

U.S. SECONDARY SANCTIONS: THE U.K. AND EU RESPONSE

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INTRODUCTION

U.S. assertions of extraterritorial jurisdiction over the activities of companies incorporated and doing business in the U.K. have long been a source of tension in U.S./U.K. relations.¹ The extraterritorial jurisdiction claimed for U.S. antitrust law has given rise to disputes since the 1950s,² and prompted passage of the Protection of Trading Interests Act (PTIA) by the British Parliament in 1980.³ U.S. claims to regulate the re-export of U.S.-origin goods and technology by imposing licensing requirements on non-U.S. firms operating wholly outside U.S. territory have caused similar problems.⁴ Most recently, passage of the Helms-Burton Act⁵ and the Iran and Libya Sanctions Act of 1996 (ILSA),⁶ directed at the activities of non-U.S. companies in third countries, has provoked a prolonged dispute with the European Union (EU) and with several other U.S. allies and led to the making of a new European Community (EC) Regulation⁷ designed to protect European businesses from their effects.

This Article examines these responses and the reasons for

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1. See F.A. Mann, *Anglo-American Conflict of International Jurisdiction*, 13 INT'L & COMP. L.Q. 1460, 1460 (1964).

2. See, e.g., Shipping Contracts and Commercial Documents Act 1964 c87, § 2(1)(a) & (b); In re Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 317-18 (D.D.C. 1960); United States v. Imperial Chem. Indus., 105 F. Supp. 215, 220 (S.D.N.Y. 1952); British Nylon Spinners Ltd. v. Imperial Chem. Indus., [1953] 1 Ch. 19 (C.A. 1952); Mann, *supra* note 1, at 1462 (noting that the United States antitrust legislation allows Americans to exceed extraterritorial boundaries).

3. See Protection of Trading Interests Act, 1980, ch. 11 (Eng.).

4. See Tom Harris, *The Extraterritorial Application of U.S. Export Controls: A British Perspective*, 19 N.Y.U. J. INT'L L. & POL. 959, 959-60 (1987).

5. Cuban Liberty And Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997).

6. Iran & Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 1, 110 Stat. 1541, 1541 (1996), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997).

7. Council Regulation 2271/96, 1996 O.J. (L 309) 1.

them.⁸

THE U.K. POSITION

U.S. claims to extraterritorial jurisdiction have tended to cause particular problems with the U.K. In part, this reflects the disproportionate exposure of U.K. companies to such claims because of the size of the bilateral investment relationship between the U.S. and the U.K. In 1996, the latest year for which figures are available, the U.K. was the largest inward investor in the U.S., and vice versa.⁹

The U.K. view is that in international law, and as a matter of good international practice or comity, a state may exercise jurisdiction only over matters occurring within its territory and over the conduct of its citizens and corporations in other countries.¹⁰ A few exceptions to this limitation obviously exist, but are not relevant in the context of this Article.

The U.S., in contrast, adopts a much broader view of legitimate jurisdiction, extending it to the conduct outside the U.S. of foreign residents of the U.S. and to foreign businesses controlled by U.S. interests,¹¹ to transactions outside the U.S. involving goods and technology of U.S. origin, and to conduct outside the U.S. which merely has effects within the U.S.¹²

At the root of traditional U.K. objections to exorbitant U.S. claims to extraterritorial jurisdiction is the belief that attempts to apply U.S. law to actions in other countries represent an unaccept-

8. This Article does not consider the economic sanctions imposed by a number of U.S. state and city governments, particularly directed at Burma. While the secondary effect of these laws is significant, and has led both the EU and Japan to seek consultations in the World Trade Organization (WTO) with the U.S., their primary impact is on U.S. companies, and the laws have given rise to domestic U.S. litigation over their constitutionality. See John Maggs, *Businesses Battle State Sanctions*, J. COMM., Aug. 28, 1997, at 1A and Bernard Wolfson, Group decries Mass law on business with Burma, BOSTON HERALD, May 7, 1998.

9. See U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 39, 36 (July 1997).

10. See INTERNATIONAL INV. AND MULTINATIONAL ENTER., ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MINIMIZING CONFLICTING REQUIREMENTS: APPROACHES OF MODERATION AND RESTRAINT 20-21 (1987).

11. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES PT. IV (1987); Joseph P. Griffin & Michael R. Calabrese, *Coping with Extraterritoriality Disputes*, 33 WORLD COMPETITION 77-78, 86.

12. See ANTITRUST DIVISION, DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTI-TRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995) [hereinafter *Antitrust Enforcement Guidelines*].

able interference in those countries' sovereign rights.¹³ The British Government's view is that where territorial and extraterritorial jurisdictions conflict, the territorial principle should prevail. Actions in the U.K. should be governed by U.K. law (including, since 1973, European Community law), not by the laws of another country. Extraterritorial U.S. laws are particularly likely to give rise to disputes when they impose unilateral sanctions which run contrary to the policies of the territorial state involved of either permitting or positively encouraging trade with the target country.

Exorbitant assertions of extraterritoriality impose unnecessary burdens on businesses by requiring them to comply with possibly conflicting rules. They create added uncertainty for companies operating internationally, and weaken the framework of international trade and investment. On the political level, they often create unnecessary and distracting conflicts between allies and make co-operation on shared international policy concerns more difficult.¹⁴

THE PROTECTION OF TRADING INTERESTS ACT

The immediate trigger for the passage of the PTIA was the threat of treble damages being imposed on a major U.K. minerals company as a result of a private suit filed under U.S. antitrust law alleging participation in an international uranium cartel (itself a reaction to U.S. restrictions on the import of uranium).¹⁵ The structure and provisions of the PTIA to some extent reflect this background.

The primary purpose of the PTIA is to provide protection to British businesses threatened with the application of the laws of a foreign country to conduct occurring outside that country.¹⁶ On all but one of the occasions when the British Government has invoked

13. See A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 270 (1981).

14. For a European perspective see EUROPEAN COMM'N, REPORT ON U.S. BARRIERS TO TRADE AND INV. 7-8 (1997).

15. See generally *United Kingdom: Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act*, reprinted in 21 I.L.M. 834, 840 (1982); Lawrence Collins, *Blocking and Clawback Statutes: The U.K. Approach*, 1986 J. BUS. L. pt. 1, at 372, pt. 2, at 452; Lowe, *supra* note 13, at 268-72; G.R. Sutherland, *Extraterritorial Application and Enforcement of U.S. Laws Regulating International Trade: A British Response*, 28 FED. B. NEWS 235, 235 (1981).

16. See Sutherland, *supra* note 15, at 236.

the Act, the laws in question were those of the U.S.¹⁷ Provisions of the Act enable the British Government to make Orders and Directions under the Act to:

- prohibit compliance by persons in the U.K. with foreign laws for regulating or controlling international trade outside the country concerned which damage or threaten to damage the trading interests of the U.K.,¹⁸
- prohibit U.K. persons from providing information or documents to a foreign court or authority where doing so would infringe U.K. jurisdiction.¹⁹

In addition, the PTIA

- prevents U.K. courts from ordering the production of evidence in the U.K. requested by a foreign court where the request infringes U.K. jurisdiction;²⁰
- prevents U.K. courts from enforcing awards of multiple damages by foreign courts;²¹
- enables British citizens and corporations and other persons carrying on business in the U.K. to recover in U.K. courts the multiple part of multiple damages awarded against them in an overseas court.²²

These provisions appear on the face of the Act and do not need to be activated by Orders or Directions.

The PTIA thus provides both direct protection against certain assertions of extraterritorial jurisdiction and a deterrent to parties contemplating bringing proceedings dependent on extraterritorial jurisdiction for their success, notably by raising the costs and risks of private extraterritorial suits for multiple damages through the provisions on nonenforcement of judgments in such cases in U.K. courts, the provisions on recovery of multiple damages and the restrictions on the provision of documents to a foreign court. The Act may also offer defendants the possibility of mounting a foreign sovereign compulsion defense in U.S. court cases.²³

17. PARL. DEB., H.C. Mar. 12 1993, Columns 773–774.

18. See Protection of Trading Interests Act, 1980, ch. 11, § 1 (Eng.).

19. See *id.* § 2.

20. See *id.* § 4.

21. See *id.* § 5.

22. See *id.* § 6.

23. See generally *International Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1291 (D. Del. 1970); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS

The PTIA has been applied by the British Government on several occasions, most commonly in relation to antitrust proceedings, but also during the 1982 dispute over the application of U.S. re-export controls to shipments by non-U.S. companies of goods for use in the Trans-Siberian pipeline.²⁴ The U.S. Administration at the time attempted to ban such shipments from anywhere in the world if the goods originated from the U.S., used U.S. technology, or were to be exported by subsidiaries of U.S. corporations.²⁵ A PTIA Order was made and a number of directions were given to prevent certain corporations from complying.²⁶ Although most of the corporations were British, at least one company was American, and was prohibited from complying in respect of its exports from the U.K.²⁷ The U.S. ultimately rescinded the relevant regulations.²⁸

More recently, an Order was made and directions were given in 1992 to prohibit any person in the U.K. from complying with the extraterritorial aspects of the U.S. embargo on Cuba, so far as it affected activities in the U.K., or trade into and out of the U.K.²⁹ Until that point, the British Government had taken the view that the U.S. embargo was a bilateral matter between the U.S. and Cuban governments. The 1992 Cuba Democracy Act prompted a change in the British Government's position by attempting to strengthen and enforce the extraterritorial aspects of the Cuban Assets Control Regulations (CACRs),³⁰ through the Act's prohibition on the issue of Treasury Department licenses to foreign subsidiaries of U.S. corporations to trade with Cuba.³¹ The provisions of the 1992 directions were partially superseded in November 1996 by the EC Regulation made in response to U.S. sanctions legislation (Helms-Burton and, the Iran and Libya Sanctions Act): the Regulation includes a prohi-

OF THE UNITED STATES § 441 (1987); Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L LAW. 593, 594-95 (1980) (explaining that the foreign sovereign compulsion doctrine's purpose is to avoid punishing a country for another foreign government's compelled conduct).

24. See PARL. DEB., *supra* note 17; see also Harris, *supra* note 4, at 959-61.

25. See Harris, *supra* note 4, at 959-61.

26. See *id.*

27. See *id.*

28. See *id.*

29. Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order, S.I. 1992, No. 2449.

30. See 31 C.F.R. § 515.559 (1997).

31. See 22 U.S.C.A. § 6005 (1994).

bition on compliance with the CACRs by EU companies.³²

THE HELMS-BURTON ACT

A brief reminder of why the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (more commonly known as the Helms-Burton Act) has provoked such a strong reaction from U.S. trading partners may be helpful to readers unfamiliar with the controversy surrounding the Act.

The most troubling provisions of the Act from a jurisdictional perspective are in Titles III and IV. Both rely on the concept of "trafficking" in confiscated property claimed by United States' nationals. Title III penalizes such activity by creating a right for U.S. nationals, whose claim to property confiscated by the Cuban Government has been certified under Title V of the International Claims Settlement Act, to sue those engaged in "trafficking" in U.S. federal courts.³³ This right was extended in March 1998 to U.S. nationals whose claims have not been so certified, including those who were not U.S. nationals at the time their property was confiscated.³⁴ Title IV requires the Administration to exclude from the U.S. those who have overseen or directed confiscation of U.S. property in Cuba, those "trafficking" in such property, including officers of "trafficking" corporations and their spouses and minor children.³⁵ Although President Clinton has repeatedly suspended the right to bring Title III lawsuits,³⁶ executives of two companies (including some British citizens) have been excluded from the U.S. under Title IV.³⁷

In the view of the British Government, government-to-government negotiations are the proper mechanism for settling claims arising from the expropriation of the property of nationals of one

32. See Council Regulation 2271/96, 1996 O.J. (L 309) 1.

33. See 22 U.S.C.A. § 6083(a) (West Supp. 1997).

34. See *id.* § 6082(a)(5)(C).

35. See *id.* § 6091(a).

36. Nancy Dunne, *Clinton Suspends Helms-Burton Again*, FIN. TIMES (London), Jan. 4, 1997, at 3; Nancy Dunne & Stephan Fidler, *Cuban Fudge Puts off Wave of Lawsuits*, FIN. TIMES (London), July 17, 1996, at 3; Jurek Martin & Bernard Simon, *Clinton Postpones Court Actions over U.S. Anti-Cuba Law*, FIN. TIMES (London), July 17, 1996, at 22.

37. Jurek Martin & Bernard Simon, *Britons Face Exclusion from U.S. over Business Dealings in Cuba*, FIN. TIMES (London), July 11, 1996, at 24.

state by the government of another.³⁸ It is improperly extraterritorial for the law of a state to contain rules governing property situated, transactions effected, or acts done outside that state when, as in Title III of Helms-Burton, the plaintiff's nationality is the only factor connecting the property, transaction, or act with that state. While the exercise of immigration laws envisaged in Title IV falls properly within U.S. jurisdiction, the purpose and effects of this exercise of jurisdiction are also objectionable.

The definition of "traffic" is slightly different in Titles III and IV. In Title III, the definition states that a person "traffics" if that person knowingly and intentionally, *inter alia*, "engages in a commercial activity using or otherwise benefitting from confiscated property."³⁹ The equivalent provision in Title IV covers someone who "enters into a commercial arrangement using or otherwise benefitting from confiscated property."⁴⁰ In both cases, the definition is very wide, catching not only companies which directly buy a property once confiscated from a U.S. person (or someone who has subsequently become a U.S. person) but also, potentially, a company whose involvement in the expropriated property is several steps removed from the original transaction. At one extreme, a U.K. supermarket chain selling sugar it knew to have been refined in an expropriated Cuban sugar mill could be deemed to be "trafficking."

The breadth of this definition powerfully suggests that the aim of the Helms-Burton Act is not simply to provide a mechanism to help deal with problems arising from expropriations of U.S. property — in however inappropriate a way — but to act as a much wider deterrent to foreign investment in — and even trade with — Cuba, extending the U.S. embargo extraterritorially to cover foreign companies. Supporters of the Act have publicly accepted and welcomed this wider deterrent effect.⁴¹ Indeed, given the likely cost and difficulty of any lawsuit ever brought under Title III it is not easy to believe that the Act could provide much real benefit to U.S. claims

38. See Lowe, *supra* note 13, at 272.

39. 22 U.S.C.A. § 6023(13)(A)(ii) (West Supp. 1997).

40. *Id.* § 6091(b)(2)(ii).

41. See THE CUBAN AM. NAT'L FOUND., A REPORT ON THE IMMEDIATE IMPACT OF THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT (LIBERTAD) § 2 (1996); Senator Jesse Helms, Address to the Regent University Conference (July 9, 1996) (transcript available in the Federal News Service).

holders, some of whom opposed the Act during its passage.⁴² On the other hand, the threat of having senior executives excluded from the U.S. under Title IV may well be a serious disincentive to foreign companies with significant U.S. interests from undertaking otherwise potentially profitable new operations in Cuba or involving Cuban produce. The Act has been widely seen by foreign governments as an attempt to extend the United States Cuba embargo to companies and individuals outside U.S. territorial jurisdiction, and as such as an unwelcome and objectionable attempt to substitute the foreign and trade policies of the U.S. Congress for those of foreign sovereign governments.

THE IRAN AND LIBYA SANCTIONS ACT

The Iran and Libya Sanctions Act of 1996 (ILSA)⁴³ is more direct than Helms-Burton in its attempts to influence the overseas investment decisions of non-U.S. companies. Section 5(a) of the Act requires the President to impose two or more sanctions from a list in Section 6 of the Act against any person who:

has, with actual knowledge, on or after the date of the enactment of this Act, made an investment of \$40,000,000 or more [now reduced to \$20,000,000 or more by virtue of Section 4(d)(1)] (or any combination of investments of at least \$10,000,000 [\$5,000,000] each, which in the aggregate equals or exceeds \$40,000,000 [\$20,000,000] in any 12-month period), that directly and significantly contributed to the enhancement of Iran's ability to develop petroleum resources of Iran.⁴⁴

Section 5(b) imposes identical penalties in relation to Libya, adding sanctions for violations of prohibitions embedded in the United Nations Sanctions regime against Libya.⁴⁵ A variety of waiver authorities are provided to the President, including the general ability to waive sanctions on national interest grounds under section 9(c).⁴⁶

The comprehensive, unilateral U.S. embargo imposed on Iran by

42. See *Senate Nears Vote on Bill Extending Sanctions on Cuba*, J. COMM., Oct. 13, 1995, at 2A.

43. Pub. L. No. 104-172, § 1, 110 Stat. 1541, 1541 (1996).

44. *Id.* § 5(a)(2).

45. *Id.* § 5(b).

46. See *id.* § (9)(c).

President Clinton in May 1995⁴⁷ (superseded by a further Order in August 1997),⁴⁸ bars U.S. companies from making investments of the sort caught by the ILSA. ILSA's target is, therefore, non-U.S. companies (although U.S. companies may also be sanctioned for the activities of their non-U.S. parents or affiliates by virtue of section 5(c) (2)).⁴⁹ In November 1996, the President delegated to the Secretary of State responsibility for determining whether particular actions are sanctionable under the Act.⁵⁰ At the time of writing, no such determinations have been made.

The ILSA does not directly apply U.S. law to transactions taking place outside the U.S. in the manner of either Title III of Helms-Burton or of U.S. re-export controls under the Export Administration Regulations. On a strict reading, therefore, the ILSA might not be considered extraterritorial. Its extraterritorial intent to control the investment decisions of non-U.S. companies is, however, much more explicit than Helms-Burton. ILSA seeks to deprive Iran and Libya of the resources "to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's [and Libya's] ability to explore for, extract, refine or transport by pipeline petroleum resources of Iran [and Libya]," by discouraging foreign investment in the Iranian and Libyan petroleum industries with the threat of punitive U.S. measures against those making such investments.⁵¹

Although U.S. concerns about Iranian and Libyan behaviour are widely shared by other governments, no major trading partner of the U.S. has chosen to impose a full-scale economic embargo on either country. In the case of the U.K., while no official export credit cover is available for either Iran or Libya, government policy, under both Conservative and Labour administrations, has been that decisions about whether to invest in either country are for the companies concerned. ILSA's attempt to coerce non-U.S. companies into making investment decisions regarding Iran and Libya that are acceptable to the U.S. Congress, regardless of the laws and policies of their

47. See Exec. Order No. 12959, 3 C.F.R. § 356 (1996).

48. See Exec. Order No. 13059, 62 Fed. Reg. 44,531 (1997).

49. See Pub. L. No. 104-172, § 5(c)(2), 110 Stat. 1541, 1544 (1996).

50. See Delegation of Responsibilities Under the Iran and Libya Sanctions Act of 1996, 61 Fed. Reg. 64,249 (1996).

51. Pub. L. No. 104-172, § 3, 110 Stat. 1541, 1541-42 (1996).

countries of nationality or incorporation, is strongly objectionable.

THE EU RESPONSE

The response of the European Union (EU) to the passage of Helms-Burton and ILSA was both political and legal. Through a series of diplomatic notes and other formal protests, the EU collectively and Member States individually made their objections to the legislation clear to the U.S. Administration and Congress.⁵² After a series of formal consultations held under the framework of the World Trade Organisation (WTO), the WTO's Dispute Settlement Body agreed on 20 November 1996 to the EU's request to form a panel to consider the compatibility of Helms-Burton with U.S. WTO commitments.⁵³ The panel proceedings were suspended in April 1997 to allow bilateral negotiations aimed at resolving EU/U.S. differences over both ILSA and Helms-Burton.⁵⁴ At the time of writing these negotiations continue.

On 22 November 1996, the Council of the European Union adopted a Regulation "protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom."⁵⁵ As the title of the Regulation suggests, like the PTIA, its purpose is essentially protective. By virtue of Article I and an Annex to the Regulation, the Regulation was applied immediately to Helms-Burton, ILSA, and the Cuban Assets Control Regulations, embodying the pre-existing U.S. Cuban embargo, including its extraterritorial elements (hereinafter "covered laws").⁵⁶ The Council is empowered subsequently to add measures to or delete measures from the Annex and the Commission may add or delete subordinate legislation.⁵⁷

The key provisions of the Regulation are:

52. See, e.g., European Commission Press Release, European Commission President Jacques Santer Underlines EU's Deep Concern with Helms-Burton Legislation to President Bill Clinton (July 12, 1996); Carroll J. Doherty, *Trade Curbs on Outlaw Nations Upset U.S. Allies, Businesses*, 54 CONG. Q. 807, 807 (1996).

53. See *EU Forces Dispute Panel on Cuba Trade*, FIN. TIMES (London), Nov. 21, 1996, at 14.

54. See *EU-U.S.: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act*, 36 I.L.M. 529, 530 (1997).

55. Council Regulation 2271/96, 1996 O.J. (L 309) 1.

56. See *id.* § 1.

57. See *id.* § 1.

Article 2, requiring EU companies affected by the covered laws to submit to the Commission information relevant for the purposes of the Regulation;⁵⁸

Article 4, blocking recognition or enforcement of decisions or judgments giving effect to the covered laws;⁵⁹

Article 5, prohibiting compliance by persons specified in Article 11 with requirements or prohibitions based on or resulting from the covered laws, unless authorized by the Commission under Article 7;⁶⁰

Article 6, providing for the recovery of damages caused by the application of the covered laws (not just the multiple part of damages awarded by foreign courts as under the PTIA);⁶¹ and

Article 9, requiring Member States to determine the sanctions to be imposed for breach of the Regulation.⁶²

As well as offering specific protection against the effects of the covered laws on EU companies in a similar manner to the PTIA, the Regulation is intended to deter the passage of similar legislation in the future by providing a mechanism for a swift EU legal response.

The Regulation throws into sharp relief the hazards and complications for companies operating internationally created by U.S. secondary sanctions legislation. If the Regulation induces some restraint in the passage and operation of such legislation it will have provided a significant service to the cause of promoting a secure and supportive framework for international trade and investment.

58. *See id.* § 2.

59. *See id.* § 4.

60. *See id.* § 5.

61. *See* Council Regulation 2271/96 O.J. (L309) 1 § 6.

62. *See id.* § 9.