

## ARTICLES

### FACTORING U.S. EXPORT CONTROLS AND SANCTIONS INTO INTERNATIONAL TRADE DECISIONS\*

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#### INTRODUCTION

You are a lawyer specializing in transactional matters. One of your clients has developed successful new high technology dual-use products and is interested in exporting them.<sup>1</sup> He has done his homework. He realizes that exporting can contribute to his company's growth and his employees' job security and economic well-being.<sup>2</sup> His international sales staff has attended several ex

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\* This Article is not an official statement or interpretation of statutory or regulatory provisions or of government policy.

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1. Dual-use products can have both civilian and military applications. Examples of these products include chemicals, telecommunications equipment, computers, off-highway tractors, civil aircraft, machine tools, and software. *See generally* 15 C.F.R. pt. 774 (Supp. I 1997) (listing items controlled by the Department of Commerce that have civilian and military applications).

2. President Clinton told Congress that, given the economy's increasing reliance on exports for growth, he needed "fast track" authority to negotiate new international

port control seminars. The staff members understand that the products are subject to the Commerce Department's Export Administration Regulations.<sup>3</sup> Also, the Treasury Department's various asset control and sanctions regulations<sup>4</sup> could affect shipments to sensitive destinations, such as certain countries in the Middle East. Your client has classified his products on the Commerce Control List, noted destinations for which no export license is normally required,<sup>5</sup> studied the license exception eligibility requirements for other destinations, flagged the destinations for which his products will need prior Commerce Department written authorization, and developed an internal control program to make sure all international sales are made with proper authorization. Your client is prepared to factor United States Government export controls into his international trade decisions.

Despite all this preparation, your client feels he has only completed the first course, Export Controls 101, which covers the license requirements for export transactions involving most, but not all, countries. He needs a better understanding of the scope of United

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trade agreements, arguing that his approach was vital to the nation's continued prosperity. See Paul Blustein & John E. Yang, *President Seeks Power to Negotiate More Trade Pacts*, WASH. POST, Sept. 17, 1997, at A1. "[Fast track authority] will enable the United States to sell to the world's fast-growing markets — regions where our competitors will step in if we retreat." *Id.* Stuart Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, commented:

Fast Track is also a key to continued job growth in the United States. An increasing number of U.S. jobs, some 11 million, now depend on exports. These jobs tend to be higher-paying than those not related to exports. Over the past four years, exports have created 1.7 million new American jobs.

Stuart Eizenstat, *Benefits Riding on the Fast Track*, WASH. TIMES, Oct. 19, 1997, at B3. The role of international trade in ensuring economic growth and prosperity is widely recognized. See, e.g., Alex Brummer, *China's Next Great Leap*, J. COM., Sept. 24, 1997, at A7; Kathy Chen, *Global Cooling: Would America Buy a Refrigerator Labeled 'Made in Qingdao'?*, WALL ST. J., Sept. 17, 1997, at A1; Tom Connors, *Big Foreign Trade Figures Boost Results in Quarter*, J. COM., Aug. 29, 1997, at A2; Nancy Dunne, *Exports Steer U.S. to Robust Growth*, FIN. TIMES, Aug. 29, 1997, at 3; Jeffrey E. Garten, *A Pro-Reform Foreign Policy*, ASIAN WALL ST. J., June 27, 1996, at 10; *Growth Through Trade*, J. COM., Mar. 20, 1997 at A8; Sheryl WuDunn, *Exporters Thrive as other Sectors Sink*, N.Y. TIMES, Sept. 16, 1997, at D3.

3. See generally 15 C.F.R. pts. 730–774 (1997).

4. See 31 C.F.R. ch. V (1997).

5. Even items that would not normally require an export license will be subject to a Commerce Department license requirement when the exporter knows or is informed by the Commerce Department that the export of these items are destined for a weapons proliferation activity. See generally 15 C.F.R. pt. 744 (1997) (explaining what products are subject to license requirements and the applicable license review standards).

States embargoes and other special controls that apply to trade with designated terrorist countries and entities. He wants to know the prohibitions on indirect trade with proscribed countries and entities. Also, he has heard of the increasingly numerous “sanctions laws” that provide for economic sanctions against target countries that engage in objectionable behavior.<sup>6</sup> Finally, because of media attention on the Helms-Burton and Iran and Libya Sanctions legislation,<sup>7</sup> he understands that certain sanctions laws also provide for sanctions on foreign companies and foreign governments that trade with such target countries. He wants to know whether export bans might apply to some of his European or Asian customers that trade with Libya, Cuba, Iran, or other countries targeted by sanctions laws. Since he is expanding into emerging markets — India, Russia, Malaysia, Turkey, and China — he also needs to know if his new business will be affected by existing or pending U.S. sanctions laws.<sup>8</sup> He does not want to run afoul of United States law so he asks you to update his internal control program to include consideration of economic sanctions measures.

You begin a memorandum on “The Impact of U.S. Embargoes and Other Special Controls on Company X's International Sales,”<sup>9</sup> keeping in mind your client's new products. This project is a bit more complicated than just going through the steps of the Commerce Department's Export Administration Regulations to determine for which countries a license is required. This memorandum will involve reading the Commerce Department's regulations to-

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6. Objectionable behavior includes: support for international terrorism; acquisition, development or use of weapons of mass destruction; transfer of destabilizing numbers and types of conventional weapons; lack of democracy; and abuse of human rights, unfair trade practices, or inappropriate environmental practices. See Richard N. Haass, *Sanctioning Madness*, FOREIGN AFF., Nov. 21, 1997, at 74. For purposes of this paper, “sanctions measures” include only those that are (a) unilateral, (b) restrict or condition economic activity, and (c) are imposed for national security, non-proliferation, anti-terrorism, or human rights reasons.

7. See Carter, *infra* note 48, at A1; see also *infra* notes 51–52 and accompanying text.

8. “U.S. companies export more to emerging markets today than to Europe and Japan combined, a feat made possible by market openings in these countries.” Garten, *supra* note 2, at 10.

9. See generally R. Richard Newcomb, *Office of Foreign Assets Controls, in COPING WITH U.S. EXPORT CONTROLS 1996*, at 69, 69–217 (PLI Com. L. and Practice Course Handbook Series No. 748, 1996) (discussing embargoes and economic sanctions administered against foreign countries by the Treasury Department's Office of Foreign Assets Control).

gether with the Treasury Department's regulations affecting embargoed countries and proscribed entities.<sup>10</sup> Although your client has no interest in dealing directly or indirectly with embargoed countries, his sales to European and Asian trading partners could be prohibited if he knows his foreign purchasers are re-exporting his products "as is" to embargoed destinations, are incorporating his products into goods destined for embargoed countries, or are ordering his equipment or software to produce items destined for certain embargoed destinations.

You will want to point out that regulations implementing embargoes generally prohibit exports to, imports from, and investments in embargoed destinations, as well as most activities by U.S. persons involving such destinations. This includes providing services from the United States, such as arranging for the sale of goods, technology or services from third countries to the embargoed country; arranging for the exportation of goods, technology or services from the embargoed country; financing or insuring such transactions; or assisting third country firms in development or sales projects in the embargoed country. Executive orders imposing comprehensive trade and investment bans may prohibit U.S. persons from facilitating financial agreements or the performance of contracts involving embargoed destinations. Executive orders also generally prohibit activities undertaken to evade or avoid an embargo. This means that companies cannot restructure their activities to produce items offshore for delivery to certain destinations, such as Iran or Iraq, or change their corporate procedures specifically to allow foreign subsidiaries to make decisions involving certain sanctioned destinations.

It is also important to know who is considered to be a U.S. person for purposes of each embargo program, since the definition is not the same for each embargo. The scope of this definition may affect decisions relating to mergers and acquisitions or commitments made in joint ventures with foreign companies. For example, under the Cuban Assets Control Regulations,<sup>11</sup> administered by the Treasury Department, foreign subsidiaries of U.S. companies are considered U.S. persons and are subject to the same trade and investment restrictions as the U.S. parent companies.<sup>12</sup> As a result, if your client

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10. See sources cited *supra* notes 3-4.

11. See 31 C.F.R. pt. 515 (1997).

12. See *id.* § 515.329.

wishes to acquire a foreign subsidiary that has a trade contract with Cuba, at the moment of acquisition the foreign subsidiary will become a U.S. person involved in a prohibited contractual relationship with Cuba. Therefore, you should consult with the Treasury Department's Office of Foreign Assets Control on this matter prior to acquiring the foreign subsidiary. If the foreign subsidiary's trade contract with Cuba has expired or has been terminated, but the subsidiary still has accounts receivable from Cuba, you should request authorization from the Treasury Department to seek and obtain these outstanding payments.

Your client may wish to acquire a foreign subsidiary that has investments in, or is contemplating an offer made by a sanctioned country or entity. Your client may request a checklist of embargoed destinations and entities, along with a description of the prohibitions that apply in each case. Alternatively, your client may prefer a mere listing of the embargoed destinations and entities accompanied by an illustrative list of questions and answers of a more practical nature. The following three questions and answers are examples of the latter approach.

*Question:* I wish to acquire an Eastern European company that is bidding on a contract to improve airfields in Libya. Is there a problem?

*Answer:* That may be a problem. United Nations Security Council (UNSC) Resolution 883<sup>13</sup> directs member states to prohibit their nationals and those in their territory from supplying any materials destined for the construction, improvement or maintenance of Libyan civilian or military airfields and associated facilities and equipment, or any engineering or other services for such projects, except emergency equipment and equipment and services directly related to civilian air traffic control.<sup>14</sup> The Eastern European country is a United Nations member and has almost certainly enacted a national law or issued a decree prohibiting such activities. You need to know if the activity in question has been determined to fall within the exception noted in the Security Council Resolution or has received any required national and U.N. authorizations. Even if the new foreign subsidiary may legally bid on and perform such a con-

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13. S.C. Res. 883, U.N. SCOR, 3312th mtg. at 1, U.N. Doc. S/RES/883 (1993).

14. *See id.*

tract for Libyan airfield improvement, U.S. persons and U.S.-origin goods will likely be prohibited from any involvement in such a project under the Libyan Sanctions Regulations<sup>15</sup> administered by the Treasury Department and the Export Administration Regulations<sup>16</sup> administered by the Commerce Department.

*Question:* A regular foreign customer has called to request shipment of turbine engine components destined to be installed by a European facility in Boeing-manufactured aircraft belonging to Iran Air. Is there a problem?

*Answer:* That is a problem. Executive Order 13,059, issued August 19, 1997,<sup>17</sup> specifically prohibits the exportation from the United States, or by a U.S. person, of goods intended specifically for incorporation into other goods to be supplied to Iran or the Government of Iran. Iran Air is considered an entity of the Government of Iran. You may request authorization from the Treasury Department under the Iranian Transactions Regulations,<sup>18</sup> noting in particular section 560.528 of those regulations, which provides that “[s]pecific licenses may be issued on a case-by-case basis for the exportation and reexportation of goods, services, and technology to insure the safety of civil aviation and safe operation of U.S.-origin commercial passenger aircraft.”<sup>19</sup> However, your client should be advised that this provision has been interpreted very narrowly and the process for obtaining authorization is lengthy.<sup>20</sup>

*Question:* I wish to acquire a foreign subsidiary that is providing oil pipeline parts to Iraq. Is there a problem?

*Answer:* That may be a problem. You need to inquire whether the foreign company has been authorized to provide such items as part of the temporary and limited “Oil for Food” exception to the United Nations mandated trade restrictions against Iraq set forth in Security Council Resolution Res. 986.<sup>21</sup> Under the Oil for Food exception to the international embargo, companies may obtain authorization to enter into contracts with Iraq and to perform con-

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15. See 31 C.F.R. pt. 550 (1997).

16. See 31 C.F.R. pts. 730–774 (1997).

17. See Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (1997).

18. See 31 C.F.R. pt. 560 (1997).

19. *Id.* § 560.528.

20. See *id.*

21. S.C. Res. 986, U.N. SCOR, 3519th mtg. at 1, U.N. Doc. S/RES/986 (1995).

tracts for the purchase of oil, the sale of food and medicine, or the supply of parts and equipment essential to the safe operation of the Kirkuk-Yumurtalik pipeline system in Iraq.<sup>22</sup> In any case, your client should consult with the Treasury Department concerning any requirements that could apply to him under U.S. law if he acquires a company involved in a trade relationship with Iraq.

Providing guidance on the application of U.S. law governing trade with embargoed destinations requires a good knowledge of relevant regulations and attention to detail. You can nevertheless provide your client good advice on such trade restrictions because applicable regulations are available and you may consult with both the Commerce and Treasury Departments to clarify the scope of the various embargoes and determine your client's duty of care.

Providing guidance on the "Potential Impact of U.S. Unilateral Sanctions Laws on Company X's International Trade" will be more difficult since these laws are relatively new, there is no discernable pattern of application, and very few sanctions law provisions have implementing regulations. Your challenge is to provide your client with some degree of certainty and predictability about the application and impact of economic sanctions. United States unilateral sanctions laws have spurred a highly charged legal and foreign policy debate. You may first want to provide some background material so your client can understand the context in which these laws have developed. You will then have to devise a method of segregating the various sanctions provisions, determining which ones could affect your client's business, whether the impact would be great or small, and what measures he can take to minimize his business risks.

Your client has many questions. How, in roughly a decade, did the focus of export controls shift so dramatically from the former Soviet Union to countries supporting terrorism or developing nuclear, biological, and chemical weapons and the missiles to deliver them? Why do we now have so many unilateral controls, when for so long we limited their use and acknowledged the greater benefit of multilateral controls?<sup>23</sup> Why was there far greater consensus within the

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22. *See id.*

23. The Export Administration Act of 1979 (EAA), 50 U.S.C.A. app. §§ 2401–2420, which provides authority for the control of dual-use goods and technology worldwide, contains provisions designed to restrict the use of unilateral controls or to limit the burden on U.S. exporters. 50 U.S.C.A. app. § 2405 (West 1991 & Supp. 1997). Numerous criteria must be met and a report submitted to the Congress prior to the imposition, expansion,

United States and amongst the allies about the Cold War export controls directed against the Soviet Bloc than there is today about export controls against countries of concern for terrorism or weapons proliferation reasons?

Are we moving to a “new world order” export control regime that would stem the flow of goods, technology, and services to those who would use them for inappropriate purposes?<sup>24</sup> Are we in a transitional period, constantly rebalancing (a) the need to maintain our technological edge through the competitive discipline of global trade with (b) the need to prevent our high technology exports from falling into the wrong hands?

Your client is perplexed. He tries to keep up with current events, with national and international news, to help him assess business risks and opportunities. But he is receiving mixed messages, particularly on unilateral economic sanctions.

As some critics have asked, is the “proliferation” of unilateral economic sanctions merely haphazard, the result of a political need to “do something” immediately, unrealistic since the technology genie is already out of the bottle?<sup>25</sup> Are unilateral sanctions inef

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or extension of controls on exports for foreign policy reasons. *See id.* § 2405(b)–(f). The criteria include consultation with United States industry and other countries. *See id.* § 2405(c)–(d). A contract sanctity provision was added in 1985 to permit companies to carry out transactions benefitting from a contract or license in effect prior to the date of the new control, thereby lessening the risk that United States companies would be branded as unreliable suppliers. Pub. L. No. 99-64, § 108(l), 99 Stat. 120, 136 (1985). Though certain foreign policy controls on weapons proliferation items are multilateral, the controls maintained on most terrorist and embargoed countries are unilateral in nature. During the course of the 1980s, Congress amended the EAA to prohibit unilateral controls on exports of national security-controlled items to the Soviet Bloc. *See* 50 U.S.C.A. app. § 2404. The EAA expired in August 1994. *See id.* § 2419. The Export Administration Regulations promulgated under the EAA are maintained in effect pursuant to the International Emergency Economic Powers Act. 50 U.S.C.A. §§ 1701–1706 (West 1991 & Supp. 1997).

24. *See generally* THE STANLEY FOUNDATION, WEAPONS OF MASS DESTRUCTION: ARE THE NONPROLIFERATION REGIMES FALLING BEHIND? 4 (1996) (explaining that threats advanced by the proliferation of weapons of mass destruction are changing and the tools used to address these threats should be revised). This report includes a “model regime” tool to evaluate the effectiveness of existing non-proliferation regimes, and indicates the key components needed for an effective regime: a universal treaty or treaties, a widely supported, multilateral oversight organization, transparency and verification measures, export controls to limit technology transfers to states of proliferation concern, enforcement mechanisms, regime-specific sanctions, domestic criminalization, domestic materials control, and commitment from national governments. *See id.* at 7–10.

25. *See* Sven Kraemer, *Illusory Game of Arms Control*, WASH. TIMES, May 11, 1997, at B4; *see also* Christine Ford, *Off the Shelf Supercomputing*, MONTGOMERY MAG., Aug.



fective to change the behavior of rogue states and organizations, a mere squandering and undermining of U.S. power,<sup>26</sup> harmful only to United States' business, and counterproductive because such sanctions only serve to harden the target countries' opposition to United States interests?<sup>27</sup> Or, as proponents of economic sanctions maintain, are such measures necessary to assert a United States leadership role and persuade reluctant trading partners to join the combat against terrorism, weapons proliferation, and abuse of fundamental human rights? Proponents point to the effectiveness of multilateral sanctions against South Africa, Iraq, and Libya, and the fact that the United States must sometimes impose unilateral sanctions first to garner multilateral support. Proponents also point to the effectiveness of certain unilateral sanctions in keeping foreign businesses away from investing in countries targeted by the United States.<sup>28</sup> Of the three major tools in the foreign policy arsenal — diplomacy, economic sanctions, and military force — have economic sanctions become the tool of choice or the tool of “first” resort?<sup>29</sup>

Despite the widespread criticism of such sanctions,<sup>30</sup> what is the

1, 1997, at 8 (explaining how federal researcher, Rodolan Pozzo, assembles a supercomputer with several small computers and the right software). “You don't need [a] Ph.D.[] to do this, . . . all the materials came off the shelf. You can get everything you'd need at your neighborhood computer store.” *Id.* (quoting Rodolan Pozzo).

26. See Jim Hoagland, *Squandered Power*, WASH. POST, Oct. 16, 1997, at A19.

27. See THE PRESIDENT'S EXPORT COUNCIL, UNILATERAL ECONOMIC SANCTIONS: A REVIEW OF EXISTING SANCTIONS AND THEIR IMPACTS ON U.S. ECONOMIC INTERESTS WITH RECOMMENDATIONS FOR POLICY AND PROCESS IMPROVEMENT (1997); NATIONAL ASS'N OF MFRS., A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993–96, at 1 (1997); USA ENGAGE, THE FOREIGN POLICY EFFECTS OF UNILATERAL SANCTIONS, (1997).

28. See *The LIBERTAD Act: Implementation and International Law: Hearing Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 104–09 (1996) [hereinafter *Hearing*] (statement of The Cuban American National Foundation: A Report on the Immediate Impact of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, July 1996 (Part III, The “Chilling Effect” of LIBERTAD)).

29. See Hoagland, *supra* note 26, at A19.

30. See, e.g., Stuart Anderson, *Stop the Sanctions Game*, J. COM., July 23, 1996, at A6; Rick Atkinson, *Divergent Policies Toward Iran Strain U.S.-German Relations*, WASH. POST, June 27, 1996, at A21; Lionel Barber & Robert Graham, *Europe Sends Warning to U.S. over Sanctions*, FIN. TIMES, June 24, 1996, at 2; Bruce Barnard, *E.U. to Fight U.S. Efforts to Punish Iran and Libya*, J. COM., July 22, 1996, at A5; Joe Cobb, *Trade Sanctions: Seizing Your Sword by Its Blade*, WORLD & I, Oct. 1995 (copy on file with the *Stetson Law Review*); Nancy Dunne, *Retaliation Fears over U.S. Sanctions Bill: Companies Dealing with Iran and Libya Face Curbs Under Controversial Legislation*, FIN. TIMES, June 17, 1996, at 4; *European Union Official Condemns U.S. Sanctions*, N.Y.

mood in Congress?<sup>31</sup> What future sanctions measures can your client expect? Is there some movement afoot to reimpose licensing requirements on certain high-performance computers, particularly to China and Russia?<sup>32</sup> Is there some way to predict the application of current sanctions and the impact of future sanctions in order to minimize business losses?

This paper focuses on the development of United States unilateral “sanctions laws” imposed for non-proliferation, anti-terrorism, and human rights reasons and attempts to provide a mechanism to

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TIMES, Sept. 9, 1996, at A5; Arthur Gottschalk, *Steps Against Mideast Hurt U.S. More, Experts Claim*, J. COM., May 6, 1996, at B7; Richard N. Haass, *Sanctions — With Care*, WASH. POST, July 27, 1997, at C9; Michael S. Lelyveld, *Major U.S. Banks Press Opposition to New House Iran-Libya Sanctions*, J. COM., May 16, 1996, at A3; Donald L. Losman, *Good Intentions Gone Bad: Punitive Trade Embargoes Are Appealing, but They Don't Achieve Our Goals*, WASH. POST, Oct. 6, 1996, at C3; Robert Marquand, *“Ugly American” Is Back: U.S. Slaps Own Friends to Spite Cuba and Iran*, CHRISTIAN SCI. MON., June 26, 1996, at 8; Greg Mastel, *The Sanctions Game*, J. COM., July 9, 1996, at A6; Dale McFeatters, *Blending Sanctimony with Sanctions*, J. COM., Sept. 16, 1997, at A8; *The Sanctions Madness*, J. COM., Feb. 28, 1997, at A6; *Targeting Sanctions*, J. COM., Mar. 25, 1997, at A6; *WTO Members Criticize U.S. for Unilateral Trade Measures*, INSIDE U.S. TRADE, Nov. 15, 1996, at 16.

31. “In spite of objections raised by economists and foreign policy experts against trade and other financial sanctions, they have emerged as the pre-eminent weapon in Congress's diplomatic arsenal. ‘Congress loves sanctions,’ observed Rep. Lee H. Hamilton, D-Ind.” Carroll J. Doherty, *Sanctions: Nice Idea but . . .*, J. COM., Sept. 22, 1997, at A7.

32. In early 1997, reports that a U.S. company sold a high-performance computer to a Russian laboratory involved in nuclear weapons work spurred congressional action since the license exception under which the computer was exported was only available for shipments to civil end-users and civil end-uses in former Soviet Bloc countries. See Jeff Gerth & Michael R. Gordon, *Despite U.S. Ban, Russia Buys I.B.M. Computers for Atom Lab*, N.Y. TIMES, Oct. 27, 1997, at A1 (detailing the facts behind a federal grand jury investigation regarding the computer sale). Representatives Floyd Spence and Ron Dellums proposed amendments to a pending Defense appropriations bill to reimpose a USG prior approval mechanism on exports or re-exports of computers with performance levels above 2000 million theoretical operations per second to all end-users in Russia, China, and other destinations identified as “Tier 3” countries in § 740.7 of the Export Administration Regulations. See National Defense Authorization Act for Fiscal Year 1998, H.R. 1119, 105th Cong. §§ 1211–1215 (1997) (enacted as Pub. L. No. 105-85, §§ 1211–1215, 111 Stat. 1629, 1632–35 (1997)). A similar provision that would affect exports of such computers to China was added to another pending bill, the China Policy Act of 1997. See S. 1164, 105th Cong. § 306 (1997). See generally Michael S. Lelyveld, *Supercomputer Superbattle Looms; Congress-Clinton Row Likely over China Sales*, J. COM., Oct. 23, 1997, at A1 (explaining the conflict that exists between Congress and the Clinton Administration over efforts to slow supercomputer sales to China and other countries); Toni Marshall, *Helms Says U.S. Policy Appeases Beijing; His Bill on China Imposes Sanctions*, WASH. TIMES, Sept. 18, 1997, at A15 (discussing the criticisms regarding proposed legislation).

assist companies in factoring such sanctions laws into their business decisions.<sup>33</sup> Part I describes the evolution over the past decade of multilateral and United States unilateral trade controls.<sup>34</sup> Part II views the on-going debate over U.S. unilateral controls and sanctions from the perspective of an individual U.S. company.<sup>35</sup> Such a company would glean its information from the press and from its trade association and industry contacts. Given the complexity of current trade law and the uncertainty surrounding the scope and application of sanctions laws, such a company would likely seek advice of counsel to understand and comply with existing export license requirements and with any export bans imposed under “sanctions” laws. Therefore, Part III, including its Appendix, provides a series of questions and charts to assist the practitioner in advising clients involved in international trade.<sup>36</sup>

### *PART I: BACKGROUND*

#### A. Multilateral Export Controls

Over the past decade, the United States has made profound changes to its export control system. A string of events spurred a reassessment of trade controls: the end of the Cold War and corresponding reduction of the Soviet military threat, the use of chemical weapons during the 1980–88 Iran-Iraq War, the 1990–91 Persian Gulf conflict, the discoveries in Iraq of advanced weapons programs and stockpiles, and terrorist incidents in the United States and abroad. Since 1990, the United States has significantly scaled back the Cold War controls aimed at the former Soviet Union, while imposing broad new controls on dual-use exports to entities involved in international terrorism and countries seeking to acquire biological, chemical, or nuclear weapons and missile delivery systems. The United States has made many of these changes multilaterally, working with major trading partners in a number of export control regimes. These non-treaty based regimes — the Wassenaar Arrange-

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33. This paper will not examine statutory provisions aimed at environmental and unfair trade practices.

34. *See infra* Part I. See also BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* (1988) and GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (2d ed. 1990), for a comprehensive analysis of economic sanctions.

35. *See infra* Part II.

36. *See infra* Part III.

ment,<sup>37</sup> Australia Group,<sup>38</sup> Nuclear Suppliers Group,<sup>39</sup> and Missile Technology Control Regime<sup>40</sup> — include countries that have agreed to controls or guidelines for regulating the export of strategic, chemical and biological, nuclear, and missile technology items, respectively.

### B. Growth of Unilateral Export Controls and Embargoes

However, the United States is taking increasingly unilateral actions, and continually tightening controls on embargoed and terrorist-supporting countries,<sup>41</sup> without being able to persuade its

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37. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established in 1996 and takes its name from the town in the Netherlands in which the member countries met to create the new regime. See Evan R. Berlack & Cecil Hunt, *Overview of U.S. Export Controls*, in COPING WITH U.S. EXPORT CONTROLS 1997, at 13, 28 (PLI Com. L. and Practice Course Handbook Series No. A-760, 1997); Golden E. Herrin, *CNC Export Regulations*, MOD. MACHINE SHOP, Feb. 1, 1997, at 156; see also Jana Byron, *Inside BXA*, EXPORT PRAC., Nov. 15, 1997, at 19. This regime was initially viewed as a successor regime to CoCom, the Coordinating Committee for Multilateral Export Controls, which served from 1949 to 1995, stemming the flow of sensitive goods and technologies to the Soviet Bloc. See Herrin, *supra*. However, the Wassenaar Arrangement differs from CoCom in several respects: Wassenaar members approve exports according to national discretion, unlike the Cocom consensus procedures; the Wassenaar lists of sensitive goods are shorter than the Cocom lists; there are no official target countries, although the United States continues to focus attention on countries that seek advanced weapons systems and engage in international terrorism; and there are many more Wassenaar members (33) than former CoCom members (17). See Berlack & Hunt, *supra*. Russia and certain Eastern European countries that were formerly the target of CoCom are now Wassenaar Arrangement members. See Herrin, *supra*.

38. The Australia Group, created in 1984, includes approximately 30 countries that have agreed to control dual-use chemicals, biological microorganisms, and chemical and biological equipment to prevent the proliferation of chemical and biological weapons. See Thomas Daschle, *S. Exec. Res. 75, Resolution of Approval of U.S. Ratification of the Chemical Weapons Convention*, GOV'T PRESS RELEASES, Apr. 22, 1997; see also Berlack & Hunt, *supra* note 37, at 27.

39. The Nuclear Suppliers Group includes over 30 countries that have agreed to controls and guidelines for restricting exports of nuclear-related items to prevent the proliferation of nuclear weapons. See Eduardo Lachica, *U.S., China Move to Revive Nuclear Pact*, ASIAN WALL ST. J., Oct. 14, 1997, at 30; see also Berlack & Hunt, *supra* note 37, at 28.

40. The Missile Technology Control Regime includes roughly 30 countries that have agreed to control missile systems and related dual-use items to prevent the proliferation of missile systems capable of delivering nuclear, chemical, or biological weapons. See Berlack & Hunt, *supra* note 37, at 27; see also 15 C.F.R. §§ 742.2(a) & (d), 742.3(a) & (d), 742.5(d) (1997); 15 C.F.R. pt. 740 (Supp. 1 1997).

41. For a chronology and description of export controls imposed on these countries, see Anne Q. Connaughton, *Exporting to Special Destinations: Terrorist-Supporting and*

trading partners to take similar measures. Major U.S. trading partners, greatly dependent on exports and believing that it is counterproductive to isolate countries from normal trading and diplomatic relationships, maintain a “constructive dialogue” with countries such as Iran.<sup>42</sup> However, even if the Western European countries, Japan, and Australia agreed to boycott rogue countries, such a boycott would not be completely effective in preventing rogue countries from acquiring the items they seek — from consumer goods to sophisticated weapons components and systems. The Western allies are not the sole suppliers of such items, which are available from many new foreign sources in Russia, Eastern Europe, China, and other Asian countries.<sup>43</sup> A key objective in on-

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*Embargoed Countries*, in COPING WITH U.S. EXPORT CONTROLS 1996, at 353, 353–432 (PLI Com. L. and Practice Course Handbook Series No. 748, 1996).

42. As a result of the German court ruling on April 10, 1997, which implicated the Iranian Government in an assassination carried out in Germany in 1992, E.U. countries withdrew their ambassadors from Tehran, and banned certain high-level meetings with Tehran, but have not broken diplomatic or trade ties with Iran, and are seeking to send their envoys, including German envoys, back to Tehran. See Lionel Barber, *E.U. Reviews Iran Options as Envoys Set to Return*, FIN. TIMES, Apr. 29, 1997, at 6; *Bonn Sees Chance to Mend Ties to Iran*, WASH. POST, Aug. 28, 1997, at A29; William Drozdiak, *E.U. Nations' Envoys Going Back to Iran*, WASH. POST, Apr. 30, 1997, at A15; see also William Drozdiak, *German Court: Tehran Ordered Exile Killings*, WASH. POST, Apr. 11, 1997, at A1; *European Union Envoy Fails to Resolve Dispute with Iran*, WASH. POST, Sept. 8, 1997, at A18; George Gedda, *U.S. Tries Again to Isolate Tehran*, WASH. TIMES, Apr. 22, 1996, at A13; Toni Marshall, *Washington Hails E.U. Iran Policy but Foreign Ministers Balk at U.S. Efforts to Isolate Tehran*, WASH. TIMES, Apr. 30, 1997, at A13; *Mixed Response from Europe on Ruling Linking Iran to Killings*, N.Y. TIMES, Apr. 30, 1997, at A1; *Some Europe Envoys Not Welcome in Iran*, WASH. POST, May 1, 1997, at A28; Greg Steinmetz, *E.U. Unlikely to Impose Embargo on Iran*, WALL ST. J., Apr. 14, 1997, at A12. The German court found that officials at the highest level of Iran's Islamist government ordered the killing of Iranian-Kurdish dissidents. See William Drozdiak, *German Court: Tehran Ordered Exile Killings*, WASH. POST, Apr. 11, 1997, at A1. The killings took place in September 1992 in Berlin's Mykonos restaurant, providing the name — Mykonos trial and Mykonos affair. See *id.*

43. See, e.g., *Arms Sales in the Sunlight*, WASH. POST, Oct. 21, 1997, at A18; *As Wars Wane, Civilian Arsenal Grow; Weapons Passing from Government Hands Worldwide, Report Says*, WASH. POST, Oct. 26, 1997, at A11; Christy Campbell, *Arms Salesmen Target Deadly Soviet Weapons at the West*, SUNDAY TELEGRAPH, Sept. 14, 1997, at 13; Bruce Clark, *Russian Groups "Helping Iran with Missiles,"* FIN. TIMES, Sept. 11, 1997, at 2; *Controlling Arms*, FIN. TIMES, Oct. 15, 1997, at 17; Barbara Crossette, *New U.N. Monitor Says Iraq Is Still Hiding Data on Weapons*, N.Y. TIMES, Oct. 8, 1997, at A7; Jamie Dettmer, *Tehran Building Deadly Gas Plant; Germany Cites Aid from Indian Firms*, WASH. TIMES, Jan. 30, 1995, at A1; Bill Gertz, *Albright Concedes "Concern" over China-Iran Transfers; Cites Items that Could Be Used to Make Biological Arms*, WASH. TIMES, Jan. 24, 1997, at A6; Bill Gertz, *China Joins Forces with Iran on Short-Range Missile*, WASH. TIMES, June 17, 1997, at A3; Bill Gertz, *China Sold Iran Missile Technology*,

going United States bilateral discussions with many countries, including Russia and China, is to persuade these countries to stop supplying weapons proliferation items to rogue states and to establish effective export control schemes.<sup>44</sup>

### C. Do Unilateral Export Controls and Embargoes Have the Desired Effectiveness?

In most unilateral sanctions measures, such as the embargoes maintained against Cuba, North Korea, Libya, and Iran, the United States prohibits virtually all exports and re-exports of United States goods to such countries and also prohibits United States persons from engaging in virtually all transactions with such countries or

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WASH. TIMES, Nov. 21, 1996, at A1; Bill Gertz, *N. Korea Building Missiles that Could Hit American Forces; Alaska, Bases in Japan Possible Targets*, WASH. TIMES, Oct. 22, 1997, at A1; Bill Gertz, *Russia, China Aid Iran's Missile Program; Prototype Expected Within Three Years of Weapon that Could Hit Central Europe*, WASH. TIMES, Sept. 10, 1997, at A1; Bill Gertz, *Russia Sells Iran Missile Metals; Contract Contrary to Official Denials*, WASH. TIMES, Oct. 20, 1997, at A1; Bill Gertz, *Russian Space Chief Raises Concerns in U.S.; Koptev Linked to Sale of Missile Knowhow*, WASH. TIMES, Sept. 16, 1997, at A6; Bill Gertz, *U.S. May Punish Russia for Iran Sales; But White House Opposes New Laws*, WASH. TIMES, Oct. 16, 1997, at A1; Jane Harmon & Jon Kyl, *Make Russia Face Reality; Insist on Choice Between U.S. Aid, Sales to Iran*, DEF. NEWS, Oct. 20–26, 1997, at 21; David Hoffman, *Russian Missile Gyroscopes Were Sold to Iraq; Smuggling Spotlights Holes in Moscow's Defense-Industrial Complex*, WASH. POST, Sept. 12, 1997, at A1; *Iran May Be Building Tunnels for Missile Use, U.S. Alleges*, WASH. POST, May 3, 1996, at A24; Michael S. Lelyveld, *Iran Arms Deal Creates Tangled Web for Russia*, J. COM., Mar. 6, 1996, at A1; Robert Reid, *U.N. Says Iraqis Hide Biological Arms Data; Sanctions on Travel May Be Imposed*, WASH. TIMES, Oct. 8, 1997, at A15; *Russia to Help Libya Rebuild Reactor*, J. COM., Oct. 24, 1997, at A3; Martin Sieff, *U.S. Decides to Continue Iran-Iraq "Containment"; Albright Policy Unenforceable, Critics Say*, WASH. TIMES, Jan. 28, 1997, at A1; Laura Silber et al., *U.N. Call for Iraq to Disclose Weaponry*, FIN. TIMES, Oct. 8, 1997, at 1; R. Jeffrey Smith, *CIA Report Calls China and Russia Key Suppliers of Most Destructive Arms, Technology*, WASH. POST, July 2, 1997, at A24; *Those Iranian Missiles*, WASH. POST, Sept. 30, 1997, at A20; Robin Wright, *New U.N. Report on Iraqi Arms Called "Damning"*, L.A. TIMES, Oct. 7, 1997, at A4.

44. See *China Issues Nuclear Export Rules*, WASH. POST, Sept. 12, 1997, at A29; Steven Erlanger, *U.S. Telling Russia to Bar Aid to Iran by Arms Experts*, N.Y. TIMES, Aug. 22, 1997, at A3; Bill Gertz, *Gore Calls Iran's Missile Program "Vigorous,"* WASH. TIMES, Sept. 24, 1997, at A13; Scott Hillis, *China Issues Rules for Nuclear Exports*, J. COM., Sept. 12, 1997, at A12; David Hoffman, *Gore Says Probe Shows Iran Seeks Technology to Build Nuclear Arms*, WASH. POST, Sept. 24, 1997, at A26; David Hoffman, *Russia Says It Thwarted Attempt by Iran to Get Missile Technology*, WASH. POST, Oct. 3, 1997, at A35; *Q&A: Primakov on NATO, China and Arms Control*, WASH. POST, Sept. 21, 1997, at C2; *Russia Denies Helping Iran Make Nuclear Weapons*, REUTERS NEWS WIRE, Sept. 10, 1997; *Talks with China on Iran Confirmed; Uranium Recovered by Russian Police*, WASH. POST, Sept. 19, 1997, at A18.

with specially designated nationals of such countries. Such actions assert a leadership role, by “distancing” the United States from, and calling attention to the threats posed by, the target countries. However, such unilateral measures cannot prevent target nations from acquiring goods widely available from other sources or contracting with other countries' companies for assistance in developing their economic infrastructures or natural resources. A number of studies have underscored the limited effectiveness of United States' unilateral trade controls and embargoes, indicated the economic costs of such measures on United States companies, and noted that foreign companies often step in to fill orders for countries with which American companies can no longer trade.<sup>45</sup>

#### D. Enactment of “Sanctions Laws” Targeting Foreign Persons that Trade with Rogue States

It is in this context that the United States has enacted a series of laws, mostly since 1990, aimed at preventing foreign persons from engaging in specified trade with target states. These laws provide for sanctions against foreign persons and governments that supply certain foreign goods, technology, or investments to target countries. Initially, most sanctions laws were aimed at persons or countries that transferred conventional weapons or weapons of mass destruction (WMD) items to certain countries. A number of foreign companies and entities, in certain cases both the suppliers and recipients of WMD items, have been sanctioned under these laws.<sup>46</sup> These laws, despite their potential extraterritorial impact, have not generated notable objections, perhaps since they have underscored international objectives in maintaining regional stability and preventing the proliferation of weapons of mass destruction. Also, these laws were unlikely to affect companies or governments of traditional allied countries.

More recent laws, however, such as the Iran and Libya Sanctions Act of 1996 (ILSA)<sup>47</sup> and Cuban Liberty and Democratic Soli

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45. See *supra* note 27.

46. See Thomas W. Lippman, *U.S. Rethinking Economic Sanctions; State Dept. Team Weighs Costs, Impact of Trade Restrictions*, WASH. POST, Jan. 26, 1998, at A6. Sanctions have been imposed on entities in China, Pakistan, Syria, North Korea, Iran, India, and Russia. See *id.*

47. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541

parity (LIBERTAD) Act of 1996 (Helms-Burton Act)<sup>48</sup> target foreign persons and governments that engage in specified trade and investment mainly in the civilian sector of target countries. One of the main objectives of ILSA, for example, is to prevent Libya and Iran from gaining wealth from development of their natural resources, which they can then use to increase their military and terrorist-support capabilities. Under these laws, sanctions could be applied to a company in any country, including an allied country, for investing specified sums to develop Iranian or Libyan petroleum resources<sup>49</sup> or for “trafficking” in United States property in Cuba expropriated by the Castro regime.<sup>50</sup>

#### E. Sanctions Laws Generate International and Domestic Criticism

Sanctions laws, in particular the Helms-Burton Act and ILSA, have sparked significant international controversy. European Union (E.U.) and NAFTA countries have strenuously objected to ILSA and Helms-Burton,<sup>51</sup> arguing that the attempt to legislate the behavior of foreign persons extraterritorially infringes on their national sovereignty and also violates international law.<sup>52</sup> Several countries have taken domestic legal action to block the effect of these laws by prohibiting their companies from complying with U.S. reporting and other requirements.<sup>53</sup> An Organization of American States legal

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(1996), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997) [hereinafter Iran and Libya Sanctions Act of 1996].

48. See 22 U.S.C.A. §§ 6021–6091 (West Supp. 1997). This law, often called “LIBERTAD” is most commonly known as “Helms-Burton” because of its principal sponsors, Senator Jesse Helms and Representative Dan Burton. See Tom Carter, *Life After Death for Cuba Policy; Mas Leaves Legacy in Intractability of U.S. Embargo*, WASH. TIMES, Dec. 14, 1997, at A1.

49. Iran and Libya Sanctions Act of 1996, *supra* note 47.

50. See 22 U.S.C.A. § 6023 (West Supp. 1997).

51. See Jeff Apter, *Chirac Warns U.S. of Retaliation if French Firms Are Penalized*, J. COM., Aug. 8, 1996, at A2; see also *Hearing*, *supra* note 28.

52. See Bruce Barnard, *E.U. to Challenge Helms-Burton in Geneva; Retaliatory Measures Also Sought Against U.S.*, J. COM., Oct. 2, 1996, at A1. The E.U.'s trade commissioner, Sir Leon Brittan, characterizes Helms-Burton as “quite contrary to international law and an unacceptable extension of territoriality.” *Id.*

53. See, e.g., Foreign Extraterritorial Measure (United States) Order, SOR/92-584 (1992) (Can.) (amending Canada's Foreign Extraterritorial Measures Act, *inter alia*, to prohibit production of records or information related to the enforcement of foreign trade laws, allows for blocking recognition of foreign judgments relating to specified foreign trade laws, permits recovery in Canadian courts of amounts awarded under foreign rulings, a procedure known as “clawback,” and increases penalties — to \$1.5 million for



advisory body, in a non-binding opinion, claimed that Helms-Burton violates international norms protecting nationals' property rights.<sup>54</sup> And, the E.U. has challenged Helms-Burton and ILSA by moving to establish a dispute settlement panel in the World Trade Organization (WTO).<sup>55</sup>

The United States considers this dispute a diplomatic and national security matter, rather than a trade dispute, and objects to a WTO dispute panel.<sup>56</sup> The United States has been working with the E.U. to negotiate disciplines to regulate investment in expropriated property and to resolve the jurisdictional issue of which laws apply when companies face conflicting laws in different countries.<sup>57</sup> The parties have given themselves until October 15, 1997, to resolve these issues, which could allow the E.U. to withdraw its request for a WTO dispute panel and assist in convincing Congress to revise Helms-Burton to allow the President additional waiver or suspension authority.<sup>58</sup>

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corporations — for violations of Canadian orders to make them higher than penalties for violations by corporate persons of the U.S. embargo of Cuba). The E.U. also adopted blocking regulations to counter U.S. extraterritorial legislation. See *E.U. Approves Law to Block U.S. Sanctions Against Cuba, Iran-Libya*, INSIDE U.S. TRADE, Nov. 1, 1996, at 1.

54. See *OAS Legal Panel Says Helms-Burton Violates International Norms*, INSIDE U.S. TRADE, Sept. 6, 1996, at 15.

55. See *U.S. Blocks European Request for WTO Panel on Helms-Burton*, INSIDE U.S. TRADE, Oct. 18, 1996, at 11.

56. See *id.* But see *Legal Analysis Says Helms-Burton Should Be Heard by WTO Panel*, INSIDE U.S. TRADE, Sept. 5, 1997, at 11 (explaining the legal analysis prepared by a law firm in Brussels).

57. See *E.U. Anti-Helms-Burton Law Could Be Used Against Iran-Libya Sanctions*, INSIDE U.S. TRADE, July 26, 1997, at 3; *House Poised to Retaliate Against Helms-Burton Title III Suspension*, INSIDE U.S. TRADE, July 18, 1997, at 1; *U.S., E.U. Wrestle with Conflicting Jurisdiction in Helms-Burton Talks*, INSIDE U.S. TRADE, Aug. 1, 1997, at 1.

58. See *U.S., E.U. Wrestle with Conflicting Jurisdiction in Helms-Burton Talks*, INSIDE U.S. TRADE, Aug. 1, 1997, at 1; see also Neil Buckley, *U.S. and E.U. to Continue Talks on Cuba Law*, FIN. TIMES, Oct. 16, 1997, at 4; *Congressmen Reject Brittan Appeal to Soften Stance on Helms-Burton*, INSIDE U.S. TRADE, Sept. 26, 1997, at 1; *E.U. Official Predicts Deal With U.S. Over Cuba Law*, J. COM., Oct. 15, 1997, at A5; *Possible Sanctions Under Iran-Libya Act Threaten Helms-Burton Talks*, INSIDE U.S. TRADE, Oct. 3, 1997, at 1; Anne Swardson, *U.S., E.U. Make Trade Strides, But Fail to Reach Settlement; Helms-Burton Act at Center of Disagreement*, WASH. POST, Oct. 16, 1997, at A27; *U.S., European Union Still Far Apart in Helms-Burton Negotiations*, INSIDE U.S. TRADE, Aug. 8, 1997, at 1; *U.S. Pushing to Extend Helms-Burton Talks, Issue Status Report Oct. 15*, INSIDE U.S. TRADE, Oct. 10, 1997, at 1. The President has authority to suspend the right to bring an action under Title III of Helms-Burton for periods of six months each. See 22 U.S.C.A. § 6085 (West Supp. 1997); see also Nancy Dunne & Guy de Jonquieres, *Helms-Burton Antagonists Keep Fingers Crossed*, FIN. TIMES, Apr. 14, 1997, at 6. Title

Nevertheless, members of Congress have introduced measures to tighten Helms-Burton.<sup>59</sup> The President's decision to suspend the right to bring an action under Title III of Helms-Burton for the third six-month period prompted introduction of the LIBERTAD Enforcement Act, which would repeal the President's authority to suspend application of Title III.<sup>60</sup> This congressional reaction is consistent with calls by supporters of the ILSA to apply the law vigorously.<sup>61</sup> It is also consistent with pending legislation that would remove the Administration's discretion to regulate financial transactions with governments that support terrorist countries.<sup>62</sup>

According to press reports, in July 1997, the Clinton Administration concluded that a proposal for the construction of a pipeline across Iran, intended to carry gas from Turkmenistan to Turkey, did not violate the ILSA.<sup>63</sup> In October 1997, it became evident that sanc-

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III allows U.S. persons to sue, in U.S. courts, foreign companies that have "trafficked" in property expropriated by the Castro regime. See 22 U.S.C.A. §§ 6081-6082; see also Dunne, *supra*, at 6. The President does not have authority to waive or suspend application of Title IV of Helms-Burton. See *id.* Title IV excludes, from entry into the United States, executives of companies found to have trafficked in U.S. expropriated property in Cuba. See 22 U.S.C.A. § 6091(a); see also Dunne, *supra*, at 6. The class of persons to be excluded under Title IV includes agents, spouses, and minor children. See 22 U.S.C.A. § 6091(a)(4).

59. See H.R. 2288, 105th Cong. (1997) (amending Helms-Burton to require the Secretary of State to submit reports to Congress relating to exclusion from the United States of persons who have trafficked in expropriated property in Cuba). *But see* H.R. 1951, 105th Cong. (1997) (making an exception to the U.S. embargo on Cuba by lifting restrictions on certain humanitarian items, such as medicine and medical equipment); H.R. 1566, 105th Cong. (1997) (seeking to amend Helms-Burton to narrow the class of persons to be excluded from the United States under Title IV, by making the exclusion provision inapplicable to spouses and minor children); H.R. 287, 105th Cong. (1997) (amending the Trading with the Enemy Act (TWEA) and the International Emergency Economic Powers Act to prohibit regulation of the establishment of U.S. news bureaus in foreign countries or foreign news bureaus in the United States); H.R. 284, 105th Cong. (1997) (repealing both the Cuban Democracy Act and Helms-Burton).

60. See H.R. 2179, 105th Cong. (1997); see also Bill McCollum, *Putting Fangs Back into Helms-Burton*, J. COM., Sept. 16, 1997, at A9.

61. See Michael S. Lelyveld, *D'Amato Chides Clinton for Failing to Act on Iran*, J. COM., Oct. 15, 1996, at A3.

62. See Foreign Affairs Reform and Restructuring Act of 1997, S. 903, 105th Cong. § 1605 (1997) (prohibiting, with a few exceptions, all financial transactions with governments of terrorist-supporting countries, and removing the Administration's discretion to regulate or license such transactions by amending 18 U.S.C.A. § 2332d(a)-(b)).

63. See Dan Morgan & David B. Ottaway, *U.S. Won't Bar Pipeline Across Iran; Move Seen as Gesture of Reconciliation, Easing of Isolation*, WASH. POST, July 27, 1997, at A1.

tions under ILSA might apply to the pipeline project.<sup>64</sup> The press also noted in October 1997 that the United States deferred applying sanctions against a French energy company for signing a contract — worth \$2 billion — with Russian and Malaysian partners to develop Iran's South Pars gas field in the Persian Gulf.<sup>65</sup> While the Administration scrutinizes this proposal to determine if it violates ILSA,<sup>66</sup> the media is also investigating the degree to which the involved companies are vulnerable to United States pressure.<sup>67</sup> It is unclear what activities or what overall situation will trigger application of ILSA sanctions.<sup>68</sup> The Administration has only deferred application of sanctions in the latter case and may still apply sanctions on companies whose national governments have not taken enough steps to curb Iran's dangerous activities.<sup>69</sup> Moreover, Congress could

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64. See Michael S. Lelyveld, *U.S. May Reverse Stance on Iran Pipeline Project; Sanctions Possible, Officials Now Say*, J. COM., Oct. 21, 1997, at A3. "Despite numerous reports based on administration statements in July, officials now say that the trans-Iran project to pipe gas from Turkmenistan to Turkey could violate terms of the Iran-Libya Sanctions Act if a final contract is signed." *Id.*

65. See Thomas W. Lippman, *U.S. Defers Sanctions on Iran Gas Deal; Action Could Avert European Trade War*, WASH. POST, Oct. 4, 1997, at A1; Anne Swardson, *France, U.S. at Odds on Iran Oil Deal; Contract Could Result in American Sanctions*, WASH. POST, Sept. 30, 1997, at A17.

66. See Richard Lawrence, *House Bill Seeks to Limit Use of Unilateral Trade Sanctions*, J. COM., Oct. 24, 1997, at A3. At a trade subcommittee hearing, "Under Secretary of State Stuart Eizenstat disclosed that the United States is not only investigating a proposed Iranian gas field project, involving France, Russia and Malaysia, but also an Iranian oil field project involving Canadian and Indonesian investors." *Id.*

67. See, e.g., Robert S. Greenberger & Laurie Lande, *Russia's Gazprom Appears Vulnerable to U.S. Pressure over Iranian Gas Deal*, WALL ST. J., Oct. 17, 1997, at A4; Michael S. Lelyveld, *Experts Raise Doubts About Gazprom Plan for Turkey*, J. COM., Oct. 17, 1997, at A3.

68. See Steven Erlanger, *Turkey-Iran Gas Deal: A Test of U.S. Law on Terror?*, N.Y. TIMES, Aug. 13, 1996, at A7; Robert S. Greenberger, *U.S. to Investigate if Iran, 3 Countries Violated Law*, WALL ST. J., Oct. 7, 1997, at A18; Michael S. Lelyveld, *Canadian Firm's Iran Deal Tests U.S. Sanctions Policy*, J. COM., Aug. 7, 1997, at A1; *U.S. Unclear if Turkey-Iran Gas Deal Violates U.S. Sanctions Law*, INSIDE U.S. TRADE, Aug. 16, 1996, at 7; Julie Wolf, *E.U., U.S. Will Continue Trade Talks*, WALL ST. J., Oct. 7, 1997, at A19; see also David B. Ottaway & Dan Morgan, *Deal Tests U.S. Policy on Tehran; Pressure for Gas, Oil Drives Plans for Pipeline Across Iran*, WASH. POST, Oct. 12, 1997, at A1. "The British-Dutch energy conglomerate Shell is negotiating to build a \$2.5 billion gas pipeline across northern Iran . . . . The project would carry natural gas from the former Soviet republic of Turkmenistan to Turkey and Western Europe . . . ." *Id.*

69. See Michael S. Lelyveld, *Clinton Considers Waiving Iran Sanctions for E.U.*, J. COM., Oct. 7, 1997, at A1. "Europeans reportedly are being asked to increase enforcement of export controls on a dual-use list of items for Iran . . . .] sign six additional counter-terrorism conventions . . . ., and] order some reduction in Iranian Embassy staffs

initiate measures intended to ensure application of sanctions under ILSA, expand ILSA to cover additional countries,<sup>70</sup> or take other actions.<sup>71</sup>

Foreign countries are not the only critics of U.S. unilateral sanctions measures. Numerous U.S. trade groups have cataloged the proliferation of unilateral economic sanctions, objected to their increasing use as a favorite and facile tool of foreign policy, and recommended that such sanctions only be imposed after determination that the benefits to the national security outweigh the economic consequences on U.S. business.<sup>72</sup> The National Association of Manufacturers' study claims that in a four-year period from 1993–1996, the United States enacted sixty-one laws and executive actions targeting thirty-five countries (forty-two percent of the world's population) and that “[t]he sanctioned countries represent 2.3 billion potential consumers of U.S. goods and services . . . and \$790 billion worth of export markets (19 percent of the world's total).”<sup>73</sup> The President's Export Council also issued a report that urged adoption of criteria for imposing sanctions, the establishment of an interagency oversight committee, the consideration of a compensation scheme for affected companies, and exceptions for companies to perform existing

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and agree to forgo further [Iranian] debt rescheduling . . . .” *Id.*; see also Nancy Dunne, *U.S. Industry Tries to Curb Sanctions*, FIN. TIMES, Oct. 24, 1997, at 7. Under Secretary of State Eizenstat “warned that he would have to act against European companies investing in Iranian energy projects unless the European Union took further steps to deter Iran's support for terrorism and its efforts to obtain weapons of mass destruction.” Dunne, *supra*, at 7.

70. For example, § 103 of the China Policy Act of 1997 and § 3 of the China Sanctions and Human Rights Advancement Act would mandate application of sanctions on named entities. See China Policy Act of 1997, S. 1164, 105th Cong. § 103(a)(2) (1997); China Sanctions and Human Rights Advancement Act, S. 810, 105th Cong. § 3(a)(1)(A)–(E) (1997). Certain provisions in the proposed legislation appear to be “self-executing” to the extent the President is not authorized to make prior determinations, delay application of sanctions while negotiating with countries whose entities have engaged in objectionable behavior, or waive application of sanctions in the national interest. See S. 1164 § 103(b)(2); S. 810 § 3(a)(2). The ILSA applies to investment in Iran's or Libya's petroleum sections, but does not provide for sanctions on investments in Iraq's petroleum sector. See John Helmer, *Russian, Iraqi Oilmen Refuse to Discuss Moscow Meeting*, J. COM., Oct. 16, 1997, at A10.

71. See Nancy Dunne, *Gazprom Row Set to Reach Eximbank*, FIN. TIMES, Oct. 24, 1997, at 8; *Lawmaker Moves to Halt Ex-Im Aid to Gazprom*, J. COM., Oct. 24, 1997, at A3.

72. See *supra* note 27.

73. NATIONAL ASS'N OF MFRS., *supra* note 27, at 1.

contracts.<sup>74</sup>

#### F. The Chilling Effect of Sanctions Laws

As sanctions proponents have noted, however, U.S. unilateral sanctions have had a chilling effect on foreign companies' investments in Iran and Cuba.<sup>75</sup> The growing body of sanctions laws may even have a chilling effect greater than the sum of its parts. This is so because these laws have been enacted, mostly since 1990, on an ad hoc basis, rather than as part of a comprehensive plan to define and sanction irresponsible and dangerous trading activity. Many new sanctions law contains potential sanctions on exports, imports, loans, overseas trade insurance, or bilateral or multilateral financial assistance that could indirectly constrain a foreign country's purchasing power, and thereby reduce or eliminate trade with U.S. suppliers. Despite certain similarities in structure, there are a myriad of differences in these laws as to —

- sanctionable activity;
- criteria for determining if sanctionable activity has occurred;
- whether the sanctions apply only to persons and goods subject to U.S. jurisdiction;
- whether the sanctions apply to foreign persons that trade with sanctioned countries or entities;
- whether foreign persons to be sanctioned also include parent companies, successors entities, subsidiaries, or affiliates;
- whether foreign individuals subject to sanctions include agents, spouses, and minor children;
- whether the sanctions apply to foreign governments and/or foreign countries that trade with target countries;
- whether there is a list of mandatory (and discretionary) sanctions or a menu from which a specified number of sanctions must be selected;
- duration of sanctions;
- termination of sanctions provisions, if any;
- waiver provisions, if any;
- termination or sunset provisions, if any; and
- reporting requirements.

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74. See THE PRESIDENT'S EXPORT COUNCIL, *supra* note 27.

75. See *Hearing*, *supra* note 28 and accompanying text.

In addition, these laws are implemented by various agencies, in large measure without specific implementing regulations,<sup>76</sup> written guidelines,<sup>77</sup> or requirements for issuing advisory opinions.<sup>78</sup> Moreover, the sanctions required to be applied to sanctionable entities under these laws or pending bills have not been considered in relation to each other or in relation to existing penalties for illegal trade activities and may send unintended messages.<sup>79</sup> Finally, cer

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76. Treasury and Commerce regulations were amended to reflect certain provisions of the Cuban Democracy Act of 1992, the Iran-Iraq Arms Non-Proliferation Act of 1992, and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. *See* 31 C.F.R. § 515 (1997); 15 C.F.R. §§ 740, 742, 746 (1997). Also, the Treasury has issued regulations pursuant to sanctions measures imposed by Executive Order, such as the trade and investment embargo against Iran and sanctions against Angola. *See* 31 C.F.R. pts. 590, 760 (1997). However, it would be more difficult to craft a body of detailed regulations to implement certain sanctions laws, such as ILSA, whose sanctions provisions are triggered by determinations that a person has, for example, “with actual knowledge” transferred to Libya goods that “significantly and materially” contributed to Libya’s petroleum, aviation, or military sectors. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(b)(1), 110 Stat. 1541, 1543 (1996); 50 U.S.C.A. § 1701 note (1997).

77. *See State Department Has Targeted 12 Foreign Firms for Possible Boycott Action Under ILSA*, BOYCOTT L. BULL., Feb. 10, 1997 (explaining no rules or guidelines regarding the enforcement of ILSA would be issued). The State Department has held a series of oral public briefings in 1996–97 on economic sanctions programs. *See id.* The State Department has also published a notice providing additional information on the ILSA. *See* Additional Information for the Iran and Lybia Sanctions Act, 61 Fed. Reg. 66,067 (1996).

78. Not all sanctions laws affecting foreign persons and/or governments provide for the issuance of advisory opinions if requested by a party that wishes to determine whether a proposed transaction falls within the scope of the sanction. *Compare* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 7, 110 Stat. 1541, 1546 (1996), and Missile Technology Control Act, Pub. L. No. 101-510, § 1701, 104 Stat. 1738 (1990) (providing such provisions), *with* Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571 (1992) (excluding such provisions), and Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102-138, 105 Stat. 722 (1991) (current version at 22 U.S.C.A. §§ 5601–5606 (West Supp. 1997)). It might also defeat the purposes of certain sanctions statutes to require the administration to issue advisory opinions that could be used by foreign parties to devise transactions to avoid sanctions.

79. *See generally* Freedom from Religious Persecution Act of 1997, H.R. 2431, 105th Cong. § 7(a)(3) (1997) (seeking to apply penalties under the Trading with the Enemy Act (TWEA), 50 U.S.C.A. app. § 16(a)–(b)(1), to persons that shipped specified items to foreign entities found to be persecuting religious minorities). Under TWEA, civil fines are up to \$50,000 per violation and criminal penalties are up to \$1,000,000 (\$100,000 for a natural person). *See id.* However, penalties for illegally exporting the same specified items to entities involved in political repression, as well as penalties for illegal exports of chemical weapons precursors or nuclear-related items to Iran would trigger far lower fines under the International Emergency Economic Powers Act. *See* International Emergency Economic Powers Act, 50 U.S.C.A. § 1705(a)(b) (West 1991 & Supp. 1997) (provid-

tain activities, such as sales of proliferation items to rogue countries, may be reviewed under two or more sanctions statutes, each with its own sanctions triggering criteria and list of applicable sanctions.<sup>80</sup> The potential impact of one sanctions law is unpredictable. When more than one sanctions law may apply to a particular activity, there are additional uncertainties. How would two potential sanctions or set of sanctions be applied? Would the most stringent sanctions prevail? Would sanctions be cumulative?

### G. United Nations Economic Sanctions

Critics complain not only about U.S. unilateral sanctions, but also about United Nations economic sanctions. Since the end of the Cold War, the United Nations has imposed an unprecedented number of economic sanctions — at least seven times since 1990.<sup>81</sup> Well-placed observers of international sanctions point out that United Nations Security Council sanctions can be an effective tool before resorting to the use of force.<sup>82</sup> However, such international sanctions have their shortcomings in that they are: applied too gradually,

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ing for civil fines up to \$10,000 and criminal fines up to \$50,000). Use of such TWEA penalties could be read as creating a hierarchy of violations, in which illegal shipments that contributed to the repression of civil liberties or the development of Iran's weapons proliferation programs are considered less serious than illegal exports to entities persecuting certain religious minorities.

80. Transfers of weapons proliferation items to Iran or Iraq could trigger sanctions under one or more laws. *See, e.g.*, Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571 (1992), amended by 50 U.S.C.A. § 1701 note (West 1991 & Supp. 1997); 22 U.S.C.A. §§ 2799aa-2799aa-2, 3201 (West Supp. 1997); 50 U.S.C.A. app. §§ 2402 note, 2405, 2410b (West 1991 & Supp. 1997); 22 U.S.C. § 2797 note (West Supp. 1997); Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 22 U.S.C.A. §§ 2498, 2798, 5601-5606 (West Supp. 1997); 50 U.S.C.A. app. § 2410c (West Supp. 1997).

81. James C. Ngobi, Deputy Director of the Security Council and Secretary of the United Nations Sanctions Committees, stated:

In the first 45 years of its existence, the United Nations imposed mandatory sanctions only twice — in 1966 against Southern Rhodesia, and then in 1977 against South Africa. Since 1990, the Security Council has resorted to the use of sanctions at least seven times as an instrument of policy for regulating and redressing the accepted norms of behavior among nations through peaceful means.

James Ngobi, *Economic Sanctions and International Relations*, INFORUM (Fourth Freedom Forum, Goshen, Ind.), Summer 1993, at 1-4 (copy on file with the *Stetson Law Review*). The U.N. has announced further sanctions against Angola and new sanctions against Sierra Leone. *See id.*

82. *See Ngobi, supra* note 82, at 1.

inconsistently enforced, not rule-based, and often harm innocent populations rather than rogue regimes.<sup>83</sup> Former U.N. Secretary-General Boutros Boutros-Ghali and other United Nations officials have called on the United Nations to carefully consider the effects of proposed sanctions, maximize their political impact, but minimize their human costs, particularly on vulnerable groups — children, the sick and elderly — in sanctioned countries.<sup>84</sup>

### *PART II: THE ON-GOING DEBATE OVER UNILATERAL SANCTIONS*

In a brief period of time, attention shifted from Cold War controls on strategic goods to controls on weapons proliferation items transferred or sold to rogue regimes. The new focus may be obscured by a further shift of focus: media attention, at least, appears focused more on the controversy generated by U.S. economic sanctions than the threat such sanctions measures are intended to counter.

Lawmakers face great difficulties in devising effective export rules in today's global trading environment. They deal with many conflicting goals, such as the need to maintain global competitiveness versus the need to prevent high technology from reaching rogue states. They also have to assess conflicting reports about the effectiveness, enforceability, and difficulty of administering unilateral trade sanctions.<sup>85</sup> It is increasingly clear that “[e]xport con

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83. *See id.* at 2.

84. *See* Boutros Boutros-Ghali, *U.N. Sanctions Cause Suffering*, U.N. PRESS RELEASE, Jan. 5, 1996; *see also* Javier Perez de Cuellar, *Letter Dated 20 March 1991 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, at 2-13, U.N. Doc. S/22366 (1991) (attaching the Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment By a Mission to the Area Led By Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management, dated 20 March 1991); Colman McCarthy, *The Ongoing War Against Iraq's Civilians*, WASH. POST, Jan. 30, 1996, at E20; Abdullah Mutawi, *U.N. Sanctions on Iraq Lead to Deaths of 500,000 Children* (visited Mar. 27, 1998) <[http://www.oneworld.org/news/reports/may96\\_iraq2.html](http://www.oneworld.org/news/reports/may96_iraq2.html)>.

85. Though critics note the economic burden sanctions laws placed on U.S. business, few have noted the ever increasing number of reports required by sanctions laws (ILSA contains eight reporting requirements), or the time-consuming research and meticulous verification needed to determine that an entity or country has in fact met the criteria or engaged in the activity set forth in a particular statutory provision. *See Iran-Libya Sanctions Act — One Year Later: Hearing Before the House Comm. on Int'l Relations*, 105th Cong. 1997) (testimony of Alan Larson, Assistant Secretary for Economic and Business Affairs); *see also* Bill Gertz, *State Slow to Publish List of Terrorists Politi-*



trols occur at the most delicate intersection of commerce and foreign policy, where the definition of ally or enemy is spelled out in the stark language of proscription instead of the veiled vocabulary of diplomacy.”<sup>86</sup> Congress is vying with the President to attach public policy strings to arms sales, dual-use items, and U.S. assistance.<sup>87</sup> Domestic groups advocate a range of actions, such as lifting unilateral controls, opposing proposed impositions of new restrictions because of the effect on one U.S. industry,<sup>88</sup> and linking trade or assistance to a country's behavior.<sup>89</sup> Domestic and international forces apply pressure from different directions on the President over application of ILSA and Helms-Burton.<sup>90</sup>

As unilateral trade controls have increased, the business community has assumed a larger role in the debate over such controls. Interestingly, this occurs at a time when exporters have been given new responsibilities in the export control arena. For example, under the Export Administration Regulations, an exporter must obtain an export license for the export of an item that otherwise would not require a license if he knows that the item is destined for a weapons

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*cal Correctness Is Blamed for Delay*, WASH. TIMES, Aug. 8, 1997, at A1 (referring to the State Department's preparation of a list of “terrorist organizations” as provided for in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)). The State and Treasury Departments published a notice identifying terrorist organizations, and regulations that set forth economic sanctions on such organizations, which became effective on October 6, 1997. See 62 Fed. Reg. 52,493 (1997).

86. Rory J. O'Connor, *Supercomputer Sales Restrictions Obsolete?*, AUSTIN AMERICAN-STATESMAN, Mar. 10, 1997, at D1.

87. See, e.g., *Arms Sales in the Sunlight*, WASH. POST, Oct. 21, 1997, at A18.

88. See Thomas W. Lippman, *Threatened Ban on Key Import Has Lobbyists Lining up Behind Sudan Trade*, WASH. POST, Oct. 16, 1997, at A6.

The Sudanese government, a Muslim regime allied with Iran, has no friends on Capitol Hill and no lobbying clout. But that was before the gum arabic lobby woke up. Minute Maid Orange Soda, Ultra SlimFast diet drinks . . . M&Ms and scores of other everyday products, it seems, are made with gum arabic, a derivative of the acacia tree so plentiful in Sudan that the vast and impoverished African nation is the source of 70 percent to 90 percent of the world's supply. Without gum arabic, fruit particles in fruit drinks would sink to the bottom of the can, one lobbyist warned. Many soft drinks, candies, printing inks, pharmaceuticals and cosmetics would not be the same.

*Id.*

89. See Holly Burkhalter, *The U.S. Military Should Not Train Forces that Abuse Civilians*, LEGAL TIMES, Sept. 29, 1997, at 29; see also *infra* note 134.

90. See Tom Carter, *Clinton Pressured on Cuba Sanctions; Helms, U.S. Allies Squeeze from 2 Sides*, WASH. TIMES, Oct. 21, 1997, at A16. “The Senate Foreign Relations Committee is turning the screws on the Clinton administration to comply with the Helms-Burton law in a move certain to anger U.S. allies even more.” *Id.*

proliferation end-use or end-user.<sup>91</sup> Also, an exporter may use certain license exceptions based on his determination that he is exporting to a civil end-user, not to a military or weapons proliferation end-use or end-user.<sup>92</sup> Exporters requested and received guidance on the scope of the knowledge requirement, as it relates to certain weapons proliferation activities,<sup>93</sup> and have also urged for identification of entities of concern.<sup>94</sup>

During the Cold War, there was acute U.S. and allied awareness of the Soviet threat of nuclear Armageddon<sup>95</sup> and a corresponding multilateral consensus to restrict the export of high technology goods to the Soviet bloc.<sup>96</sup> Ironically, although acts of terrorism and the use of weapons of mass destruction by rogue nations are easier to carry out and more likely to occur today, the threats appear more diffuse,<sup>97</sup> and there is no national or international consensus on what to do about them. For example, U.N. Security Council members are divided on the need to widen sanctions on Iraq in the face of continued Iraqi non-compliance with requirements to disclose all proliferation weapons programs.<sup>98</sup>

There is no lack of publicity about the threat. Former Senator Sam Nunn noted that the greatest threats to U.S. national security today are terrorism and the proliferation of weapons of mass destruction.<sup>99</sup> Many of the sanctions laws and recent executive actions state counter-terrorism and nonproliferation objectives. The media

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91. See *supra* text accompanying note 5.

92. See *supra* notes 5, 32, and accompanying text.

93. See 58 Fed. Reg. 68,029 (1993).

94. See generally 15 C.F.R. pt. 744 (Supp. IV 1997) (providing Entity List).

95. See Jessica Stern, *U.S. Backs Wrong Nuke-Deterrence Efforts*, USA TODAY, Sept. 17, 1997, at A15.

96. See Export Administration Act of 1979, Pub. L. No. 96-72, § 5, 93 Stat. 503, 506-513 (1979); Export Administration Act of 1985, Pub. L. No. 99-64, §§ 105-107, 99 Stat. 120, 123-131 (1985); S. REP. NO. 98-170, at 6-12 (1979), reprinted in 1979 U.S.C.C.A.N. 1147, 1152-59; H.R. CONF. REP. NO. 99-180, at 47-65 (1985), reprinted in 1985 U.S.C.C.A.N. 108, 108-27; MARIE-HÉLÈNE TABBÉ, *LA POLITIQUE AMÉRICAINE DE COMMERCE AVEC L'EST 1969-1989*, at 58, 184-187 (1990).

97. See *supra* notes 43, 45, and accompanying text.

98. See Barbara Crossette, *Russia and France Balk at U.S. Plan to Punish Iraq Even More*, N.Y. TIMES, Oct. 22, 1997, at A13; Barbara Crossette, *U.S. Fails to Get U.N. Backing to Widen Sanctions on Iraq*, N.Y. TIMES, Oct. 23, 1997, at A3; *Iraq: Two Crises*, WASH. POST, Oct. 22, 1997, at A20; Betsy Pisik, *Added Sanctions on Iraq Delayed; U.S. Needs Backing of Russia, France*, WASH. TIMES, Oct. 22, 1997, at A11.

99. See *News Hour with Jim Lehrer* (PBS television broadcast, July 9, 1996) (remarks by former Senator Sam Nunn).

has reported alleged nuclear and missile-related transfers by Russia and China to Iran and other countries, along with the risk that Russian nuclear materials will be diverted to countries of concern.<sup>100</sup>

Yet, opinion remains divided. On the one hand, industry and certain commentators say the United States is doing too much and has too many restrictions on trade to too many countries.<sup>101</sup> Certain commentators and groups advocate lifting sanctions on certain countries<sup>102</sup> or lifting specified controls for humanitarian reasons.<sup>103</sup> Other groups contest the legality of certain embargoes or advocate violating U.S. law to export medical and other items to Iraq or

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100. See *id.*; see also Campbell, *supra* note 43, at 13; David Hoffman, *Gore Says Probe Shows Iran Seeks Technology to Build Nuclear Arms*, WASH. POST, Sept. 24, 1997, at A26; Amy Dockser Marcus, *Growing Dangers: U.S. Drive to Curb Domsday Weapons in Mideast Is Faltering*, WALL ST. J., Sept. 6, 1996, at A1; Floyd Spence, *Missile Defense Vacuity*, WASH. TIMES, Feb. 29, 1996, at A20.

101. See *supra* notes 25–27 and accompanying text.

102. See H.R. 284, 105th Cong. (1997) (attempting to repeal the Cuban Democracy Act and Helms-Burton); Susan B. Levine & David J. Rothkopf (former Senior Vice President of the Overseas Private Investment Corporation and Deputy Under Secretary of Commerce for International Trade, respectively), *Time to Lift U.S. Sanctions*, J. COM., Oct. 20, 1997, at A9.

103. See Cuban Humanitarian Trade Act of 1997, H.R. 1951, 105th Cong. (1997); H.R. 287, 105th Cong. (1997). House Bill 287 would amend § 203(b) of the International Emergency Economic Powers Act and § 5(b) of the Trading with the Enemy Act to prohibit the regulation of news bureaus in foreign countries. See H.R. 287, § 1. This bill would also repeal the provisions in Helms-Burton that authorize the President to establish an exchange of news bureaus. See H.R. 287, § 3; see also Tom Carter, *Human Loop-hole Sought in Cuba Embargo Bill Would Ease Food, Medicine Through*, WASH. TIMES, June 19, 1997, at A13; *Former Congressmen Urge Reexamination of U.S. Policy on Cuba*, INSIDE U.S. TRADE, Jan. 17, 1997, at 13; Malcolm Wallop, *Target Castro, Not Cuba's People*, WALL ST. J., Apr. 24, 1997, at A18. Certain commentators allege the U.S. Government prohibits exports of all humanitarian items to embargoed countries. See, e.g., Stephen S. Rosenfeld, *Cuba, Food, Medicine; America Should Not Be in the Business of Inflicting Pain*, WASH. POST, Apr. 4, 1997, at A21. But see 15 C.F.R. § 740.12 (1997) (setting forth the eligibility requirements for exports of gift parcels and donations by U.S. charitable organizations of human needs items to embargoed countries subject to the Commerce Department's licensing jurisdiction); BUREAU OF INTER-AMERICAN AFFAIRS, FACT SHEET: THE U.S. EMBARGO AND HEALTHCARE IN CUBA; MYTH VERSUS REALITY (1997); DEPARTMENT OF COMMERCE 1997 ANNUAL FOREIGN POLICY REPORT TO CONGRESS (noting Commerce Department authorization for \$4.68 million in humanitarian aid and \$1.4 million for individual gift parcels, many of which include food, medical items and clothing); Agustin Blazquez, *The U.S. Embargo on Cuba*, WASH. POST, Apr. 17, 1997, at A22; Linda Robinson, *The Island of Dr. Castro, Cubans Scrounge for Aspirins but Hope to Strike It Big in Biotech*, U.S. NEWS & WORLD REP., May 5, 1997, at 39 (contrasting the Cuban peoples' need for the most basic pharmaceuticals with the development of a sophisticated biotech industry intended to bring in foreign currency).

Cuba.<sup>104</sup> Still others warn that use of sanctions may backfire on the United States.<sup>105</sup>

On the other hand, proponents of sanctions say the United States is doing too little, and advocate staying the course,<sup>106</sup> enforcing existing treaties and domestic law,<sup>107</sup> tightening current law,<sup>108</sup> or imposing more controls<sup>109</sup> and sanctions.<sup>110</sup> Some charge there is a

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104. See Colman McCarthy, *The Ongoing War Against Iraq's Civilians*, WASH. POST, Jan. 30, 1996, at E20.

It is a pleasing fiction that the economic sanctions on Iraq mean that its sadistic dictator is living on bread and water and running out of aspirin. He is not. No evidence exists that Saddam is personally hurting, while facts continue to surface that Iraqi citizens are being devastated by this economic war as they were five years ago by the bombing war . . . . The U.S. law that prohibits breaking the embargo ensures death and suffering to a people who have already had too much of it. The sooner that law is broken, and broken defiantly, the greater the chance that people-to-people reconciliation between Americans and Iraqis can begin.

*Id.* Groups, such as the Pastors for Peace, have also challenged the U.S. embargo of Cuba by organizing a number of "friendship convoys" consisting of humanitarian and other goods intended for export through Mexico or Canada to Cuba. See *Pastors Break Cuba Embargo Again*, Feb. 17, 1996 (copy on file with the *Stetson Law Review*).

105. See David E. Sanger, *On Russian-Iranian Oil Deal, U.S. Sanctions May Backfire*, N.Y. TIMES, Oct. 16, 1997, at A1.

106. See Robert E. Freer, Jr., *U.S. Should Stay the Course on Cuba*, J. COM., Oct. 11, 1996, at A9; Jack Payton, *It's Too Soon to Ease Up on Iran*, J. COM., Aug. 8, 1997, at A9.

107. See Malvina Halberstam, *How Serious Are We About Prohibiting International Terrorism and Punishing Terrorists?*, 11 JEWISH LAW. 1 (1996) (pointing out the mixed record concerning enforcement of multilateral conventions dealing with acts of terrorism).

108. See LIBERTAD Enforcement Act, H.R. 2179, 105th Cong. (1997) (repealing the authority of the President to suspend the effective date of Title III of the LIBERTAD Act); McCollum, *supra* note 60, at A9; see also Foreign Affairs Reform and Restructuring Act of 1997, S. 903, 105th Cong. § 1605 (1997) (prohibiting all financial transactions with governments of terrorist-supporting countries, removing Administration's discretion to regulate or license such transactions, and amending § 321 of the Antiterrorism and Effective Death Penalty Act of 1996); Michael Lelyveld, *Clinton Power to Waive Iran Curbs May Be at Risk; Lawmakers Consider Limiting Authority*, J. COM., Oct. 16, 1997, at A3 (considering provision giving Congress 90 days to overturn a presidential waiver of sanctions).

109. See Lawrence F. Kaplan, *Where Do All the Supercomputers Go?*, WASH. TIMES, Sept. 24, 1997, at A19; see also *supra* note 32 and accompanying text.

110. See Thomas W. Lippman, *Israel Presses U.S. to Sanction Russian Missile Firms Aiding Iran*, WASH. POST, Sept. 25, 1997, at A31. The advocacy of various groups, including families of the Pan Am Flight 103 victims, for sanctions against Libya and Iran contributed to the enactment of the ILSA. See Thomas W. Lippman, *White House, Hill Agree on New Iran Sanctions; Both Parties Predict Quick Enactment of Bill*, WASH. POST, Dec. 13, 1995, at A34; R. Jeffrey Smith & Thomas W. Lippman, *White House Agrees to Bill Allowing Covert Action Against Iran*, WASH. POST, Dec. 22, 1995, at A27. The advocacy of various groups is also an important factor in congressional consideration of pend-

double standard in the application of sanction measures targeted at human rights violators, comparing China, an important U.S. trading partner, with Cuba, which has been subject to a comprehensive U.S. embargo since the early 1960s.<sup>111</sup> Others say the “United States should establish a constructive relationship with Tehran in the same way it has sought to engage Beijing.”<sup>112</sup>

The debate is epitomized by a March 21, 1996 House of Representatives Markup of the Iran Oil Sanctions Act,<sup>113</sup> the predecessor to the ILSA. Statements by numerous members indicated broad support for sanctions on foreign companies that provide \$40 million or more in a twelve-month period in investment in Iran's petroleum industry.<sup>114</sup> Members noted that there was evidence linking Iran's

ing legislation that provides for sanctions on countries and entities that persecute religious minorities. See Paul Blustein, *Crusader for a Religious Right: Michael Horowitz Hopes to Stop Persecution of Christians. To Him, It's a Catholic Cause*, WASH. POST, Sept. 30, 1997, at E1; cf. Albright Says Religious-Rights Bill Is Wrong Goal, N.Y. TIMES, Oct. 24, 1997, at A3 (criticizing the pending legislation).

111. See Bob Deans, *Cuba, China on Different Paths; Eizenstat Looks Ahead in New State Department Job*, ATLANTA J. & CONST., July 27, 1997, at A13 (quoting Stuart Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs, on his reasons for the different approach the U.S. has taken toward economic sanctions involving China and Cuba). “Cuba, unlike China, has expropriated U.S. property without paying compensation. Cuba, unlike China, has tried . . . to destabilize the Western Hemisphere. Cuba, unlike China, shows no signs of economic or political openness . . . and . . . has pushed out a million of its citizens who are now citizens of the United States.” *Id.*; cf. John Bolton, *Arms Sales . . . and Human Rights*, WASH. TIMES, Sept. 21, 1997, at B3 (explaining that a foreign policy clash exists between values and interests). “[T]he Clinton administration's human rights policy comes down hard on Burma and lightly on China, to the particular amusement of the ruling elements in Beijing.” *Id.*

112. Edward Mortimer, *Dealing with Iran*, FIN. TIMES, Oct. 22, 1997, at 20.

If there is one country US legislators love to hate even more than China it is Iran. And it seems Beijing has agreed to stop selling nuclear technology and anti-ship cruise missiles to Tehran . . . . If Mr. Rubin [State Department spokesman] can sell a “soft-on-China” policy as being hard on Iran, perhaps it would not be beyond him to sell a “new-deal-with-Iran” policy as “let's finally get serious with Saddam”.

*Id.*

113. *Markup on H.R. 3107 Before the House Comm. on Int'l Relations*, 104th Cong. 1–56 (1996) [hereinafter *Markup*].

114. See *Markup*, *supra* note 113, at 5–11 (statements of Representative Benjamin A. Gilman, Chairman, Committee on International Relations, and Representatives Lee H. Hamilton, Sam Gejdenson, Toby Roth, Robert Menendez, Doug Bereuter, and Howard L. Berman); see also Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 4(a)(2), 110 Stat. 1541, 1542 (1996). However, the ILSA reduces this triggering amount to \$20 million or more of investment in Iran's petroleum industry one year after enactment. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 4(d)(1), 110 Stat. 1541, 1542 (1996).

oil revenue to terrorism and development of weapons of mass destruction,<sup>115</sup> that the allies' strategy of constructive dialogue had failed, and the United States could not allow business as usual.<sup>116</sup> Nevertheless, several members questioned the effectiveness of such unilateral sanctions, the lack of leverage against Iran, the extraterritorial impact, and the wisdom of issuing threats against friends.<sup>117</sup> However, in a strong statement expressing his unqualified support, Representative Tom Lantos characterized the unilateral versus multilateral argument as phony, stating that lack of multilateral support may stem from the profound inconsistency of Congress and the Administration in dealing with rogue regimes.<sup>118</sup> In addition, Repre-

115. *See Markup, supra* note 113, at 6 (statement of Representative Sam Gejdenson).

116. *See id.* at 10–11 (statement of Representative Howard L. Berman). Representative Berman stated:

This is simply about two critical issues: export of terrorism and development of weapons of mass destruction by a country that no one can feel assured should have those kinds of weaponry. I think we have to ask certain questions. We just went through a cold war where the United States bore the greatest burden for financing the effort by the Western countries to deter Soviet imperialism and expansionism and we won. We stood together and we won. So soon thereafter we watched the disintegration of that alliance as economic issues of importance to individual countries superseded any coherent process for trying to deal with the problems of proliferation of weapons of mass destruction or international terrorism.

So what can we do? We can withdraw our sanctions and go back to business as usual. Or we can make an effort to try and force the countries and the companies that want to fill in for lost American opportunities. They can choose between doing business with the United States and doing business with Iran.

*Id.*

117. *See id.* at 7–8 (statement of Representative Toby Roth).

118. *See id.* at 12–14 (statement of Representative Tom Lantos).

[O]ur consciences are aroused. That is why we have this legislation . . . . There is a sort of bizarre self-fulfilling prophecy in this recurring plea for multilateralism. We all understand that multilateral sanctions would be more effective than unilateral sanctions. You do not have to be a genius to grasp that. But we will not have multilateral sanctions because this country, both in terms of the Congress, and in terms of the Administration is profoundly inconsistent in dealing with totalitarian regimes supporting terrorism and disrespecting human rights.

I think it is extremely important to realize that we are dealing with fundamental issues of terrorism, a danger to proliferation in terms of chemical, biological and nuclear weapons, in terms of vicious, vicious policy toward religious minorities such as the Baha'i people in Iran. We are dealing with sickening regimes and the Europeans come in with no moral standing on these issues, no moral standing whatever. They sold everything to Iraq until the night of the invasion of Kuwait. They are ready to sell everything to China. They are ready to sell everything to Iran. And I would much rather stand up alone and

sentative Lantos stated that the Europeans have no moral standing when it comes to dealing with “despicable regimes,” and that foreign companies can complain but will in the end choose trade with the United States over trade with target regimes, ultimately giving the sanctions law its intended effect.<sup>119</sup>

Despite the eloquence of the arguments, it is difficult to focus public opinion when the sanctions laws themselves lack focus. They target a wide range of countries and entities. The national security threat no longer comes from one major source (the former Soviet Union), but from many smaller countries (e.g., Iraq, Iran, Libya, North Korea). The laws also target individuals and groups that easily cross borders, change addresses, and acquire new identities.<sup>120</sup>

Additionally, businesses and individuals may suffer from information overload and tend to focus only on front-page media reports. While the danger of weapons proliferation by rogue states is amply reported,<sup>121</sup> readers may see more front-page reports on the risk of trade wars with our allies over the potential application of U.S. sanctions. Readers may wonder whether the prospect of a trade war with traditional allies takes precedence over the threat posed by rogue countries that are acquiring weapons of mass destruction or related technologies.<sup>122</sup>

Adding to the diffusion of public attention, new export control and sanction provisions have objectives beyond the security of the nation. They also seek to change the behavior of foreign governments and provide a solution to many ills in many countries. Cer-

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make the point, however ineffectively, than to wait until everybody else falls in line, because that day is not going to come.

The United States has the capability of making an impact. These companies will have to choose between our market and the Iranian market. And they can complain until hell freezes over. They will choose our market which is more valuable to them. And this legislation will have some degree of effectiveness.

*Id.* at 12–13 (statement of Representative Tom Lantos).

119. *Id.*

120. See generally Specially Designated Terrorist, 31 C.F.R. §§ 595.31, ch. V app. A–C (1997).

121. See *supra* note 43 and accompanying text.

122. Compare *Those Iranian Missiles*, WASH. POST, Sept. 30, 1997, at A20 (arguing that deterring war, through sanctions that deny proliferation, comes first), with Thomas W. Lippmann, *U.S. Defers Sanctions on Iran Gas Deal; Action Could Avert European Trade War*, WASH. POST, Oct. 4, 1997, at A1 (explaining that the U.S. decided not to impose sanctions to avoid a trade war with the E.U.).

tain current and pending sanction measures target lack of democracy or human rights practices in certain countries, such as the harboring of war criminals,<sup>123</sup> female genital mutilation,<sup>124</sup> or persecution of religious minorities.<sup>125</sup> They also have environmental and animal protection objectives.<sup>126</sup>

Further, various state and local governments have taken or are considering measures to ban procurement of goods from United States or foreign companies that trade with countries that violate human rights, such as Nigeria, Burma, or Indonesia.<sup>127</sup> The European Union has objected to measures taken by U.S. sub-federal authorities, alleging these measures violate U.S. obligations under the World Trade Organization's Government Procurement Agreement.<sup>128</sup> Moreover, USA Engage, an industry association that has criticized the proliferation of sanctions laws, indicated it may challenge a Massachusetts law under the supremacy clause of the Constitution.<sup>129</sup> USA Engage would argue that such sub-federal laws infringe on the exclusive power of the federal government to conduct foreign policy.<sup>130</sup> Fifty or more trade policies could emerge if sub-national entities in the United States continue to take their own actions.<sup>131</sup>

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123. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 568, 110 Stat. 3009, 3009-165 (1996); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1996, Pub. L. No. 104-107, § 582, 110 Stat. 704, 751-52 (1996).

124. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 579, 110 Stat. 3009, 3009-170 (1996).

125. See Freedom from Religious Persecution Act of 1997, H.R. 2431, 105th Cong. (1997); see also S. 772, 105th Cong. (1997); *Business Rejects Religious Persecution Bill, Awaits Senate Action*, INSIDE U.S. TRADE, Sept. 19, 1997, at 13; *Fighting Religious Persecution*, N.Y. TIMES, Sept. 17, 1997, at A1.

126. See 16 U.S.C.A. §§ 1371, 1372, 1415 (West Supp. 1997); Bear Protection Act, S. 263, 105th Cong. (1997). The Bear Protection Act "prohibit[s] the import, export, sale, purchase, possession, transportation, acquisition, and receipt of bear viscera or products that contain or claim to contain bear viscera . . ." *Id.*

127. See, e.g., *Massachusetts House Delegation Warns Japan on Burma Sanctions*, INSIDE U.S. TRADE, Feb. 7, 1997, at 20.

128. See *Brittan Offers Flexibility in WTO Action on Massachusetts Law*, INSIDE U.S. TRADE, June 27, 1997, at 5; see also U.S., *E.U. Make No Headway in Dispute over Massachusetts Burma Law*, INSIDE U.S. TRADE, July 25, 1997, at 14.

129. See *USA-Engage Case on State Sanctions Would Focus on Federal Supremacy*, INSIDE U.S. TRADE, Aug. 22, 1997, at 6.

130. See *id.*

131. See Charles Oliver, *What Do You Do When a City Enacts Its Own Foreign Policy?*, INV. BUS. DAILY, Aug. 19, 1997, at B1 (indicating the trend of state and local governments passing foreign policy is growing). *But cf.* Thaug Tun (Deputy Chief of Mis-



Finally, there is no one vehicle which makes a comprehensive statement about dangerous activities and egregious behavior, and provides for a uniform set of sanctions to be applied by a known set of rules in a reasonably clear and predictable fashion. It is unclear when sanctions requirements will be triggered, which sanctions will be applied (e.g., import, export, EXIM credits, USG procurement, ban on private bank loans), how sanctions will be applied, on which entities or countries, or how long they will last.

The debate becomes increasingly complex as export trade — as opposed to export controls — is viewed as a fundamental component of the national security.<sup>132</sup> International trade is critical to maintaining the nation's economic growth and prosperity. Export trade creates profits, which in turn permit more research and development leading to new technology, which then maintains the country's continued technological edge. Moreover, the defense establishment is ever more dependent on civilian technology, such as satellite, data processing, and telecommunications systems, to provide intelligence and effective battlefield communications. Technological superiority and economic security are ever more linked to national security.<sup>133</sup> Therefore, preventing companies from selling their highest technology products to certain foreign markets often means conceding large markets to foreign competitors for both current and future business, thereby foregoing the opportunity, especially in leading edge technologies, such as U.S. nuclear reactor technology, of developing further expertise.<sup>134</sup> Additionally, U.S. trade restrictions often encour-

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sion, Embassy of the Union of Myanmar), *Fifty Different Trade Policies?*, WASH. POST, Sept. 16, 1997, at A16 (arguing state and local governments should not attempt to make foreign policy).

132. See Remarks of William A. Reinsch, Under Secretary of Commerce for Export Administration, on Sanctions and Export Controls in a Global Economy, at the Economic Strategy Institute, May 29, 1996 (copy on file with the *Stetson Law Review*); William A. Reinsch, *Sensible Export Policy: The Key to Sustained Economic Growth*, in COPING WITH U.S. EXPORT CONTROLS, at 13–24 (PLI Com. L. and Practice Course Handbook Series No. A4-4484, 1995) [hereinafter *Sensible Export Policy*].

133. See *Sensible Export Policy*, *supra* note 134, at 14.

134. See, e.g., *China. Certifiably What?*, ECONOMIST, Oct. 25, 1997, at 41; James B. Edwards, *Going Nuclear with the Chinese*, WASH. TIMES, Oct. 20, 1997, at A19; James Harding & Bruce Clark, *U.S. Nuclear Suppliers Hover over China*, FIN. TIMES, Oct. 23, 1997, at 5; Stephen J. Hedges & Douglas Pasternak, *China's Surprising Nuclear Helpers*, U.S. NEWS & WORLD REP., Sept. 29, 1997, at 30; Joseph I. Lieberman, *Common Sense in China*, J. COM., Oct. 21, 1997, at A9; Dan Morgan & David B. Ottaway, *U.S. Reactor Firms Maneuvering to Tap China's Vast Market*, WASH. POST, Oct. 21, 1997, at A1; R.

age foreign manufacturers to design out U.S. components to avoid U.S. export control restrictions.

There is, nevertheless, a growing awareness of the economic costs of unilateral sanctions. Senator Richard Lugar, Representative Lee Hamilton, and other U.S. lawmakers are considering legislation to require comprehensive economic and foreign policy assessments, as well as consultation between the executive and legislative branches, prior to imposing new U.S. sanctions.<sup>135</sup> Under Secretary of State Stuart Eizenstat acknowledged the value of many recent criticisms of unilateral economic sanctions and noted that several principles were already clear in the search for a better way to integrate sanctions into foreign policy.<sup>136</sup> Sanctions should be used only when diplomacy has failed and should be designed to hurt the target, not the innocent, minimize the economic cost to the United States and its allies, while maximizing leverage on the target.<sup>137</sup> Despite these recent acknowledgments of the need to reform the pro-

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Jeffrey Smith, *Limits on Iran Ties open Way for China to Buy U.S. Reactors*, WASH. POST, Oct. 25, 1997, at A1. *But see* Paul Blustein, *China Plays Rough: 'Invest and Transfer Technology, or No Market Access,'* WASH. POST, Oct. 25, 1997, at C1 (fearing that American firms are being coerced into sacrificing U.S. jobs, establishing Chinese competitors, and risking technology theft); Frank Gaffney, *Nuclear Power for the U.S., Not China*, WASH. TIMES, Sept. 26, 1997, at A17 (explaining the downsides of lifting trade restrictions on China); Ralph Z. Hallow, *Forbes Places Human Rights Above Free Trade with Chinese; Supports Constitutional Ban on Abortion with Exceptions*, WASH. TIMES, Oct. 22, 1997, at A4 (giving other reasons why the U.S. should continue imposing sanctions); Barbara Opall, *Anti-China Legislation Is Proliferating on Capitol Hill*, DEFENSE NEWS, Oct. 20-26, 1997, at 8 (describing proposed legislation against China); *Republican Leadership Delays Vote on China Bills Until After Summit*, INSIDE U.S. TRADE, Oct. 10, 1997, at 5.

135. *See* Dunne, *supra* note 69, at 7; Richard Lawrence, *House Bill Seeks to Limit Use of Unilateral Trade Sanctions*, J. COM., Oct. 24, 1997, at A3; *Lugar, Hamilton Considering Bills to Reform Unilateral Sanctions Process*, INSIDE U.S. TRADE, July 11, 1997, at 8; *Outline of Proposed Sanctions Bill Stresses Reporting, Transparency*, INSIDE U.S. TRADE, Sept. 19, 1997, at 23; *see also Use and Effect of Unilateral Trade Sanctions; Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 105th Cong. (1997) (testimony of Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs).

136. *See* Remarks of Under Secretary of State Stuart Eizenstat at the Global Business Forum, Sept. 26, 1997 (copy on file with the *Stetson Law Review*).

137. *See id.*; *see also Concern Over Economic Sanctions Heats Up*, AIA UPDATE, Oct. 1997 (copy on file with the *Stetson Law Review*). State Department Advisory Body on International Economic Policy "complete[s] a study of unilateral economic sanctions . . . [and] provide[s] . . . a matrix of policy options the U.S. government could take to affect the behavior of foreign countries . . . includ[ing] a range of diplomatic, cultural, political, economic and military [actions] meant to reward or punish foreign governments." *Id.*

cess of imposing sanctions, it is unclear when and if new disciplines will be adopted, and if they are, whether there will be a harmonization of current sanctions laws or merely an effort to apply new guidelines to future sanctions measures.

### *PART III: ASSISTING YOUR CLIENT IN COMPLYING WITH CURRENT EXPORT CONTROLS AND SANCTIONS LAWS*

While lawmakers grapple with ways to devise workable trade rules in a context of conflicting goals and diverging views, you have to assist your client in complying with existing trade rules and anticipating the impact on his business of future rules.

You can easily advise him about the license requirements and prohibitions on direct trade with specific countries. You know whom to write to and talk with about particularly complex foreign ventures and sales opportunities that may involve indirect trade with target countries.

But, can you help your client foresee the likelihood that trade sanctions will be imposed on a European partner for having supplied certain oilfield pumps or airfield services to Libya,<sup>138</sup> or for having invested in the development of Iranian petroleum resources under the ILSA?<sup>139</sup> If this happens, will your client be able to perform an existing contract to supply his new product to the sanctioned manufacturer in Europe or Asia? If not, does your client's contract have an

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138. See generally S.C. Res. 883, U.N. SCOR, 3312th mtg. at 1, U.N. Doc. S/RES/883 (1993); S.C. Res. 748 U.N. SCOR, 3063d mtg. at 1, U.N. Doc. S/RES/748 (1992). United Nations Security Council Resolutions 748 (1992) and 883 (1993) require member countries to prohibit the transfer to Libya of arms and related material, specified oil-related equipment, aircraft, aircraft parts, and related services, and the transfer of equipment for the construction, maintenance or improvement of Libyan airfields. See *id.* Section 5 of the ILSA also requires the President to impose two or more sanctions on persons who knowingly transferred to Libya items prohibited under the two cited UNSC Resolutions, if the provision of such items significantly and materially contributed to Libya's petroleum resources, or aviation and weapons proliferation capabilities. See *Iran and Libya Sanctions Act of 1996*, Pub. L. No. 104-172, § 5, 110 Stat. 1541, 1543 (1996).

139. The ILSA also provides for sanctions against persons who invest specified amounts in one year in Iran's or Libya's petroleum sectors. See § 5, 110 Stat. at 1543-45. Such investment is not prohibited under any United Nations Security Council Resolution or under any multilateral arrangement. In an Executive Order, President Clinton invoked the International Emergency Economic Powers Act to declare a national emergency and prohibit U.S. persons from providing significant management and supervisory expertise in the development of Iranian petroleum resources. See *Exec. Order No. 12,957*, 60 Fed. Reg. 14,615 (1995).

effective force majeure clause so he can escape damages for breach of contract? Will his inability to export to this sanctioned partner over the duration of the sanction brand him as an unreliable U.S. supplier? If so, will he, as a result, lose not only current business with this partner, but all future business as well? Will it affect potential sales to the sanctioned party's subsidiaries, affiliates, or customers? If your client loses business, will he be compensated?<sup>140</sup>

You may be able to take preventive measures to narrow your client's exposure to the risks posed by application of the ILSA, primarily because the ultimate targets, Iran and Libya, are limited in number and well known internationally as pariah states. But, can you come up with a plan for your client, not only to ensure he complies with all current export controls, but also to minimize the risk he will suffer business losses because of application of all other potential sanctions?

Perhaps you can distinguish the various types of sanctions laws, categorize them, and place them in descending order of importance based on the level of risk they pose to your client's international trade. What sanctions laws are close in on his radar screen, which ones have the greatest likelihood of impacting his trade? Which sanctions provisions are farther out on the radar screen and are less likely to impact your client's trade?

You can become familiar with the different forms of economic sanctions measures. At one end of the spectrum, some sanctions provisions are single sections in large federal authorization acts and

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140. Section 103 of Senate Bill 610 (Civil Liability of the United States) provides remedies for U.S. companies that have lost business proprietary information through the actions of international inspectors carrying out on-site inspections pursuant to or under the color of the Chemical Weapons Convention. *See* Chemical Weapons Convention Implementation Act of 1997, S. 610, 105th Cong. § 103 (1997). However, U.S. chemical companies and other U.S. companies would not be compensated for business losses incurred by reason of application of trade sanctions on foreign inspectors, companies, or governments involved in the unauthorized disclosure of company confidential information. *See id.* Trade sanctions against foreign persons and foreign companies would be for a period not less than 10 years; sanctions against foreign governments would be for a period not less than five years. *See* S. 610, § 103(e)(2)–(3). Sanctions may be waived on foreign governments if necessary to protect national security interests; there is no waiver provision for foreign persons or entities. *See* S. 610, § 103(e)(5). This means that a U.S. company that lost proprietary technical data could be compensated by the U.S. Treasury as set forth in section 103 of Senate Bill 610, but the same company and all other companies that lost export trade revenue because of an export ban or other sanctions on foreign countries or foreign persons during a five- to 10-year period, respectively, would not be compensated for those trade losses. *See* S. 610, § 103.

contain only limited sanctions. For example, they may ban U.S. bilateral assistance or require the Treasury Department to oppose multilateral assistance to the target government. In this case, they would only affect your client if he trades with the target government and the target government either is dependent on this financial assistance to purchase your client's goods or reacts to the imposition of U.S. measures by curtailing U.S. imports.<sup>141</sup> Sanctions provisions may be limited both in scope and time. For example, sanctions provisions may be included in budget bills and provide that none of the funds appropriated under that appropriations act may be used during that fiscal year to assist a country whose government is determined to engage in specified objectionable human rights practices. Such a provision normally would expire at the end of the fiscal year. At the other end of the spectrum, there are sanctions laws that could have far broader and lasting effects on your client's business. For example, some of these sanctions laws ban export trade directly with target entities or countries;<sup>142</sup> some pro

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141. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 579, 110 Stat. 3009, 3009-170 (1996) (requiring U.S. representatives to oppose loans by international financial institutions to countries that maintain a practice of female genital mutilation). Similarly, the Foreign Operations, Export Financing and Related Programs Appropriations Act of 1996 prohibits U.S. financial assistance to foreign *governments* that supply lethal military equipment to terrorist list countries. See Pub. L. 104-107, § 552, 110 Stat. 704, 741-42 (1996). Although the sanctions provisions in this statute may not affect a client's trade with the target government, other sanctions laws, such as the Iran-Iraq Arms Non-Proliferation Act of 1992, may affect a client's trade. See Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, § 1601, 106 Stat. 2324, 2571 (1992), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997). Section 582 of the Foreign Operations, Export Financing and Related Programs Appropriations Act of 1996, prohibits U.S. financial assistance and requires U.S. opposition to multilateral financial assistance to foreign countries whose governments knowingly harbor war criminals, including those indicted by International Criminal Tribunals for Rwanda and the former Yugoslavia and those indicted for war crimes or crimes against humanity in connection with activities of the Nazi government of Germany. See § 582, 110 Stat. at 751-52.

142. See, e.g., Iraq Sanctions Act of 1990, Pub. L. No. 101-513, § 586, 104 Stat. 2047, 2047 (1990), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997)); China Policy Act of 1997, S. 1164, 105th Cong. § 103 (1997). Senate Bill 1164 would prohibit, for one year, without possibility of waiver, the export of items, controlled for national security or foreign policy reasons, to named affiliates of the People's Liberation Army of China (PLA) and any other PLA affiliates determined to have engaged in transfers of proliferation items or imports of weapons or firearms into the United States. See *id.* Section 103 of Senate Bill 1164 would also prohibit, *inter alia*, imports from designated entities and extensions to such entities of U.S. credits or guarantees. See *id.* The Freedom from Religious Persecution Act of 1997 would require application of export

vide for additional sanctions on U.S. persons who trade with target entities;<sup>143</sup> some provide for sanctions on foreign persons but not U.S. persons who trade with target entities;<sup>144</sup> some provide for sanctions on both U.S. and foreign persons;<sup>145</sup> some provide for sanctions on foreign countries or governments that engage in certain trade with countries of concern;<sup>146</sup> some provide for sanctions on U.S. persons, foreign persons and foreign governments or countries.<sup>147</sup>

You might find that a chart is helpful in visualizing the potential impact of current and pending sanctions laws. A suggested chart format is set out in Appendix A. This model lists only nine<sup>148</sup> of the existing sanctions statutes, but could be enlarged to cover additional laws. Part I of the chart notes the target countries and the reasons

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sanctions on entities that persecute religious minorities and on countries that support such persecution or fail to take action to eliminate it. *See* H.R. 2431, 105th Cong. (1996). The bill itself names potential targets: Cuba, China, Laos, Tibet, North Korea, Sudan, other Islamic countries, and Vietnam; other potential targets are Russia, Egypt, Turkey, and Pakistan. *See id.* Opponents indicate this measure also might cover Afghanistan, Bulgaria, Burma, Krygystan, Morocco, Serbia-Montenegro, Greece, Mexico, Israel, Ethiopia, Sri Lanka, and Nigeria. *See* Tom Connors, *Washington Showdown on New Sanctions Bill*, J. COM., Sept. 11, 1997, at A1; *see also* Blustein, *supra* note 111, at E1; *Business Rejects Religious Persecution Bill, Awaits Senate Action*, INSIDE U.S. TRADE, Sept. 19, 1997, at 13.

143. *See, e.g.*, Iran and Libya Sanctions Act of 1996, *supra* note 47; Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484; § 1601, 106 Stat. 2324, 2571 (1992), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997); Missile Technology Control Act, Pub. L. No. 101-510, § 1701, 104 Stat. 1738 (1990).

144. *See* Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102-182, § 301, 105 Stat. 1233, 1245 (1991). This act does not provide additional sanctions on U.S. persons that supply chemical and biological items to countries of concern; however, U.S. persons who export such items without appropriate export authorization are subject to criminal and/or civil penalties under existing export control legislation. *See id.*

145. *See, e.g.*, Iran and Libya Sanctions Act, *supra* note 47; Missile Technology Control Act, Pub. L. No. 101-510, § 1701, 104 Stat. 1738 (1990).

146. *See, e.g.*, Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Pub. L. No. 102-182, § 301, 105 Stat. 1233, 1245 (1991); Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484; § 1601, 106 Stat. 2324, 2571 (1992), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997).

147. *See, e.g.*, Iran and Libya Sanctions Act, *supra* note 47.

148. The nine statutes listed in the charts are: Tiananmen Square Sanctions Law, Iraq Sanctions Act, Missile Technology Controls Act, Chemical and Biological Weapons Control and Warfare Elimination Act, Cuban Democracy Act, Iran-Iraq Arms Non-Proliferation Act, Nuclear Proliferation Prevention Act, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, and the ILSA. *See supra* notes 47, 48, 79, 139 and accompanying text.

for enactment of the various laws. Part II notes restrictions on direct trade with, or assistance for, the target country. The direct trade restrictions are often in addition to any import or export license requirements that apply under other laws and regulations, and will most often be expressed as requiring specific licenses for items or requiring denial of licenses for products. Part III lists the sanctions that may apply to U.S. persons. Part IV lists the sanctions that may apply to foreign persons that engage in prohibited activities. Part V lists the activities that may trigger sanctions against foreign countries or governments. Part VI lists the sanctions that may apply to foreign countries or governments that engage in prohibited activities with the target destination. Finally, Part VII lists other measures commonly found in sanctions laws, including waiver, termination, sunset, duration, reporting and other provisions.

By checking the appropriate boxes in all Parts (Part I serves as a model), you will have a better idea of whether, or to what extent, imposition of sanctions under one or more laws could affect your client's business. Acronyms or abbreviations are used to minimize use of space on the charts.<sup>149</sup>

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149. *See* App. A.

**APPENDIX A****GLOSSARY**

<b>WMD:</b>	weapons of mass destruction
<b>FMS:</b>	foreign military sales
<b>USML:</b>	United States Munitions List items
<b>MT:</b>	missile technology items
<b>CB:</b>	chemical and biological items
<b>CC:</b>	crime control and detection items
<b>NP:</b>	nuclear proliferation items
<b>NRC:</b>	Nuclear Regulatory Commission
<b>FAA:</b>	Foreign Assistance Act of 1961, as amended
<b>CCC:</b>	Commodity Credit Corporation
<b>EXIM:</b>	Export-Import Bank
<b>OPIC:</b>	Overseas Private Insurance Corporation
<b>IFI:</b>	international financial institutions
<b>IEEPA:</b>	International Emergency Economic Powers Act
<b>AECA:</b>	Arms Export Control Act



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*International Trade Decisions*

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