.F.R. pt. 536); *infra* notes 211-14 and accompanying text.

17. The embargo's prohibition on direct dealings with Cuba would be considered a "primary" boycott, one which only affects transactions between the belligerent parties. When this is extended to dealings with Cubans or Cuban agents in third countries, and then further extended to third country nationals, who may themselves deal with Cuba in order to reach indirect transactions with the embargo target, the "primary" boycott becomes a "secondary" boycott. *See infra* notes 209-14 and accompanying text.

18. That is not to say that parties in the United States never appear in an SDN list. Such parties can be named to the list, as a prelude or adjunct to imposing penalties for violating the controls. This may be particularly likely if the entity to be added to the list is controlled by the embargoed target country, and becomes a means to close down that particular business or freeze any assets associated with that company or individual as part of the embargo program. This is what happened to the Miami-based operations of Travel Services Inc. and Havanatur, which were blacklisted under the terms of the Cuban embargo at the same time Pierre Boileau was added to the SDN list. *See supra* note 13. Two other Florida-based companies are on the Cuban SDN list: KOL Investments, Inc. and American Air Ways Charters, Inc. *See* 31 C.F.R. ch. V, app. B. *See also* Richard T. Meislin, *Main Air Link Between U.S. and Cuba Shut Down*, N.Y. TIMES, Apr. 17, 1982, at 3. Naming a U.S. party in the SDN list essentially closes that business down because of the broad prohibitions found in the CACR on virtually all kinds of financial dealing with SDNs.

otherwise already obligated to comply with U.S. law; rather, its real purpose is to extend the reach of the U.S. controls to those who are otherwise beyond the reach of U.S. jurisdiction. By using this blacklisting tool, the U.S. government attempts to influence the behavior of those who are beyond its direct reach by ordering those whom the government can reach to refrain from further dealings with the blacklisted party. In fact, the third party behavior abroad, which the U.S. government seeks to influence, may be entirely legal, and even encouraged, by the jurisdiction in which the actions actually occur.[19]

From the U.S. perspective, however, doing business with a blacklisted entity or person, such as Pierre in Canada, is deemed to be the same as doing business with the target destination, Cuba, even though the transaction occurs in a third country.[20] Additionally, the blacklisting means that all dealings with Pierre are deemed to involve Cuba, whether or not he may be acting as a Cuban agent for a given transaction.[21] The distinction between actually acting as a Cuban agent or acting in some other capacity may well affect whether it is possible to obtain the U.S. government's approval or authorization to proceed with a particular transaction. However, it does not affect the requirement to actually seek the government's approval that is

---

19. *See infra* notes 268-314 and accompanying text (discussing the reaction to U.S. extraterritorial actions, especially the tightening of the U.S. embargo of Cuba with the Cuban Democracy Act and the Helms-Burton Act).

20. *See* 31 C.F.R. § 515.302 (1997) (definition of "national"); 31 C.F.R. § 515.306 (1997) (definition of "specially designated national"). In the CACR, the "term *designated national* . . . mean(s) Cuba and any national thereof including any person who is a specially designated national." 31 C.F.R. § 515.305 (1997). The concept behind this awkward phraseology, identifying the country as the individual, is mirrored in the regulatory definition of "foreign country," which identifies the individual as the country. The regulation states that the "term *foreign country* also includes . . . any person to the extent that . . . there is reasonable cause to believe that such person is, or has been . . . acting or purporting to act directly or indirectly for the benefit or on the behalf of the [state or government of the foreign country]." 31 C.F.R. § 515.301(c) (1997). The prohibition provision completes the circle by making clear that "the term 'foreign country designated under this part' and the term 'designated foreign country' means Cuba . . . ." 31 C.F.R. § 515.201(d) (1997).

21. Once a party is designated as an SDN, the regulatory prohibitions in 31 C.F.R. §§ 515.201-202 (1997) are triggered by the party's *status*, and not by the operation of agency principles to the particular tasks the party may be performing for itself or others at any given time. Nonetheless, parties that are neither Cuban nationals, nor deemed to be Cuban nationals by virtue of an OFAC "designation" as such, can nevertheless still be brought within the terms of the embargo under ordinary agency principles. *See* 31 C.F.R. §§ 515.301-302, § 515.306 (1997) (bringing "any person" who is reasonably believed to have acted directly or indirectly for Cuba or Cubans within the CACR's respective definitions of "foreign country," "national" or "specially designated national").

triggered by Pierre's simply being named as an SDN of Cuba.[22] Thus, dealing with Pierre in Canada is the same as dealing directly in or with Cuba, under the terms of the U.S. sanctions.

This makes sense when the intent and historical context of sanctions programs, such as the Cuban embargo, are considered. The Cuban sanctions, like most embargoes, are designed to impose as complete a state of economic isolation as possible. The concept of using a SDN-like blacklist to cut off indirect dealings with the target destination is a direct outgrowth of U.S. efforts to address "corporate cloaks" and "fronts" operating for the Axis powers in World War Two,[23] with what was then called the Proclaimed List of Certain Blocked Nationals.[24] In issuing this list in 1940, the President declared that:

> [a]ny person so long as his name appears in such list, . . . shall be treated for all purposes under Executive Order No. 8389 [the directive freezing enemy assets] as though he were a national of Germany or Italy. All the terms and provisions of Executive Order No. 8389 . . . shall be applicable to any such person so long as his name appears in such list, and to any property in which any such person has or has had an interest, to the same extent that such terms and provisions are applicable to nationals of Germany or Italy and to property in which nationals of Germany or Italy, have or have had an interest.[25]

The Treasury Department later stated: "it was recognized from the inception of the freezing program that a control which could reach only those who were actually citizens of the Axis countries or of other countries under their domination would be ineffective, and, indeed, naive in the light of Axis practices."[26]

---

22. Authorization to proceed is typically obtained by requesting a "specific license" for an otherwise embargoed transaction from OFAC under 31 C.F.R. § 515.801(b) (1997). The CACR also contains broader "general licenses" that authorize certain categories of transactions without the need for issuing individual approvals, although there still may be record keeping or reporting requirements associated with the use of one of these "general licenses." *See* 31 C.F.R. § 515.801(a), §§ 515.502-574 (1997). Additionally, particularly when dealing with third party transactions outside of the embargoed destination itself, OFAC may issue notices or provide individual guidance concerning the applicability of the regulations that may indicate that the transaction is entirely outside the scope of the embargo program.

23. *See* Exec. Order No. 8785 § 5E, 6 Fed. Reg. 2898 (1941); MARTIN DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, chs. X, XI (1943); MARTIN DOMKE, CONTROL OF ALIEN PROPERTY 105-113 (Supp. 1947).

24. Proclamation No. 2497, § 2, 6 Fed. Reg. 3555 (1941).

25. *Id.*

26. U.S. TREASURY DEPARTMENT, ADMINISTRATION OF THE WARTIME FINANCE AND PROPERTY CONTROLS OF THE U.S. GOVERNMENT 32-33 (1942), *cited in* Carl F. Goodman, *United States Government Foreign Property Controls*, 52 GEO. L.J. 767, 782 (1964).

The list was designed "so that anyone entangled in the web of Nazi influence could be subjected to the control."[27]

Thus, these Treasury Department blacklists, from their onset, were tools for economic warfare.[28] OFAC, as of the office which administers the Cuban embargo, still views itself as carrying out essentially a wartime mission. Its current director has stated: "[T]his is the other front . . . [my staff members are] an elite category of highly trained professional men and women devoted to waging economic warfare."[29]

B. *The Growth of Blacklisting in U.S. Trade Policy*

1. Additional Blacklisting Tools in the Cuban Sanctions

The use of blacklisting in the Cuban sanctions goes beyond expansive notions of "deemed nationality" for those who act on behalf of Cuba or Cubans. By virtue of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,[30] popularly known as the Helms-Burton Act,[31] it also extends to imposing potential civil liability for treble damages on those identified as "trafficking"[32] in property expropriated by the Castro regime in Cuba,[33] and also includes the denial of visas to such individuals

---

27. *Id.*

28. It should also be noted that the World War Two controls and the Cuban embargo share a common legislative basis in the TWEA.

29. Keith Kendrick, *In Economic Battle, Soldiers Fight on Carpet*, WASH. POST, Sept. 19, 1990, at A21. This history also explains why OFAC often contends that it is not a "trade control" agency like the Commerce Department's Bureau of Export Administration (BXA) or the State Department's Office of Defense Trade Controls (DTC). However, from the perspective of businesses and others who must create procedures to comply with all of the various government requirements, the OFAC programs are very much like the controls imposed by BXA and DTC.

30. 22 U.S.C. § 6021-6091. *See also* 28 U.S.C. § 1611.

31. The Act's popular name refers to its principal sponsors, Senator Jesse Helms (R., North Carolina) and Representative Dan Burton (R., Indiana).

32. The use of the term "trafficking" in the statute, with its connotation of immoral activity such as drug dealing, was apparently intentional by the authors of the legislation.

33. Title III of the Helms-Burton Act authorizes private lawsuits by U.S. nationals against those who traffic in confiscated property. *See* 22 U.S.C. §§ 6081-6085. There is, however, a $50,000 threshold for claims against traffickers in expropriated property, which led some to criticize the provision as benefiting only wealthy Cuban émigrés, and calling the Act the "Bacardi Bill" because this provision was authored by lawyers for the distillery. *See* Louis F. Desloge, *The Great Cuban Embargo Scam: A Little Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at C1; Stephen Fidler, *The Long Arm of American Law: U.S. Legislation Aimed at Punishing Fidel Castro has Angered*

or companies, as well as to the officers or principals of those companies, as well as to their families.[34] Although there is no SDN-like public list to specifically identify "traffickers" in confiscated property, there is an internal governmental procedure for those subject to the visa restrictions.

Based upon information obtained either from the Foreign Claims Settlement Commission (FCSC) in the case of adjudicated claims against Cuba,[35] or from the claimants themselves in the case of non-FCSC certified claims,[36] the Assistant Secretary of State for Inter-American Affairs makes a determination as to the visa ineligibility or excludability of foreign persons connected with trafficking in confiscated property after the effective date of Title

---

Washington's Trading Partners and Left Mr. Clinton with a Dilemma, FIN. TIMES (London), July 8, 1996, at 17.

President Clinton has exercised his discretion to temporarily suspend the implementation of these provisions of the Act for consecutive six month periods since its passage. *See* White House Press Office, *Text of Clinton Letter on Helms-Burton Act*, July 16, 1997, *available in* LEXIS, News Library, USNWR File; White House Press Office, Text of Letter from President Clinton to Ranking Members of Congress, *available in* LEXIS, News Library, USNWR File; *Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995*, 32 WEEKLY COMP. PRES. DOCS. 1265 (July 22, 1996).

34. Title IV of the Helms-Burton Act requires that the Secretary of State deny visas to those who confiscate or traffic in confiscated property subject to the Act; those who are officers, principals, or controlling shareholders in an entity that confiscates or traffics in confiscated property subject to the Act; and to their agents, spouses, and minor children. *See* 22 U.S.C. § 6091. The President's discretion to suspend portions of the Helms-Burton Act does not extend to Title IV. *See* 22 U.S.C. § 6085. These provisions are currently in force. *See Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 61 Fed. Reg. 30,655 (1996) [hereinafter *Guidelines Implementing Title IV*].

35. The U.S. Foreign Claims Settlement Commission (FCSC) certified 5911 individual and corporate awards, totaling $1,799,548,568.69, under the Cuban claims program it administered. *See* 1972 FCSC Ann. Rep. at 412.

36. One of the more controversial aspects of the Helms-Burton Act is that it is intended to benefit all U.S. nationals, including those who were not U.S. citizens at the time their property may have been confiscated, *i.e.*, it provides a forum for Cuban nationals and refugees who acquired U.S. citizenship sometime after the takings occurred. These individuals did not have standing to participate in the FCSC process, and never received FCSC adjudicated awards for their losses. Some commentators regard this aspect of the Helms-Burton Act, providing a U.S. forum for litigating disputes that occurred between the Cuban government and Cuban nationals based upon their subsequent acquisition of U.S. citizenship, as an expansion of the usual international rules of standing and jurisdiction regarding whether a country may properly espouse a claim on behalf of an individual. *See, e.g.*, Paul K. Chudzicki, Comment, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries?*, 28 LOY. U. CHI. L.J. 505, 539-44 (1997). *See also* U.S. Practice: State Responsibility, 76 AM. J. INT'L. L. 836 (1982) (quoting Office of Legal Advisor, U.S. Department of State letter on H.R. 2619 to Congressman C. J. Zablocki, Chairman of House Committee on Foreign Affairs).

IV of the Helms-Burton Act, March 12, 1996.[37] Once the determination is made, the individual's name, along with the names of the individual's spouse and minor children are entered into the Immigration and Naturalization Service's (INS) "visa lookout" and "entry exclusion" systems, which results in the denial of any visa application and revocation of any existing visas.[38] Although there are confidentiality provisions that limit the disclosure of decisions regarding visa ineligibility or excludability in individual cases,[39] the government freely discusses the names of the companies with whom the excluded individuals are affiliated.[40] In this way, not only are the individuals subject to visa restrictions by the operation of the INS internal blacklists, but the public at large is put on notice that those particular firms are deemed by the government to be "traffickers" and therefore potentially subject to civil liability under Title III of the Helms-Burton Act as well.[41]

The U.S. government acknowledges that, to date, thirteen executives or officers of the Toronto-based Sherritt International Corporation,[42] and five officials of the Mexican telecommunications firm Grupo Domos,[43] have been excluded under Title IV of the Act. Thus, as some have noted, "denying

---

37. *See Guidelines Implementing Title IV, supra* note 34.

38. Prior to making the actual determination, the individual is notified by registered mail and given 45 days to divest themselves of any investment in confiscated property or otherwise justify why he or she should not be subject to exclusion. Consular Officers and the INS are directed to look *solely* to the INS database entries in order to verify whether an alien is excludable. *See id.*

39. 61 Fed. Reg. 30,656 (1996); Immigration and Nationality Act, 8 U.S.C. § 1202(f) (1994).

40. Part of the objective of Title IV of the Helms-Burton Act is to limit trafficking in confiscated property by making possession of such property unattractive. *See* 22 U.S.C. § 6022(6).

41. There is, however, a slight difference between the definition of "trafficking" in the travel sanctions provision, Title IV, and in the civil liability section, Title III. The Title IV visa exclusion provisions only apply to those who deal in confiscated property after March 12, 1996. *Compare* 22 U.S.C. § 6023(1), *with* 22 U.S.C. § 6091(b)(2).

42. The "45 day letter" was sent to nine individuals connected with Sherritt on July 10, 1996, and four other Sherritt officials were so notified on March 17, 1997. Sherritt is reported as having assets in Cuba worth $250 million, including a joint venture with the Cuban government in a nickel mine expropriated from a U.S. company in 1959. *See* Judith A. Lee, *Conflict Over Cuba*, LEGAL TIMES OF WASH., Sept. 9, 1996, at S37; *U.S. Department of State Daily Press Briefing*, M2 PRESSWIRE, Mar. 17, 1997.

43. The "45 day letter" was sent to Grupo Domos officials on August 19, 1996. Grupo Domos has a sizable stake in the Cuban national telephone company, which utilizes property expropriated from AT&T. *See* Lee, *supra* note 42, at S37.

Disney World to a few Canadian . . . children becomes part of the U.S. strategy for defeating Castro."[44]

Nevertheless, the visa blacklist has had an impact despite having been fully invoked only with regard to two companies. The government asserts that at least twelve companies have revised their Cuban investment plans since Title IV went into effect,[45] and a number of major companies in the European Union (EU) have been contacted, including Iberia, Banco Bilbao Vizcaya, Repsol, and Tabacalara in Spain, and the Italian telecommunications company Stet,[46] as well as at least one company in Brazil, and another in Israel.[47] Thus, the "extraterritorial" impact of the Helms-Burton travel restrictions,[48] while perhaps receiving less popular attention than the Title III civil liability provisions, has caused great concern abroad, and forms a significant part of the EU's complaint to the World Trade Organization (WTO) regarding the U.S. Cuban policy.[49] The Clinton Administration's promise to seek a waiver from the mandatory provisions of the visa blacklist was in fact a key part of the agreement negotiated in 1997, under which the EU would temporarily refrain from pursuing its petition to the WTO for a period of six months.[50]

2. Other U.S. Trade-Related Blacklists

When Congress decided to further tighten the Cuban sanctions in 1996,[51] its resort to the visa blacklist was a natural

---

44. *Crazy on Cuba: Helms-Burton Hurts U.S., Not Castro*, MINNEAPOLIS STAR TRIB., Metro Edition, July 12, 1996, at 20A.

45. *See Israeli Company Faces US Visa Ban for Investments in Cuba*, AGENCE FRANCE PRESS, International News, Jan. 3, 1997.

46. *See EU/US Ministers Emphasize Friendly Solution to U.S.-Cuba Row*, EUR. INFO. SERV., EUR. REP., Feb. 26, 1997.

47. *See Remarks of Under Secretary of State Stuart Eizenstat, State Department Briefing*, FED. NEWS SERV., July 16, 1997.

48. It may be debatable whether rules on who can receive an entry visa to visit the U.S. should properly be viewed as an extraterritorial or a purely domestic control. In prepared press questions and answers to accompany the *Guidelines for Implementing Title IV*, *supra* note 34, the State Department asserts that "[c]ountries have the right to control their borders, and to exclude individuals they determine to be undesirable" and that this is not an extraterritorial action. *See* Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 93, 98 (1997).

49. For a discussion of the WTO case, see *infra* notes 387-95 and accompanying text.

50. *See* R.W. Apple, Jr., *Split Over Cuba is Eased by U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, at A1; *Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act*, Apr. 11, 1997, *reprinted in* 36 I.L.M. 529 (1997).

51. *See* Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994).

outgrowth of the increased use of blacklisting mechanisms as part of U.S. trade policy generally, which began to accelerate markedly in the 1980s. Trade controls and economic sanctions themselves have increasingly been the government's tools of first resort in dealing with a variety of diplomatic and foreign policy issues as the second half of the century has progressed.[52] As the unusual position of overwhelming dominance the United States held in world affairs immediately after World War Two abated, the U.S. government sought alternately to lead, and sometimes coerce, other nations into following its policies with a wide range of economic sanctions and trade control programs.[53] Sometimes these programs were created as part of a multilateral effort; often they were not.[54] Moreover, unlike similar measures taken in earlier times as a prelude or adjunct to hostilities, economic sanctions and trade controls became ends in themselves. They are now used to demonstrate that the government is "taking action" to achieve diverse policy objectives[55] ranging from combating communism,[56] or fighting the international drug trade[57] or terrorism,[58] to protecting democracy and human rights,[59] for example. It is estimated that in the 1990s alone the

---

52. Additionally, it should also be noted that U.S. economic sanctions and trade control programs are typically created to address particular economic, political, and diplomatic objectives, rather than as part of a concerted overall trade policy. In fact, many of these measures have come to serve domestic political requirements as much as, if not more than, any foreign policy objective. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE § 1.3 (1990).

53. Compare, for example, the U.S. approach in the Cuban embargo with the multilateral actions taken with regard to Iraq or the former Yugoslavia. *See infra* notes 76 & 79 and accompanying text.

54. Multilateral sanctions include those targeted at the former Yugoslavia, Iraq, South Africa, and to a lesser extent those aimed at Iran and Libya. *See, e.g., infra* notes 70-71, 74, 76 & 79 and accompanying text. Unilateral sanctions include the Cuban embargo and the sanctions that were aimed at Vietnam, Cambodia, Nicaragua, and Panama. *See, e.g., infra* notes 64-66, 73 & 75 and accompanying text.

55. Historically "most of these episodes (the imposition of economic sanctions) foreshadowed, or accompanied, warfare. Only after World War I was extensive attention given to the notion that economic sanctions might substitute for armed hostilities as a stand alone policy. Even through World War II, the objectives sought with the use of sanctions retained a distinctively martial flavor . . . . In the period following World War II, other foreign policy motives became increasingly common . . ." GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 5 (2d ed. 1990) [hereinafter HUFBAUER, SANCTIONS RECONSIDERED].

56. The COCOM product-oriented trade controls are examples. *See supra* note 10; *infra* notes 102-110.

57. *See, e.g.*, Narcotics Trafficking Sanctions Regulations, *infra* notes 96-97.

58. *See, e.g.*, Terrorism Sanctions Regulations, *infra* notes 94-95.

59. *See, e.g.*, South African control program, *infra* note 71.

United States resorted to some form of economic sanctions on more than seventy occasions.[60]

a. Blacklists in U.S. Economic Sanctions Programs

Since the end of the World War Two, in addition to establishing the embargo of Cuba in 1963,[61] the United States has imposed TWEA based economic sanctions targeted at China (1950-1971),[62] North Korea (1950-present),[63] North (1964-1994)[64] and South Vietnam (1975-1994),[65] and Cambodia (1975-1992).[66]

---

60. These 70 different uses of economic sanctions have been connected with a variety of policy objectives and programs, including anti-narcotics (8), anti-terrorism (14), environmental protection (3), human rights/democratization (22), nuclear nonproliferation (9), political stability (8), and worker rights or the use of prison labor (6). They also involved 61 separate laws, targeting 35 different countries. *See* NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-1996, 1-2 (1997). *See also* Evelyn Iritani, *U.S. Learns How to Anger Friends While Failing to Influence Enemies*, L. A. TIMES, Mar. 24, 1997, at A6.

61. A variety of controls were applied to Cuba beginning in 1960 as a result of the nationalization and expropriation of various properties. Initially these took the form of restrictions on various Cuban exports and imports. The full embargo was imposed following the Cuban missile crisis. *See* 28 Fed. Reg. 6974 (1963). *See generally* GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES, 194-204 (2d ed. 1990) [hereinafter HUFBAUER, SANCTIONS SUPPLEMENT].

62. These sanctions actually began with a tightening of the controls on exports of goods and technology with military significance under the Export Control Act, Pub. L. No. 81-11, 63 Stat. 7 (1949), administered by the Commerce Department as a result of the success of Communist forces within China. This escalated into a full embargo in 1950 with China's support of the North Korean invasion of South Korea. The sanctions were administered by the Treasury Department, and "blocked" or froze virtually all types of financial transactions and other dealings in a manner similar to the subsequent Cuban controls. *See* 15 Fed. Reg. 9040 (1950). The embargo was essentially lifted in 1971 in connection with President Nixon's visit to China, although residual controls remained in place until outstanding claims were settled in 1980. *See* 36 Fed. Reg. 8584 (1971); 36 Fed. Reg. 11,441 (1971); 45 Fed. Reg. 7224 (1980). *See generally* HUFBAUER, SANCTIONS SUPPLEMENT, *supra* note 61, at 100-09.

63. 31 C.F.R. § 500 (1997). *See generally* HUFBAUER, SANCTIONS SUPPLEMENT, *supra* note 61, at 110-14.

64. As was the case with the Chinese sanctions, the larger embargo of North Vietnam was preceded by a tightening of the product oriented export controls as early as 1954. The embargo itself was imposed ten years later, 29 Fed. Reg. 6025 (1964), prospectively lifted in 1994, 59 Fed. Reg. 5696 (1994), and completely removed upon settlement of outstanding claims the following year, 60 Fed. Reg. 12,885 (1995). *See* 31 CFR § 500.578 (1997). *See generally* HUFBAUER, SANCTIONS SUPPLEMENT, *supra* note 61, at 133-41.

65. The embargo of North Vietnam was extended to the entire country with the fall of South Vietnam. 40 Fed. Reg. 19,202 (1975).

66. The embargo of Cambodia, or Kampuchea, was established with the rise of the National United Front under Prince Sihanouk and the Communist Khmer Rouge. 40 Fed. Reg. 17,262 (1975). It was prospectively lifted in 1992, 57

Each of these sanctions programs utilized the SDN blacklist tool. In fact, since the Foreign Assets Control Regulations (FACR)[67] that OFAC created to administer these embargoes predate the Cuban embargo regulations, they served as the model for the blacklist provisions that bring Pierre Boileau within the scope of the Cuban sanctions.

More recently the International Emergency Economic Powers Act (IEEPA)[68] provided the legislative basis[69] for economic sanctions directed against Iran (1979-present),[70] South Africa

---

Fed. Reg. 1872 (1992), and completely removed in 1994, 59 Fed. Reg. 60,558 (1994). *See* 31 CFR § 500.570 (1997). *See generally* HUFBAUER, SANCTIONS SUPPLEMENT, *supra* note 61, at 412-16.

67. 31 C.F.R. §§ 500.101-901 (1997).

68. 50 U.S.C. §§ 1701-1706 (1994).

69. Other statutes have also supported the imposition of economic sanctions. For example, the United Nations Participation Act of 1945, 22 U.S.C. § 287c (1994), mandates the imposition of sanctions in accordance with decisions of the Security Council under Article 41 of the U.N. Charter. This was used to impose financial and trade restrictions on Rhodesia when the white-minority Ian Smith government unilaterally declared its independence from the United Kingdom in 1965 thereby thwarting steps toward self-determination in Southern Rhodesia. U.N. Security Council Res. No. 232, December 16, 1966, called for mandatory sanctions after a series of lesser steps failed, and then further tightened the sanctions two years later with U.N. Security Council Res. No. 253, May 29, 1968. The United States complied, imposing sanctions under Exec. Order No. 11,322, 32 Fed. Reg. 119 (1966) and Exec. Order No. 11,419, 33 Fed. Reg. 10,837 (1968). *But see* H.R. Rep. No. 95-59, 95th Cong., 1st Sess. 3-4 (1977) *reprinted in* 1977 U.S.C.C.A.N. 18, 19-20 (questioning the effect of the Rhodesian sanctions in light of the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act of 1939, 50 U.S.C. 98 (1994), which authorized the import of Rhodesian chrome from 1971-1977). The Rhodesian sanctions, 31 C.F.R. § 530 (1972), were prospectively lifted upon the accession of majority rule and the creation of Zimbabwe in 1979, Exec. Order No. 12,183, 44 Fed. Reg. 74,787 (1979), and entirely removed in 1992, 57 Fed. Reg 1386 (1992). *See generally* HUFBAUER, SANCTIONS SUPPLEMENT, *supra* note 61, at 285-93.

Since the time of the Rhodesian sanctions, the more common practice has been to predicate the imposition of sanctions on multiple pieces of legislation. For example, both IEEPA and the U.N. Participation Act were used for the programs aimed at Iraq and Kuwait, Haiti, the former Yugoslavia, and Angola. *See infra* notes 76, 78-80. IEEPA and the International Security Development and Cooperation Act of 1985, 22 U.S.C. § 2349aa-9 (1994), together support the second round sanctions aimed at Iran and the sanctions on Libya. *See infra* notes 70 & 74. The Comprehensive Anti-Apartheid Act of 1986 bolstered the IEEPA-based sanctions on South Africa. *See infra* note 71.

70. Following the seizure of the U.S. embassy in Tehran, President Carter first imposed a ban on importing any Iranian oil, *see* Pres. Proclamation 4,702, 44 Fed. Reg. 65,581 (1979), and then tightened immigration and visa requirements for Iranian nationals. *See* 44 Fed. Reg. 65,727 (1979). The next day the President used his authority under IEEPA to "block" all assets of the Iranian government or its controlled instrumentalities which came within U.S. jurisdiction. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). The Iranian Assets Control Regulations (IACR) followed immediately. *See* 44 Fed. Reg. 65,956 (1979); 31 C.F.R. § 535 (1997). It is interesting to note that "blocking"

(1985-1991),[71] Namibia (1985-1990),[72] Nicaragua (1985-1990),[73] Libya (1986-present),[74] Panama (1988-1990),[75] Iraq (1990-

---

assets with financial sanctions is a term of art referring to the ultimate effect of a broad prohibition on all financial dealings or transfers affecting an embargoed target. *See, e.g.*, 31 C.F.R. § 535.201 (1997). The term is not defined in the regulations themselves, although there are references to "blocked," "blocking," and "unblocking" accounts or persons. *See, e.g.*, 31 CFR §§ 535.217, 535.414, 535.508, 535.566 & 535.802 (1997). These limited blocking measures were then expanded to include a broader trade embargo as the hostage crisis continued. *See* Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26, 685 (1980). Agreement was ultimately reached on the release of the hostages and the return of the blocked assets with a complex arbitral process administered by a bilateral Claims Tribunal at the Hague, and most of the IACR controls were prospectively lifted in 1981. *See* Exec. Order No. 12,283, 46 Fed. Reg. 7,927, (1981); 31 C.F.R. § 535.579 (1997). These Executive Orders and the IACR represented the first use of IEEPA, as opposed to the TWEA, to support economic sanctions. *See generally* HUFBAUER, SANCTIONS RECONSIDERED, *supra* note 55, at 153-62.

Iran is also subject to further sanctions under the Iranian Transaction Regulations (ITR), 31 C.F.R. § 560 (1997), which now have greater impact than the IACR. The ITR were initially implemented under the authority of the International Security and Development Cooperation Act of 1985, 22 U.S.C. § 2349aa-9 (1994), as a result of Iran's designation as a country supporting state-sponsored terrorism. *See* Exec. Order No. 12,613, 52 Fed. Reg. 41,940 (1987). The ITR augmented a number of product oriented export restrictions imposed under the Export Administration Act, 50 U.S.C. § 2405(m), with a series of import restrictions on Iranian origin goods or services. *See* 31 C.F.R. § 560.201 (1997). The ITR were bolstered, and their legislative basis expanded to include IEEPA, in 1995 when President Clinton banned contracts for the development of Iranian petroleum resources, as well as "blocking" new investments, exports, re-exports, financing, or brokering transactions for the benefit of the government of Iran or its controlled instrumentalities with a series of Orders. *See* Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995); 31 C.F.R. § 560 (1997). The amended ITR also included a broadly worded prohibition on those subject to the regulations taking any acts to evade or avoid their application. *See* 31 CFR § 560.203 (1997). Additional restrictions on investing more than $40 million in the development of Iranian petroleum resources in any 12 month period were imposed with the Iran and Libya Sanctions Act of 1996. *See* Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 1701, Pub. L. No. 104-172, 110 Stat. 541 (1996).

71. *See* Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985). The South African Transaction Regulations (SATR), 31 C.F.R. § 545 (1986), were imposed in an effort to head off more sweeping sanctions then being proposed by Congress. As initially promulgated, the SATR were largely patterned after United Nations Security Council Resolution No. 569 of 1985. S.C. Res. 569, U.N. SCOR, 40th Sess., 2602d mtg., U.N. Doc. S/RES/569 (1985). Resolution No. 569 was then the latest in a series of U.N. resolutions condemning the apartheid practices in South Africa which extended back to 1962. It called for a broad economic embargo on transactions with the South African government, after years of more limited measures. The United States had followed these earlier U.N. measures by initially imposing limited product oriented trade restrictions on exports of arms and related equipment and later on all exports, to the South African military and police. *See* 15 C.F.R. § 385.4 (1964); 43 Fed. Reg. 7311 (1978). The IEEPA-based sanctions issued in 1985 expanded the product oriented trade controls to ban most computer exports to the apartheid enforcing agencies, as well as most

exports of nuclear goods and technology, severely limited the ability of U.S. financial institutions to extend credit to the South African government, and prohibited the importation of South African arms, military vehicles, or Krugerrands. *See* 50 Fed. Reg. 46,726 (1985). The 1985 controls were substantially modified and broadened the following year, in accordance with the congressionally-mandated program of sanctions found in the Comprehensive Anti-Apartheid Act of 1986 (CAAA), Pub. L. No.99-440, 100 Stat. 1086 (1986). *See also* Exec. Order 12,571, 51 Fed. Reg. 39,505 (1986); 51 Fed. Reg. 41,906 (1986); 51 Fed. Reg. 46,853 (1986).

However, even the post-CAAA sanctions fell short of the sweeping prohibitions found in the TWEA based programs under the FACR and CACR, focusing more on various specific types of prohibited transactions rather than imposing a blanket prohibition on all dealings with South Africa or South African nationals. *See generally* HUFBAUER, SANCTIONS RECONSIDERED, *supra* note 55, at 221-48. They did include a variety of limitations on new investment and loans, and wider bans on imports or exports directly or indirectly involving the government of South Africa, apartheid enforcing agencies, or government controlled or subsidized entities known as "South African Parastatal Organizations." *See id.*; 31 C.F.R. §§ 545.208, 545.315 (1986). Additionally, unlike the earlier sanctions programs where the blacklists were maintained by Treasury, the publication of the names of the blacklisted Parastatal Organizations was a responsibility of the Secretary of State. *See* State Department Public Notice No. 983, 51 Fed. Reg. 41,912 (1986), *revised by* State Department Public Notice No. 1007, 52 Fed. Reg. 9982 (1987). Similarly, the Commerce Department blacklisted a number of "South African Entities Enforcing Apartheid" as an adjunct to its product oriented trade and export controls. *See* 52 Fed. Reg. 27,798 (1987). This reflected the complex delegations of authority to the Treasury, Commerce, and State Departments which were required to carry out the policy toward South Africa mandated by the CAAA and Executive Orders.

The SATR were prospectively lifted in 1991, 56 Fed. Reg. 32,056 (1991), although products subject to the U.N. arms embargo, and certain U.S. unilateral controls on dealings with the military and police, remained controlled until the U.N. lifted its arms embargo three years later. *See* S.C. Res. 919, U.N. SCOR, 49th Sess., 3379th mtg., U.N. Doc. S/RES/919 (1994); 59 Fed. Reg. 30,684, (1994). The last remaining restrictions, affecting dealings in gold coins, were removed in 1995. *See* 60 Fed. Reg. 33,725 (1995).

72. Namibia, as part of South Africa, was initially caught in the sanctions that were aimed at dealings with the government of South Africa. It was removed from the scope of the SATR in March 1990 following Namibian independence. 55 Fed. Reg.10,618 (1990).

73. *See* Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985). The Nicaraguan Transaction Control Regulations (NTCR), 50 Fed. Reg. 19,890 (1985) (codified at 31 C.F.R. § 540 (1986)), were imposed as part of the Reagan Administration's opposition to the Sandinista government of President Daniel Ortega. They were lifted prospectively following the election of the Chamorro government in 1990, 55 Fed. Reg. 28,613 (1990), and removed entirely in 1995, 60 Fed. Reg. 33,725 (1995). *See generally* HUFBAUER, SANCTIONS RECONSIDERED, *supra* note 55, at 175-91.

Unlike the FACR or CACR, however, the NTCR were largely trade (import/export) restrictions, which lacked the broad general prohibition of the other programs. They incidentally used a specific prohibition which affected direct dealings with Nicaraguan registered vessels and aircraft, but unlike some of the other programs, for example, the ISR, *infra* note 76, and the FRYSR *infra* note 79, the NTCR did not specifically employ a blacklist for those vessels and aircraft. *See* 31 C.F.R. §§ 540.206-207 (1986). *But see* 31 C.F.R. § 540.208 (1986) (placing present),[76] Kuwait (1990-1991),[77] Haiti (1991-1994),[78] the former Yugoslavia (1992-1996),[79] Angola (1993-present),[80] Burma (1997-

---

broad prohibitions on engaging in "related transactions" that might result in violations of the NTCR). Thus, the NTCR were more directed at embargoing direct transactions between the United States and Nicaragua than was the case with many other OFAC sanctions programs.

74. As is often the case, the economic sanctions imposed on Libya were preceded by a tightening of the product oriented export controls dating back to 1978 when military sales were suspended because of Libyan support for international terrorism. These trade sanctions were expanded to a wider range of goods as tensions escalated through the early 1980s, and particularly focused on goods and technology used in the petroleum industry. *See, e.g.*, 47 Fed. Reg. 11,248-49 (1982); 49 Fed. Reg. 10,247-48 (1984); 50 Fed. Reg. 3,740-43 (1985). After a series of terrorist incidents involving Libya, which cumulated in the Palestinian attack at the Rome airport in December 1985, for which Abu Nidal claimed a "considerable amount of financing and assistance" from Momar Gadhafi, President Reagan invoked IEEPA to impose a broad trade and financial embargo of Libya. *See* HUFBAUER, SANCTIONS RECONSIDERED, *supra* note 55 at 140-52. Additional authority for President Reagan's actions was predicated upon the International Security and Development Cooperation Act of 1985, 22 U.S.C. §§ 2349aa-8, 2349aa-9 (1994), which would be used the following year to support the ITR, *supra* note 70, as well as the Federal Aviation Act, 49 U.S.C. § 1514 (1994).

Two Executive Orders were issued in quick succession in January 1986, which provided the basis for the Libyan Sanctions Regulations (LSR). *See* Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (1986); 31 C.F.R. § 550 (1997). The LSR froze or "blocked" all manner of property interests of the government of Libya and its controlled entities that came within the possession or control of "U.S. Persons," in addition to restricting imports and exports. *See* 31 C.F.R. § 550.200 (1997). In this regard, the LSR are more similar to the TWEA based sanction programs than is the case with the NTCR, *supra* note 73, or even the SATR, *supra* note 71. The LSR was also the first IEEPA based sanctions program to include a regulatory definition of a "blocked account" or "blocked property" as "any account or property in which the government of Libya has an interest, with respect to which payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to an authorization or license . . . ," thereby highlighting the importance of being within or without the definition of "Government of Libya." 31 C.F.R. § 550.316 (1997). Additional restrictions on investing more than $40 million in the development of Libyan petroleum resources in any 12 month period were imposed with the Iran and Libya Sanctions Act of 1996. *See* 50 U.S.C. § 1701 (1991). *See also infra* note 86.

75. *See* Exec. Order No. 12,635, 53 Fed. Reg.12,134 (1988). The Panamanian Transaction Regulations (PTR), 53 Fed. Reg. 20,566 (1988), were imposed as part of the Reagan Administration's efforts to isolate and undermine the regime headed by General Manuel Noriega because of involvement with drug trafficking. The PTR were lifted prospectively in 1990 following the U.S. incursion which removed General Noriega from power, *see* 55 Fed. Reg. 3560 (1990), and removed entirely in 1995, *see* 60 Fed. Reg. 33,725 (1995). *See generally* HUFBAUER, SANCTIONS RECONSIDERED, *supra* note 55, at 249-67.

76. As a result of Iraq's invasion of Kuwait on August 2, 1990, President Bush issued two Executive Orders, one restricting imports and exports to Iraq and "blocking" Iraqi government property, *see* Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (1990), and another "blocking" Kuwaiti government property as a

protective measure to limit looting by Iraq, *see* Exec. Order 12,723, 55 Fed. Reg. 31,805 (1990). The U.N. immediately condemned the Iraqi invasion, *see* S.C. Res. No. 660, U.N. SCOR, 45th Sess., 2932 mtg., U.N. Doc. S/RES/660 (1990), and called for mandatory embargo of Iraq by all member nations, *see* S.C. Res. 661, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/661 (1990). This was supported by a naval blockade, *see* S.C. Res. 665, U.N. SCOR 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990), restrictions of food and humanitarian shipments, *see* S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/RES/666 (1990), and an air embargo, *see* S.C. Res. 667, U.N. SCOR 45th Sess., 2940th mtg., U.N. Doc. S/RES/667 (1990), as a prelude to the Gulf War. Although the initial U.S. and U.N. embargoes were quite similar, the U.S. sanctions were brought into line with the U.N. actions by Exec. Order No. 12,724 with regard to Iraq, *see* 55 Fed. Reg. 33,089 (1990), and No. 12,725 with regard to Kuwait, *see* 55 Fed. Reg. 33,091 (1990), thereby grounding the controls both in IEEPA and the U.N. Participation Act, 22 U.S.C. § 287c (1994).

The Iraqi Sanctions Regulations (ISR), 31 C.F.R. § 575 (1997), and the separate but related Kuwaiti Assets Control Regulations (KACR), 31 C.F.R. § 570 (1991), utilize the full range of sanctions tools available to the government in a manner not seen since the TWEA based FACR and CACR. They employ a combination of financial sanctions (asset blocking), trade sanctions (export/import controls), travel restrictions, and contract restrictions, together with a broad prohibition on those subject to the regulations taking steps to evade or avoid the prohibitions. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE § 9A.2.1 (Supp. 1996). Following the liberation of Kuwait, the KACR were prospectively lifted in 1991, 56 Fed. Reg. 12,450 (1991), and entirely removed in 1995, 60 Fed. Reg. 33,725 (1995). The ISR remain in effect.

77. *See* 31 C.F.R. § 570 (1996); 56 Fed. Reg. 12,450 (1991); 60 Fed. Reg. 33,725 (1995).

78. The Haitian sanctions are unique in that they were applied, removed, and then reapplied during the course of the same crisis. With Exec. Order No. 12,775, 56 Fed. Reg. 50,641 (1991), President Bush invoked IEEPA to impose "blocking" sanctions against the government of Haiti following the coup, which ousted the then recently elected President Aristide. The blocking measures were expanded, after the OAS condemned the coup in Resolution 2/91 of October 1, 1991, with Exec. Order No. 12,779, 56 Fed. Reg. 59,975 (1991). Together the two orders imposed a broad range of financial and trade sanctions on the de facto Haitian government and its various instrumentalities, along with the now standard prohibition against "evasion" of the regulatory requirements. The OFAC Haitian Transaction Regulations, 31 C.F.R. § 580 (1992), which embodied the controls created by the Executive Orders, were issued in March 1992. *See* 57 Fed. Reg. 10,820 (1992). Later in August 1993, U.N. Security Council Res. 861 called for the suspension of some of the sanctions based upon the Governor's Island Agreement for the return of the elected president. S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg., U.N. Doc S/RES/861 (1992). *See* 58 Fed. Reg. 46,540 (1993). When the return did not occur as scheduled, however, the U.N. called for the reimposition of the sanctions. *See* S.C. Res. 873, U.N. SCR, 49th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993); Exec. Order No. 12,853, 58 Fed. Reg. 35,843 (1993). Further measures were taken when the issue remained unresolved the following year. *See* S.C. Res. 917, U.N. SCOR, 49th Sess., 3376th mtg., U.N. Doc S/RES/917 (1994). When the democratically elected President Aristide returned to Haiti, the sanctions were suspended, *see* Exec. Order No. 12, 932, 59 Fed. Reg. 52,403 (1994), and 59 Fed. Reg. 51,066 (1994), and finally removed in June 1995. *See* 60 Fed. Reg. 33,725 (1995).

79. Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992), was issued following the breakup of Yugoslavia, blocking property of the governments of

present),[81] and Sudan (1997-present).[82] Unlike the various Asian sanctions, which were administered with a single common set of regulations,[83] entirely new and separate regulations were created for each of these various sanctions programs.[84] One common element, however, is that virtually all of them employ some sort of blacklist tool.[85]

The terminology associated with each blacklist varies, as the government slightly restructures the basic economic sanctions mechanisms each time it drafts a new program. The purpose of the blacklist within each program, however, remains unaltered—

Serbia and Montenegro (the Federal Republic of Yugoslavia or FRY) when their troops seized territory within Croatia and Bosnia-Herzegovina. Simultaneously, U.N. Security Council Resolution No. 757, S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992), called for a broad range of trade and financial sanctions to be directed at the FRY, resulting in the issuance of Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (1992), and Exec. Order, No. 12,831, 58 Fed. Reg. 5253 (1993), imposing additional controls to limit trade and then to expand the blocking measures to companies and FRY controlled entities, thereby bringing the U.S. sanctions in line with the U.N. measures. When the U.N. called for still further sanctions, *see* S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg., U.N. Doc. S/RES/820 (1993); S.C. Res. 942, U.N. SCOR, 49th Sess., 3428th mtg. (1994), to tighten the embargo as the situation in the former Yugoslavia deteriorated, the United States followed suit, adjusting its own sanctions to block trade and financial dealings with the Serbian controlled portions of Bosnia and Herzegovina. *See* Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993); Exec. Order No. 12,934, 59 Fed. Reg. 54,117 (1994). The blocking measures directed at Serbia and Montenegro were prospectively lifted in January 1996, as a result of the Dayton Peace Accords, *see* 31 C.F.R. § 585.525 (1997), but were not similarly lifted for the Serbian controlled areas of Bosnia until May, when the Serb forces withdrew. *See* 31 C.F.R. § 585.527 (1997).

80. Sanctions were imposed on dealing with the National Union for the Total Independence of Angola (UNITA) under Exec. Order No. 12,865, 58 Fed. Reg. 51,005 (1993), in accord with U.N. Security Council Res. No. 864. S.C. Res. 864, U.N. SCOR, 48th Sess., 3277th mtg., U.N. Doc. S/RES/864 (1993). The UNITA Sanctions Regulations are essentially limited to imposing an arms embargo and prohibiting actions to facilitate the sale of arms or petroleum products to UNITA or Angola. *See* 31 C.F.R. § 590 (1997).

81. The government of Burma, or Myanmar, was sanctioned in May 1997, for its "large scale repression of the democratic opposition" by the imposition of a prohibition on any new investment in the country under Exec. Order 13,047, 62 Fed. Reg. 28,301 (1997). These restrictions on investment in Burma represents the most recent use of IEEPA to support sanctions. No regulations have been issued for this program as of yet.

82. *See* Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (1997).

83. The embargoes of China, Vietnam, and Cambodia were all administered by OFAC under the FACR. *See supra* notes 62-66.

84. *See supra* notes 70-80.

85. Only the Burma program, for which no regulations have been issued as of yet, lacks a clear blacklist tool as part of its sanctions. *See supra* note 81. However, if and when regulations are issued to implement the requirements of the President's Executive Order, based upon OFAC's past practice with other sanctions programs, it is likely there will be some sort blacklist to help identify in which projects, companies, or areas investment will be prohibited.

to extend the reach of the sanctions beyond just the geography associated with the target country to reach specific individuals or organizations within, or without, that geography. Accordingly, the term "Specially Designated National" gradually disappeared from the regulations[86] and was replaced with references to "controlled,"[87] "blocked,"[88] or "governmental"[89] entities, or with

---

86. Interestingly, while the term SDN may no longer appear in the regulations themselves, it became sufficiently well-recognized as a term of art to be included parenthetically in the captions of the blacklists used with the Libyan and Iraqi embargo programs.

As the Libyan sanctions developed over time, they used an SDN list to extend the reach of the controls, *see* Libyan Sanctions Regulations, 31 C.F.R. pt. 550, app. B (1991), as well as a list of "Organizations Determined to be Within the Term "government of Libya." *See* 31 C.F.R. pt 550, app. A (1991). In so doing, the LSR combined both the SDN mechanism of the TWEA based FACR and CACR, with the "blocked" persons or organizations approach, based upon a flexible definition of who acts for a target government, begun with the IEEPA based IACR/ITR. *Compare* 31 C.F.R. § 535.301 (IACR definition of "Iran" and "Iranian"), *and* § 560.304 (ITR definition of "government of Iran"), *with* § 550.304 (LSR definition of "government of Libya") (1997). The LSR themselves, however, neither mention the SDN mechanism nor define the term, as was done in the FACR and CACR. The SDN terminology only appears in the notices publishing the Libyan blacklist or its updates, along with the explanation that "individuals determined to be 'specially designated nationals' . . . thus fall within the definition of 'government of Libya' found in § 550.304(a) of the regulations, and are subject to all prohibitions applicable to other components of the government of Libya." 31 C.F.R. § 550 (1997). The Libyan blacklists are now consolidated at 31 C.F.R. ch. V, apps. A & B (1997).

As with the LSR, *see supra* note 74, the PTR, *see supra* note 75, and arguably with the IACR/ITR, *see supra* note 70, OFAC blacklisted a number of individuals and entities by defining them to be part of the sanctioned Iraqi or Kuwaiti government targeted by these regulations. *See* 31 C.F.R. § 570.306(d) & App. A (1991) (listing "Kuwaiti Governmental Entities"); Iraqi Sanctions Regulations, 31 C.F.R. § 575 apps. A & B (1991) (listing "Individuals and Organizations Determined to Be Specially Designated Nationals of the Government of Iraq" and "Merchant Vessels Registered, Owned, or Controlled by the Government of Iraq or by Persons Acting Directly or Indirectly on Behalf of the Government of Iraq"). As with the LSR and PTR, the SDN mechanism was neither explicitly used nor defined in the ISR. The focus of 31 C.F.R. § 575.306 (1997) is on identifying what persons or organizations should be "blocked" as part of the respective target governments, but the SDN term nevertheless is used in captioning the blacklist itself and in the Federal Register notice describing the blacklist. The Iraqi blacklist now appears at 31 C.F.R. ch. V, apps. A & B (1997).

87. Blacklisting of "controlled" entities is most clearly seen in the sanctions directed at the former Yugoslavia, which listed both "controlled entities" and "vessels," and Iran, which loosely blacklisted Iranian controlled banks, but the term also permeates several of the other sanctions programs such as the Iraqi, Kuwaiti and Sudanese sanctions programs. *See supra* notes 76-77, 79 & 82.

Rather than using the SDN or "blocking" terminology in the Yugoslav sanctions, OFAC published an extensive list of "Controlled Yugoslav Entities" in July 1992. *See* General Notice No. 1, 57 Fed. Reg. 32,051-02 (1992). This was several months prior to the publication of the Federal Republic of Yugoslavia (Serbia and Montenegro) Sanctions Regulations (FRYSR), which did not occur until March 1993. *See* 31 C.F.R. § 585 (1993), 58 Fed. Reg. 13,199 (1993). General Notice No. 1 was predicated on the authority of the Director of OFAC to make a determination that a "person or organization" should be included within the definition of the "Government of the Federal Republic of Yugoslavia (Serbia & Montenegro)" or those "purporting" to act on their behalf, even though that grant of authority was not expressly made in either of the Executive Orders establishing the sanctions program. *See supra* note 79. It was only in the subsequently issued regulations that the Director of OFAC was expressly vested with the authority to blacklist entities in this manner. *See* 31 C.F.R . § 585.311 (1997). OFAC was, however, implicitly able to make the designations. *See* Milena Ship Management Co, Ltd v. Newcomb, 804 F. Supp. 846 (E.D. La. 1992), *aff'd*, 995 F.2d 620 (5th Cir. 1993) (refusing a request for an injunction by a listed entity). Nevertheless, General Notice No. 1 blacklisted a few hundred names as "Controlled Yugoslav Entities" without providing addresses or other identifying information, which made the list of questionable utility. For example, one of the "blocked" entities on the list was simply identified as "Global" and another as "SBS." *See* 57 Fed. Reg. 32,051, 32,053-54 (1992). Addresses were added later, *see* 59 Fed. Reg. 59,460 (1994), *corrected by* 59 Fed. Reg. 61,656 (1994), and the Yugoslav blacklist expanded to also include the names of Bosnian Serb Civilian and Military Authorities as the sanctions themselves were expanded. *See* 60 Fed. Reg. 19,448 (1995). The Controlled Yugoslav Entities and Bosnian Serb names now appear with addresses in 31 C.F.R. ch. V, apps. A & B (1997).

Another type of blacklist was also used with the FRYSR, one which blacklisted vessels controlled by sanctioned parties, irrespective of the registry or flag the vessel might fly. *See* Exec. Order No. 12,831, 58 Fed. Reg. 5253 at § 1(b)(2) (1993); 31 C.F.R § 585.418 (1997). Vessels have been blacklisted under other programs, such as the CACR or the ISR, when owned or controlled by sanctioned governments, SDNs, or blocked entities, but the FRYSR was the first program to formalize this particular type of blacklist in its regulations. The combined list of blacklisted vessels is currently found at 31 C.F.R. ch. V, app. C (1997).

The two sets of Iranian sanctions regulations, the IACR and the ITR both permit the blacklisting of individuals or entities, but attempt to simplify the complex definitions of "foreign country," "national," "designated national," and "specially designated national" used in the earlier TWEA sanction programs. Instead, the Iranian sanctions authorize the Secretary of the Treasury to simply designate persons or organizations who are deemed to be Iranian, Iranian controlled entities, or part of the government of Iran for the purposes of the sanctions. *Compare* 31 C.F.R. §§ 535.301, 560.303 & 560.304, *with* §§ 500.301, 500.302, 500.305 & 500.306 (in the FACR), *and* §§ 515.301, 515.302, 515.305 & 515.306 (1997) (in the CACR). This designation functions much as the SDN designation would, triggering the various "blocking" measures and other regulatory requirements found in the IACR/ITR.

Despite having gone to these lengths to simplify the blacklist designation process, the U.S. government has not utilized this tool. Rather than specifically designating or defining persons or organizations as within these definitions and thus clearly sanctioned for all purposes, the government issued a list of 84 "Banks Controlled by the Government of Iran" located both within Iran and in various locations around the world. This list was initially released prior to the 1995 expansion of the coverage of the Iranian Transactions Regulations, as an Annex to General License No. 3 dealing with the "Exportation of Services: Iranian Accounts at U.S. Financial Institutions." *See* 60 Fed. Reg. 40,881, 40,882 (1995). While General License No. 3 was subsequently embodied in the ITR, *see* 31 C.F.R. 560.517 (1997), the status of the listed banks is somewhat confusing. They are not themselves "blocked," but transactions with these banks are constrained by the ITR, and the names of these banks were added to the consolidated OFAC list of "Specially Designated Nationals and Blocked Persons" on May 20, 1997, but their names have yet to be incorporated into 31 C.F.R. ch. V, apps. A & B (1997). *See* <http://ftp.fedworld.gov/pub/tel/t11edit.txt>.

88. The term "blocked," like "controlled," is loosely used with most of the sanctions programs, both to identify sanctioned persons or organizations and to explain the effect of the sanctions. It is most clearly used to identify sanctioned parties in the Haitian and Angolan sanctions, but also figured prominently in the Kuwaiti blacklist. *See supra* notes 76, 78 & 80.

The Haitian Transaction Regulations made extensive use of blacklisting in the form of "blocking" persons or organizations who were deemed to be part of the de facto regime in Haiti under 31 C.F.R. § 580.303 (1992). This was similar to the LSR, PTR, and KACR provisions defining who was deemed to be part of the targeted "government." *See supra notes* 74, 75 & 76. However, the voluminous list of names of "Blocked Persons of the De Facto Regime in Haiti," *see* 58 Fed. Reg. 40,043 (1991), 31 C.F.R. § 580 app. A (1993), consisted mostly of the names of organizations located in Haiti, or individuals located in Haiti and serving in the Haitian military or government after the coup. The individuals were "unblocked" when a settlement appeared possible, although the organizations remained subject to blocking. *See* 58 Fed. Reg. 46,540 (1993). Many of the individuals were "blocked" again when the Governors Island Agreement collapsed, *see* 58 Fed. Reg. 54,024 (1993), and others were added as President Aristide's return was further delayed, *see* 59 Fed. Reg. 16,548 (1994). The sanctions were belatedly and retroactively lifted by OFAC in December 1994, in accordance with the President's Exec. Order 12,932 dated October 14, 1992. *See* 59 Fed. Reg. 66,476 (1994).

In accordance with what was standard practice by 1993 when the UNITA (Angola) Sanctions Regulations were issued, *see supra* note 80, the Director of OFAC is authorized to designate persons or organizations as being within the definition of the embargo target, in this case UNITA, *see* 31 C.F.R. § 590.307 (1997), and "blocked" as a result of that determination. No such designations have been made under the UASR.

89. Defining a party to be to be "governmental" or a "government entity" is basic to the blocking mechanisms of many of the IEEPA based economic sanctions programs. Its use as a blacklisting tool is particularly seen in the Panamanian and Kuwaiti sanctions.

The PTR, like the LSR, included an SDN-like blacklist mechanism, but not the "specially designated national" terminology, instead permitting the Director of OFAC to determine who was to be defined as part of the Noriega regime targeted by the sanctions. *See* Panamanian Transaction Regulations, 31 C.F.R. § 565.304(a)(4) (1988). This was required because there were in effect two "governments" of Panama, the Noriega regime and the U.S. recognized government in exile. Accordingly, OFAC published two separate blacklists under the PTR, one designating "Panamanian Governmental Entities" subject to sanctions, *see* 53 Fed. Reg. 20,566 (1988), and one listing "Persons and Organizations Acting on Behalf of the Noriega/Solis Regime," *see* 54 Fed. Reg. 36,272 (1989). Both of these blacklists were used to expand the definition of the "government" subject to sanctions under the PTR, in a manner not dissimilar to that used in the LSR, but virtually all the persons or organizations listed were located within Panama itself. The PTR were removed entirely in 1995. *See* 60 Fed. Reg. 33,725 (1995).

Similarly, OFAC blacklisted a number of individuals and entities by defining them to be part of the Kuwaiti government targeted by the protective blocking and freezing measures of the KACR. *See* 55 Fed. Reg. 49,856 (1990); 31 C.F.R. § 570, app. A (1991) (listing "Kuwaiti Governmental Entities"). This list neatly highlights the interrelated nature of the various terms OFAC has used with its different more elaborate terms or titles tying the blacklisted individual or organization to a specific part of a target government.[90] The function of the designation under whatever term is used, however, remains the same—to expand the reach of the controls by defining who or what is part of the embargo target, by individual name.[91] The perceived success of these programs among policy makers led the government to extend the use of blacklisting to trigger economic sanctions to its logical conclusion in two other recent IEEPA sanctions programs, which simply blacklist certain persons or organizations without regard to geography or, arguably, to any particular target government at all.

In relatively short succession in 1995, and not long before Congress enhanced the traditional SDN mechanism in the Cuba controls with the visa blacklist provision in the LIBERTAD Act, President Clinton announced two new sets of economic sanctions focused on those involved with international terrorism,[92] and also

---

blacklists, by subdividing the Kuwaiti Governmental Entities into those that are "Controlled" and therefore "Blocked," those that are "Controlled" but nevertheless "Licensed to Operate" and those that are "Not Controlled" and for which there are "No Restrictions" under the regulations. *Id.* The blocking effect of these designations was lifted in 1991, *see* 56 Fed. Reg. 12,450 & 26,034 (1991), and the KACR were entirely removed in 1995, *see* 60 Fed. Reg. 33,725 (1995).

90. Identifying the blacklisted individual or organization with a precise part of a sanctioned government is clearly seen in the South African sanctions under the CAAA, where the State Department published an extensive list of "South African Parastatal Organizations" and where the Commerce Department published its list of "South African Entities Enforcing Apartheid." *See supra* note 71. With the IEEPA based sanctions programs, it is most evident in the Panamanian sanctions but also appears in the Libyan and Iranian programs.

OFAC published two separate blacklists under the PTR, one of which attempted to specifically identify "Persons and Organizations Acting on Behalf of the Noriega/Solis Regime," *see* 54 Fed. Reg. 36,272 (1989). Similarly, one of the two appendices created for the Libyan program was a list of "Organizations Determined to be Within the Term 'Government of Libya.' " *See* 56 Fed. Reg. 20,540 (1991) (creating 31 C.F.R. § 550, app. A) (1991). In a slightly different sense, the list of "Banks Controlled by the Government of Iran" also acts as a similar designation, trying to reach a subset of a targeted sanctioned government. *See supra* note 70; Annex to General Notice No. 3, 60 Fed. Reg. 40,881, 40,882 (1995).

91. Sometimes this level of particularity is found in the sanctions regulations themselves, without resort to the use of a separate blacklist. For example, the UASR, *see supra* note 80, specifically define the target, UNITA, to include "Free Angola Information Services, Inc." *See* 31 C.F.R. § 590.307(a)(3) (1997). Similarly, the majority of the IEEPA based sanctions programs since the mid 1980s have included specific references to various agencies as part of their definition of the sanctioned "government," most commonly including the appropriate "central bank." *See, e.g.,* 31 C.F.R. §§ 550.304 (LSR); 570.306, 575.306 & 575.307 (ISR); 585.311 (1997) (FRYSR).

92. *See* "Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process," Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995).

on those involved with narcotics trafficking.[93] This led to the creation of the Terrorism Sanctions Regulations[94] to deal with "Specially Designated Terrorists" (SDTs),[95] and the Narcotics Trafficking Sanctions Regulations[96] to deal with "Specially Designated Narcotics Traffickers" (SDNTs).[97] These executive orders and regulations adopted the asset "blocking" techniques previously associated with economic embargoes aimed at isolating other countries and applied them, after largely removing the traditional "geographic" basis for the sanctions,[98] directly against certain specified persons and organizations in an effort to address two of the more intractable political issues of recent years.[99] Both programs block all property within the reach of U.S. jurisdiction in which the designated persons or organizations have any interest whatsoever,[100] and broadly prohibit any attempts by those subject to U.S. jurisdiction to engage in unlicensed dealings with the blacklisted parties, or to evade or avoid the programs' restrictions.[101]

This represents a significant move away from the use of blacklisting as embodied in the World War Two economic

---

93. *See* "Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers," Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (1995).

94. 31 C.F.R. § 595.101-595.901 (1997).

95. In an Annex to Exec. Order 12,947, President Clinton identified 12 Middle Eastern terrorist groups whose activities threatened the peace process. The list of SDTs is comprised of these 12 groups, along with other groups and individuals designated by the Secretary of State, and others determined by the Secretary of the Treasury to be owned or controlled by any of the foregoing. *See* 31 C.F.R. § 595.311 (1997). The list of SDTs is consolidated into the other OFAC blacklists. *Id.* ch. V, apps. A & B.

96. 31 C.F.R. § 536.101-536.901 (1997).

97. In an Annex to Exec. Order 12,978, President Clinton identified four principal figures in the Cali drug cartel. These four individuals, along with others designated by the Secretary of the Treasury as being significantly involved in Colombian drug trafficking activities, and those who are owned or controlled by such individuals, comprise the list of SDNTs. *See* 31 C.F.R. § 536.312 (1997). The list of SDNTs is consolidated into the other OFAC blacklists. *Id.* ch. V, apps. A & B.

98. The SDTs are truly international, involving groups and individuals from many countries around the world, although there is a rudimentary "geographic" element to the TSR in that the SDT designation is predicated upon a potential threat to the peace process in the Middle East. *See* 31 C.F.R. § 595.311 (1997). The SDNTs are more localized, at least currently, in that they are all associated with the Cali drug cartel based in Colombia and to that degree the NTSR also contain a rudimentary "geographic" element. *See id.* § 536.312.

99. One might question the practicality of blacklisting some of these persons or organizations, such as Abu Nidal or the Black September Organization, which presumably operate in secret or conceal their identities at least when dealing with U.S. parties and financial institutions.

100. *See* 31 C.F.R. §§ 536.201 & 595.201 (1997).

101. *See id.* §§ 536.204 & 595.205.

sanctions, where it was a secondary tool augmenting the sanctions on a particular target country by bringing "corporate cloaks" and "front companies" within the ambit of the primary controls, to a point where blacklisting of specific persons and organizations has itself become the government's primary tool to achieve its desired objectives. Additionally, the new sanctions also highlight how the objectives behind the use of economic sanctions themselves have changed over time. It represents a marked shift, from seeking the practical economic isolation of a target country as a substitute for warfare, to demonstrating leadership or staking out the "moral high ground" for both domestic and international political purposes, with less concern for the practical ability of the particular sanction to actually control its intended object (*e.g.*, terrorism or narco-trafficking). This experience with economic sanctions, in turn, demonstrated the usefulness of blacklisting to other parts of the U.S. government, which also wanted to be seen taking action on troublesome issues on both a practical and political level.

b. Blacklists in U.S. Trade Control Programs

Blacklisting has progressed from simply being one of several tools used by various trade control agencies to ensure compliance with their requirements and punish those who violate their rules, to being a significant part of entirely new controls being formulated by policy makers, importing many of the techniques developed by OFAC in its financial and economic sanctions programs into the traditionally commodity-oriented world of trade controls.

The government's principal trade control agencies,[102] the Commerce Department and the State Department, have long used blacklisting to enforce their basic regulatory controls on exporting goods, services, and technology from the United States. The

102. There is no single agency or department responsible for U.S. trade controls. On the contrary, there are a variety of agencies involved in regulating U.S. exports and foreign trade, usually depending upon the goods or technology being transferred. These include the Department of Agriculture (tobacco seeds and plants), the Drug Enforcement Agency (narcotics and dangerous drugs), the Department of Energy (natural gas, nuclear, and electric power), the Food and Drug Administration (drugs, biologics, and medical devices), the Department of the Interior (endangered fish and wildlife, migratory birds, and Bald and Golden Eagles), the Maritime Administration (large watercraft), the Nuclear Regulatory Commission (nuclear equipment and material), and the Patent Office (technology contained in patent filings). *See* Other U.S. Government Departments and Agencies with Export Control Responsibilities, 15 C.F.R. pt. 730, supp. 3 (1997). The vast majority of export and trade related matters, however, are the responsibility of the Departments of Commerce and State.

Commerce Department's Bureau of Export Administration (BXA) and State's Office of Defense Trade Controls (DTC) administer broad, primarily product-oriented regulations, which control trade based upon the capabilities of the particular products or technologies being exported or disclosed to foreign nationals. DTC controls "defense articles" or "munitions" under the International Traffic in Arms Regulations (ITAR),[103] and BXA controls civilian products under the Export Administration Regulations (EAR).[104] In either case, the precise controls are based upon the classification of the particular products, services, or technology under their respective regulatory control lists.[105] Virtually all goods and technology that move in international trade are addressed in some fashion by these two control lists.[106] Persons or organizations who fail to comply with these controls by, for example, not obtaining an export license when required, or who do not meet the requirements for an exception to a licensing requirement,[107] are subject to a variety of criminal,[108] civil,[109]

---

103. The ITAR, 22 C.F.R. §§ 120-128 (1997), were issued under the authority of the Arms Export Control Act, 22 U.S.C. §§ 2778-2799.

104. The EAR, 15 C.F.R. §§ 730-774 (1997) were issued under the authority of the Export Administration Act, 50 U.S.C. App. §§ 2401-2420 (EAA), which must be renewed periodically. The EAA expired in 1994, and since that time the EAR have been administered under temporary extensions pursuant to the president's authority under IEEPA. *See* "Continuation of Export Control Regulations," Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (1994); "Administration of Export Controls," Exec. Order No. 12,981, 60 Fed. Reg. 62,981 (1995); "Continuation of Emergency Regarding Export Control Regulations," 61 Fed. Reg. 42,527 (1996); and Amendment to Executive Order No. 12,981, 61 Fed. Reg. 54,079 (1996).

105. DTC controls products, services, and technology, described in the United States Munitions List, 22 C.F.R. § 121 (1997), and BXA controls products, service, and technology described in the Commerce Control List, 15 C.F.R. § 774, supp. 1 (1997).

106. *See* Fitzgerald, *supra* note 10, at ch. 14, § B(2)(b)(2) (1996).

107. For a discussion of the various requirements associated with trade under the EAR and ITAR, see generally *id.*

108. Criminal violations of the Arms Export Control Act are punishable by up to ten years imprisonment and fines up to $1 million. *See* 22 U.S.C. § 2778(c); 22 C.F.R. § 127.3 (1997).

Criminal, willful violations of the EAA are punishable by up to ten years imprisonment, organizational fines up to the greater of $1 million or five times the value of the goods, or individual fines up to $250,000. *See* 50 U.S.C. App. 2410(b); 15 C.F.R. § 764.3(b)(2) (1997). "Knowing" violations and "attempted" violations of the EAA are punishable by up to five years imprisonment and fines up to the greater of $50,000 or five times the value of the goods. *See* 50 U.S.C. App. 2410(a); 15 C.F.R. § 764.3(b)(1) (1997).

As the EAR are currently operating under the president's authority under IEEPA, *see supra* note 104, violations would be punished by reference to that statute until the EAA is renewed or reenacted. IEEPA provides for criminal penalties of up to ten years imprisonment and fines up to $50,000. *See* 50 U.S.C. § 1705 (1997).

and administrative penalties.[110] The principal administrative penalty is being named in one of the blacklists identifying parties who have lost their rights to make or receive their exports from the United States, or from other parties subject to U.S. jurisdiction.

The Commerce Department calls its blacklist the "Denied Persons List" (DPL)[111] because persons or organizations listed in the DPL have been denied[112] their ability to make or receive exports of goods or technology subject to U.S. jurisdiction.[113] The Under Secretary for Export Administration issues the denial order following proceedings before an administrative law judge.[114] BXA also has the ability to order the temporary denial of export privileges if it believes that a violation of its regulations is

---

109. Civil penalties under the Arms Export Control Act include fines up to $500,000. *See* 22 U.S.C. § 2778(e); 22 C.F.R. § 127.10 (1997).

Civil penalties under the EAA include fines up to $100,000, without any showing of "knowledge" or "intent" to violate the export regulations. *See* Iran Air v. Kugelman, 969 F.2d 1253 (D.C. Cir. 1993). The maximum fine is $10,000 if the item is not controlled for "national security" reasons. *See* 50 U.S.C. App. 2410(c); 15 C.F.R. § 764.3(a)(1) (1997).

As the EAR are currently operating under the president's authority under IEEPA, *see supra* note 104, violations would be punished by reference to that statute until the EAA is renewed or reenacted. IEEPA provides for civil fine of up to $10,000. *See* 50 U.S.C. § 1705; 61 Fed. Reg. 54,936 (1996).

110. While the principal administrative sanction is a loss of export privileges by being named a "denied party" by BXA or "debarred" by DTC, *see infra* notes 111-22 and accompanying text, other administrative sanctions for violating the export controls are also available, such as civil forfeiture proceedings under the EAA and EAR, 50 U.S.C. app. § 2411(g); 15 C.F.R. § 764.3(c)(2)(I) (1997), or under the Customs Services' statutory detention and seizure powers under the Espionage Act of 1917, 22 U.S.C. § 401.

111. The DPL is referenced in 15 C.F.R. pt. 764, supp. 2 (1997). The names of parties being added to the list appear periodically in the Federal Register. This list used to be referred to as the Table of Denial Orders or TDO, but this terminology caused confusion with the term Temporary Denial Order.

112. While there is a great deal of discretion in determining precisely what privileges will be lost, and for how long, the standard terms of a denial order are set forth in Standard Terms of Orders Denying Export Privileges, 15 C.F.R. pt. 764, supp. 1 (1997). Denial periods ranging up to 35 years have been issued, *see* Actions Affecting Export Privileges: Globe Computers et al., 54 Fed. Reg. 9537 (1989); 54 Fed. Reg. 13,715 (1989), and it was not uncommon to see denial orders of indefinite (*i.e.*, virtually permanent) duration in the 1980s. *See also* Denied Persons List, 15 C.F.R. pt. 764, supp. 2 (1997), *available at* <http://www.bxa.doc.gov/Text/1_denial.txt>.

113. No one subject to U.S. jurisdiction may engage in an export related transaction which directly or indirectly benefits a "denied party." *See* 15 C.F.R. § 764.3(a)(2). This includes "ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing or otherwise servicing . . . any transaction . . . that is subject to the EAR." *See* "Standard Terms of Orders Denying Export Privileges," 15 C.F.R. pt. 764, supp. 1 at (b)B.

114. *See* Administrative Enforcement Proceedings, 15 C.F.R. § 766.1-766.23 (1997).

imminent.[115] The primary use of denial orders, however, is as a penalty or sanction after a violation has occurred.[116]

DTC's administrative sanctions process has a similar effect, but proceeds differently and results in persons or organizations being "debarred," rather than "denied," from exporting or receiving goods or technology controlled under the ITAR.[117] Parties may be debarred by order of the Director of DTC following administrative hearings,[118] or upon conviction of violating any of the trade related laws,[119] including the EAA, IEEPA, and TWEA.[120] In a similar manner to BXA under the Commerce regulations, DTC also has the ability to temporarily suspend privileges under the ITAR when "reasonably necessary to protect world peace or the security or foreign policy of the United States."[121] Debarment remains, however, like the Commerce denial order, primarily a sanction for violating the regulatory requirements of the State Department's trade controls.[122]

This was the extent of the blacklisting mechanisms used in connection with trade controls until the advent of President

---

115. *See* 15 C.F.R. § 766.24 (1997). Export privileges may be suspended with only a suspicion that a violation has or will occur. *See, e.g.*, Action Affecting Export Privileges: Delft Instruments N.V., 56 Fed. Reg. 8321-02 (1991). These temporary denial orders may not exceed 180 days in duration, but may be renewed indefinitely.

116. The violation which triggers the denial order does not necessarily have to be a violation of the EAA. BXA has the ability to issue a denial order for violations of any trade-related act or regulation. Thus, a Commerce denial order could be issued as a collateral sanction for an ITAR violation, for example. *See* 15 C.F.R. § 766.25 (1997). Convictions in the United States or abroad can support this type of denial, and the parties may be collaterally estopped from challenging the facts in any subsequent proceedings. *See, e.g.*, Action Affecting Export Privileges: Japan Aviation, 57 Fed. Reg. 9533 (1992); *In re* Ahberg Oy, 55 Fed. Reg. 8,504 (1990); Spawr Optical Research, Inc. v. Baldrige, 649 F. Supp. 1366 (D.D.C. 1986). This type of denial order may not exceed ten years in duration.

117. DTC's debarment authority is embodied in 22 C.F.R. § 127.7 (1997). The typical duration for a debarment is three years. *See id.* § 127(a).

118. This is referred to as "administrative debarment." *See* 22 C.F.R. §§ 127.7(b)(2) & 128.10 (1997). Administrative debarment orders are effective until rescinded.

119. This is referred to as "statutory debarment," *see* 22 C.F.R. § 127.7(c) (1997), and is roughly analogous to Commerce's "collateral sanction" provision, 15 C.F.R. § 766.25. The standard duration for a statutory debarment is three years, but exporting privileges are not automatically reinstated. The statutorily debarred party may be required to apply for reinstatement. *See* 22 C.F.R. § 127.10(b)(2).

120. 22 C.F.R §§ 120.27 & 127.7 (1997).

121. 22 C.F.R. § 127.8. This interim suspension cannot exceed 60 days unless other proceedings are instituted. *Id.* § 127.8(a).

122. It should be noted that the same term, "debarment," is also used to refer to companies who have lost their contracting rights with the federal government, *see* 48 C.F.R. § 9.400 (1997), which in and of itself is grounds for being debarred by DTC. *See* 22 C.F.R. § 126.7(a)(5).

Bush's Enhanced Proliferation Control Initiative (EPCI) in 1990.[123] EPCI marked a fundamental shift in focus of the traditional export control system, de-emphasizing licensing requirements based upon the strategic threat of particular products and technologies, in favor of a much greater focus on controlling the behavior of parties subject to U.S. jurisdiction with regard to dealings with their customers. While continuing to control the actual "weapons of mass destruction" themselves,[124] the EPCI nonproliferation initiative adds new obligations based upon what exporters and vendors "know" about the parties with whom they are dealing, and what these parties will do with the products they acquire.

The regulations were revised to make the export of virtually any item a licensable transaction, if it involved a "bad" customer or a "bad" end use by an otherwise acceptable customer.[125] With the EPCI initiative, the government thus moved the decision about what was a permissible or impermissible transaction out to the exporters themselves, based upon their knowledge of their customer and their customer's activities, on the theory that the exporters were closer and knew more about what was being done with the goods and services they were selling than any government licensing official would ever know. In this manner, the export of the most innocent products, such as pencils or paper clips, becomes licensable and must be reviewed in advance by the government if destined for a "known" weapons proliferator or weapons proliferation project. The same transaction with a heretofore benign customer similarly becomes licensable if the exporter or vendor "knows" the items will contribute to the proliferation of weapons of mass destruction and their associated missile delivery systems.[126] These new requirements also

---

123. Exec. Order No. 12,735, 55 Fed. Reg. 48,587 (1990).

124. See, for example, the Commerce controls on chemical precursors which are useful in constructing chemical weapons, 15 C.F.R. § 742.2(a)(2) (1997), biological agents and viroids, *id.* § 742.2(a)(1), chemical/biological weapons production equipment, *id.* § 742.2(a)(3), missile related equipment and technology, *id.* § 742.5, specified nuclear related items, *id.* § 742.3, the Energy Department controls on nuclear power generation equipment, 10 C.F.R. § 110 (1997), and the State Department controls on actual weaponry sūch as toxicological agents, United States Munitions List, 22 C.F.R. § 121.1 (1997), Category XIV, and its Missile Technology Control Regime Annex, *id.* § 121.6.

125. This is neatly stated in "General Prohibition Five-Export or Reexport to Prohibited End Uses or End Users": "You may not, without a license, knowingly export or reexport any item subject to the EAR to an end user or end use that is prohibited by part 744 of the EAR." 15 C.F.R. § 736.2(b)(5) (1997).

126. This is colloquially referred to as a "catch-all" control. These knowledge based export control requirements on "end uses" and "end users" are set forth in the EAR. 15 C.F.R. §§ 744.2-744.5 (1997). Additional purely "behavioral" restrictions on the activities of U.S. persons that might support

highlight a fundamental shift in what was the historic objective of the U.S. trade controls, restricting dealings with the Cold War Communist bloc countries. The new focus of the controls is the spread of nuclear, chemical, or biological weapons and their associated weapons systems to anyone, anywhere, who would not similarly control these items or technologies[127] under one of the several control regimes that grew up as the Cold War came to an end.[128]

Blacklisting is used to significantly augment these EPCI nonproliferation controls on transactions with suspect end-uses or end-users. A government declaration that someone or some organization is involved in weapons proliferation activities affirmatively conveys the "knowledge" required to trigger the trade controls.[129] This type of blacklisting can occur in a number of ways. The State Department's Bureau of Political-Military Affairs periodically names foreign parties as being involved in weapons

---

weapons proliferation, even when not involving export activities, are found. *Id.* § 744.6.

127. An added complication is that, particularly with chemical and biological weapons, there are relatively few key products or technologies which, if "choked off," would prevent the spread of such weapons of mass destruction. To the contrary, the same sorts of products and technology that contribute to developing many pharmaceuticals or fertilizers can also produce weapons, if misused. It is for this reason that EPCI places such emphasis on the exporter's or vendor's knowledge of its customer and its customer's activities in determining whether the transaction is permissible, rather than relying upon a mandatory licensing system where remote bureaucrats make the decisions.

128. The principal weapons nonproliferation control regimes are the Australia Group, the Missile Technology Control Regime (MTCR), and the Nuclear Supplier Group Dual Use Regime (NSG). The Australia Group was formed in 1985 and now consists of 30 industrialized countries who multilaterally address the spread of chemical and biological weapons, and who helped formulate the Biological and Toxic Weapons Convention and the Chemical Weapons Convention. The MTCR, established in 1987, now consists of 28 countries who have multilaterally agreed to control missile delivery systems. The NSG was established in 1992 as an informal group of 34 countries multilaterally controlling commodities that have utility for nuclear weapons, thereby augmenting the Nuclear Nonproliferation Treaty. *See* U.S. DEPARTMENT OF COMMERCE, BUREAU OF EXPORT ADMINISTRATION, ANNUAL REPORT 1996, at II-22-27 (Jan. 16, 1996) [hereinafter BXA ANNUAL REPORT].

129. Additionally, the government sometimes designates an entire country or area as presenting a high risk for proliferation related activities, rather than identifying particular persons or organizations, thereby triggering the controls on a large scale. See, for example, the "destinations of concern" for the Missile Technology Control Regime for country group D:4, 15 C.F.R. § 740 supp. 1 (1997), the "destinations of concern" for chemical and biological weapons proliferation for country group D:3, *id.*, and the Nuclear Nonproliferation Special Country List for country group D:2, *id.* While significant from a trade control perspective, this type of designation is not the sort of particularized "blacklisting" with which this Article is concerned.

proliferation in the Federal Register.[130] Additionally, by identifying certain missile "projects of concern" in the Commerce regulations themselves, an indirect form of blacklisting occurs, affecting those persons and organizations associated with the specified projects.[131]

More pertinent, however, is the authority the regulations implementing EPCI gave to the Deputy Assistant Secretary for Export Administration at Commerce to individually "inform" exporters and vendors that transactions involving particular customers required licenses because of the government's concerns over proliferation-related activities by that end user.[132] This could even be done orally, if followed up in writing within two working days.[133] In part because of concerns that an exporter might be disadvantaged if its competitors were not similarly "informed" of the government's blacklisting of a customer in this fashion,[134] Commerce recently amended the regulations to include an "Entities List," which publicly names parties sanctioned under the EPCI controls.[135] This list now blacklists fifteen entities located in five countries for trade control purposes because of proliferation related concerns.[136]

These persons and organizations, unlike those listed on the Debarred List or the DPL, may not have engaged in any conduct proscribed by the regulations. To the contrary, the activities that the persons and organizations are conducting and that cause the

---

130. For example, nationals of Austria, Germany, Italy, Russia, Switzerland, and Thailand were identified as being involved in the proliferation of chemical or biological weapons in a series of announcements which appeared at 60 Fed. Reg. 62,526 (1995); 60 Fed. Reg. 30,148 (1995); 60 Fed. Reg. 13,201 (1995); 59 Fed. Reg. 10,663 (1994); 59 Fed. Reg. 40,956 (1994); 59 Fed. Reg. 44,222 (1994); 59 Fed. Reg. 61,648 (1994); 59 Fed. Reg. 65,837 (1994). Not only are individuals identified in this manner, but sometimes foreign government agencies are also included. *See, e.g.*, 61 Fed. Reg. 29,785 (1996); 58 Fed. Reg. 45,408 (1993) (listing a number of government ministries in China, Iran, North Korea, and Pakistan that are involved in missile proliferation activities).

131. *See* 15 C.F.R. § 744 supp. 1 (1997).

132. 15 C.F.R. §§ 744.2(b), 744.3(b), 744.4(b), 744.6(b) (1997).

133. *Id.*

134. The National Security Council declared that it would be the government's policy to publish in the Federal Register the names of customers who have been the subject of an "informed" notification in 1992. *See* NSC letter to the Executive Secretary of the Industry Coalition on Technology Transfer (ICOTT), Mar. 11, 1992, *reprinted in* PRACTISING LAW INSTITUTE, COPING WITH U.S. EXPORT CONTROLS 1993, at 193 (1993). Commerce subsequently affirmed that it was working toward some sort of publication mechanism, *see* 61 Fed. Reg. 12,714, 12,722 (1996), but this did not occur until six years after EPCI, in 1997.

135. *See* 62 Fed. Reg. 4910 (1997) (creating Supp. No. 4 to 15 C.F.R. § 744) (1997).

136. *See id.* The updated Entities List is also available at <http://www.bxa.doc.gov/entities.htm>.

U.S. government concern may be entirely legal where they are performed, and may even be actively encouraged by the local governments. These individuals and organizations are not being sanctioned for violating the U.S. regulations. They are being blacklisted because of the U.S. government's concerns over their activities abroad running contrary to U.S. policies regarding the potential spread of weapons of mass destruction, and a desire to demonstrate leadership or to be seen as "taking action" to address difficult issues. Thus, in the EPCI controls the U.S. government is seen importing the classic blacklisting tool from its financial sanctions programs to help it extend its trade controls to influence or coerce behavior beyond the direct reach of its jurisdiction.

C. *Application of U.S. Sanctions and Trade Controls Abroad*

Seeking to influence the behavior of others beyond the reach of U.S. jurisdiction, through either leadership or coercion, is one of the basic functions of blacklists in U.S. trade control policy. The United States wants Pierre Boileau in Canada to decide that it is more important to have access to U.S. products, technology, and markets than it is to be involved with Cuba, and therefore to alter or abandon his relationship with Cuba. The government seeks to influence this decision by controlling the behavior of those within the United States and, in an effort to bring as much pressure to bear as possible, U.S. affiliated parties abroad as well. This raises a separate, but related issue: whether parties outside of the United States can be required to adhere to U.S. financial sanctions and trade controls, which may have no counterpart in the local laws where they are operating. More simply, must America Online Canada honor the U.S. blacklisting of Pierre Boileau?

The United States would clearly regard its own citizens and residents as bound by the terms of the Cuban embargo, and also U.S. based companies such as America Online, Inc. As U.S. nationals or companies, they all would be fully obligated to follow U.S. laws and regulations, whether operating in the United States or abroad.[137] More significantly, however, the United States

137. International law, as reflected in the Restatement of Foreign Relations Law, generally recognizes four bases for a state's "jurisdiction to prescribe," all of which are subject to a reasonableness limitation. These overlapping bases are the "territorial" principle (a state may proscribe activity occurring within its boundaries), the "effects" principle (a state may proscribe activity having an effect within its territory), the "nationality" principle (a state may proscribe activities of its nationals, wherever located), and the "security" principle (a state may proscribe activities affecting its national security). Regulating the activity of

would also regard America Online Canada as being subject to the terms of the U.S. embargo of Cuba.

Although a Canadian company that conducts its business in Canada, America Online Canada is a controlled subsidiary of a U.S.-based corporation. The Cuban sanctions are specifically designed to reach to the farthest possible limits[138] of U.S. legislative or prescriptive jurisdiction,[139] as are all the TWEA-based economic sanctions.[140] By definition, foreign subsidiaries of U.S. companies, or those that are "controlled in fact" by U.S. nationals or companies, are considered to be "persons subject to the jurisdiction of the United States."[141] Of course, the Canadian government may have its own view as to whether a domestic company such as America Online Canada should be following the dictates of U.S. or Canadian law with regard to Cuba.[142]

1. Economic Sanctions and Foreign Subsidiaries or Branches

Given the wartime origins of TWEA, and the circumstances that historically were associated with the use of economic sanctions, broadly requiring U.S. affiliated parties outside the country to support and follow such sanctions makes sense and is

---

citizens, residents, or companies formed under a state's laws would be a classic application of the "nationality" principle supporting jurisdiction to proscribe. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW].

138. See, for example, the basic prohibitions in the CACR which extend to all dealings, "direct or indirect," between Cuba, Cuban nationals, or Cuban SDNs, and "any person (including a banking institution) subject to the jurisdiction of the United States." 31 C.F.R. §§ 515.201(a)(1) & 515.201(b)(1) (1997). The prohibitions also extend to "any property subject to the jurisdiction of the United States" in which Cuba, Cuban Nationals, or Cuban SDNs have or had "any interest of any nature whatsoever, direct or indirect." *Id.*

139. The Restatement of the Foreign Relations Law conceptually distinguishes, under international law, between a state's power to legislate or proscribe—the "authority to make its substantive laws applicable to particular persons or in particular circumstances"—and its ability actually to enforce those laws. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, § 401, intro. to pt. IV. The state's jurisdiction to proscribe is subject only to a "reasonableness" limitation. *See id.* § 403.

140. The basic prohibitions in the FACR are similar to the CACR. *Compare* 31 C.F.R. §§ 515.201(a) & 515.201(b), *with* 31 C.F.R. §§ 500.201(a) & 500.201(b) (1997).

141. The term "person subject to the jurisdiction of the United States" is defined in the CACR to include (1) U.S. citizens and residents, (2) "persons within the U.S." (which itself is a defined term within the regulations), (3) corporations organized under the laws of the U.S., and (4) "any corporation, partnership, or association, *wherever organized or doing business, that is owned or controlled* by" U.S. citizens, residents, or corporations. 31 C.F.R. § 515.329 (1997) (emphasis added). The same definition appears in the FACR. *See id.* § 500.329.

142. *See infra* notes 268-86 and accompanying text.

a necessary corollary to an effective set of controls.[143] In fact, the regulatory definition which brings controlled foreign subsidiaries within the scope of "persons subject to the jurisdiction of the United States"[144] is traceable directly to a Treasury Department notice issued during the early months of World War Two.[145] Nevertheless, the legitimate, reasonable use of such a broad claim of regulatory power was recognized as being confined to unusual circumstances. TWEA itself limited the exercise of the extraordinary powers it conferred upon the president initially to wartime, although this was later expanded to include "any other period of national emergency declared by the President."[146]

Blacklisting is very easy to employ, and very amenable to targeting specific parties abroad who might otherwise be beyond the reach of U.S. processes, which makes it an attractive tool for policy makers and regulators. The government merely needs to add individuals and organizations to a list in order to have "control" and be seen to be acting on an issue. The risk is that overuse of these measures generates conflict with other governments who perceive their own jurisdiction and sovereign interests as being impinged upon by the U.S. rules. This is particularly likely to occur when multilateral agreement on the object of the control is lacking.[147]

An increased U.S. sensitivity to the strength and legitimacy of the objections of foreign governments to the assertion of jurisdiction over non-U.S. companies, perhaps albeit combined with declining U.S. political and economic hegemony, led the United States to back away from the expansive approach it claimed in the TWEA-based programs as new economic sanctions

143. *See supra* notes 52-55 and accompanying text.

144. TWEA's broad grant of authority to the president to take action with regard to "any person, or with respect to any property, subject to the jurisdiction of the United States" is not further defined within the statute itself. *See* 50 U.S.C. app. § 5(b)(1) (1994).

145. U.S. Treasury Public Circular No. 18, 7 Fed. Reg. 2503 (1942).

146. 50 U.S.C. app. § 5b (1994). Originally, TWEA granted the president broad powers to regulate foreign exchange, transactions in gold or silver, and transfers of credit, evidences of indebtedness, or property, but only during wartime. *See* 40 Stat. 411, 414 (1917). The "national emergency" provision was actually added to TWEA to approve retroactively the "emergency" President Roosevelt declared in 1933 to justify the imposition of a mandatory "Banking Holiday" as one of his first official acts. *See* Pres. Proc. No. 2039, 48 Stat. 1968 (Mar. 4, 1933); 48 Stat. 1 (Mar. 9, 1933). This "national emergency" language was removed from TWEA, except with regard to pre-existing programs, in 1977 with the passage of the National Emergencies Act, 50 U.S.C. §§ 1601, 1621, 1622, 1631, 1641 & 1651 (1994), and IEEPA, 50 U.S.C. §§ 1701-06 (1994). *See supra* text accompanying note 68.

147. *See infra* notes 266-399 and accompanying text.

were created in the late 1970s and 1980s.[148] By that time, Congress was also concerned that the Korean War era "national emergency"[149] was too "stale" to confer extraordinary powers upon the President.[150] Upon investigation,[151] Congress determined that not one but four ongoing "emergencies" delegated broad extraordinary powers to the President,[152] which Congress then attempted to curtail with new legislation.[153] One result of this effort was the passage of IEEPA,[154] which removed the "national emergency" authority from TWEA entirely,[155] except for the then existing programs,[156] confining TWEA once again to being a war-time grant of authority.[157]

---

148. *See supra* notes 70-75 and accompanying text; *infra* notes 364 & 373 and accompanying text.

149. The "emergency" was President Truman's declaration used to support the imposition of economic sanctions on China at the time of the Korean War. Pres. Proc. No. 2914, 15 Fed. Reg. 9092 (1950). President Truman's declaration remains the basis for the FACR and CACR in effect today. *See* Presidential Determination No. 96-43, 61 Fed. Reg. 46,529 (1996).

150. The courts, however, have rejected arguments that a "stale" declaration of an emergency is insufficient to trigger the delegation of extraordinary power to the President, leaving it up to Congress to "speak" on the matter. *See* Welch v. Kennedy, 319 F. Supp. 945, 947-48 (D.D.C. 1970).

151. The Senate Special Committee on the Termination of the National Emergency was created in January 1973. S. Res. 9, 93d Cong., 1st Sess. (1973). Various investigations into the use of presidential emergency power proceeded through 1976, as one outgrowth of the realignment of executive and legislative power in the aftermath of both Watergate and Vietnam. *See* HOUSE SUBCOMM. ON INTERNATIONAL TRADE AND COMMERCE, COMMITTEE ON INTERNATIONAL RELATIONS, TRADING WITH THE ENEMY: LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATIONS OF INTERNATIONAL TRANSACTIONS IN TIME OF DECLARED NATIONAL EMERGENCY, 94th Cong., 2d Sess. (Comm. Print 1976).

152. These included President Roosevelt's Bank Holiday emergency, Proclamation No. 2039, 48 Stat. 1691 (1933), President Truman's Korean Conflict emergency, Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), President Nixon's emergency relating to work stoppage by Postal Service employees, Proclamation No. 3972, 3 C.F.R. § 473 (1970), and President Nixon's balance of payments emergency, which was used to support supplemental duties on imports, Proclamation No. 4074, 3 C.F.R. § 60 (1971).

153. The initial result was the passage of the National Emergencies Act of 1976, 50 U.S.C. § 1601, 1621, 1622, 1631, 1641 & 1651 (1994), which terminated all presidential powers granted by virtue of past declarations of emergencies, but which exempted, *inter alia*, emergencies declared under TWEA. *See* 50 U.S.C. § 1651(a)(1) (1994).

154. 50 U.S.C. §§ 1701-1706 (1994).

155. *See* Pub. L. No. 95-223, § 101(a), 95th Cong. (1977) (striking the "during any other period of national emergency declared by the President" language from TWEA § 5(b); 50 U.S.C. App. § 5, Historical Notes (1994)).

156. Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977), authorized the continuation of the then existing programs until 1978, and the president's ability to annually renew them from 1978 forward. *See* 50 U.S.C. App. § 5, Historical Notes (1994); Presidential Determination No. 96-43, 61 Fed. Reg. 46,529 (1996).

157. Other than the procedural mechanisms for triggering their application, the actual grants of authority to the president under TWEA and IEEPA are very

Rather than limiting the President in practice, separate "emergencies" declared under IEEPA supported the imposition of more economic sanctions programs in the past twenty years than were created in the seventy years prior to the amendment of TWEA in 1977.[158] However, while the statutory language continues to broadly empower the president to act with regard to any property or persons "subject to the jurisdiction of the United States,"[159] the actual sanctions imposed under IEEPA have generally taken a more limited approach. Rather than seeking to reach the farthest limits authorized in prescribing the behavior of U.S. affiliated foreign companies, most of the IEEPA economic sanctions only impose obligations upon "U.S. persons."[160] The distinction is that the "U.S. person" term typically excludes foreign controlled subsidiaries of U.S. companies, although it does include overseas branches (entities that lack any status as a foreign juridical person) within its ambit.[161] This shift was not immediately apparent when IEEPA supplanted TWEA as the basis for the U.S. economic sanctions programs. There was neither an immediate nor a uniform departure from the prior practice. Instead, foreign concerns regarding the extraterritorial application of U.S. economic sanctions were gradually accommodated as the various sanctions became more tailored

---

similar. TWEA does differ from IEEPA in authorizing the wartime expropriation or "vesting" of enemy property in the government, as well as broad powers to regulate domestic transactions, and the ability to seize bullion and records. *Compare* 50 U.S.C. App. § 5(b)(1) (1994), *with* 50 U.S.C. § 1702(a) (1994).

158. *Compare supra* notes 70-81, *with supra* notes 61-67 and accompanying text.

159. *See* 50 U.S.C. § 1702(a)(1) (1994).

160. The definition of "U.S. persons" is essentially the same in the IEEPA based economic sanctions and in the Commerce Department's special trade controls regulating the activities of "U.S. persons" that might contribute to the proliferation of weapons of mass destruction by others in third countries under the EAR. *See* 15 C.F.R. § 744.9(b) (1997).

Nonetheless, the definition of "U.S. persons" used in the IEEPA based economic sanctions and the EAR's nonproliferation controls should *not* be confused with the same term as used in the Export Administration Act Amendments of 1977, which introduced a number of prohibitions regarding U.S. participation in the Arab League's boycott of Israel. *See infra* notes 246-65 and accompanying text. The definition of "U.S. person" used in the antiboycott law *includes* controlled-in-fact foreign subsidiaries of U.S. companies and is therefore substantially the same as "persons subject to U.S. jurisdiction" under the OFAC economic sanctions programs. *See* Pub. L. No. 95-52, 91 Stat. 235, 50 U.S.C. App. § 2407 (now codified at 15 C.F.R. § 760.1 (1994)).

This only serves to highlight that when dealing with the various U.S. trade control programs even common terms can have arcane implications, which are not consistently applied from program to program.

161. *See, e.g.*, 31 C.F.R. § 550.308 (LSR); § 560.314 (ITR); § 570.321 (KACR); § 575.321 (IACR); § 585.317 (FRYSR); § 595.315 (1997) (TSR); and Exec. Order No. 13067 § 4(c), 62 Fed. Reg. 59989 (1997) (Sudanese controls).

and targeted at less stringent objectives than the complete and total isolation of the "enemy," as was the case under TWEA.

The first round of Iranian controls, and the initial use of IEEPA to support sanctions in 1977, still used the "persons subject to U.S. jurisdiction" approach,[162] but limited its controls in practice with several regulatory authorizations or interpretations. For example, foreign branches and subsidiaries of U.S. banks and other companies were directed to deposit Iranian assets and property into blocked accounts with the Federal Reserve Bank of New York,[163] but only if they were denominated in U.S. dollars.[164] The South African IEEPA and CAAA based sanctions tried to maintain a middle ground. They defined U.S. persons and nationals to exclude overseas subsidiaries,[165] but then included a definition of "affiliate" covering both branches and subsidiaries,[166] which in turn was tied to special prohibitions on U.S. nationals' involvement or approval of actions by their affiliates.[167] The 1985 Nicaraguan sanctions were a limited set of controls largely focused on direct import and export transactions with the United States. They attempted to avoid concerns over the extraterritorial application of the sanctions with a different approach, by including a specific provision clarifying that third country "offshore" transactions were not caught by the sanctions merely because of the involvement of a U.S. national, if no trade between the United States and Nicaraguan trade was at issue.[168] The Panamanian sanctions imposed in 1988 were also quite limited, excluding even overseas branches from their coverage, unless the branch was actually located in Panama. Overseas branches in third countries were not obligated to abide by the U.S. sanctions under the Panamanian regulations.[169] Each of these represented an attempt by government regulators to devise a mechanism that balanced the U.S. policy objectives behind a particular set of sanctions with increasing opposition to attempts to dictate the actions and behavior of U.S. affiliates abroad. This effort resulted

---

162. *See* 31 C.F.R. § 535.329 (1997).

163. *See* 31 C.F.R. §§ 535.201 & 535.212 (1997).

164. *See* 31 C.F.R. § 535.566 (1997).

165. *See* 31 C.F.R. § 545.313 (1987).

166. *See* 31 C.F.R. § 545.310 (1987).

167. *See, e.g.,* 31 C.F.R. § 545.408 (1987) which interpreted the SATR as preventing U.S. nationals from approving loans or investments in South Africa made by their overseas affiliates.

168. *See* Transactions Relating to Unprohibited Offshore Transactions, 31 C.F.R. § 540.410 (1985).

169. *See* 31 C.F.R. § 565.307 (1988). The same approach was taken in the Rhodesian Sanctions Regulations issued under the U.N. Participation Act in the 1970s. *See* 31 C.F.R. § 530 (1976).

in an approach that considers foreign subsidiaries, with a separate juridical existence, as generally beyond the reach of U.S. controls, while it considers foreign branches, which are merely parts of a U.S. based company, as subject to the same controls as companies operating in the United States.[170]

The U.S. ability and willingness to ameliorate the extraterritorial reach of its economic sanctions following the passage of IEEPA related to two factors. Firstly, a more limited political objective underlies several of the more recent sanctions, particularly in those programs focused on targets in this hemisphere (*e.g.*, Nicaragua, Panama, Haiti, Narco-Terrorists).[171] Secondly, many of the targets that otherwise might have been subjected to more expansive sanctions were also the subject of sanctions programs by other countries, acting pursuant to directives from the U.N. Security Council[172] (*e.g.*, South Africa and Namibia, Iraq and Kuwait, the former Yugoslavia, Angola, and to a lesser degree, Libya and Iran).[173] Where there is substantial multilateral cooperation on sanctioning a particular target country, there is less practical need for broad extraterritorial controls by any one country such as the United States, and perhaps less justification as well.

2. Trade Controls and Re-exports

U.S. trade controls generate similar concerns regarding their extraterritorial application,[174] but in a slightly different fashion.

---

170. *See supra* note 161 (definition of "U.S. person" found in the provisions of the LSR, ITR, KACR, IACR, FRYSR, TSR, NTSR, and Sudanese controls).

171. *See supra* notes 73, 75, 78 & 94 and accompanying text.

172. It should be noted that even where the U.N. has called for sanctions, the U.S. sanctions programs are often more stringent or go beyond the action sought by the U.N., as with the South African, Iranian, and Libyan sanctions, for example. In other cases, the U.S. sanctions preceded action by the U.N., as was the case with the sanctions on Iraq/Kuwait and on the former Yugoslavia.

173. Also note that the U.N. Participation Act provides a coordinate basis for the U.S. sanctions in each of these cases. *See supra* notes 70, 71, 74, 76, 77 & 80 and accompanying text. It would not be correct, however, to assume that IEEPA is no longer used as the sole basis for sanctions. The blocking of terrorist assets in January 1995, under Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995) and the addition of new restrictions on contracts to develop Iranian petroleum resources under Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995) in March 1995 were ordered solely on the President's authority under IEEPA.

174. Extraterritoriality is perhaps a greater problem under the EAA and the EAR than under the AECA and the ITAR, where "foreign persons" are ineligible to register as manufacturers or exporters of "defense articles." Businesses incorporated or established outside of the United States are considered as "foreign persons." *See* 22 C.F.R. §§ 120.1(c), 120.16 & 122.1 (1997). The ITAR is thus structured to focus much more narrowly on U.S. nationals, residents, and companies than are the EAR or the OFAC sanctions programs. For example, the

Portions of the Export Administration Act (EAA) and EAR do expressly apply to foreign subsidiaries[175] in the same manner as TWEA and the TWEA based sanctions programs. Other portions of the EAA use the same "U.S. person" approach[176] that is now commonly used with the IEEPA based sanctions. Most of the issues surrounding the extraterritorial application of the trade controls, however, are generated by an aspect of the regulations that is unique to the United States. The EAR, and to a slightly lesser extent the ITAR,[177] purport to control the re-export of U.S. origin products and technology abroad by non-U.S. parties. In essence, the re-export provisions create controls based not upon the nationality of the parties involved, but upon the "nationality" of the goods or technology that are the subjects of the transaction.[178] This applies both to transactions abroad in

---

ITAR expressly tries to impose the maximum amount of responsibility upon the initial (registered) exporter when it states:

> Any *person who is granted a license* or other approval under this subchapter *is responsible for the acts of* employees, agents, and *all other authorized persons to whom possession of the licensed defense article or technical data has been entrusted* regarding the operation, use, possession, transportation and handling of such defense article or technical data abroad.

22 C.F.R. § 127.1 (1997) (emphasis added).

This is immediately supplemented by language to address the possibility of "unauthorized transfers." All "persons subject to U.S. jurisdiction" are required to follow the requirements of the ITAR when dealing with "defense articles" whenever they may be encountered abroad. *Id.* "All persons abroad subject to U.S. jurisdiction who obtain temporary custody of a defense article . . . irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor." *Id. But see infra* note 177.

175. This is seen in the broad reach of the antiboycott provisions in the EAA, *see* 50 U.S.C. App. § 2407 (1994), and in the EAR, *see* 15 C.F.R. § 760.1(b) (1997), which apply equally to foreign branches and controlled subsidiaries of U.S. based firms. Unlike the IEEPA sanctions programs, however, the antiboycott provisions refer to controlled U.S. affiliates as "U.S. persons." *Id.*

176. *See supra* note 160.

177. Despite its stronger focus on confining its controls to the registered U.S. national manufacturers and exporters of munitions, the ITAR attempts to control re-exports of defense articles by declaring that:

> It is unlawful . . . to conspire to export, import, *reexport, or cause to be* exported, imported *or reexported,* any defense article . . . for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls.

22 C.F.R. § 127.1(a)(3) (1997) (emphasis added).

178. This is unique to the U.S. EAR, and not a recognized application of the "nationality principle" as a basis for the exercise of proscriptive jurisdiction under

products containing more than a de minimis amount of U.S. parts,[179] and also to the foreign-produced "direct products" of certain U.S. technology or software,[180] even when they consist entirely of foreign parts.

These re-export provisions also indirectly tie into the trade control blacklists. If the parties to an unapproved re-export are unaffiliated with the United States and therefore beyond U.S. jurisdiction for enforcement purposes, the re-export provision nevertheless provides a basis for the United States to assert that a violation of its controls has occurred. It can then proceed to administratively sanction those involved with the violation by naming them to the State Department's Debarred List or the Commerce Department's DPL, even though they are otherwise beyond the reach of other U.S. enforcement processes. Moreover, the United States may order those who are subject to U.S. jurisdiction to cease dealing with the "wrongdoers."[181] For example, a company in Singapore that re-exports items that the United States deems to be subject to its regulations without the necessary authorizations or approvals may find itself blacklisted and effectively cut off from access to U.S. products, technology, and markets.[182]

---

international law as reflected in the Restatement of Foreign Relations Law. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, §§ 401-02.

179. *See* General Prohibition Two - Reexport and Export from Abroad of Foreign-Made Items Containing more than a De Minimis Amount of Controlled U.S. Content (Parts and Components Reexports), 15 C.F.R. § 736.2(b)(2) (1997).

180. *See* General Prohibition Three - Reexport and Export from Abroad of the Foreign-Produced Direct Product of U.S. Technology and Software (Foreign Produced Direct Product Reexports), 15 C.F.R. § 736.2(b)(3) (1997).

181. It is worth emphasizing that the only "wrongdoing" which may have occurred is the failure to comply with extraterritorial U.S. requirements related to transferring products traceable to U.S. origin parts or technology. The transaction could otherwise be fully compliant with all applicable local laws.

182. Ignoring the U.S. administrative processes does not help. In a recent case, for example, Pan Asia Exim Enterprises PTE in Singapore was charged with re-exporting U.S. origin engine parts to Vietnam without a proper authorization from BXA. Pan Asia did not respond to the "charging letter" which starts the process. Consequently, the alleged facts were deemed to be correct resulting in an order adding Pan Asia to the DPL for a period of two years. By virtue of this order:

> no person may, directly or indirectly . . . export or reexport to or on behalf of [Pan Asia] any item subject to the [Export Administration] Regulations; . . . take any action which facilitates the acquisition or attempted acquisition by [Pan Asia] of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities . . . or . . . engage in any transaction to service any item subject to the Regulations.

The mere threat of this sanction effectively extends the reach of the U.S. trade controls. The force of the U.S. controls and the threat of blacklisting becomes even more credible when there is some affiliation between the foreign persons or organizations and parties in the United States, as when it is a foreign subsidiary, branch, or contractually related party such as a distributor. The U.S. blacklists can reach not only the actual persons or organizations who committed the violation of the controls, but also "related" persons or parties, those who are connected by "ownership, control, position of responsibility, affiliation, or other connection in the conduct of business."[183] Thus, when one part of a group of companies commits a violation, the entire corporate enterprise may find itself "denied." As a practical matter, this places tremendous pressure on the U.S. parent or affiliate to take whatever steps it can to ensure that foreign "related parties" comply with the extraterritorial controls, as those more closely involved or dependent upon U.S. products, technology, and markets will be the most adversely affected by a denial or debarment. The *Delft* case dramatically illustrates how these provisions interrelate to bolster the effectiveness of the U.S. controls well beyond the direct reach of U.S. legal processes.

Instrubel N.V. and OIP N.V., two Belgian subsidiaries of the Delft group of companies based in the Netherlands, manufactured night vision devices.[184] These devices contain imaging equipment and parts, which are controlled under the ITAR, and manufactured by Hughes Aircraft Corp in the United States. Hughes shipped the imaging equipment and parts to OIP and Instrubel, via another Delft subsidiary, Franke & Co. Optik GMBH, in Germany, under a U.S. State Department license indicating that the exporters were to be incorporated into night vision devices intended for NATO military forces.[185] However, in 1991 during the Gulf War, the Delft night vision devices were found in the possession of captured Iraqi forces.[186]

The State Department suspended all licenses and other approvals, as of January 25, 1991, for Delft Instruments, OIP, and Franke & Co., based upon a "reasonable belief" that a

---

Pan Asia Exim Enterprises PTE Limited, Decision and Order, 62 Fed. Reg. 30,842-3 (1997).

183. 15 C.F.R. § 766.23(a) (1997). *See also infra* note 187. The ITAR provision is very similar, looking to relationships defined by "affiliation, ownership, control, position of responsibility, or other commercial connection." 22 C.F.R. § 127.9 (1997).

184. *See* In the Matter of: Delft Instruments, N.V. *et al.*, 56 Fed. Reg. 50,308 (1991).

185. Hughes was not charged or sanctioned in the Delft affair.

186. *See Delft Instruments*, 56 Fed. Reg. 50,308 (1991).

violation of the ITAR occurred.[187] The Commerce Department similarly issued a Temporary Denial Order naming the three companies on February 28, 1991, based upon the assumed ITAR, not EAR, violation.[188] As was explained when the Commerce Department's ex parte Temporary Denial Order was subsequently renewed:

> Establishing prior violations of the Export Administration Regulations is one way to establish that an imminent violation is likely to occur. It is not the only way. Here the Department has established that Delft ignored U.S. export controls in the past and, given the gravity of that action may likely do it again. That the past violations were of munitions controls is no guarantee that Delft would not supply goods controlled under the EAR in a future violation.[189]

At the same time, Commerce significantly expanded the scope of the Denial Order to include the entire Delft enterprise, forty-seven companies located in thirteen countries or territories, as known "related parties" of OIP and Instrubel.[190] Arguments that alleged violations by two subsidiaries should not support denial of export privileges for the entire group of Delft companies were initially rejected,[191] but when the Denial Order was next renewed

---

187. Interestingly, this ex parte suspension under 22 C.F.R. §§ 126.7(a)(1) & (2) (1991) did not appear in the Federal Register until March 1, 1991. *See* Public Notice 1354, 56 Fed. Reg. 8824 (1991).

188. Action Affecting Export Privileges: Delft Instruments N.V., Op. Instrubel, and Franks & Co. Optik Gmbh, 56 Fed. Reg. 8321 (1991).

189. Action Affecting Export Privileges, Delft Instruments N.V., *et al.*, Decision and Order on Renewal of Temporary Denial Order, 56 Fed. Reg. 42,977 (1991). As the initial Order was issued in an ex parte proceeding, many of Delft's arguments were not formally presented until BXA requested the Acting Assistant Secretary for Export Administration to renew the order on August 30, 1991. According to 15 C.F.R. § 766.24(b)(4) (1997), the maximum duration of a Temporary Denial Order is 180 days, although they may be renewed indefinitely. The Order was renewed for 90 days at this time. *See* Decision and Order, 56 Fed. Reg. 42,978 (1991).

190. There were two companies named in Belgium, one in Denmark, two in France, three in Germany, one in Hong Kong, one in Italy, one in Japan, twenty-five in the Netherlands, one in the Netherlands Antilles, one in Spain, two in Switzerland, two in the United Kingdom, and five in the United States. *See* Decision and Order, 56 Fed. Reg. 42,978. The Assistant Secretary also noted that "a person related to a denied person, even without being named in an order, is usually covered by the terms of the order [because an exporter/vendor] may not engage in an export transaction if a person denied export privileges 'may obtain any benefit' from that transaction." *Id.* at 42,977. One of the named companies was subsequently successful at getting itself removed by showing that it had sold to unrelated owners, and therefore transactions with them would confer no "benefit" upon Delft. *See* Action Affecting Export Privileges, Delft Instruments, N.V. and OIP Instrubel and Franks & Co. Optik Gmbh, 56 Fed. Reg. 55,491 (1991).

191. This occurred on October 4, 1991. *See Delft Instruments,* 56 Fed. Reg. 50,308 (1991).

its coverage was reduced to just the seven Delft companies with substantial involvement in defense-related businesses.[192] At the next renewal of the Denial Order, in February 1992, its coverage was again reduced to deny export privileges only for OIP and Instrubel as negotiations with the U.S. government on a resolution continued.[193] In July 1992, Delft paid $3.3 million in fines[194] and pled guilty to a criminal indictment charging Delft, and OIP and Instrubel, with violating the re-export prohibitions of the ITAR.[195] As part of a consent settlement, the State Department lifted its suspension of Delft's export privileges[196] and the Commerce Department's Temporary Denial Order was revoked.[197] However, because of the conviction resulting from the entry of the guilty plea, OIP and Instrubel simultaneously received a seven year formal denial of their export privileges under the EAR,[198] and Delft's seven defense-related companies were statutorily debarred under the ITAR.[199] Although defense-related business accounted for less than ten percent of Delft's overall revenue, the loss of access to U.S. products, technology, and markets for the larger enterprise due to its blacklisting resulted in a net operating loss of $26.6 million for 1991.[200] The collateral effects of the case still linger on in 1997, as Delft recently paid a civil fine to settle allegations that it knowingly made false

---

192. Once again, on November 27, 1991, the Denial Order was renewed for 90 days. *See* Action Affecting Export Privileges, Delft Instruments N.V. *et al.*, 56 Fed. Reg. 60,085 (1991).

193. Action Affecting Export Privileges; Decision and Order, 57 Fed. Reg. 6583 (1992).

194. Douglas Frantz, *Firm Admits Giving Iraq High-Tech Gear*, L.A. TIMES, July 18, 1992, at A2.

195. This occurred on August 26, 1992. *See* Recession of Suspended Exports Regarding Delft Instruments, N.V. and Related Parties, 57 Fed. Reg. 38,708 (1992).

196. *Id.*

197. The revocation was published on August 11, 1992. *See* Action Affecting Export Privileges, Instrubel, N.V. and OIP, N.V., 57 Fed. Reg. 35,779 (1992).

198. *See id.*; Order Modifying Order Denying Permission to Apply for or Use Export Licenses, 58 Fed. Reg. 59,447 (1993). Issuing a Denial Order following conviction for violating a trade related statute is discretionary, but also common. *See* 15 C.F.R. § 764.6(d) (1997).

199. *See* Public Notice No. 1,678, 57 Fed. Reg. 38,708, (1992); Public Notice No. 1798, 58 Fed. Reg. 26,028 (1993). This second notice, issued on April 29, 1993, nine months after the guilty plea, appears to have been issued as part of a negotiation where the second and third years of the three year statutory debarment would be suspended. *See id.* Debarment is mandatory upon conviction of one of the designated criminal provisions of the statutes. *See* 22 C.F.R. §§ 120.27 & 127.7(c) (1997).

200. *See Delft Instruments Reports Big Loss After U.S. Sanctions*, THE REUTER BUS. REP., May 1, 1992, *available in* LEXIS, News Library, REBUS File.

statements to the government while opposing renewal of the Temporary Denial Orders.[201]

This illustrates the interrelated operation of the trade blacklists, the incentive they provide to innocent foreign parties to comply with the controls abroad, and the rapid and dramatic consequences of being accused of violating the extraterritorial requirements of U.S. trade controls. Here, only one part of the Delft enterprise acted contrary to the U.S. rules, but several of the larger group of related companies, and for a period of time the entire enterprise, was cut off from access to U.S. products, technology, and markets for over a year-and-a-half without administrative charges or civil or criminal proceedings ever being instituted.[202] This also serves to emphasize why it is the administrative sanction of blacklisting rather than more formal criminal or civil enforcement proceedings that has the greatest impact upon, and prompts the most concern from, foreign businesses who must comply with U.S. laws and regulations. As noted previously, this traditional use of blacklisting to enforce U.S. trade controls is now further augmented by new blacklist tools expressly aimed at encouraging those beyond the reach of U.S. jurisdiction to comply with the EPCI nonproliferation controls.[203]

In the hypothetical with Pierre, America Online Canada does not appear to face an imminent threat of blacklisting by Commerce. Its immediate concern is its obligations under the OFAC regulations regarding dealings with Cuba and Pierre Boileau's status as a Cuban SDN. Amidst the complexities of the interrelationships among the U.S. economic sanctions and trade control programs, that could change rapidly, however. If America Online Canada is convicted of violating the TWEA because of its dealings with Pierre, the conviction will trigger "statutory debarment" under the ITAR[204] and possibly a denial of export

---

201. *Commerce Department Imposes $50,000 Penalty on Netherlands Company in Connection with Iraqi War Case* (last modified June 16, 1997) <http://www.bxa.doc.gov/delftpr.htm>. This press release alleges that Delft knowingly made five false and misleading statements concerning whether members of its Executive Board knew that it had exported the imaging devices without the proper license approvals.

202. The use of temporary suspensions or denials, which may be initially issued ex parte and are easily renewed, in lieu of pursuing the minimal administrative proceedings required to issue a standard Denial Order or Debarment is not uncommon. This prompted Commerce Department Administrative Law Judge Hugh J. Dolan, even as he upheld one of the early renewals of the Temporary Denial Order in the *Delft* case, to bemoan "[a]s in prior cases, I lament the failure to issue a charging letter and get on with the adjudication." *See* 56 Fed. Reg. 50,308, 50,309, at n.2 (1991).

203. *See supra* notes 123-36 and accompanying text.

204. *See* 22 C.F.R. §§ 120.27 & 127.7(c) (1997).

privileges by Commerce[205] as collateral sanctions for the initial violation. Beyond just the threat of what might happen under U.S. law, however, America Online Canada's response will be greatly influenced by what the Canadian government might do if it does comply with the U.S. requirements. The Canadian government's reaction will, itself, be greatly influenced by the prior history of intergovernmental disputes over extraterritorial sanctions and trade controls such as these blacklists.[206]

III. RESPONSES TO EXTRATERRITORIAL CONTROLS AND BLACKLISTS

Blacklisting is a very powerful yet easily applied tool, and is for that reason most attractive to policy makers and regulators. This, in turn, creates a very interesting dichotomy with other aspects of U.S. policy. The U.S. government is willing to use blacklisting in its economic embargoes, terrorist and narco-trafficking sanctions, or trade and nonproliferation controls, to influence and coerce behavior in and by third-party countries to meet U.S. policy objectives. At the same time, however, the U.S. government is unwilling to be similarly influenced or coerced itself. This reluctance to be coerced by others can be seen in the U.S. response to the League of Arab States'[207] boycott of Israel.[208] Accordingly, before considering how other nations respond to the extraterritorial application of U.S. blacklists, it is instructive to briefly review how the United States itself reacted in similar circumstances with the Arab-Israeli boycott.

---

205. *See* Temporary Denials, 15 C.F.R. § 766.24 (1997). Interestingly, TWEA is *not* listed among those statutes for which a conviction justifies entry of a standard denials order, as opposed to taking prophylactic action with a temporary denial order in order to protect the public from an "imminent violation;" however, IEEPA *is* listed among those statutes justifying a standard denial order. *See* 15 C.F.R. § 766.25(a) (1997).

206. *See infra* notes 268-86 and accompanying text.

207. For a brief background on the formation of the League by 21 states in the Middle East under the Alexandria Protocol of October 7, 1944, see 3 ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, INTERNATIONAL ECONOMIC LAW, 309 (2d ed. 1983).

208. The boycott actually predates the establishment of Israel as a state in 1948, and can be traced to Arab League Council Res. No. 16, Dec. 16, 1945, calling for the prohibition of importing any goods manufactured by Jewish industry in what was then Palestine. LOWENFELD, *supra* note 207, at 313. A Central Boycott Office was established in Damascus, Syria, in 1951, to coordinate efforts; a Unified Law on the Boycott of Israel was promulgated in 1954 and subsequently adopted in most of the member states, although enforcement varies greatly. *See id.* at 313-29 (describing the Arab League Boycott).

A. *National Legislation: U.S. Antiboycott Laws*

The Arab-Israeli boycott, like the various U.S. trade controls and sanctions, has elements of both a primary and a secondary boycott.[209] The primary boycott is reflected in the provisions that prohibit direct dealings between the belligerent countries, for example, in the prohibition on direct trade between an Arab League country and Israel itself[210] or direct trade between the United States and Cuba.[211] The Arab League often enforced this

---

209. These terms are not found in the boycott or antiboycott laws, but are commonly used by legislators, commentators, and analysts to help make sense out of the complex and often contradictory provisions in this area. *See, e.g.*, Comments of Senators Brooke and Bayh regarding S. Bill No. 69, CONG. REC. 13,810-11 (1977); Export Administration Amendments of 1977, Report of the Senate Comm. on Banking, Housing, and Urban Affairs, S. REP. No. 95-104, at 21-24 (1977). *See also* KENNAN LEE TESLIK, CONGRESS, THE EXECUTIVE BRANCH, AND SPECIAL INTERESTS: THE AMERICAN RESPONSE TO THE ARAB BOYCOTT OF ISRAEL 22 n.12 (1982).

These terms are analogous to those terms used when dealing with strikes, lockouts, and boycotts in the context of labor/management disputes to distinguish between permissible (primary) and impermissible (secondary boycott) labor practices under the Taft Hartley Act of 1947, which introduced § 8(b) into the National Labor Relations Act, 29 U.S.C. § 158(b)4. In commenting upon the prohibition of secondary boycotts in the NLRA, Judge Learned Hand stated:

> The gravamen of a secondary boycott is that its sanctions bear, not upon the . . . party to the dispute, but upon some third party who has no concern it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

International Brotherhood of Electrical Workers Local 501 v. NLRB, 181 F.2d. 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951). The same mechanism is at work in the Arab-Israeli boycott and many of the U.S. economic and trade control programs.

210. The "primary" aspects of the Arab-Israeli boycott can be seen, for example, in the first two provisions of the Unified Law On the Boycott of Israel which state:

> (1) All persons within the enacting country are forbidden to conclude any agreement or transaction, directly or indirectly, with any person or organization (i) situated in Israel; (ii) affiliated with Israel through nationality; or (iii) working for or on behalf of Israel, regardless of place of business or residence; and
>
> (2) Importation into the enacting country is forbidden of all Israeli goods, including goods elsewhere containing ingredients or components of Israeli origin or manufacture.

LOWENFELD, *supra* note 207, at 314. Compare these Arab-Israeli boycott provisions with the provisions of the U.S. CACR, *infra* note 211.

211. The CACR imposes a "primary boycott" on all dealings with Cuba or Cuban nationals, which is not dissimilar from the Arab boycott of Israel.

part of the boycott by requiring "certificates of origin" so that Israeli origin goods could be identified and rejected, or by refusing to issue visas to Zionist, Israeli, or sometimes simply Jewish visitors to their countries.[212] The secondary boycott is reflected in the prohibitions on trading with individuals or companies in third-party countries that in turn do business in or with the primary target. Examples of secondary boycotts are the Arab boycott prohibition against dealing with named U.S. firms who conduct business with Israel,[213] and the U.S. prohibition against dealing with named Canadians who do business for Cuba.[214] The principal tool for enforcing a secondary boycott is the blacklist.

The Arab League's Central Boycott Office in Damascus, along with separate regional and national boycott offices, maintains blacklists of individuals and firms who invest in or conduct business with Israel.[215] The Arab League member states agreed to refrain from dealing with these blacklisted persons and

---

> All of the following transactions are prohibited . . . if either such transactions are by, or on behalf of, or pursuant to the direction of [Cuba] or any national thereof, or such transactions involve property in which [Cuba] or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect.

31 C.F.R. § 515.201(a) & (d) (1997). Compare these CACR provisions with the provisions of the Arab-Israeli boycott, *supra* note 210.

212. *See* TESLIK, *supra* note 209, at 9, 14-15.

213. The "secondary" aspects of the Arab-Israeli boycott can be seen, for example, in the third and fourth provisions of the Unified Law On the Boycott of Israel which state:

> (3) Foreign companies with offices, branches or general agencies in Israel are considered prohibited corporations for purposes of the prohibition on agreements or transactions under paragraph 1; and
>
> (4) All goods destined for Israel, directly or indirectly, *or for persons prohibited by the preceding paragraphs*, are considered Israeli goods and therefore subject to the ban on exports as well as transit (emphasis added).

LOWENFELD, *supra* note 207, at 314-15. Compare these Arab-Israeli boycott provisions with the provisions of the U.S. CACR, *infra* note 209.

214. The "secondary boycott" aspects of the CACR are found in the manner in which it equates SDNs outside of Cuba with "nationals" of Cuba for purposes of the basic prohibitions of the regulations. *See supra* notes 13-22 & 209 and accompanying text. *See also* 31 C.F.R. § 515.203(a) (1997), which states:

> Any transfer after the "effective date" which is in violation of any provision of this part . . . and involves any property in which a *designated national has or has had an interest* . . . is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property (emphasis added).

215. *See* LOWENFELD, *supra* note 207, at 315.

organizations[216] although, as the lists are not published, there is often confusion and substantial variation from country to country as to who might be sanctioned.[217] Some have suggested that this confusion enlarged the potential impact of the Arab blacklist and thereby served, ironically, both the Arab proponents and Israeli opponents of the boycott.[218]

The rules governing the blacklisting of parties in third countries are found in the "General Principles for the Boycott of Israel" issued in 1972.[219] As an adjunct to the blacklist, the Boycott Offices would sometimes provide questionnaires, either directly to blacklisted entities who wished to demonstrate that they had altered their position to comply with the boycott and therefore should be removed from the blacklist, or to others when there would be a question regarding their possible connections or links to Israel.[220] This comports with the claim that the function of the Arab blacklist is to influence future behavior toward Israel, rather than to sanction past conduct. Accordingly, the questionnaire process provides an opportunity for firms to clarify or correct their status with the Boycott Offices prior to incurring any adverse consequences under the boycott.[221] Additionally, "certificates" are often requested from contractors or bidders, as

---

216. *See id.* at 314.

217. *See* TESLIK, *supra* note 209, at 9-13. Some Arab League member states (Algeria, Mauritania, Morocco, Somalia, Sudan, and Tunisia) never really enforced the secondary boycott at all. *See id.* at 11. Moreover, the mechanisms behind the Arab-Israeli boycott have begun to be dismantled as the Middle East peace process continues to evolve. This began in 1980 with the Israeli-Egyptian Peace Treaty of 1980 and gained momentum with the Jordanian-Israeli Peace Treaty of 1994 and the announcement that same year that many of the Gulf Cooperation Council countries (Bahrain, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) that they were abandoning enforcement of the "secondary" aspects of the boycott. Unlike Egypt and Jordan, however, neither the Gulf Corporation Council countries nor the Arab League have changed their laws or regulations, although Qatar has closed its national Boycott Office. *See* BXA ANNUAL REPORT, *supra* note 128, at II-124.

218. *See* TESLIK, *supra* note 209, at 13.

219. *See* LOWENFELD, *supra* note 207, at DS-333 to 393. The Principles are quite lengthy, running to more than 30,000 words in the original Arabic version. They prohibit dealings with those who have "contributed to Israel's strength with direct investment or contractual partnerships, consulting, supplying goods or intellectual property, operating offices or agencies, etc." Significantly, the principles also include refusing to answer the Boycott Office's questions as grounds for being blacklisted. There are also numerous exceptions, permitting business when it is deemed to be in the interest of a given country; for example, in the government procurement of defense items and strategic products. *See* TESLIK, *supra* note 209, at 10-11.

220. *See* LOWENFELD, *supra* note 207, at DS-398 to 400.

221. *See* Andreas F. Lowenfeld, " . . . *Sauce for the Gander": The Arab Boycott and United States Political Trade Controls*, 12 TEX. INT'L L.J. 25, 27-28 (1977).

one means of enforcing the rules that firms contracting with Arab states were not themselves blacklisted, nor supplying products or parts from entities that were blacklisted.[222]

Over time, the United States became increasingly concerned with the questionnaires, certificates, and blacklisting of persons and organizations by the Arab League, but the U.S. reaction built slowly. While blacklisting dated back to the 1950s when the Arab League called for the refusal to supply ships that carried cargo or immigrants to Israel,[223] it was not until 1965 that the United States initially acted. At that time, a modest reporting requirement was instituted. U.S. firms were required to inform the Commerce Department when they were asked to support a boycott or "restrictive trade practice."[224] Although officially "discouraged," there was no actual prohibition against complying with such a request.[225]

Stronger measures were advocated by Senator Harrison Williams of New Jersey in a proposal to amend the Export Control Act of 1949, then up for renewal.[226] The Johnson Administration opposed the proposed measures because they might be viewed as an affront to other nations' sovereignty and undermine U.S. efforts to gain support for its own extraterritorial controls aimed at isolating communist countries during the Cold War. Under Secretary of State George Ball stated:

> In our judgement [the proposed amendment] . . . could interfere seriously with the effective operation of programs of economic denial that we are now conducting against several Communist countries. Because they interfere with the free flow of commerce these programs of economic denial are not popular in the international trading world and there is considerable complaint about them. [Senator Williams' antiboycott bill] if adopted, would provide the excuse for other governments to interfere with their effective execution. If foreign governments were to refuse to provide information to the United States to assist us in the enforcement of these programs - and were to prohibit their domestic firms from providing such information - we would be sharply restricted in our ability to make these programs effective.[227]

---

222. *Id.* This obligation not to supply the products of blacklisted entities is sometimes referred to as the "tertiary" boycott. Other times it is simply subsumed within the notion of a "secondary" boycott.

223. *See* TESLIK, *supra* note 209, at 8-9.

224. Amendments to the Export Control Act of 1949, Pub. L. No. 89-63, 79 Stat. 209 (1965).

225. *See* LOWENFELD, *supra* note 207, at 329-32.

226. S. 948, 89th Cong., 1st Sess. (1965).

227. Hearings to Amend Section 2 of the Export Control Act of 1949 before Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 7-8

Thus, the reporting obligation remained the only federal requirement through the mid 1970s.[228] Then, following the October 1973 War, the OPEC Oil Embargo, and gasoline rationing, the Arab boycott was seen in a new light and again became a topic for debate. A number of measures were discussed and considered in 1975 and 1976.[229]

The Ford Administration acknowledged an increasing concern over discrimination against U.S. citizens and businesses resulting from the boycott,[230] and both expanded the reporting obligations

---

(1965) (testimony of George W. Ball), *quoted in* LOWENFELD, *supra* note 207, at 329-30.

228. By the mid 1970s, several states were beginning to enact their own antiboycott measures, which added further impetus to the effort to pass preemptive federal legislation. *See, e.g.*, Illinois Blacklist Trade Law, 775 ILL. COMP. STAT. ANN. 15/1-6 (West 1993) (most recent codification); Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 1993) (most recent codification).

229. Domestic politics played a large role in these debates. It should also be recalled that this was shortly after the Watergate affair. When Congressional demands to see the boycott reports Commerce had received "in confidence" under the old 1965 law were initially refused by Secretary Rogers Morton in 1975, it began to look like "stonewalling" or obstructionism by the White House, thereby generating domestic political pressure on the Executive branch to move forward on the boycott issue. Moreover, internationally, the oil crisis had changed the perception of the importance of the Middle East, and made the pursuit of new policies there of greater concern than when the Johnson Administration was preoccupied with the Cold War against Communism. Still, there was no clearly identified policy approach as pro-Israeli, antiboycott sentiment was counterbalanced by the tremendous growth of Arab League economic power in "petrodollars" and the possible adverse reaction of other countries seeing a potential double standard at work regarding extraterritorial controls. *See* LOWENFELD, *supra* note 207, at 338-40.

230. Anti-Jewish discrimination against U.S. citizens and businesses was increasingly being used by the proponents of stronger antiboycott measures during the mid 1970s. President Ford's statement and his expansion of the antiboycott reporting obligation was in part motivated by Arab dominated underwriting syndicates, which promised certain European banks in 1975 that they would make generous deposits or loans if the bank would agree that no member of the Jewish faith would sit on its board or control a substantial portion of its stock. Nonetheless, while religious discrimination was certainly a part of the boycott, commentators suggest that it was not the principal motivation behind the Arab League's boycott of Israel. *See* TESLIK, *supra* note 209, at 13-16. As Teslik states:

> however, religious discrimination was not the driving force behind the boycott that many advocates of strong anti-boycott measures claimed. After the boycott became a major issue in 1975, Arab leaders made a genuine effort to keep religious discrimination out of boycott implementation, and certainly American businessmen, once educated about boycott requirements, had no desire to practice a shadow boycott. Indeed one of the ironies of the boycott debate was that when Jewish leaders, the press, and members of Congress continually spoke of the boycott's 'discriminatory' nature—whether for strategic purposes or out of

of the 1965 law[231] and prohibited discrimination against U.S. citizens based upon race, color, religion, sex, or national origin.[232] In doing so, however, President Ford also continued to emphasize the need to balance these new measures with internationally accepted sovereign rights, which recognized the Arab League's ability to conduct a boycott and limited the U.S. ability to respond. "[M]y administration," President Ford declared, "as in the administration of George Washington, will give 'to bigotry no sanction'.[233] [M]y administration will not countenance the translation of any foreign prejudice into domestic discrimination against American citizens."[234] Nevertheless, the expanded obligations President Ford instituted were "taken with due regard for our foreign policy interests, international trade and commerce, and the sovereign rights of other nations."[235] President Ford continued to oppose stronger measures for the remainder of his administration as being counterproductive.[236] His administration argued that:

> a far more constructive approach . . . is to work through our growing economic and political relations with the Arab states as well as our close relationships with Israel and the broad range of contacts the Executive Branch and the regulatory agencies

---

> ignorance—they spread misconceptions that gave extra life to the shadow boycott.

Id. at 16. *See also infra* note 238.

231. Under the 1965 law, only actual exporters were required to report the receipt of "boycott requests." President Ford directed that this obligation be expanded to all who were involved in the export transaction, *i.e.*, "related service organizations" such as freight forwarders, banks, shipping companies, etc. Additionally, federal agencies and contractors were directed to report any countries excluding or denying visas to U.S. citizens connected to their overseas business or activities, which might be related to discrimination based upon race, color, religion, sex, or national origin. *See Foreign Boycott Practices*, 11 WKLY. COMP. PRES. DOC. 1305 (Nov. 20, 1975).

232. Thus, for the first time, federal agencies were prohibited from considering race, color, religion, sex, national origin, or age requirements of foreign nations in making overseas assignments. Federal contractors, exporters, and "related service organizations" were prohibited from complying with boycott related requests to discriminate against U.S. citizens on the basis of race, color, religion, sex, or national origin. *See id.* at 1305-06; 15 C.F.R. § 760.2(b) (1997).

233. *Foreign Boycott Practices*, *supra* note 231, at 1205. President Ford was referring to Washington's August 17, 1790, letter to the Hebrew congregation at Newport Rhode Island, in which he wrote, "[H]appily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support." 31 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-99, at 93 n.65 (John C. Fitzpatrick ed. 1939).

234. *Foreign Boycott Practices*, *supra* note 231, at 1305.

235. *Id.*

236. *See generally* TESLIK, *supra* note 209, at 128-160.

> maintain with the U.S. business community to achieve progress on the boycott issue.[237]

Moreover, the United States was the only industrial nation clearly opposing the Arab boycott, and its capacity to influence the Arab League was limited as there was "precious little that the United States supplies to the Arab nations that is not available from sources in other countries and they are eager to take the [United States] place."[238]

As a presidential candidate, Jimmy Carter thought the Ford Administration's attempt at balancing interests was "a disgrace"[239] and endeavored to stake out the moral high ground during the second televised debate of the campaign. Carter stated:

> I believe that the boycott of American businesses by the Arab countries because those businesses trade with Israel or because they have American Jews who are owners or directors in the company is an absolute disgrace. This is the first time that I remember in the history of our country that we've let a foreign country circumvent or change our Bill of Rights. I'll do everything I can as President to stop the boycott of American firms by the Arab countries. It's not a matter of diplomacy or trade with me. It's a matter of morality.[240]

This capitalized on the emotional appeal of the common misconception, in the midst of the presidential elections, that the principal motivation for the economic boycott of Israel by the Arab League was religious discrimination.[241]

---

237. *Extension of the Export Administration Act of 1969: Hearings before the Comm. on International Relations*, 94th Cong., 58 (1976) (remarks by Sec. Treas. William Simon), *quoted in* TESLIK, *supra* note 209, at 131.

238. Teslik also reports that 80% of the goods and services traded with the Arab nations at this time came from non-U.S. sources. *See id.*

239. Second Carter-Ford Presidential Debate, Oct. 6, 1976, *quoted in* TESLIK, *supra* note 209, at 154.

240. *Id.*

241. Several commentators have noted that religious discrimination, while a factor in the boycott, accounts for only a small percentage of the "boycott requests" received and reported by U.S. businesses. For example, Ludwig and Smith state:

> Much of the legislative impetus in the 94th Congress was the result of widespread belief . . . that the Arab boycott was essentially discriminatory in nature, imbued with discriminatory animus against firms with Jewish officers or directors. Boycotting governments and their officials have steadfastly denied this charge. Reports of boycott requests filed at the Department of Commerce . . . disclose that boycott requests manifesting racial or religious discrimination are extremely rare, and that the Arab boycott of Israel has become in large part what it purports to be - an economic boycott.

As president, Carter was somewhat more circumspect when he signed the antiboycott amendments to the EAA in 1977. President Carter noted that the issue of a nation's or a group of nations' ability to conduct a boycott, and the ability of other nations such as the United States to sanction such activity:

> goes to the very heart of free trade among nations . . . . The new (U.S. antiboycott) law does not threaten or question the sovereign right of any nation to regulate its own commerce with other countries,[242] nor is it directed toward any particular country.[243] The bill seeks instead to end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society. If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.[244]

Much more than a change in administrations led to the passage of the antiboycott amendments to the Internal Revenue Code[245] and the EAA in 1977.[246] The boycott was vigorously debated between 1975 and 1977[247] by Congress, the Executive

---

Eugene A. Ludwig & John T. Smith, II, *The Business Effects of the Antiboycott Provisions of the Export Administration Amendments of 1977 - Morality Plus Pragmatism Equals Complexity*, 8 GA. J. INT'L & COMP. L 581, 587 n.15 (1979). *See also supra* note 230.

242. That is, the U.S. antiboycott legislation was aimed at limiting the effects of the secondary boycott rather than denying the right or ability of any nation to conduct a primary boycott. *See supra* notes 209-14 and accompanying text.

243. The U.S. antiboycott legislation and regulations, somewhat disingenuously, refer to boycotts by foreign countries "against a country friendly to the United States," although the entire debate was framed in terms of the Arab-Israeli boycott. *See, e.g.*, 50 U.S.C. App. § 2407(a) (1994); 15 C.F.R. § 760.5(a) (1997).

244. *Remarks of the President upon signing H.R. 5840 Anti-Boycott Legislation*, Press Release, Office of the White House Press Secretary, June 22, 1977, *quoted in* TESLIK, *supra* note 209, at 216. Teslik notes that "Carter's statement . . . combined strong words of support for Israel . . . a modest attempt to soothe the Arabs, a misrepresentation of the discriminatory impact of the boycott on American Jews (post passage antiboycott rhetoric-habits are hard to break) and an attempt to put a political gloss over the conclusion of the debate." *Id.* at 217.

245. The Tax Reform Act of 1976 contained provisions introduced by Senator Abraham Ribbicoff of Connecticut, which denied certain tax credits and deferrals to firms who "agreed" to cooperate with the Arab boycott, but which did not actually prohibit participation in the boycott. *See* Pub. L. No. 94-455, §§ 1061-64, 1066-67, 90 Stat. 1649-50, 1654 (1976). This measure was separate and distinct from the amendments to the EAA. While it generally complemented the EAA antiboycott provisions, it was not part of a coordinated antiboycott strategy and passed into law with relatively little discussion. *See* TESLIK, *supra* note 209, at 141-45.

246. *See* Export Administration Act Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977); 50 U.S.C. App. § 2407 (1994).

247. *See* LOWENFELD, *supra* note 207, at 344-50.

Branch, and a number of established interest groups such as the Anti Defamation League of B'nai B'rith, the American Jewish Congress, the American Jewish Committee,[248] and the then newly formed Business Roundtable representing the CEO's of 180 major American corporations.[249] The final legislation and the implementing regulations were in fact largely the result of an extraordinary collaboration and series of compromises[250] worked out between the various lobbying and business interests and then adopted by the government.[251] The two Presidents' comments, however, do evoke the major themes of the debate. On the one hand, the comments touch upon the principles of nondiscrimination[252] and territorial sovereignty.[253] On the other hand, the comments touch upon the more utilitarian concerns of what is achievable and what might be the consequences of any

---

248. *See* TESLIK, *supra* note 209, at 31-46. The Arab lobbying interests in the United States were generally less organized or effective. *Id.* at 46-50. Teslik quotes Senator James Abourezk of South Dakota as stating that "the reason the Arabs have lost those battles in the Middle East is because they have lost them previously here in Washington." *Id.* at 46.

249. *See id.* at 51-53.

250. *See* LOWENFELD, *supra* note 207, at 332-49. *See generally* TESLIK, *supra* note 209.

251. *See* LOWENFELD, *supra* note 207, at 347-50.

252. The nondiscrimination arguments encompassed both traditional American notions of fairness and international free trade principles.
The principle of nondiscrimination had a genuine and not contrived bearing on legislation.

> The principle reached beyond religious discrimination to figure within the recurring free-trade arguments against the boycott.
>
> . . . .
>
> Free trade arguments in the Congress may have been used instrumentally to cover other motives for attacking the boycott. But their prominence suggests that they carried some weight of their own.

Henry J. Steiner, *Pressures and Principles - The Politics of the Antiboycott Legislation*, 8 GA. J. INT'L & COMP. L. 529, 537-38 (1978).

253. Steiner notes that the nondiscrimination and territorial sovereignty arguments are interrelated.

> As it merges into free-trade objectives, the non-discrimination principle borders upon the second major principle in the legislative arguments, that of territorial sovereignty . . . A *de jure* Arab boycott on export of goods, capital or technology to Israel threatened to become *de facto* our export ban as well.
>
> Seen from this [perspective] Congress' action can be understood to assert: if any government imposes a systematic boycott scheme upon American industry, that government should be our own.

Id. at 538.

action.[254] As promulgated, the legislation and extraordinarily complex regulations were aimed essentially at blocking the secondary effects of the Arab boycott. They prohibited compliance with the Arab blacklisting of U.S. firms, while recognizing the Arab League's right to conduct a primary boycott on direct Arab-Israeli dealings.[255]

While the U.S. antiboycott laws are themselves extraterritorial, affecting the behavior of U.S. nationals, residents, companies, and their controlled overseas branches and subsidiaries, this response was considered justified because the Arab blacklisting of U.S. firms with:

> [a] secondary boycott, a territorially aggressive policy, [which] sought to absorb third-countries [the U.S.] into the boycotters economic warfare against the target country [Israel]. It reached extraterritorially in an explicit way, leaving upon the third country's [U.S.] territory a trail of questionnaires, certifications and letters of credit with boycott-related conditions.
>
> . . . .
>
> Moreover the boycott attempted to absorb American business into a discriminatory scheme against Israel, a country enjoying broad public sympathy as well as one receiving our military and economic aid. The boycott could hardly have touched more sensitive national nerves, or avoided the charge of interfering with our territorial sovereignty.[256]

---

254. *See id.* at 540-46.

255. As was noted in the Senate Committee Report on the Export Administration Amendments of 1977:

> The committee recognizes that the Arab States regard their boycott efforts as part of a continuing struggle against Israel . . . . The committee is aware that primary boycotts are a common, although regrettable, form of international conflict and that there are severe limitations on the ability of outside parties to bring such boycotts to an end. However, the committee strongly believes that the United States should not acquiesce in attempts by foreign governments through secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. Accordingly, the bill reported by the committee directly attacks attempts to interfere with American affairs while creating mechanisms for more subtle and flexible pressure against the other dimensions of foreign boycotts . . . .
>
> The committee also recognizes that such legislation, however well intentioned, could unjustly interfere with the sovereignty of others and thus violate the very principle which the bill seeks to establish . . . . [L]egislation which fails to recognize the political sensitivities of the Arab States themselves, most of which are as jealous of their prerogatives as the United States is of its own, could erode U.S. influence in the Arab world and undermine efforts toward peace . . . .

S. REP. No. 95-104, at 20-21.

256. *See* Steiner, *supra* note 252, at 538-39.

Nevertheless, the legislation also included:

> certain limited accommodations to the laws and rights of other nations, including boycotting nations, with the realization that where the rights of nations conflict, each must make adjustments, however reluctantly, to avoid confrontations on "principles" which are as strongly opposed by others as they are deeply held by the United States.[257]

This focus on the "secondary" aspect of the Arab-Israeli boycott derives as much from domestic policy as from a practical limitation on the U.S. ability to do anything more to oppose the Arab League's actions under international law. Secondary boycotts were considered problematic under the antitrust laws,[258] and their use in the context of labor and management relations had been proscribed by statute since 1947.[259]

The basic mechanism of the antiboycott legislation is simple. It essentially imposes a broad prohibition,[260] which states that no

---

257. S. REP. No. 95-104, at 21.

258. It is well established that § 1 of the Sherman Act prohibits a concerted "refusal to deal" and potentially reaches activities that produce "substantial effects" within the United States. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). Suits have been instituted on the basis that cooperation with the Arab blacklist is an actionable refusal to deal. *See, e.g.*, U.S. v. Bechtel Corp., 648 F.2d. 660, 662 (9th Cir. 1981); Bulk Oil (ZUG) A.G. v. Sun Co., Inc., 583 F. Supp. 1134, 1136 (S.D.N.Y. 1983). Use of the antitrust laws to pursue an antiboycott violation remains rare, however, despite an express statement that the antiboycott law does not limit the antitrust or civil rights laws. *See* 50 U.S.C. App. § 2407(a)(3) (1994).

259. The National Labor Management Relations Act prohibits labor organizations from using "secondary picketing" or "secondary boycotts" to apply pressure to neutral employers when striking or picketing the "primary" employer in any dispute. This was one of the limits and duties imposed upon unions by the Taft-Hartley Act of 1947. *See* 29 U.S.C. § 158(b)(4) (1994). If the union engages in secondary picketing/boycotts, as an unfair labor practice it is subject to being enjoined and also to federal suits for monetary damages. *See id.* §§ 160, 162 & 187. There is an extensive line of NLRB decisions and cases interpreting these provisions.

In the debates concerning this provision, Senator Taft stated that the "provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement." 93 CONG. REC. 4198 (1947). The secondary boycott ban, however, does not apply to publicizing the primary dispute, nor to seeking consumer boycotts of the products produced by the primary employer. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 582-83 (1988).

260. The amended EAA and the implementing regulations actually provide four basic prohibitions addressing boycott-related (1) refusals to do business, (2) discriminatory actions, (3) furnishing information about race, religion, sex or national origin, or (4) implementation of letters of credit containing boycott-related provisions. *See* 50 U.S.C. App. § 2407(a) (1994); 15 C.F.R. § 760.2 (1997). The tax code provisions do *not* contain any prohibitions, but do deprive taxpayers of certain tax credits and deferrals if they agree to participate in a boycott. *See supra* note 245.

U.S. person, affiliate, or controlled-in-fact subsidiary[261] can participate or cooperate with the Arab-Israeli boycott or blacklist. This is combined with a number of carefully crafted exceptions to the broad prohibition in order to authorize actions related to the primary boycott.[262] Additionally, as was the case under the 1965 law, the mere receipt of a request to cooperate in the boycott has to be reported to the U.S. government.[263] The failure to file the proper report itself constitutes a violation of these provisions.[264] Ironically, one of the sanctions Congress has urged be used more frequently to address violations of the U.S. antiboycott legislation, is naming the violator to the Commerce Department's own DPL.[265]

Interestingly, the Canadians thought the approach embodied in the U.S. antiboycott legislation was a useful mechanism, because they employ very much the same tools in responding to the U.S. embargo of Cuba. It is this Canadian response to the U.S. laws that America Online Canada must also bear in mind while trying to avoid violating the CACR controls in dealing with the blacklisted Pierre Boileau.

---

261. The statute uses the term "U.S. person," which the regulations defined broadly, as was done under TWEA to include foreign controlled entities. *See supra* note 141 and accompanying text. Unlike TWEA, however, there is an additional requirement that the transaction must also involve "activities in the interstate or foreign commerce of the United States." *See* 50 U.S.C. App. § 2407(a)(1), (5); 15 C.F.R. § 760.1 (1997).

262. *See* 50 U.S.C. App. § 2407(a)(2); 15 C.F.R. § 760.3 (1997). As the "devil is in the details," it is in these exceptions and qualifications to the prohibitions that many of the compromises struck by the various interest groups and industry are reflected. The antiboycott regulations are unique among trade controls in the amount of detail and voluminous examples they employ to define what is prohibited and what is permissible, producing what often appears to be a triumph of form over substance. For example, boycott-related discrimination based upon "national origin" is prohibited, but discrimination based upon "nationality" is permissible (at least under the antiboycott regulations). *Compare* 15 C.F.R. § 760.2(b)(1), *with* 15 C.F.R. § 760.2(b), ex. (iii) (1997). Such fine distinctions may have value in the domestic political arena, but when applied to foreign boycott requests which are generally being translated from other languages, the formulaic arguments often become meaningless.

263. *See* 50 U.S.C. App. § 2407(b)(2); 15 C.F.R. § 760.5 (1997).

264. *See* 15 C.F.R. § 764.2(l) (1997).

265. *See Oversight of the Office of Antiboycott Compliance: Hearing Before the Subcomm. on Int'l Econ. Policy and Trade of the House Comm. on Foreign Affairs*, 102d Cong. 36, 51-53, 64-65 (1991).

B. *National Legislation: Foreign "Blocking Measures"*

Canada has long disagreed with the U.S. policy toward Cuba,[266] and opposes the extraterritorial application of that policy in much the same way as the United States responded to the Arab League policy toward Israel.[267] Canada accordingly created similar measures, aimed at directing Canadian nationals and companies to refrain from cooperating with the U.S. embargo of Cuba and further requiring that they also report any and all communications requesting their cooperation or support for the embargo to the Canadian Attorney General. This is embodied in the Canada's Foreign Extraterritorial Measures Act of 1985 (FEMA),[268] and the orders issued under that Act,[269] which is enforceable with fines of up to C$1.5 million and terms of imprisonment of up to five years.[270] Similar measures aimed at

---

266. *See, e.g.,* James Irvine Whitcomb Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation,* 14 McGILL L.J. 174, 202-05 (1968).

267. Canadian opposition to the extraterritorial application of U.S. controls goes well beyond the Cuban embargo. In fact, it dates at least to the application of Korean War era TWEA-based controls targeted at China to prevent Canadian subsidiaries of U.S. companies from expanding trade with China in the 1950s and 1960s. *See generally id.* at 187-201 (providing a historical survey of the TWEA's effect on U.S. owned or controlled Canadian corporations). It then continued through the 1970s and 1980s with the uranium cartel litigation, Bank of Nova Scotia subpoenas case, and the Russian pipeline embargo. *See* Douglas H. Forsythe, Introductory Note, Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act, 36 I.L.M. 111, 112 (1997); *infra* Part III.C.1.

268. Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§1-11 (1985) (Can.), *reprinted in* 24 I.L.M. 794 [hereinafter FEMA]. As the U.S. policy toward Cuba was tightened, first with the Cuban Democracy Act and then with the LIBERTAD or Helms-Burton Act, so too FEMA was amended to counter the tougher U.S. policies. FEMA was substantially amended by Bill C-54, which was passed in late 1996, and became effective on January 1, 1997. *See* An Act to Amend the Foreign Extraterritorial Measures Act, Bill C-54 (1996), *reprinted in* 36 I.L.M. 115-24 (1997).

269. The only Order currently in effect under FEMA specifically evokes its provisions with regard to the U.S. Helms-Burton Act. *See* Schedule to FEMA, 36 I.L.M. 124. This is an amended version of the original Order issued in 1992, which triggered FEMA with regard to the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010. *See generally* 24 I.L.M. 794 (1985). Both Orders are predicated upon a Canadian belief that the extraterritorial application of these U.S. laws "adversely affect Canadian trading interests or infringes upon Canadian sovereignty." *See* FEMA, § 5.

270. In the case of an individual defendant the maximum fine is C$150,000. *See* FEMA, § 7(1)(a).

countering the United States-Cuba policy were instituted by Mexico[271] and the EU.[272]

The FEMA, unlike the U.S. antiboycott law, goes beyond simply prohibiting compliance with extraterritorial laws from other jurisdictions. It is also a "blocking measure," designed to insulate Canadian nationals and companies from foreign attempts to enforce their extraterritorial requirements or penalize their violation. In an effort to limit the clear conflicts-of-law issues such blocking measures create, FEMA only applies to: (1) particular foreign trade laws that are designated as being "contrary to international law or comity;"[273] (2) situations where a foreign state or tribunal takes actions that adversely affect Canadian interests in international trade and commerce;[274] or (3) situations where a foreign state or tribunal takes actions that adversely affect Canadian sovereignty.[275] In each case, a formal order must be issued by the Canadian Attorney General after consultation with the Minister of Foreign Affairs to bring the foreign measure within the scope of the FEMA.[276]

A variety of different "blocking" techniques are employed to augment the basic prohibition on complying with offensive foreign laws.[277] Firstly, there is the reporting requirement, which presumably permits the Canadian government to both monitor attempts to compel enforcement of extraterritorial measures within Canada, and to intervene on a state-to-state level, if

---

271. *See* "Ley de Proteccion al Comercio y la Inversion de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., Oct. 23, 1996 (Mex.), *reprinted in* 36 I.L.M. 133 (1997) [hereinafter Act to Protect Trade and Investment].

272. *See* Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, Council Regulation 2271/96, 1996 O.J. (L 309) 39, *reprinted in* 36 I.L.M. 125 (1997) [hereinafter Eur. Council Reg. 2271/96].

273. These designations are accomplished by an Order issued by the Canadian Attorney General, after consultation with the Minister of Foreign Affairs, which amends a Schedule of foreign trade laws to which FEMA applies. The Helms-Burton (LIBERTAD) Act is the only trade law which currently appears in the FEMA schedule. *See* FEMA, § 2.1.

274. The Canadian "interests" in trade or commerce which are adversely affected must be, at least in part, within Canada. *See generally* FEMA, §§ 3, 5 & 8.

275. *See id.*

276. *See id.*

277. The basic prohibition on Canadian residents, nationals, and companies complying with designated foreign trade laws or measures is found in a provision which states that the Canadian Attorney General may "prohibit any person in Canada from complying with such measures, or with any directives, instructions, intimations of policy or other communications relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada." *Id.* § 5(1)(b).

necessary.[278] The reporting requirement, like the basic prohibition, is quite broadly worded, reaching even "intimations of policy," which may be conveyed by a corporate parent or affiliate, for example.[279] Secondly, in order to frustrate the enforcement of extraterritorial requirements, Canadian citizens or residents may be prohibited from producing, disclosing, or identifying records or information sought by foreign tribunals.[280] In appropriate cases, Canadian courts are even empowered to order the seizure of records in Canada to prevent their disclosure.[281] Thirdly, recognition and enforcement of any foreign judgments that are rendered regarding offensive extraterritorial measures[282] may be prohibited, or their awards reduced.[283] Finally, Canadian residents, citizens, or companies are given the right to "clawback" any awards that foreign parties may have recovered elsewhere in a new cause of action.[284] That is, the Canadian party who loses in a foreign forum may sue the foreign party for the amount of the judgment the foreign party obtained, the expenses incurred in both the foreign action and the Canadian "clawback" suit, and for any consequential losses or damages suffered by the Canadian party because of the foreign judgment.[285] The Canadian award resulting from a clawback action may itself be executed not only against the foreign party, but also against the property of any person or entity, which owns or controls, or is part of a group that

---

278. The reporting requirement states that the Canadian Attorney General may "require any person in Canada to give notice to (the Attorney General) of such measures, or of any directives, instructions, intimations of policy or other communications relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada." *Id.* § 5(1)(a).

279. *See id.* This is, in fact, broader than the U.S. antiboycott reporting requirement, which only reaches actual "boycott requests." *See* 15 C.F.R. § 760.5.

280. *See* FEMA, § 3.

281. *See id.* § 4.

282. This would include, for example, the Title III provisions of the Helms-Burton (LIBERTAD) Act, which authorizes private suits for treble damages against traffickers in expropriated Cuban property.

283. *See* FEMA, § 8(1)(b). This section is applicable primarily to antitrust awards, and designated trade laws set forth in the FEMA schedule. It is also bolstered by another section, which specifically prohibits the enforcement in Canada of any awards made under the U.S. Helms-Burton (LIBERTAD) Act, irrespective of whether or not Helms-Burton appears on the FEMA schedule at the time. *See id.* § 7.1.

284. As with the provisions on enforcement and recognition of foreign judgments, with which this is closely related, this section applies to antitrust suits and suits relating to scheduled trade laws (*i.e.*, Helms Burton Act). *See generally* FEMA, § 9.

285. *See id.* § 9(1).

owns or controls, the foreign party who obtained the impugned foreign judgment.[286]

This mechanism is not unique to Canada, but reflects a history of opposition to the extraterritorial application of U.S. laws and regulations by a number of countries throughout the latter half of the century.[287] The Canadian, Mexican, and European statutes do represent, however, a new stage in the development of

---

286. Thus, this permits the "clawback" award to be executed against any parent company property located within Canadian jurisdiction, or the property of other members of a holding corporation or group. *See id.* § 9(2).

287. FEMA is an example of what might be considered a "third stage" in the development of blocking measures.

The "first stage" in the widespread use of blocking measures is traceable to the extraterritorial application of U.S. merchant shipping regulations and documentation demands by the Federal Maritime Commission beginning in the 1960s, which culminated in a series of antitrust actions against European shipping cartels or conferences in 1979. *See In re* Ocean Shipping Antitrust Litigation 1982-1 Trade Cas. (CCH) ¶ 64,585 (S.D.N.Y. 1982). Numerous blocking measures were passed as this dispute developed, primarily aimed at blocking "US-style" sweeping discovery requests, which many other countries regarded as simply fishing expeditions by the U.S. government and private plaintiffs. *See, e.g.*, "Law Concerning the Regulation of Marine Transport," Mar. 27, 1969, 723 Bull. Usuel des Lois et Arrêtés 500 (amended to include Air Transport, June 21, 1977, 1490 Bull. Usuel des Lois et Arrêtés 1075) (Belg.); "Law Relating to the Transmission of Documents and Information to Foreign Authorities in the Area of Maritime Trade," J.O., 1968, p. 7267, B.L.D. 1968, p. 438 (Fr.); "Federal Maritime Shipping Act," v. 24.5.1965 (BGBl. II S. 833) (F.R.G.); "Power for the King to Forbid Shipowners to Give Information, etc. to Foreign Authorities," Act of June 16, 1967, Norges Lover 1685-1985, at 1726 (Nor.); "Ordinance Regarding Prohibition in Certain Cases for Shipowners to Produce Documents Concerning the Swedish Shipping Industry," Svensk Forfattningssamling No. 156, at 411 (1966) (Swed.); Shipping Contracts and Commercial Documents Act, 1964, ch. 87 (Eng.). *See also infra* note 293.

The "second stage" of blocking measures was prompted by the increasing extraterritorial application of the U.S. antitrust laws, especially in connection with the Uranium Litigation, *see infra* notes 290 & 295. These blocking measures reflected many foreign countries' view of private treble damage awards as "punitive," and saw the introduction of "clawback" mechanisms in addition to measures aimed at frustrating discovery. The blocking measures passed at this time varied, with some targeted just at the nuclear industry, and some with a more general application. *See, e.g.*, Foreign Proceedings (Excess Jurisdiction) Act, 1984, No. 3 (replacing Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 121) (Austl.); Atomic Control Act, R.S.C. ch. 49, § 9 (1970) (Can.); Uranium Information Security Regulations, S. Prov. C. 1976-2368, O.R. 77-836 (1977) (Can.); "Law Relating to Communication of Economic, Commercial, Industrial, Financial, or Technical Documents or Information to Foreign Natural or Legal Persons," Law No. 1799 of July 16, 1980, J.O., 1980 (Fr.); § 2 of Second General Law Amendment Act 94 of 1974, 12 Stat. S. Afr. 602 (S. Afr.). Other applications of the U.S. antitrust laws, notably the Light Bulb Litigation, U.S. v. Gen. Elec. Co., 82 F. Supp. 753 (D.N.J. 1949), prompted passage of blocking statutes of this type as early as 1956. *See Economic Competition Act*, 28 June 1956, § 39 (Neth.), *reprinted in* A.V. LOWE, EXTRATERRITORIAL JURISDICTION 123 (1983).

"blocking measures."[288] This is demonstrated in the statutes' focus on offensive[289] foreign trade laws, generally, and in the breadth of their "clawback" provisions when such foreign laws are enforced elsewhere.[290] They represent an expansion of earlier blocking measures, such as the U.K.'s Protection of Trading Interests Act 1980,[291] which was in fact the model for the blocking provisions in the Canadian FEMA.[292]

---

288. *Id.*

289. That is, each of these statutes applies only against foreign trade laws that are deemed to violate international norms. *See* FEMA, § 2.1(a) ("[T]he Attorney General of Canada is of the opinion that the law or provision is contrary to international law or international comity."); Eur. Council Regulation 2271/96 ("Whereas by their extra-territorial application such laws, regulations, and other legislative instruments violate international law . . ."). The application of the Mexican blocking statute was made clear in President Zedillo's message to the Senate when the Bill was introduced:

> The formulation of legislation, by a foreign country, purporting to restrict the acts of trade taking place outside its territory and which are not executed by its own nationals, constitutes a clear example of a claim of extraterritoriality which is contrary to our legal tradition, and which has always been respectful of the fundamental principles of international law.

See "Excerpts from Legislative History," Act to Protect Trade and Investment, *reprinted in* 36 I.L.M. 133, 148-49 (1997).

290. The Mexican and EU statutes are the first such blocking measures to be issued by those respective jurisdictions. Both the Mexican and EU blocking measures were specifically targeted at the U.S. Helms-Burton (LIBERTAD) Act, but are broadly written so they may be invoked with regard to any similar trade measures that are issued by the U.S. or other countries simply by adding those measures to the appropriate annex or schedule. (The EU Annex, in fact, includes the U.S. Cuban Democracy Act of 1996 and the Iran and Libya Sanctions Act of 1996 in addition to the Helms-Burton Act in its list of offensive trade measures.) This is the same approach as that employed in Canada's FEMA, and reflects the strong influence the Canadian legislation had on the drafting of these statutes. Like FEMA, the Mexican and EU blocking statutes require reporting of any direction to comply with the offensive foreign trade laws (Mexico, Art. 3; EU, Art. 2), prohibit the production of documents or information to foreign enforcement efforts (Mexico, Art. 2; EU, Art. 5), deny recognition to any foreign judgments that are rendered (Mexico, Art. 4; EU, Art. 4), and authorize the "clawback" of any awards paid outside their respective jurisdictions (Mexico, Arts. 5 & 6; EU, Art. 6). *See* Act to Protect Trade and Investment; Eur. Council Reg. 2271/96.

Interestingly, the Mexican statute also authorizes sanctioning, with fines, against "foreign persons" outside of Mexico who violate the Mexican blocking measure, if the foreign persons' actions have substantial "effects" within Mexico, not unlike the United States own antiboycott laws. *See* Act to Protect Trade and Investment, art. 9; *supra* notes 258-63 and accompanying text. Sanctions for violating the EU Regulations are left up to the individual member states, but must be "effective, proportional and dissuasive." *See* Eur. Council Reg. 2271/96, art. 9.

291. *See generally* Protection of Trading Interests Act, 1980, ch. 11 (Eng.) *reprinted at* 21 I.L.M. 834 (1980).

292. *See* FEMA. However, perhaps the first "blocking measure" was passed by the province of Ontario, with the Business Records Protection Act of 1947,

The passage of the Protection of Trading Interests Act was the U.K.'s response to the extraterritorial application of the antitrust laws[293] to sanction activities performed in the United Kingdom, but which purportedly had "effects"[294] within the United States.[295] According to the U.K. Secretary of State for Trade, it was an effort to "reinforce the defenses in the United Kingdom against attempts by other countries (*i.e.*, the United States) to enforce their economic and commercial policies unilaterally

---

R.S.O., ch. B.19 (1947) (Ontario). The Ontario provision was passed in response to subpoenas issued by a New York grand jury investigating potential antitrust violations in the paper industry. *See generally In re* Grand Jury *Subpoenas Duces Tecum* Addressed to Canadian Int'l Paper Co. et al., 72 F. Supp. 1013 (S.D.N.Y. 1947).

293. The 1980 Act is actually an expansion of earlier legislation, the Shipping Contracts and Commercial Documents Act, 1964, ch. 87 (Eng.), and thus is an example of the "second stage" in the development of blocking measures. The 1964 Act was, in turn, typical of the "first stage" in the development of blocking statutes. It was aimed at protecting the historic English shipping cartels, called "conferences," from suits challenging activities performed in the United Kingdom based upon an extraterritorial application of U.S. antitrust law in accord with the "effects doctrine" developed in the *Alcoa* case. U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

The decisions in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), and Mannington Mills, Inc. v. Congoleum, 595 F.2d. 1287 (3d Cir. 1979), epitomized the "balancing" approach of weighing the foreign and U.S. interests in any extraterritorial antitrust action, which characterized an uneasy truce that lasted until the case of *In re* Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980), 480 F. Supp. 1138 (N.D. Ill. 1979), prompted the 1980 Act. *See generally*, A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981). For the current state of the law on the extraterritorial application of the U.S. antitrust laws, see also *Hartford Fire Ins.*, 509 U.S. 764.

294. The "effects principle" is one of the internationally recognized bases for a state exercising jurisdiction over "conduct outside its territory that has or is intended to have substantial effect within its territory." As is the case with all exercises of extraterritorial jurisdiction, however, it is subject to a reasonableness limitation. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, §§ 402(1)(c) & 403.

295. In a complex series of actions, Westinghouse was sued for $2 billion for nonperformance of various supply contracts for uranium, and both Congress and the Justice Department began investigations. Westinghouse in turn sued a British company, Rio Tinto Zinc, alleging it was part of an international uranium cartel and sought treble damages of $6 billion. *See In re* Westinghouse Elect. Corp. Uranium Contract Litigation, 3 WLR 492 (C.A. 1977); Rio Tinto Zinc Corp. v. Westinghouse Elect. Corp, 1978 App. Case. 547 (H.L. 1978). The foreign uranium producers were largely unable to sell in the U.S. market because of import restrictions. RTZ in opposing discovery of documents pertaining to its activities outside the U.S. market was unable to rely upon the 1964 Act because of an inability to show a direct infringement of British "jurisdiction," but was nevertheless successful is establishing that compliance with various U.S. sweeping discovery requests would be a violation of British sovereignty. *See id.* The suits were eventually settled.

against us"[296] by blocking the production of documents,[297] the recognition of judgments,[298] or the collection of awards[299] in support of U.S. governmental or private antitrust actions.[300]

Even as the U.S. government itself was becoming more sensitive to foreign objections regarding extraterritoriality,[301] it was the growing number of private civil suits for treble damages that caused the greatest concern and prompted the Protecting of Trading Interests Act. In an exchange of diplomatic notes concerning the Protection of Trading Interests Act, the United Kingdom explained that the measure was not "anti-American,"[302] but rather a defensive step to protect British interests on matters that were not amenable to resolution on an intergovernmental basis.[303]

> [M]ultiple damage judgments of other states, which are regarded by Her Majesty's Government as penal, are non-enforceable by the U.K. courts, just as are other judgments of a penal character . . . Her Majesty's Government's main objections to the private treble damage action, which is . . . a crucial aspect of U.S. Anti-Trust enforcement, are that it provides an incentive to private parties to act as "private Attorneys-General," [and] that such a system of

296. 973 PARL. DEB., H.C. (5th ser.) 1533 (1979).

297. *See* Protection of Trading Interests Act, 1980, ch. 11, art. 2 (Eng.).

298. *See id.* art. 5.

299. *See id.* arts. 6 & 7. Moreover, this includes the ability for British defendants to "clawback" awards collected outside of the United Kingdom. *See infra* note 306 and accompanying text.

300. Similar actions were taken by the various governments where other uranium cartel members were located. *See supra* notes 287 & 295.

301. For example, the 1977 enforcement guidelines acknowledge the importance of considering foreign interests. *See generally* U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

302. In the Parliamentary debates over the blocking measure, it was stated that the "bill is not anti-American, or indeed anti-anybody . . . . It is designed to protect and not to provoke. . . . It is a legitimate exercise of our own sovereignty." *See* 973 PARL. DEB., H.C. (5th ser.) 1538, 1546 (1979).

303. It should be noted that it is not just the United States which pursues an "extraterritorial" antitrust or "competition law" policy. The EU and Germany both make use of the "effects" principle in some form to extend the reach of their competition laws. *See, e.g.*, Case 89/95, Wood Pulp Case, 1988 E.C.R. 5193; Kammergericht, Decisions I and II, WuW/E OLG 2411 (1980) (Bayer/Firestone v. Bundeskartellamt); Kammergericht, Decision, WuW/E OLG 3051 (1983) (Morris/Rothmans v. Bundeskartellamt). *See also* David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983). *But cf.* Joseph P. Griffin, *E.C. and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 378-79 (1994) (arguing that it is the nature of "implementation" of conduct within the EU, rather than the "effects" of foreign conduct, that is determinative). Only the United States, however, uses private treble damage lawsuits to augment governmental enforcement of the law in this area.

> enforcement is inappropriate and in many respects objectionable in its application to international trade.[304]

Additional concerns were raised regarding the application of U.S. long-arm personal jurisdiction to foreign nationals outside the United States, the prospect of default judgments, and "wide and prejudicial discovery procedures" in private suits where the "potential penalties can be enormous and totally out of proportion to the alleged mischief, particularly where the activities concerned were entirely legal where they occurred."[305] It was in this context that the techniques of earlier blocking measures, which were largely aimed at frustrating discovery, were augmented in the Protection of Trading Interests Act with the new provisions denying recognition to foreign judgments and permitting the local defendants to recover or "clawback" treble damage awards collected outside of the United Kingdom.[306] This also explains some of the hostility currently being shown to Title III of the Helms-Burton Act, the provision which authorizes private treble damages actions against traffickers in Cuban expropriated property.[307]

Interestingly, no Orders were immediately issued actually invoking the U.K. Protection of Trading Interests Act, the diplomatic point having been made with the passage of the

---

304. The Note further elaborated:

> Her Majesty's Government believe that two basically undesirable consequences follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard to the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.

See United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill, U.K. Diplomatic Note No. 225, Nov. 9, 1979, *reprinted in* 21 I.L.M. 847, 848-49 (1982).

305. *Id.* at 849.

306. The United Kingdom rejected arguments that at least the "compensatory" portion of the damage award should be enforceable and exempt from any subsequent "clawback," based upon their broader objection to the use of *any* private treble damages action to enforce "public" economic policy.

> Bearing in mind the objectionable features which appear to Her Majesty's Government to arise from the impact of private treble damage actions on international trade, as well as the general principle [of not enforcing penal awards], Her Majesty's Government sees no justification for proposing that there should be a specific provision enabling U.K. courts to be used to enforce a part of such judgments.

Id.

307. *See supra* notes 287, 291 & 295 and accompanying text.

blocking and clawback measure.[308] Orders under the U.K.'s Protection of Trading Interests Act, however, have subsequently been issued that are directed at legislation[309] in both the United States[310] and Australia.[311] There are now approximately twenty jurisdictions with some form of blocking legislation in place in their national laws.[312] These remain potent tools despite numerous bilateral[313] and international[314] efforts intended to minimize conflict of laws issues through increased government to government cooperation and information sharing. Even without blocking measures, however, some unusual forms of government intervention have been used to periodically frustrate the extraterritorial application of economic sanctions and trade controls. Of course, inextricably intertwined with these developments were the various cases and enforcement actions that provided much of the impetus for blocking legislation.

---

308. During the debate of the bill, Lord Hackney remarked that "nobody really expects the provisions of the bill to be used;" Lord Lloyd of Kilgerran added that "in so far as British industry is concerned, [the clawback] has no effect whatsoever from the view of realistic commercial sense." 405 PARL. DEB., H.L. (5th ser.) 926, 934, 943 (1980).

309. The U.K. government has been more reluctant to issue Orders designating specific pieces of foreign legislation as objectionable under the Act than it has been in forbidding particular actions in individual cases and, in essence, administratively enjoining cooperation with foreign litigation under Article 2(4) of the Act. It has used this authority in approximately fifteen instances since the Act was passed. *See* KARL M. MEESSEN, EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 161 (1996).

310. *See, e.g.*, Protection of Trading Interests (U.S. Reexport Control) Order, 1982, S.I. 1982, No. 885 (U.K.); Protection of Trading Interests (U.S. Antitrust Measures) Order, 1983, S.I. 1983, No. 900 (U.K.); Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order, 1992, S.I. 1992, No. 2449 (U.K.); Extraterritorial U.S. Legislation (Sanctions against Cuba, Iran, and Libya)(Protection of Trading Interests) Order, 1996, S.I. 1996, No. 3171 (U.K.). This last Order was jointly issued under Eur. Council Reg. 2271/96.

311. *See* Protection of Trading Interests (Australian Trade Practices) Order, 1988, S.I. 1988, No. 569 (U.K.).

312. *See* MEESSEN, *supra* note 309, at 157.

313. *See, e.g.*, Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., *reprinted in* 23 I.L.M. 275 (1984); Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 T.I.A.S. 10,365; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G. 27 U.S.T. 1956.

314. *See, e.g.*, COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (CIME), 1984 REVIEW OF THE OECD DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (1984); Council Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, *reprinted in* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW ENFORCEMENT (1984).

C. *Litigation and Enforcement*

Certainly, America Online in the United States and America Online Canada both will want to avoid running afoul of either the U.S. controls or the Canadian blocking statute if at all possible. Given that they are diametrically opposed, however, strict and complete compliance under both sets of laws may not be feasible[315] despite the substantial penalties attached to violating these statutes and regulations.[316] The companies' decisions as to what to do are rendered even more difficult because the outcome in cases dealing with extraterritorial controls appears to differ depending upon where the action is brought.

1. On the National Level

The classic illustration of this problem from the perspective of the United States are the cases that arose out of the Russian Trans-Siberian Pipeline dispute in 1982. Dresser Industries in the United States had a French subsidiary, which in turn had a French-based customer[317] who was going to buy locally produced products[318] that were going to be used in the Russian pipeline. When the Reagan Administration unilaterally[319] expanded the trade controls[320] on dealing with the Soviet Union as a result of

---

315. This is the type of case that should establish the "true conflict" of which Justice Souter spoke in *Hartford Fire Ins.*, 509 U.S. at 798-99 (finding no true conflict between U.S. and U.K. law in the facts of the case).

316. *See supra* note 8.

317. The customer was a recently nationalized former U.S. holding company, Creusoit-Loire, which also became embroiled in the same controversy based upon its status as a continuing licensee of the former U.S. parent and as a recipient of the "direct product" of U.S. origin technology. *See infra* note 325. The other contract party was V/O Machinoimport, a Soviet Foreign Trade Organization.

318. The products involved were 21 French built gas compressors, based upon U.S. technology. Thus, they were "controlled" from the U.S. perspective based both upon Dresser's status as a subsidiary of a U.S. company, and because of the inclusion of U.S. licensed technology. *See infra* notes 322-24 and accompanying text.

319. Facing a lack of broad support for sanctions on Poland and the Soviet Union, Defense Secretary Caspar Weinberger summed up the U.S. position by stating that the Polish situation was "one of those times when, in order to assert leadership and strengthen security, unilateral initiatives to implement sanctions become necessary." Bernard Gwertzman, *Debate on Curbs Against Moscow to Go to Reagan*, N.Y. TIMES, Feb. 21, 1982, at 1.

320. The sanctions at issue involved trade controls on oil and gas exploration and product equipment. *See* Statement on U.S. Measures Taken Against the Soviet Union Concerning Its Involvement in Poland, PUB. PAPERS: RONALD REAGAN 1209 (Dec. 29, 1981) (placing into effect the trade controls);

its role in the imposition of martial law in Poland,[321] the U.S. parent told Dresser (France) S.A. that they would be unable to fulfill the pre-existing contracts with the French customer. The expanded U.S. trade controls specifically imposed limitations on transactions related to the pipeline by foreign entities "owned or controlled"[322] by U.S. residents, nationals, or companies, as well as on transactions by licensees or distributors who were involved in the re-export of U.S. origin goods or technology or their direct products.[323] Therefore, the transactions were clearly proscribed from the U.S. perspective.

The French government disagreed with the U.S. policy and sanctions, and especially with the application of the U.S. trade controls to transactions between a French company and a French customer involving goods manufactured in France. In order to ensure that the goods were delivered, the French government "requisitioned" the goods and compelled delivery as originally contracted.[324] The U.S. government considered this a breach of the controls and the direction the French subsidiary had received, and the Commerce Department issued an ex parte Temporary Denial Order against the subsidiary, blacklisting Dresser (France).[325] Four other foreign companies in different countries were similarly blacklisted, based upon their refusal to comply with the extraterritorial U.S. Pipeline controls.[326]

Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., 47 Fed. Reg. 141 (1982) (spelling out the trade controls).

321. *See* Statement of the President on the Extension of U.S. Sanctions, 18 PUB. PAPERS: RONALD REAGAN 798 (June 18, 1982) (extending sanctions because of martial law); Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (1982) (explicating the U.S. reaction to martial law).

322. This definition reflects the same expansive view found under the TWEA of who is obligated to follow U.S. controls. *See supra* note 141 and accompanying text.

323. This reflects the unique U.S. assertion of continuing jurisdiction over the re-export of U.S. origin goods, parts, or technology on the basis of something akin to a "nationality" principle for the items involved. *See* 15 C.F.R. § 385.2(d) (1982) (asserting jurisdiction); 47 Fed. Reg. 27,250 (1982). *See also supra* note 178 and accompanying text (explaining U.S. jurisdiction policy).

324. *See* Dresser (France) S.A. Decision and Order of Assistant Secretary for Trade Administration, 47 Fed. Reg. 51,463 (1982) (factual background).

325. *See* 47 Fed. Reg. 38,170 (1982). A holding company which had recently been nationalized was also denied its export privileges at the same time, based upon its continuing obligations as a licensee of its former U.S. parent. *See* 47 Fed. Reg. 38,169 (1982) (temporarily denying the expert privileges).

326. The four were Nuovo Pignone of Italy, 47 Fed. Reg. 39,709 (1982), John Brown Engineering of the United Kingdom, 47 Fed. Reg. 40,205 (1982), AEG-Kanis and Mannesmann Anlagenbau of West Germany, 47 Fed. Reg. 44,603 & 44,604 (1982).

As with the *Delft* case some years later,[327] the U.S. government resorted to an ex parte Temporary Denial Order to accomplish the blacklisting of Dresser (France). The U.S. government justified its choice on the grounds that the Temporary Denial Order was a quick and timely measure aimed at preventing future violations with further deliveries. Despite having virtually the same practical effect upon Dresser's ability to conduct business, the Temporary Denial Order was not intended as a substitute for more extensive administrative proceedings leading to a formal Denial Order retroactively punishing Dresser for the deliveries demanded by the French government requisition.[328] Dresser had anticipated the Commerce Department action and filed suit in the United States in an attempt to enjoin the entry of the Temporary Denial Order, but was unsuccessful.[329] It also sought relief after the Order was entered, but was again unsuccessful.[330] Attempts to appeal the Temporary Denial Order through the administrative process were also unavailing,[331] as was yet another resort to the courts.[332] The U.S. administrative

---

327. *See supra* notes 185-201 and accompanying text (describing the *Delft* case).

328. In denying Dresser's subsequent administrative appeal of the entry of the Temporary Denial Order (TDO), the Commerce Department Assistant Secretary for Trade Administration stated:

> [Dresser] charges that the TDO was 'punitive'. Throughout its brief, appellant has premised much of its argument on the basis of the TDO being 'punitive' in nature. Precisely what is meant by 'punitive' is never explained by appellant, but appellant apparently means the TDO was issued to punish it for the delivery of the three compressors under its Soviet contract rather than to forestall future violations or aid in the investigation. Because I determine that this TDO was properly designed to forestall future violations and fulfill its intended role . . . appellant's 'punitive' argument fails . . . . *The TDO was not designed to punish appellant, indeed no substantive violations have yet been proven.* There is no question, and the Department does not dispute, that appellant may well suffer damage as a result of the imposition of the TDO. Whether damage may be suffered, however, is not the pertinent inquiry in determining whether the TDO was properly issued. All TDO's by their nature can impose some injury on their recipients as an unavoidable consequence of their purpose which is to prevent future violations and facilitate an ongoing investigation.

Dresser (France) S.A. Decision and Order of Assistant Secretary for Trade Administration, 47 Fed. Reg. 51,463 (1982) (emphasis added).

329. Dresser Industries Inc. v. Baldrige, No. 82-2385 (D.D.C. Aug. 25, 1982) (order delaying temporary restraining order).

330. Dresser Industries Inc. v. Baldrige, 549 F. Supp. 108 (D.D.C. 1982).

331. *See* In the Matter of Dresser (France) S.A., *reprinted in* 18 INT'L TRADE REP. U.S. EXPORT WKLY 25 (1982); Dresser (France) S.A. Decision and Order of Assistant Secretary for Trade Administration, 47 Fed. Reg. 51,463 (1982).

332. *Dresser Industries*, No. 82-2385 (order supporting temporary denial order).

and judicial processes upheld the U.S. controls, and rejected Dresser's arguments regarding "foreign sovereign compulsion"[333] or violations of international law due to the reach of the controls.[334]

The U.S. legal position has been much criticized. As one commentator wrote:

> In the Dresser case, it seems apparent that neither of the traditional principles of jurisdiction—territoriality and nationality—justified the extension of U.S. export regulations to Dresser (France). Dresser (France) had no operation within the United States; and although it was owned by a U.S. parent company, it was incorporated in France and therefore, under recognized legal principles, was a national of that country. [While o]ne could argue that jurisdiction was based on a considerably expanded notion of the 'effects doctrine' inasmuch as continued exports to the Soviet Union by Dresser (France) would affect U.S. foreign policy objectives . . . the Restatement of Foreign Relations Law . . . explicitly states that such effects must be direct and substantial. It is doubtful if the Dresser 'effects' met either criterion under the standards heretofore applied.[335]

Ultimately, the case was mooted when the Temporary Denial Order was vacated[336] as a result of the sanctions themselves

---

333. *Id.* The court rejected Dresser's last attempt at injunctive relief, in part, by stating, "[t]his court is not convinced [by their argument concerning foreign sovereign compulsion] that the plaintiffs have made a sufficient showing of likelihood of success on the merits to warrant granting this extraordinary preliminary relief." *Id.* at 300.

In its administrative appeals, the foreign sovereign compulsion defense was rejected as irrelevant to the TDO process:

> [Dresser's] argument that it is being impermissibly punished for acts compelled by the French government, fails. . . . [T]his case involves the issuance of a TDO to permit completion of the investigation and to forestall any future regulatory violations. *This case does not involve the imposition of penalties on appellant for conduct done under compulsion of the French government in violation of U.S. law.* Accordingly, the defense of foreign compulsion is inapplicable (emphasis added).

See Dresser (France) S.A. Decision and Order of Assistant Secretary for Trade Administration, 47 Fed. Reg. 51,463 (1982).

334. The Assistant Secretary of Commerce, in rejecting Dresser's administrative appeal, stated that allegations that the trade controls were contrary to accepted principle of international law "[are] not within the purview of my jurisdiction." Decision and Order of Assistant Secretary for Trade Administration, 47 Fed. Reg. 51,467 (1982).

335. *See* Monroe Leigh, *Export Administration Act - Extraterritorial Jurisdiction Over Foreign Incorporated Subsidiaries of U.S. Parent Companies Upheld in United States Court*, 77 AM. J. INT'L L. 626, 627 (1983).

336. The Orders denying all the other parties, who had been similarly sanctioned for violating the Pipeline controls, *see supra* notes 325-26, were vacated at the same time. *See* 47 Fed. Reg. 52,490 (1982); 47 Fed. Reg. 52,480 (1982); 47 Fed. Reg. 52,491 (1982).

being lifted in late 1982,[337] in response to the overwhelming opposition to their unilateral extraterritorial application from industry and from concerned governments abroad.[338]

Nevertheless, the U.S. government's ability to invoke unilateral and extraterritorial sanctions, and to punish those who ignored such measures either at home or abroad with its blacklisting tools, was upheld. Thus, based upon Dresser's experiences, America Online or America Online Canada would

---

337. *See* Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (1982).

338. The extension of the U.S. trade controls to foreign subsidiaries in June 1982, caused an immediate outcry. On the same day the regulations appeared in the Federal Register, the European Economic Community (now the EU) decried the U.S. actions as violating international law in a lengthy memorandum of law. It concluded by stating:

> The European Community considers that the Amendments to the Export Administration Regulations . . . are unlawful since they cannot be validly based upon any of the generally accepted bases of jurisdiction in international law. Moreover, insofar as these Amendments tend to enlist companies whose main ties are to the E.C. Member States for purposes of American trade policy vis-á-vis the U.S.S.R., they constitute an unacceptable interference in the independent commercial policy of the E.C. Comparable measures by third states have been rejected by the U.S. in the past . . . . For these reasons, the European Community calls upon the U.S. authorities to withdraw these measures.

See Legal Service of the Commission of the European Communities, Economic Communities' Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., *reprinted in* 21 I.L.M. 891, 904 (1982). This was followed by an *Aide-Memoire* to the U.S. on July 14, 1982, expressing the E.C.'s "strongest reservations." *See* LOWENFELD, *supra* note 207, at DS-307.

The United Kingdom issued an Order triggering its blocking statute, the Protection of Trading Interests Act of 1980, and followed with its own statement in August 1982, which asserted that the U.S. Pipeline controls "attempt to interfere with existing contracts and . . . [are] an unacceptable extension of American extraterritorial jurisdiction in a way which is repugnant in international law. . . . I would hope that . . . our approach would make the American Administration think again." *See* U.K. Statement and Order Concerning the American Export Embargo with Regard to the Soviet Gas Pipeline, Aug. 2, 1982, *reprinted in* 21 I.L.M. 851 (1982). The "approach" the United Kingdom took was to invoke the blocking measure only as it pertained to the U.K. companies (*e.g.*, John Brown Engineering) being sanctioned by the U.S. temporary denial orders. *See supra* note 326. France, West Germany, and Italy also separately denounced the U.S. actions. *See* LOWENFELD, *supra* note 207, at 282.

The pipeline sanctions were also discussed in a number of different fora including, the U.N. General Assembly, NATO Foreign Ministers meeting, and the U.S. Congress, where a bill was approved by the House Foreign Affairs Committee, which would have required the termination of the controls. *See id* at 303. President Reagan announced the repeal of the pipeline sanctions on the day after General Secretary Leonid Brezhnev died. *See* Radio Address to the Nation on East-West Trade Relations and the Soviet Pipeline Sanctions, 2 PUB. PAPERS: RONALD REAGAN 1464, 1465 (Nov. 14, 1982) (repealing the sanctions).

probably not want to be forced to challenge or defend themselves against the U.S. controls in U.S. fora.

However, the foreign cases produced a different result and show that choosing to comply with the extraterritorial application of the U.S. laws is also fraught with difficulty. In another case arising out of the pipeline dispute, Compagnie Européenne des Pétroles, S.A. v. Sensor Nederland, B.V.,[339] a Dutch company was sued in the Netherlands for specific performance of a contract to deliver goods covered by the U.S. trade controls. Compagnie Européenne des Pétroles (CEP) contracted with Sensor prior to the U.S. imposition of the pipeline sanctions for the delivery of "geophones," geological sensing equipment, which would be used in connection with the construction of the Soviet pipeline. When the U.S. sanctions were expanded in June 1982, Sensor as a wholly owned subsidiary of Geosource Inc. in Texas, informed CEP that it was precluded from completing the contract.[340]

CEP insisted the contract be completed, and the court issued an order to compel delivery with a penalty of 10,000 Nfls per day fine for nonperformance.[341] The court rejected the argument that the extraterritorial reach of the U.S. trade controls compelled the Dutch defendant to breach its contract, and that it could therefore rely upon the doctrine of force majeure[342] to excuse its obligations. The court stated that under general principles of international law, a state may not exercise jurisdiction with respect to acts performed outside its borders unless permitted by certain exceptions,[343] which the court found to be inapplicable. In particular, the "owned or controlled" standard used in the U.S. controls was a "dubious" application of the "nationality principle" under international law and additionally was contrary to the Friendship, Commerce, and Navigation Treaty between the Netherlands and the United States, which provided for mutual recognition of companies established under each other's laws.[344] Moreover, with regard to the "effects principle" the court stated

---

339. Case 82/716, 1982 Rechtspraak van de Week 167 (Dist. Ct., Neth.), *reprinted in* 22 I.L.M. 66 (1983).

340. *See id.* at 68.

341. *See id.* at 74.

342. Sensor Nederland wished to invoke Article 74 of the Uniform Act governing the International Sale of Goods. *See id.* at 69.

343. *See id.* at 72.

344. Treaty of Friendship, Commerce, and Navigation, Mar. 27, 1956, U.S.-Neth., art. XXIII(3), 8 U.S.T. 2043.

This echoes one of the criticisms of the U.S. position in the Dresser case, that in applying its controls extraterritorially the U.S. government ignored Dresser (France) status as a French juridical entity contrary to Article XIV(5) of the Convention of Establishment, Dec. 21, 1960, U.S.-Fr., 11 U.S.T. 2398. *See* Leigh, *supra* note 335, at 627 (criticizing the U.S. position).

that it could not "be seen how the export to Russia of goods not originating in the United States by a non-U.S. exporter could have any direct and illicit effects within the United States. Via this route too, therefore, the jurisdiction rule cannot be brought into compatibility with international law."[345] Lacking any valid basis for the U.S. assertion of extraterritorial jurisdiction, the Dutch defendant's refusal was not really a compulsory act and therefore Sensor had no defense to its nonperformance. As with *Dresser*, it took the lifting of the sanctions to resolve the case as a practical matter. Thus, America Online or America Online Canada is likely to find foreign fora as hostile to those who choose to ignore local laws as the United States is with respect to its own local rules and regulations. This situation can only be exacerbated when the local laws, such as those in Canada, include blocking measures specifically aimed at preventing the extraterritorial application of the U.S. law.

The extent of the opposition abroad, and the risks to businesses caught in the middle of competing governmental policies and requirements, is illustrated by an earlier, and more renowned, case involving the Detroit-based Freuhauf Corporation. In the mid 1960s, Freuhauf held two-thirds of the shares in Freuhauf-France, S.A., with the remainder of the shares being held by French interests.[346] One of its major customers, Automobiles Berliet, S.A., contracted with Freuhauf-France for a large number of Freuhauf semi-trailers. Subsequent to entering into the contract, Freuhauf-France learned that the semi-trailers, together with truck tractors manufactured by Berliet, would eventually be delivered to China.[347] The proposed delivery to China ran afoul of a now largely defunct OFAC embargo program embodied in the Transactions Control Regulations,[348] and the

345. *See supra* note 339 and accompanying text.

346. Five of the directors on Freuhauf-France's board were appointed by Freuhauf in the United States (but were actually represented by a single American expatriate under a permanent proxy) and three French directors were appointed by the minority French shareholders. One of these three French Directors, Raoul Massardy, also served as the President and General Manager of Freuhauf-France. *See* LOWENFELD, *supra* note 207, at 92.

347. Although Freuhauf-France knew that Automobiles Berliet eventually intended to export the trailers, no specific destination had been disclosed at the time of contracting. *See id.*

348. The Transaction Control Regulations (TCR) were issued under the authority of TWEA, like the FACR and subsequent CACR, and appeared at 31 C.F.R. §§ 505.01-505.60 (1954). *See* Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise Between Foreign Countries, 18 Fed. Reg. 4291 (1953). They were issued in the early 1950s, at a time when the commodity focused East-West trade controls administered by the Commerce Department did not reach re-exports of non-U.S. origin products and technology. Accordingly, the role of the TCR was to supplement the Commerce controls with a

U.S. government directed Freuhauf to rescind the contract or face penalties for violating TWEA.

Automobiles Berliet, not unlike CEP in the Dutch case, refused to release the subsidiary from its contract and threatened suit. Raoul Massardy, the President of Freuhauf-France resigned, and with the other minority French directors, petitioned the local French courts for relief.[349] A judicial administrator was appointed to temporarily take over management of Freuhauf-France for three months and perform the contract, and the Court of Appeals of Paris subsequently affirmed this extraordinary intervention in the management of the French Freuhauf subsidiary.[350] This appears to have been an application of the French doctrine of *abus de droit* (abuse of a legal right), where the controlling (foreign) management's desire to avoid liability under the TWEA lost out to concerns over potentially drastic consequences for Freuhauf-France itself if the contract were canceled.[351] The Court of Appeals specifically noted that contract cancellation would:

> definitely ruin the financial equilibrium and credit of Freuhauf-France and bring about its disappearance and laying off of more than 600 workers, that these circumstances establish sufficiently the emergency and the justification of the conservatory measure taken . . . [which was] governed by social interests in preference to the personal interests of certain members [of the Board of Directors].[352]

Underlying this approach was a rejection of the U.S. expansion of the "nationality" principle to reach Freuhauf-France as a "controlled" foreign subsidiary, and a concern for maintaining French "sovereignty" in the face of an extraterritorial U.S.

---

requirement to license trade in strategic, non-U.S. origin goods being conducted by "persons within the United States," as that term was defined in the FACR, *see* 31 C.F.R. § 505.20 (1997) (referring to the definition in § 500.300), to specified Communist countries, which then included China. *See* 31 C.F.R. §505.10 (1997).

The interesting "trick" within the regulations was that "persons *within* the United States" actually includes *foreign* business entities that are "owned or controlled" by U.S. residents, nationals, or companies. *See* 31 C.F.R. § 500.330(a)(4). Accordingly, the TCR reached Freuhauf's "controlled" subsidiary in France!

The TCR were largely removed with the demise of COCOM and the end of the Cold War. *See* 60 Fed. Reg. 34,143 (1995).

349. *See* LOWENFELD, *supra* note 207, at 92-93.

350. *See* CA Paris, 14e ch., May 22, 1965, J.C.P. 1965, II 14274 (Freuhauf Corporation v. Massardy) (upholding the decision of the judicial administrator).

351. *See* William Lawrence Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans; Reflections on* Freuhauf v. Massardy, 83 HARV. L. REV. 579, 581-82 (1970).

352. *See Freuhauf*, J.C.P. 1965, II 14274.

policy.[353] Interestingly, with the appointment of the judicial administrator the United States no longer deemed Freuhauf-France to be under U.S. "control" and declined to pursue the matter further or impose any sanctions for completing the deliveries.[354] Thus, as in the Dresser case, the sanctions were effectively circumvented, but contrary to what occurred in the pipeline dispute, no retaliatory action was taken by the United States and Freuhauf was not blacklisted.

2. On the International Level

Private litigation in various national courts has not been the only response to the extraterritorial application of the U.S. controls and blacklists, and it is certainly not the most efficient vehicle for resolving what is primarily a conflict in policies between different governments. In fact, it is fair to assume that private litigation over these issues is merely a symptom, an indication that the governments concerned are not communicating with each other about their conflicting policies, or that their dialogues have broken down.

At the international level, it is not uncommon for governments to resist the extraterritorial application of the U.S. blacklists and controls. Such resistance aims not so much to espouse the interests of the other countries' nationals and companies, although that is certainly part of the motivation, as to preserve those countries' interests in notions of state sovereignty and jurisdiction. This resistance manifests itself in a variety of government-to-government communications ranging from private diplomatic communications, to public statements or debate in both domestic and international fora, to the passage of blocking legislation, and the pursuit of international remedies where available. The intergovernmental dialogue can be conducted on many levels simultaneously.

One example of this process might be the Canadian concerns over the extraterritorial application of the U.S. TWEA, especially with regard to China, during the late 1950s and early 1960s, roughly the same general time period as the Freuhauf matter in France. The discussions during this period, internally and between the concerned governments, were sometimes heated, but did not result in litigation or enforcement actions in either

353. *See* LOWENFELD, *supra* note 207, at 99-100 (summarizing French diplomatic notes sent to Washington protesting the U.S. direction to Freuhauf).

354. The U.S. government also decided to overlook the wording of the regulatory requirement, which extends the controls to those foreign business entities that were "owned" by U.S. nationals or companies in addition to those that were "controlled" by them. *See id.* at 100.

country, unlike the incident in France. Continued dissatisfaction with the U.S. approach to extraterritoriality has, of course, led to strong Canadian blocking measures and an increased prospect for direct conflict. So, perhaps it may just be that Canadian tempers remain cooler longer than tempers in some other jurisdictions.[355]

Although the U.S. sanctions on China under the TWEA were imposed in 1950 in connection with the Korean War,[356] their extraterritorial application in Canada did not become a public issue until 1957-58, when it became apparent during the course of prominent studies by a Royal Commission that "foreign control" led to significantly different conduct by Canadian companies in a number of areas.[357] One of those areas was trade with China, which was restricted by the U.S. FACR.[358] In the succeeding years there were a number of prominent incidents in which U.S.-controlled Canadian companies refused business with China based upon the extraterritorial application of the U.S. requirements, such as Ford's 1958 refusal to permit its Canadian subsidiary to sell 1000 cars to China. The Ford incident produced an immediate reaction. The Canadian Minister of Trade and Commerce, Harold Winch, declared in Parliament that:

> [T]he government must now make it explicitly and implicitly clear that it is not going to be prone to deference to the United States. Deference to our powerful neighbor to the south must not give way to subservience either in the international field or with regard to our own economic policies . . . . [T]his is our country and no matter where companies are owned which are operating in our country, on our natural resources, and on the wealth produced by our people, it must be made clear, by legislation if necessary, that we in Canada sell where we desire to sell.[359]

The Ford incident was sufficiently prominent that it was a topic for discussion later that year when President Eisenhower

---

355. Also, for many years the Canadian government maintained a general policy of not intervening in disputes between suppliers, dealers, and customers in their business arrangements. *See* Corcoran, *supra* note 266, at 198-201.

356. *See supra* note 62 and accompanying text.

357. The areas in which the Commission found controlled subsidiaries behaved differently included the issuance of securities, personnel policies, annual reporting practices, research activities, charitable contributions, and commercial policies regarding domestic sourcing and export sales. *See* Corcoran, *supra* note 266, at 189.

358. However, as many American businesses simply combined their Canadian subsidiaries' export licensing and trade controls compliance operations into their own operations in the U.S., there was less general "visibility" in Canada as to what was being done in the name of the Canadian companies. *See id.* at 189-92.

359. Speech of Mr. Winch, *House of Commons Debates*, May 19, 1958, I, at 196 (*quoted in* Concoran, *supra* note 266, at 194-95).

met with Prime Minister Diefenbaker, and an agreement was reached to establish formal consultations on such issues.

> The Canadian and United States governments have given consideration to situations where the export policies and laws of the two countries may not be in complete harmony. It has been agreed that in these cases there will be full consultation between the two governments with a view to finding through appropriate procedures satisfactory solutions to concrete problems as they arise.[360]

This case by case approach did result in expedited license approvals in some situations, and an intergovernmental study group was formed to promote even greater cooperation.[361] Refusals continued to occur, however, although it was often difficult to determine if a particular refusal to trade was solely based upon the application of the U.S. FACR or reflected some other business consideration or requirement.[362] Similar refusals by U.S.-controlled Canadian firms were also occurring with regard to the Soviet Union, under the extraterritorial application of the U.S. EAA and regulations, which further added to the Canadian government's concerns.[363]

One result of the Canadian-U.S. dialogue during this period was an increased sensitivity in the United States to other nations' concerns about the extraterritorial application of U.S. laws. This led to the inclusion of a limitation on the extraterritorial application of the Cuban embargo regulations, with what some call a "Canadian exception,"[364] when they were first issued in 1963.[365]

The CACR employs broad general prohibitions, and reaches out to impose its obligations upon all "persons subject to the jurisdiction of the United States," in the familiar pattern of the

---

360. Statement on Export Polices, DEP'T ST. BULL., July 1958, at 209.

361. *See* Communiqué of the U.S. Canadian Joint Committee on Trade and Economic Affairs, DEP'T ST. BULL., Jan. 1959, at 128, 130.

362. Automobile, tractors, and related equipment were refused, for various reasons, in subsequent inquiries by the Chinese. For example, Massey-Ferguson's refusals to sell 400 tractors to China in 1961 was attributed to a lack of production capacity. Parts suppliers' refusals to sell to China in 1963, 1964, and 1965 were similarly attributed to mixed motives. *See* Corcoran, *supra* note 266, at 200-201. Many Canadian nationalists viewed these instances as further demonstration of U.S. domination of Canadian business. *See* LOWENFELD, *supra* note 207, at 102.

363. In 1964, U.S. parent corporations prevailed upon their Canadian subsidiaries not to show Canadian manufactured equipment at a Moscow trade fair. *See* Corcoran, *supra* note 266, at 200.

364. *See id.* at 203. Calling the offshore trading exception to the CACR a "Canadian" exception is a misnomer, however, as it was available for use by all non-U.S. businesses.

365. *See* 31 C.F.R. § 515.541 (1963).

FACR.[366] As initially written, however, the regulations included a "general license,"[367] which excluded transactions by foreign non-banking firms in non-U.S. origin goods from the scope of the CACR prohibitions.[368] Additionally, no U.S. financing, dollars, or transport was permitted for these "off shore" transactions.[369] Over time, as the U.S. policy toward Cuba changed, this provision was "clarified" to specifically exclude U.S. nationals or companies from participating in or approving foreign transactions with Cuba.[370] Subsequently, the provision was entirely replaced with a requirement that all such transactions be individually licensed by OFAC on a case by case basis.[371] OFAC's ability to license these "offshore" transactions with Cuba was then eliminated by Congress with the Cuban Democracy Act in 1992.[372] In essence, this act aligns the prohibitions of the Cuban embargo with the full extraterritorial reach of the other TWEA-based embargoes administered under the FACR.[373]

This type of diplomatic dialogue directly or indirectly attempting to harmonize differing polices is clearly imperfect, but still generally preferred over more confrontational methods. Actual cases challenging these extraterritorial controls and blacklists on the international level are infrequent, and even more rarely result in a decision. In part, this is because economic sanctions and trade controls are often inextricably interwoven with matters of national security or foreign policy that are not ordinarily regarded as justiciable in international fora.

In *Nicaragua v. United States*,[374] for example, when the U.S. support to the Contras and the imposition of the trade embargo against Nicaragua[375] was challenged, the United States refused to submit to the International Court of Justice's jurisdiction stating:

> [t]he United States has consistently taken the position that the proceedings initiated by Nicaragua in the International Court of Justice are a misuse of the Court for political purposes and that the Court lacks jurisdiction and competence over such a case . . . The conflict in Central America . . . is an inherently political

---

366. *See supra* note 141.

367. A "general license" is a regulatory authorization that requires no specific application or approval by the government.

368. *See* 31 C.F.R. § 515.541 (1965).

369. *Id.*

370. *See* 31 C.F.R. § 515.412 (1975).

371. *See* 31 C.F.R. § 515.558 (1975).

372. 22 U.S.C. §§ 6001-6010 (1997).

373. This tightening of the restrictions on offshore transactions also occasioned the passage of blocking statutes in a number of jurisdictions. *See supra* notes 287-314 and accompanying text.

374. Military and Paramilitary Activities, Jurisdiction and Admissibility (Nicar. v. U.S.), 1984 I.C.J. Rep. 392 (Nov. 26, 1984).

375. *See supra* note 73 and accompanying text.

> problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means—not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self-defense and is patently unsuited for such a role.[376]

Interestingly, the World Court nevertheless went on to render a decision in Nicaragua's favor on a number of grounds following the U.S. withdrawal,[377] but did not find that the U.S. embargo on trade with Nicaragua violated principles of customary international law.[378] Perhaps this was because the NTCR were less extraterritorial and more of a "primary"[379] boycott on trade than may be the case with the other OFAC sanctions programs.[380]

This natural preference for diplomatic as opposed to confrontational means of resolving disputes over differing governmental policies is also reflected in the formal incorporation of a "national security exception" from the dispute mechanisms provided in major international agreements, such as the General Agreement on Tariffs and Trade (GATT), the WTO Agreements,[381]

---

376. Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, DEP'T ST. BULL., Mar. 1985, at 64.

377. *See* Military and Paramilitary Activities, Merits (Nicar. v. U.S.), 1986 I.C.J. Rep. 14 (June 27, 1986).

378. The I.C.J. stated:

> Nicaragua has also asserted that the United States is responsible for an "indirect" form of intervention in its internal affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature . . . . While admitting . . . that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade . . . any such breaches would appear to fall outside the Court's jurisdiction . . . the Court merely has to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

See id. ¶¶ 244-45.

379. *See supra* notes 209-14 and accompanying text.

380. *See supra* note 73 and accompanying text.

381. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The security exemption in the GATT/WTO reads:

> Nothing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests;

and the North American Free Trade Agreement (NAFTA),[382] which might otherwise provide a vehicle for challenges over these types of controls.[383] Traditionally, the appropriateness of invoking the exemption is wholly subjective and left entirely to the state asserting the national security interest.[384] Thus, it is difficult to

---

> (i) relating to fissionable materials or the materials from which they are derived;
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Id. art. XXI.

382. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., *reprinted in* 32 I.L.M. 289, 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The security exemption in NAFTA reads:

> [N]othing in this Agreement shall be construed
> (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
> (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
> (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;
> (ii) taken in time of war or other emergency in international relations; or
>
> (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
>
> (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Id. art 2102.

383. The United States used the national security exemptions to justify its trade controls on Czechoslovakia in 1949, the Cuban controls in 1962, and in the Nicaraguan case in 1985. Other countries have also invoked GATT Art. XXI on several occasions, including Ghana's defense of its Portuguese boycott in 1961, the United Arab Republic's defense of the Arab/Israeli boycott in 1970, Sweden's import quotas for shoes in 1975, the 1982 EEC, Canadian, and Australian ban on Argentinian imports, and the EU's 1991 restrictions on trade with the former Yugoslavia. *See* 1 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 600-08 (6th ed. 1995). There have been no cases where Art. 2102 of the newer NAFTA regime has been at issue.

384. During the discussion of the Czechoslovakian complaint regarding the U.S. trade controls in 1949, it was stated that "every country must be the judge in the last resort on questions relating to its own security." *Id.* at 600. GATT member states, however, were admonished that "[o]n the other hand, every contracting party should be cautious not to take any step which might have the

pursue an international case challenging economic sanctions, trade controls, and blacklists to conclusion, but perhaps not impossible.[385]

Despite these difficulties, both Canada and Mexico threatened to challenge the U.S. Helms-Burton Act under NAFTA,[386] and the EU did, in fact, initiate a complaint with the WTO.[387] Although, as expected, Under Secretary Eizenstat stated that the WTO Panel "is not an appropriate forum for resolving differences over what is essentially a disagreement over foreign policy,"[388] the EU argued that a country should not be allowed to avoid the WTO dispute resolution process simply by asserting the national security exemption. Rather, it must satisfactorily justify any claim of exemption to the panel itself.[389] "If countries can just say this or that policy or law is motivated by national security interests more than trade interests, and thus

---

effect of undermining the General Agreement." *Id.* The panel in the Nicaraguan case reached a similar result stating that it "did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that article." *Id.* at 601. Although its unfettered use is increasingly criticized, there has been no successful challenge to the assertion of the "security exemption" as yet. *See* MEESSEN, *supra* note 309, at 196.

385. For example, the EU argues that the security exemption is not applicable to the U.S. embargo of Cuba and cannot be used to justify secondary boycotts or trade restrictions in third countries. *See* Frances Williams & Nancy Dunne, *EU Forces Dispute Panel on Cuba Trade: World Trade Organisation to Rule on Helms-Burton Law*, FIN. TIMES (London), Nov. 21, 1986, § 1, at 14.

386. *See, e.g.*, Debra Beachy, *Sanctions on Cuba Rile Mexico, Europe; But U.S. Trade Too Important to Lose*, HOUS. CHRON., May 31, 1996, BUS. at 1. For a discussion of the Helms-Burton Act's possible violations of the NAFTA agreements, see Brian J. Welke, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997).

387. The WTO agreed to establish a panel to consider the EU complaint under its dispute resolution procedures on November 20, 1996. The EU complaint actually challenges both the Helms-Burton (LIBERTAD) Act and the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 50 U.S.C. 1701 note. *See* John Zarocostas, *Trans-Atlantic Brinkmanship on Cuba Threatens to Hobble World Trade Court*, J. COM., Feb. 4, 1997, at 1A. The EU complaint alleges that Titles III and IV of the Helms-Burton Act, *see supra* notes 30-50 and accompanying text, violate GATT Arts. I, III, V, XI, and XIII, and the related General Agreement on Trade in Services Arts. I, III, VI, XVI, and XVI. *See Overview of the State-of-play of WTO Disputes* (last modified Jan. 23, 1998) <http://www.wto.org/dispute/ bulletin.htm> [hereinafter *Overview of the State-of-Play of WTO Disputes*]. For an analysis of the strength of these claims, see Pavel K. Chudzicki, *The European Union's Response to the LIBERTAD Act and the Iran-Libya Act: Extraterritoriality without Boundaries?*, 28 LOY. U. CHI. L.J. 505 (1997).

388. *See* Jim Lobe, *U.S./Cuba-Trade: U.S. to Reject WTO Panel*, INTER PRESS, Feb. 20, 1997.

389. Of course, this is not what happened when the U.S. withdrew from the Nicaraguan case. *See supra* notes 374-78 and accompanying text.

block a case from going forward, the WTO is going to have a hard time establishing itself as a credible forum."[390]

This highlights that the greatest "threat" growing out of the current dispute over the U.S. controls is not to the United States nor the EU, Canada, or Mexico, but rather to international institutions such as the WTO.

The United States is the single largest user of the WTO dispute resolution process,[391] and was the major proponent of a dispute mechanism that could not be "frustrated" by a potential defendant.[392] The problem presented by the EU complaint is that pursuing the case is a "lose-lose" proposition.[393] If the United States succeeds in asserting the security exemption it will provide a precedent for other nations to abandon compliance with the GATT/WTO rules whenever they are involved in a "political row with a neighbor;" and if a decision is rendered against the United States, it could lead to increased opposition to continued U.S. membership in the WTO from Congress.[394] It was this conundrum which was avoided, or at least postponed, by the EU agreement to suspend further action on the complaint in exchange for the Clinton Administration's efforts to seek repeal of the Title IV visa restrictions and continue the suspension of the Title III provisions authorizing private civil actions against "traffickers" in expropriated Cuban property.[395] It remains to be seen whether this truce can be maintained, however.

Thus, the tools available on the international level are essentially diplomatic or political, and not the sort of remedies that lead to immediate and predictable results in individual cases. Nevertheless, practical and political approaches on both the national and international levels have proven to be more efficacious for companies caught in the middle between competing governmental policies than have the more formal legal tools and remedies. The recent Wal-Mart incident is an example, and not far removed from the issues facing America Online in our hypothetical.

---

390. *See* Lobe, *supra* note 381.

391. *See Overview of the State-of-play of WTO Disputes, supra* note 387.

392. *See* John H. Jackson, *Helms-Burton, The U.S. and the WTO*, A.S.I.L. INSIGHT (Mar. 1997) <http://www.asil.org/insight7.htm>.

393. *See* Robert Evans, *EU, U.S. Seen Working to Avoid WTO Clash on Cuba*, REUTERS WORLD, Dec. 4, 1996.

394. *See id.*

395. *See* R.W. Apple, *Split Over Cuba is Eased by U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, at A3. The WTO Panel suspended its work on April 25, 1997. *See Overview of the State-of-Play of WTO Disputes*; "Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act," Apr. 11, 1997, DEP'T COM. BULL., *reprinted at* 36 I.L.M. 529 (1997).

When a customer in Wal-Mart Canada's store in Winnipeg noticed a "Made in Cuba" label on inexpensive pajamas, the store manager became concerned about Wal-Mart's compliance with the U.S.-Cuban controls. The pajamas had been imported by another Canadian company and then supplied to Wal-Mart in Canada. It was initially decided to remove the pajamas from the shelves of all 135 stores in Canada. That decision, however, triggered an investigation by the Canadian Justice Department into possible violations of the FEMA. Simultaneously, Wal-Mart Inc., based in Arkansas, was in discussions with OFAC at the U.S. Treasury Department, and directed its Canadian subsidiary to comply with the U.S. laws and keep the pajamas off the shelves. Wal-Mart Canada, however, "after a comprehensive review and consultation with [Canadian] customers, legal advisors, and Canadian Government officials" decided to restock the pajamas.[396] "Wal-Mart Canada made this decision in direct contradiction of directives it received from Wal-Mart Stores Inc.," according to a company spokesperson who emphasized that the Canadian subsidiary was told to "comply with U.S. law and regulations, including the Cuban Assets Control Regulations."[397] Despite subsequent protestations by OFAC that "we have a law to fulfill,"[398] there has been no public indication that any further action was taken by either U.S. or Canadian authorities. Some have even suggested that the actions of the respective companies were coordinated to demonstrate the parent's and subsidiary's compliance with their respective local laws, notwithstanding the apparent conflict between those provisions.[399]

In many respects, this leads to an unsatisfactory result for America Online and America Online Canada. Absent reliable, predictable direction as to how competing and conflicting legal requirements will be enforced, individual businesses caught in the middle must rely upon uncertain politics and prosecutorial discretion, at least in the short term. In the longer term, however, there is evidence that a new standard of customary international law is emerging, which would proscribe the use of unilateral extraterritorial blacklists as impermissible secondary boycotts. If such a standard does emerge, it will both inhibit the adoption of unilateral extraterritorial measures in the first

---

396. *See* David E. Sanger, *U.S.-Canadian Split on Cuba Tangles Wal-Mart's Pajamas*, N.Y. TIMES, Mar. 6, 1997, at A1; *Wal-Mart Continues Cuban Pajama Sales*, FACTS ON FILE WORLD NEWS DIG., Mar. 27, 1997, at 217, C3.

397. *See* David E. Sanger, *Wal-Mart Canada is Putting Cuban Pajamas Back on Shelf*, N.Y. TIMES, Mar. 14, 1997, at D4.

398. *See* Norman Kempster, *Wal-Mart May Face Sanctions Over Cuban Pjs Policy*, L. A. TIMES, Mar. 15, 1997, at D1.

399. *See* Sanger, *supra* note 397.

instance, and additionally provide a legal basis for challenging such measures in either domestic or international fora.

IV. EMERGENCE OF A CUSTOMARY STANDARD ON SECONDARY BOYCOTTS

Some urge that all forms of "economic coercion" between nations should be proscribed by international law,[400] and endeavor to find support for this proposition in various U.N. Charter provisions[401] and declarations[402] dealing with aggression and the "threat or use of force," the general principle of non-intervention in another state's affairs,[403] or in similar documents and pronouncements by other bodies such as the Organization of

---

400. *See e.g.,* D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 147, 176 (1958); HANS KELSEN, THE LAW OF THE UNITED NATIONS 726-731 (1950); MYRES S. MCDOUGAL & FLORENTINO F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 124-129 (1961); Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba,* 28 VAND. J. TRANSNAT'L. L. 901, 931-950 (1995) (discussing Cuba's various proposals for a U.N. resolution condemning the U.S. embargo in general terms).

401. For example, Article 2(4) of the U.N. Charter requires that "all members refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER art. 2, para. 4.

402. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29th Sess., Supp. No. 31, 2315th plen. mtg., Agenda Item 48, at art. 32, U.N. Doc. A/RES/3281 (1974); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, U.N. GAOR, 254th Sess., Annex, 1883d plen. mtg., Agenda Item 85, at 1, U.N. Doc. A/RES/2625 (1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, 20th Sess., U.N. GAOR, Supp. No. 14, 1408 plen. mtg., Agenda Item 107, at 1, U.N. Doc. A/RES/2131/Rev. 1 (1965). These resolutions were passed largely without the support of the developed nations, who tend to oppose restrictions on the use of economic measures, whereas developing countries tend to favor restricting the use of such measures. *See* Porotsky, *supra* note 400, at 920-26; Christopher C. Joyner, *The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice,* 17 VAND. J. TRANSNAT'L. L. 205, 243-248 (1984).

403. Although "force" is not defined in the U.N. Charter, the term as used in Article 2(4) is generally considered as not encompassing economic aggression because of the legislative history behind the provision. As the Charter was being drafted in 1945, Brazil proposed that Article 2(4) include "the threat or use of economic measures in any manner inconsistent with the purposes of the United Nations." Brazil's proposed wording was expressly rejected. *See* Joyner, *supra* note 402, at 240 n.128 (citing Doc. 25, I/1/10, 6 U.N.C.I.O. Docs. 525, 549 (1945); Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334-25 (1945)). It is for this reason, in part, that those arguing for such a norm in international law also place such emphasis upon other similar documents and resolutions.

American States (OAS).[404] Such a claim is, however, over broad[405] and clearly not supported by customary state practice.[406]

Certainly, the use of boycotts, blacklists, and similar economic measures as foreign policy tools is to be recognized and preferred if the alternative is a greater proclivity for states to use force to resolve foreign policy differences. Conversely, it is equally certain that international norms have progressed[407] in the 250

---

404. The language in the OAS Charter states, "No state or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other states" and "[n]o state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind." Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 2420, 119 U.N.T.S. 3, 56. After a largely unsuccessful attempt at directing its members to impose sanctions on Cuba, the OAS replaced its own call for sanctions with a resolution, which acknowledged that each member state had the right to determine its own diplomatic and trading relationships with Cuba. *See* Final Act, Sixteenth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, July 29, 1975, OEA/Ser.F/II.Doc.9/75, Rev. 2 (1975). This was interpreted by the United States as requiring a (slight) reduction in the extraterritorial application of the Cuban embargo regulations as they then existed and resulted in a "favorable licensing policy" for offshore transactions which remained in place until Congress directed otherwise with the Cuban Democracy Act of 1992. *See* 39 Fed. Reg. 25,317 (1974).

405. *See Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Note by the Secretary General*, U.N. GAOR, 48th Sess., Agenda Item 91(a), U.N. Doc. A/48/535 (1993).

406. *See* Porotsky, *supra* note 400 at 930-31, 949-50, 957-58; Joyner, *supra* note 402, at 240-56, 285-86.

407. While perhaps not rising to the level of a new international norm proscribing economic coercion, the support expressed among the developing countries in eight U.N. resolutions passed since 1983 reaffirming the 1970 Declaration of Principles and the 1974 Charter of Economic Rights is significant. *See* G.A. Res. 48/168, U.N. GAOR, 48th Sess., Supp. No. 49, 86th plen. mtg., at 148, U.N. Doc. A/RES/48/168 (1993); G.A. Res. 46/210, U.N. GAOR, 46th Sess., Supp. No. 49, 79th plen. mtg., at 143, U.N. Doc. A/RES/46/210 (1991); G.A. Res. 44/215, U.N. GAOR, 44th Sess., Supp. No. 49, 85th plen. mtg., at 141, U.N. Doc. A/RES/44/215 (1989); G.A. Res. 42/173, U.N. GAOR, 42d Sess., Supp. No. 49, 96th plen. mtg., at 130, U.N. Doc. A/RES/42/173 (1987); G.A. Res. 41/165, U.N. GAOR, 41st Sess., Supp. No. 49, 96th plen. mtg., at 130, U.N. Doc. A/RES/41/165 (1987); G.A. Res. 40/185, U.N. GAOR, 40th Sess., Supp. No. 53, 119th plen. mtg., at 146, U.N. Doc. A/RES/40/185 (1985); G.A. Res. 39/210, U.N. GAOR, 39th Sess., Supp. No. 51, 104th plen. mtg., at 160, U.N. Doc. A/RES/39/210 (1984); G.A. Res. 38/197, U.N. GAOR, 38th Sess., Supp. No. 41, 104th plen. mtg., at 153, U.N. Doc. A/RES/38/197 (1983).

Additionally, the gradually increasing support for Cuba's annual proposal for a Resolution on the Necessity of Ending the U.S. Embargo against Cuba, from 1992-96, suggests that more countries are recognizing that at least certain types of economic measures are problematic. *See Resolution on the Necessity of Ending [the Economic, Commercial and Financial Embargo Imposed by the United States of America] against Cuba*, G.A. Res. 51/17, U.N. GAOR, 51st Sess., Supp. No. 49, at years since Emmerich de Vattel advocated that unfettered freedom in formulating economic policies and conducting trade was an attribute of sovereignty with his classic statement that "[e]very state has consequently a right to prohibit the entrance of foreign merchandises; and the nations that are affected by such prohibition have no right to complain of it, as if they had been refused an office of humanity."[408] Thus, given that some uses of economic measures such as blacklists will be accepted and others will draw condemnation,[409] the problem is to determine where the limits might lie. This is especially difficult when resort to the principal trade treaties may be blocked by broad exceptions[410] and there is no clear international norm regarding the general use of economic measures for policy reasons.[411]

The debate is often framed as a question of what are the limits on a state's ability to exercise its proscriptive jurisdiction extraterritorially, when extraterritorial measures will inherently impinge upon the sovereignty and policies of other nations. Although this issue can be analyzed from a number of perspectives, it is typically addressed as a matter of

---

12, U.N. Doc. A/RES/51/17 (1996); G.A. Res. 50/10, U.N. GAOR, 50th. Sess., Supp. No. 49, Agenda Item 27, at 14, U.N. Doc. A/RES/50/10 (1995); G.A. Res. 49/9, U.N. GAOR, 49th Sess., Supp. No. 49, Agenda Item 24 at 8, U.N. Doc. A/RES/49/9 (1994); G.A. Res. 48/16, U.N. GAOR, 48th Sess., Supp. No. 49, Agenda Item 30, at 20, U.N. Doc. A/RES/48/16 (1993); G.A. Res. 47/19, U.N. GAOR, 47th Sess., Supp. No. 49, Agenda Item 39, 70th plen. mtg., at 40, U.N. Doc. A/RES/47/19 (1992); U.N. GAOR, 46th Sess., Supp. No. 49, Agenda Item 142, at 524, U.N. Doc. A/46/L.20 (1991), *withdrawn* G.A. Decision 46/407, 46th mtg., Nov. 13, 1994.

408. EMMERICH DE VATTEL, THE LAW OF NATIONS 38 (photo. reprint 1982) (1758).

409. The compatibility under international law of any state's actions, economic or otherwise, with regard to another state may also be influenced by whether the action is considered to be an act of "retorsion" or an act of "reprisal." An act of retorsion occurs when one state, whose citizens are subjected to harsh, but legal, treatment by a foreign government, responds with equally harsh, but legal, measures of its own. A reprisal is similar, but differs conceptually in that the acts taken would not be legal but for the illegal behavior of the foreign state at which the reprisal is directed. Thus, a retorsion is an inherently legal act limited only by political policy, and a reprisal is a self-help countermeasure whose legality requires a higher level of justification. *See* Porotsky, *supra* note 400 at 915-18; Joyner, *supra* note 402, at 253-55. Both concepts are closely related to internationally recognized rights of self-defense and self-help, as a species of retaliation against acts of other states. These notions are perhaps less useful here, as the blacklisting and other economic measures being discussed are not necessarily related to any form of "retaliation," but are simply being used as tools to meet various foreign policy objectives. *See also* RESTATEMENT OF FOREIGN RELATIONS LAW, § 905.

410. *See supra* notes 381-85 and accompanying text.

411. *See supra* notes 400-06 and accompanying text.

"reasonableness" and international comity.[412] As the connection with the legislating state becomes increasingly attenuated when compared with the extraterritorial measure's intrusion upon actions taken within a foreign state, the likelihood that the measure will be deemed an objectionable impingement of foreign state sovereignty increases. Accordingly, actions based upon the "territorial" principle or the "nationality" principle are typically accepted and those based solely upon the "effects" principle become more problematic, usually because of disagreements as to how "substantial" the effects need to be before a state can claim them as a basis to proscribe extraterritorial behavior.[413] This is the framework in which the U.S. extraterritorial laws and controls, such as those in the current Helms-Burton Act, are usually approached and debated, as a question of the U.S. government's "power" to proscribe behavior abroad.[414]

This approach is perhaps misplaced and inappropriate when applied to the blacklists accompanying these extraterritorial controls, which incidentally embody the very elements most often criticized in the extraterritoriality debate: a broad view of both the "nationality" and "effects" principles. Rather, the question is not whether the U.S. government has the authority to proscribe behavior based upon U.S. "control" of foreign firms,[415] the direct or indirect presence of U.S. parts or technology in foreign made goods,[416] or the "trafficking" in expropriated property of U.S. citizens,[417] under an expansive notion of the "nationality" or "effects" principles supporting proscriptive jurisdiction. Rather, the question is whether the U.S. government should refrain from doing so. The issue is not one of authority or power, but one of what is prudent and appropriate in the presence of what Justice

---

412. What is or is not "reasonable" can then be broken down into a number of factors, as is done in the Restatement of Foreign Relations Law. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, § 403.

413. Neither the "protective" principle (that certain extraterritorial acts, such as espionage, affect the security of the state) nor the "universality" principle (that certain acts, such as slavery, piracy, etc., are so heinous that may be prosecuted in any state) enunciated in the Restatement are considered here, as they are not typically employed in justifying the extraterritorial application of economic sanctions, trade controls, or blacklists. *See id.* §§ 402(3) & 404.

414. *See, e.g.*, Andreas F. Lowenfeld, *AGORA: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT'L LAW 419 (1996); Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L LAW 434 (1996); Brice M. Clagett, *AGORA: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Continued: A Reply to Professor Lowenfeld*, 90 AM. J. INT'L LAW 641 (1996) [hereinafter Clagett, *Reply to Lowenfeld*].

415. *See supra* Part II.C.1.

416. *See supra* Part II.C.2.

417. *See supra* Part II.B.1.

Souter called a "true conflict" in the *Hartford Fire Insurance* case.[418]

The Restatement of Foreign Relations Law of the United States indicates that,

> [w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions of the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction . . . [A] state should defer to the other state if that state's interest is clearly greater.[419]

Without affecting the ability of belligerent nations to use blacklisting to impose primary controls or boycotts domestically or even upon their own nationals abroad, an international consensus does appear to be building that the unilateral extraterritorial application of these controls to third parties is impermissible.[420] Irrespective of the basis claimed for the authority to do so, the international community is coming to regard the blacklisting of third parties, or secondary boycotts, as "unreasonable," and therefore an unjustifiable intrusion upon the sovereignty of the neutral state. It is perhaps too early in the process to assume that international secondary boycotts are recognized as per se illegal,[421] but it is certainly too late to claim that they are not problematic under international law.[422]

---

418. *See Hartford Fire Ins.*, 509 U.S. at 798-99.

419. RESTATEMENT OF FOREIGN RELATIONS LAW, § 403(3).

420. The term "third parties" here would include foreign business entities established in accordance with local laws, and reject the expansive U.S. notion of nationality extending to foreign "controlled" entities.

421. Professor Lowenfeld states:

> As I see it, the Helms-Burton Act is thus in intent—and probably in effect—a classical secondary boycott, much like the Arab boycott of Israel. . . . It is true that the sanctions imposed by the Helms-Burton Act are distinguishable from the Arab boycott of Israel, in that the sanction for violation under Helms-Burton is not a prohibition, only exposure to litigation and exclusion . . . . The objective, in any case, is the same. X, a national of state C (say Canada), is being coerced by state A (the United States) to stop trading with B (Cuba) or handling the merchandise containing products of state B, although the law of C makes such trade perfectly legal and may even encourage it. I believe that (in time of peace) the exercise of jurisdiction by the United States for these purposes, to impose a secondary boycott on Cuba, like the exercise of jurisdiction by the Arab League to impose a secondary boycott on Israel, is contrary to international law, because it seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe.

See Lowenfeld, *supra* note 414, at 430.

422. In his response to Professor Lowenfeld, Clagett states:

This trend in customary international law can be traced to the United States own aversion to the use of secondary boycotts in its domestic labor law,[423] and in its legislation to counter the secondary and tertiary effects of the Arab League's boycott of Israel.[424] The trend also can be seen in U.S. efforts to encourage other nations to pass similar antiboycott legislation of their own.[425] Equally significant is the increasing willingness of major trading allies to augment their diplomatic objections to extraterritorial laws with the passage or invocation of local "blocking measures."[426] These blocking measures are specifically intended to frustrate the use of the U.S. controls as secondary or tertiary boycotts within their countries and, ironically, derive from the United States own antiboycott legislation. It also is seen in the increasingly unified opposition to extraterritoriality being generated in the United Nations[427] and other international bodies[428] in response to laws like the Helms-Burton Act. Finally, it is also increasingly likely that international tribunals, when

---

> Professor Lowenfeld . . . wants to characterize [Title III of the Helms-Burton Act] as a "secondary boycott," a crude attempt by the United States to impose its entire trade embargo against Cuba on foreign countries and companies. On the other hand, he is too fine and honorable a scholar wholly to ignore the fact that Title III deals only with "trade" of a specific type: occupying, dealing in, or otherwise benefiting or profiting from property that was confiscated from U.S. nationals without compensation.... Having branded Title III as a secondary boycott, Professor Lowenfeld does not, as I would have expected, go on to argue that such boycotts violate customary international law. He says only that the Arab boycott of Israel is such an animal, and that the United States "strongly condemned" it in its antiboycott legislation. But that condemnation was expressly on the ground of U.S. policy, not international law. . . . If a legal case against Title III can be made, Professor Lowenfeld has not made it.

See Clagett, *Reply to Lowenfeld*, *supra* note 414, at 641-42.

423. *See supra* note 209.

424. *See supra* notes 245-65 and accompanying text.

425. *See, e.g.*, Joyner, *supra* note 402, at 268-85 (discussing antiboycott legislation in Canada, France, the Netherlands, and the United Kingdom).

426. *See supra* notes 268-314 and accompanying text.

427. *See supra* note 407 and accompanying text.

428. The Juridical Committee of the OAS issued a nonbinding opinion that the Helms-Burton Act violates generally accepted principles of international law, in part, because of its operation as a secondary boycott. The opinion stated that the U.S. "does not have the right to attribute liability to nationals of third states for a claim against a foreign state (*i.e.*, Cuba)" and that it "does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization or unrecognized by international law on this subject, thus modifying the [recognized] juridical bases for liability." *See Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act*, Organization of American States Document OEA/Ser. G, CP/doc. 2803/96, Aug. 27, 1996, *reprinted in* 35 I.L.M. 1322, 1332 (1996).

given the opportunity, will give voice to this trend and declare secondary boycotts as violative of customary international law.

One of the first demonstrations of this emerging rule of customary international law has already occurred in connection with a WTO case involving U.S. environmental laws and regulations.[429] The EU and the Netherlands challenged U.S. restrictions on the import of tuna established under the Marine Mammal Protection Act of 1972.[430] Essentially, the U.S. law prohibited the use of "purse seine nets" when fishing for tuna because they endangered dolphins, and imposed a "primary embargo" against imports from other nations whose tuna fishing fleets used the nets.[431] It then augmented the embargo with an "intermediary embargo," or secondary boycott, against tuna imports from countries who purchased their tuna from those nations that were the subject of the primary boycott.[432]

While no "national security" exemption was available in this situation, there was another provision which permitted deviations from the GATT/WTO obligations in order to protect natural resources.[433] The Dispute Panel conceded that the U.S. laws protecting the dolphins could extend extraterritorially under this exception, but only to U.S. nationals and vessels.[434] With regard to the import restrictions, however, it found that the tuna embargo was an "indirect" and "coercive" measure not sufficiently related to its stated conservation objective to fall within the exception:

> The Panel noted that measures taken under the primary nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and polices that harmed or could harm dolphins, as long as it was a country that imported tuna from countries maintaining tuna harvesting practices and policies not comparable to those of the United States. [It] then observed that the prohibition on imports of tuna into the United States could not, by itself, further the United States conservation objectives. The primary nation embargo could achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna to the United States, but in third countries from which the exporting country imported tuna.[435]

---

429. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter Tuna II].

430. 16 U.S.C. § 1361 (1994).

431. *See* Tuna II, *supra* note 429, at 847-49.

432. *See id.* at 849-50.

433. GATT art. XX.

434. *See* Tuna II, *supra* note 429, at 893-94.

435. *See id.*

The Dispute Panel thus concluded that the embargo violated the GATT/WTO agreements[436] in what may be regarded as one of the first applications of a new rule of customary international law limiting the use of secondary boycotts.[437]

V. CONCLUSION

What's left of Pierre Boileau's coffee has long since gotten cold. After spending much more time online than he thought he would, bleary eyed, he turns off his computer. "Not bad," Pierre muses to himself. "I think I'll use this Internet service," he mutters while shuffling off to bed in the early morning hours. Time is now running out for America Online and America Online Canada. When Pierre's free time expires and charges are incurred on his credit card, they will be in violation of the U.S. Cuban embargo regulations passed under the TWEA. Decisions have to be made.

Unfortunately for businesses caught in the middle of a true conflict between competing governmental policies, there may be no strictly legal solution to this type of problem. Business still needs to continue, however, even while customary rules of international law on the use of unilateral extraterritorial secondary boycotts continue to evolve. Accordingly, practical considerations may become as important as strictly legal propositions.

The OFAC embargoes are primarily aimed at controlling financial transactions, and by controlling the flow of monies, they also control international trade. The regulations, however, were written against a background where the classic international business transaction was conducted as a documentary sale (*i.e.*, a letter of credit transaction) involving financial institutions, carriers, and forwarding agents, in addition to the buyer and seller, each with their own contracts and responsibilities. Most significantly, this type of transaction took time, and depended upon each of the parties having a moderate amount of information regarding its respective "customers." The current

---

436. That is, they violated the basic "most favored nation" and "national treatment" principles, which are at the heart of the GATT. This finding is in accord with an earlier Tuna case. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1992) [hereinafter Tuna I].

437. It should be noted, however, that neither the Tuna I nor the Tuna II Panel decisions were adopted by the WTO Dispute Settlement Body. *See* Tuna I, *id.*; Tuna II, *supra* note 429. *See generally* Thomas J. Schoenbaum, *International Trade and the Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997); Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433 (1995).

regulations are not well attuned to other types of business dealings. They are especially ill-suited to business that may be conducted virtually instantaneously online, and sometime with very little information regarding who is on the other end of the connection, or even where that connection might be located. Thus, there is now a sizable gap between the letter of the law and regulations, and the U.S. government's enforcement practices, depending upon the level of knowledge concerning the customer, and the size of the transaction.

This gap is sometime referred to as the "McDonald's" problem. Despite the extraterritorial application of many of the regulations to "controlled" foreign subsidiaries and affiliates, and the presence of thousands of names on the OFAC blacklists at any given time,[438] retail cash transactions with a blacklisted party do not appear to be prosecuted. One might argue that this is because McDonald's does not necessarily know they are dealing with a blacklisted party when they sell their burgers over the counter, and incidentally highlights that the U.S. regulations do not typically require businesses to actually screen all their customers against a blacklist. However, it is also easy to envision an increasingly complex series of small transactions, which gradually provide more information about a blacklisted customer to the seller, with the addition of delivery or credit card information, for example. The cash sale at McDonald's may be at one end of the spectrum, a detailed order form and contract execution at the other end, and an online or telephone catalog sale using credit cards somewhere in the middle. Once the seller has information concerning the "identity" of its customer, it becomes impossible to defend the violation on the basis of a lack of knowledge. There may be no duty to affirmatively investigate customers, but "screening" whatever information is acquired in the ordinary course of the business does seem to be an element of any good faith attempt at complying with the U.S. regulatory requirements.[439]

Similarly, small non-banking transactions with blacklisted parties generally appear not to be prosecuted. Presumably a

438. The most recent publication of the consolidated OFAC blacklist, on June 27, 1997, lists over 2100 names. Of these, approximately 660 individuals or entities are identified as Libyan SDNs, 489 are Cuban SDNs and vessels, 452 are Iraqi SDNs and vessels, 435 are narcotics traffickers (SDNTs), 85 are terrorists (SDTs), and 7 are North Korean SDNs. *See* Blocked Persons, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Narcotics Traffickers, and Blocked Vessels, 62 Fed. Reg. 34,934 (1997) (amending 31 C.F.R. ch. V) (1997).

439. This is sometimes referred to as an obligation to avoid "self-blinding" to information that would normally be received in the ordinary course of business. *See* Fitzgerald, *supra* note 10, at § D(2)(c).

single, knowing, sale of a McDonald's burger to Pierre, even over the border within the United States, would not ordinarily be pursued by the U.S. government. The knowing sale of a single pair of nine dollar pajamas also would not seem to merit the resources required to prosecute the case. The sale of 30,000 such pajamas merits more attention but, as was seen with the Wal-Mart incident, still does not necessarily result in penalties or prosecution.

While this might appear to offer some comfort to America Online or any other business facing this type of conflict, given the size and severity of the penalties that can be imposed for a violation, there is a high degree of risk in simply relying upon the government's discretion in not pursuing a prosecution. Moreover, this reliance may be particularly risky as the politics and public relations issues associated with these embargoes can be highly charged and very volatile, resulting in policies that can change rapidly. Trusting that the government would not prosecute small or innocent violations was less of an issue in earlier years when the blacklists applied to fewer programs, and transactions did not proceed with the pace of modern transactions augmented by global electronic communications and digital networks.[440] The business environment, however, has changed from the 1950s when the basic framework of the OFAC embargoes was developed.

Changes in the regulations are needed. Rather than leaving businesses such as America Online with a Hobson's choice of violating either the U.S. extraterritorial controls or the foreign blocking measures, and then relying upon prosecutorial discretion to avoid any penalties, the best course would be for the government to refrain from using blacklists to impose secondary boycotts altogether in accordance with the emerging rules of customary international law. If this is not done, for political reasons or otherwise, the U.S. government should at least incorporate some sort of de minimis threshold or other mechanism to better align the letter of the prohibitions imposed by these secondary boycotts with regulators' willingness to enforce the restrictions. Otherwise, the controls are going to be viewed by businesses as commercially impracticable, perhaps undercutting the motivation to comply with the controls in their various operations. Moreover, the controls will be viewed by foreign governments as unnecessarily impinging upon their sovereign rights and creating conflicts that could and should be avoided in the international marketplace.

440. *But see supra* notes 317-18 (Dresser case); *supra* notes 346-54 (Freuhauf case) and accompanying text.