

UNILATERAL ECONOMIC SANCTIONS: NECESSARY FOREIGN POLICY TOOL OR INEFFECTIVE HINDRANCE ON AMERICAN BUSINESSES?

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I. INTRODUCTION

From the Megarian Decree in 432 B.C. to the American Revolution, economic sanctions have been used throughout history to bring about desired behavioral changes among groups of

people by inflicting some sort of sustained loss upon them.¹ During the latter decades of the twentieth century, the United States increasingly dealt with difficult areas of foreign policy through the implementation of economic sanctions programs, many of which have been in place for years and remain operative today.² The September 11, 2001 terrorist attacks had a tremendous impact on the psyche, politics, and priorities of both the United States government and its citizens. As a result, this event may be looked upon as a major turning point in the evolution of the United States' use of economic sanctions, having resulted in a palpable shift in American foreign policy—both in the “big picture” goals sketched by the government as well as the means used to bring them to fruition. President Bush's declaration of war on international terrorism is the most visible aspect of this dramatic realignment of American foreign policy and is one that is likely to continue to include the use of sanctions programs against terrorist-sponsoring states.³

The past two years have seen substantial changes in several long-standing economic sanctions programs; the most prominent of which have removed most major barriers to U.S. trade with countries such as Iraq and Libya.⁴ Escalating tensions with sanctioned nations like Iran, North Korea, and Syria are almost certain to result in some changes to the sanctions against these countries. An increasingly aggressive media has fueled equally skeptical public sentiments regarding the United States' relationships with these nations.⁵ As a result, some sanctions programs have become somewhat polarizing within the American public and have created heated debate in segments of the American government.⁶ This trend is almost certain to continue, if not

¹ See HOSSEIN G. ASKARI ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 4-12 (2003).

² Alan Einisman, *Ineffectiveness At Its Best: Fighting Terrorism with Economic Sanctions*, 9 MINN. J. GLOBAL TRADE 299, 304-05 (2000).

³ See generally Fareed Zakaria, *Bush, Rice and the 9-11 Shift*, NEWSWEEK, Dec. 16, 2002, at 35.

⁴ See generally Exec. Order No. 13,357, 3 C.F.R. 227 (2005); 31 C.F.R. § 550.575 (2004); Exec. Order No. 13,350, 3 C.F.R. 196 (2005).

⁵ See generally Julie Kirtz & Associated Press, *U.S. Mulling Options to Deter Iran, North Korea*, Aug. 9, 2004,

<http://www.foxnews.com/story/0,2933,128387,00.html> (last visited Mar. 25, 2006). In general, recent media reports have discussed these issues extensively.

⁶ The media and United States government have become increasingly vocal regarding economic sanctions. See generally 60 Minutes, *Doing Business with the Enemy*, Aug. 29, 2004,

<http://www.cbsnews.com/stories/2004/01/22/60minutes/main595214.shtml> (last visited Mar. 25, 2006); see, e.g., 150 Cong. Rec. S4849 (daily ed. May 4, 2004).

escalate in the near future.⁷ However, despite the relative sense of urgency surrounding relations with these countries, this time period also offers legislators the opportunity to give these programs a fresh look and to reevaluate their true effectiveness.⁸

Homeland security and protecting human rights around the world should always be at the forefront of U.S. foreign policy; on the other hand, these sanctions have a residual chilling effect on the ability of American companies to compete in many crucial markets overseas.⁹

While sanctions may be a helpful tool in advancing certain American interests, common sense also dictates that they can have a detrimental effect on American businesses. When American companies are prohibited from competing in certain countries, those markets simply fill their needs by contracting with businesses from nations that have no such trade restrictions.¹⁰ The basic purpose of imposing these sanctions—punishment remains unfulfilled and U.S. interests, both political and economic, are frustrated.¹¹ In the process, American businesses are shut out of substantial markets and put at a distinct disadvantage in an increasingly global economy.¹²

This article will argue that in the current political climate, unilateral trade sanctions are not the most effective method for advancing American interests in many regions of the world, particularly in the Middle East. It will provide an overview of key U.S. economic sanctions regulations, discuss several recent changes in these programs, and outline the impact each has had, or is likely to have, on American business. It contends that by imposing unilateral trade sanctions, the United States shuts American businesses out of important markets while at the same time, failing to realize the foreign policy changes that they are designed to bring about in the first place. In particular, this article will contend that additional unilateral sanctions, without cer-

⁷ *Id.*

⁸ The Sanctions Policy Reform Act, S. 270, 109th Cong. (2005), discussed in greater detail *infra*, would apply to any new economic sanctions programs implemented within twenty days of the date of enactment, thus potential reforms could have immediate effects on current events.

⁹ See generally Adam Smith, *A High Price to Pay: The Costs of the U.S. Economic Sanctions Policy and the Need for Process Oriented Reform*, 4 UCLA J. INT'L L. & FOREIGN AFF. 325, 339 (2000).

¹⁰ See generally Raj Bhala, *Mrs. Watu: Seven Steps to Trade Sanctions Analysis*, 20 MICH. J. INT'L L. 565, 568-69 (1999).

¹¹ See *id.* at 569 & n.13.

¹² *Id.* (Consider Libya and Iraq, for example, prior to the lifting of sanctions against these nations).

tain restrictions, are the wrong approach for dealing with the current situations in Iran, North Korea, and Syria.

II. OVERVIEW OF SANCTIONS PROGRAMS

The United States government uses economic trade sanctions as an instrument to further its foreign policy goals in countries and regions around the world.¹³ Unilateral economic sanctions have been defined as “any unilateral restriction or condition on economic activity with respect to a foreign country or foreign entity that is imposed by the United States for reasons of foreign policy or national security.”¹⁴ For the purposes of this article, these sanctions are grouped into two general categories: those dating from the Cold War era and those dealing with the Middle East and terrorist-sponsoring states. In describing the laudable goals of economic sanctions to a congressional committee, an often-cited expert on economic sanctions quoted former President Woodrow Wilson:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.¹⁵

On paper, that is exactly how economic sanctions are supposed to function, and this statement aptly demonstrates their attractiveness to various politicians and governments over the years.¹⁶ A peaceful means of bringing about change will always be a more attractive option than one that involves armed conflict. Echoing these sentiments, several commentators have described sanctions as a halfway point between “diplomacy and military

¹³ See Office of Foreign Assets Control (“OFAC”), U.S. Treasury, Specially Designated Nationals and Blocked Persons, <http://www.treas.gov/offices/enforcement/ofac/> (follow “Specially Designated Nationals List (SDN List)” hyperlink to select a data format) (last visited Mar. 25, 2006).

¹⁴ U.S. INTERNATIONAL TRADE COMMISSION, INVESTIGATION NO. 332-391, OVERVIEW AND ANALYSIS OF CURRENT U.S. UNILATERAL ECONOMIC SANCTIONS 1-1 (1998).

¹⁵ *Testimony Before the Subcommittee on Trade of the House Comm. on Ways and Means: Hearing on the Use and Effect of Unilateral Trade Sanctions*, 105th Cong. (1997)(statement of Kimberly Ann Elliott, Research Fellow, Institute for International Economics), <http://waysandmeans.house.gov/legacy/trade/105cong/10-23-97/1023elli.htm>.

¹⁶ See *id.*

engagement.”¹⁷ However, many people would now disagree with President Wilson’s assessment, and whether one accepts his words or not, economic sanctions have evolved significantly in the decades since these words were spoken in 1919.¹⁸ In reality, the end results rarely reflect President Wilson’s idyllic view.¹⁹

At the present time, the United States implements a wide variety of substantial economic sanctions programs tailored to address various political and national security concerns around the world.²⁰ The most crucial programs for the purposes of this article are those that restrict (or that previously restricted) trade with Iran, Libya, and Syria.²¹

The authority for implementing most U.S. economic and trade sanctions is found in the Trading with the Enemy Act of 1917 (“TWEA”)²² and the International Emergency Economic Powers Act of 1977 (“IEEPA”).²³ IIEPA gives the President the power to,

under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdraw, transportation, importation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.²⁴

In other words, IIEPA gives the President the ability to prohibit U.S. trade with nations that he or she deems to be a

¹⁷ HOSSEIN G. ASKARI ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 65 (2003).

¹⁸ *See generally id.* at 65-66.

¹⁹ *See id.* at 67.

²⁰ *See* Office of Foreign Assets Control (“OFAC”), U.S. Treasury, OFAC Country Sanctions Programs, <http://www.treas.gov/offices/enforcement/ofac/programs/index.shtml> (last visited Mar. 27, 2006).

²¹ *See id.*

²² Trading with the Enemy Act of 1917, 50 U.S.C.A. app. §§ 1-44 (West 1990 & Supp. 2005).

²³ International Emergency Economic Powers Act of 1977, 50 U.S.C.A. §§ 1701-06 (West 2003 & Supp. 2005).

²⁴ *Id.* § 1702. The President is given this authority “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” *Id.* § 1701.

threat to the national security of the United States.²⁵ Similarly, the TWEA gives the President much discretion in exercising the power to freeze certain assets and “to prohibit certain financial transactions during time of war.”²⁶

The Office of Foreign Assets Control (“OFAC”), an agency within the U.S. Department of the Treasury, is the primary entity responsible for the enforcement and monitoring of these programs.²⁷ As a result, OFAC is a very powerful entity with respect to the formation and execution of international business transactions and one with which any American company transacting outside of the United States should have more than a passing familiarity. Given the fact that many of OFAC’s punitive or remedial actions come in the form of individual fines and privileged communications, it can often be a difficult task to develop a clear standard for what is or is not acceptable, or to predict the degree of punishment that the agency might implement for any given violation.²⁸ It logically follows that parties are often hesitant to challenge OFAC, and as a result, there is very little case law addressing the office’s powers. The cases that have been decided tend to substantiate the view that OFAC is an agency which enjoys broad discretion in its actions.²⁹ Depending on the severity of the violation and countries involved, OFAC may impose criminal penalties of up to ten years imprisonment, corporate fines of up to \$500,000, and individual fines of up to \$250,000.³⁰ These penalties, when coupled with the threat of the loss of import or export privileges, are dangerous realities for corporations operating worldwide.³¹

Of further interest to U.S. companies, OFAC also maintains what is known as the “List of Specially Designated Nationals and Blocked Persons” or “SDN” list, which is updated on a regular basis and provides an exhaustive collection of individuals, organizations, and companies with which U.S. persons and Ameri-

²⁵ See 50 U.S.C.A § 1702.

²⁶ Angela D. Hardister, *Can We Buy Peace on Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World*, 28 N.C. J. INT’L L. & COM. REG. 605, 618 (citing 50 U.S.C. app. § 5(b)(1)(A)).

²⁷ See Office of Foreign Assets Control (“OFAC”), U.S. Treasury, Mission, <http://www.treas.gov/offices/enforcement/ofac> (last visited Mar. 27, 2006).

²⁸ See generally Lori A. Feathers, *Economic Sanctions and Their Effect on the Energy Industry*, 36 TEX. INT’L L.J. 175, 176 (2001).

²⁹ See, e.g., *Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 623 (5th Cir. 1993) (upholding OFAC’s enforcement of several executive orders regarding Yugoslavia).

³⁰ See OFAC, *supra* note 20.

³¹ See generally U.S. INTERNATIONAL TRADE COMMISSION, *supra* note 14.

can companies may not conduct business.³² Regardless of their location, companies must ensure that they do not take part in any transactions with any entity listed on the SDN list, as non-compliance can result in both the aforementioned criminal penalties, as well as civil fines.³³ American businesses and their affiliates (regardless of location) must ensure that their sales departments, import and export administrators, and shipping departments have coordinated compliance programs to make certain that they do not transact with prohibited persons or entities.

III. SANCTIONS PROGRAMS STEMMING FROM THE COLD WAR: NORTH KOREA, CUBA

The majority of sanctions programs enacted by the United States between 1945 and 1989 were products of the Cold War and were attempts to curb the spread of communism.³⁴ Several of these programs remain in effect and are of significant relevance today.³⁵

A. Cuba

One of the most well known Cold War sanctions programs to the general public involves Cuba;³⁶ however, its notoriety is probably more attributable to the well-publicized prohibition on importing the country's world famous cigars than to any palpable effects felt by the U.S. economy.³⁷ The United States issued the

³² See OFAC, *supra* note 13.

³³ William B. Hoffman, *How to Approach a New Office of Foreign Assets Control Sanctions Program*, 27 STETSON L. REV. 1413, 1417-18 (1997).

Wide variation exists among single-purpose and generic sanctions statutes as to enforcement mechanisms. IEEPA, TWEA, and the UNPA all provide for criminal penalties, and IEEPA and TWEA carry civil penalties as well. TWEA also provides for civil forfeiture. Under TWEA, however, civil penalties or forfeiture may be imposed only after an opportunity for a full hearing on the record with pre-hearing discovery. OFAC entertains requests for hearings and provides pre-hearing discovery pursuant to subpart G of 31 C.F.R. parts 500 and 515.

³⁴ See, e.g., 31 C.F.R. § 500 (2002); 31 C.F.R. § 515 (2002) (U.S. sanctions programs against North Korea and Cuba). See also Robert P. O'Quinn, *A User's Guide to Economic Sanctions*, Backgrounder (Heritage Found. Backgrounder No. 1126, 1997), available at <http://www.heritage.org/Research/PoliticalPhilosophy/BG1126.cfm>.

³⁵ See *id.*

³⁶ Cuban Assets Control Regulations, 31 C.F.R. §§ 515.201-.206 (2005).

³⁷ *Id.* § 515.204 (prohibiting the "purchase, transport, import

Cuban Assets Control Regulations in 1963 with the goal of isolating the country's economy by depriving it of all U.S. investment and financial involvement.³⁸ In a nutshell, these sanctions prevent the export of goods, technology, or services (with limited exceptions for medicine and other humanitarian supplies) from the United States to Cuba, as well as ban the import of Cuban products to the U.S.³⁹ In addition, this program prevents trading with Cuba or Cuban nationals by way of transshipping⁴⁰ through a third intermediary country.⁴¹ Furthermore, the Cuban sanctions even prohibit non-U.S. nationals working for foreign subsidiaries of U.S. companies from having any involvement with any Cuban transactions. While these sanctions probably have a tremendous personal impact on American families with relatives living in Cuba, they have a more negligible economic impact, and it is estimated that they have had little effect on the economies of either nation.⁴² They are largely symbolic and are not likely to be altered until Fidel Castro's regime ends or significant democ-

. . . with respect to merchandise if that merchandise is of Cuban origin"). The import of merchandise "made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba" is prohibited. *Id.* This would prohibit the importation of a cigar made in Cuba.

³⁸ Cuban Assets Control Regulations, 31 C.F.R. § 515 (2005); *See also* OFAC, U.S. TREASURY, CUBA: WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO: AN OVERVIEW OF THE CUBAN ASSETS CONTROL REGULATIONS, TITLE 31, PART 515 OF THE U.S. CODE OF FEDERAL REGULATIONS I, <http://www.ustreas.gov/offices/enforcement/ofac/programs/cuba/cuba.pdf> (last visited Mar. 18, 2006) ("The basic goal of the sanctions is to isolate the Cuban government economically and deprive it of U.S. dollars.").

³⁹ OFAC, *supra* note 38 at 1.

⁴⁰ "Transship" is defined as "to transfer or be transferred from one conveyance to another for reshipment." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). In other words, this refers to the shipment of goods from the U.S. to another third country prior to shipment to the final destination country.

⁴¹ *See* OFAC, *supra* note 38 at 1. For example, a U.S. company is prohibited from selling goods to a buyer in Mexico with knowledge that the first buyer would then sell the product to a Cuban entity.

⁴² On February 16, 2001, the U.S. International Trade Commission released a report on the effects of the U.S. economic sanctions on Cuba, which indicated that the Cuban sanctions have had little impact on the economies of either nation, and estimated that the U.S., as a result of the sanctions, loses approximately \$600 million to \$1 billion in exports per year. U.S. International Trade Commission, *ITC Releases Report on the Economic Impact of U.S. Sanctions with Respect to Cuba* (Feb. 16, 2001), http://www.usitc.gov/ext_relations/news_release/2001/ER0216Y1.HTM (last visited Mar. 27, 2006).

ratio reforms otherwise are enacted.⁴³

B. *North Korea*

The Foreign Assets Control Regulations were established against the Democratic People's Republic of Korea in 1950.⁴⁴ In 2000, President Clinton eased sanctions against North Korea in an effort to relieve tensions between the two countries and to coax North Korea into freezing its nuclear program.⁴⁵ These sanctions generally allow the export of many U.S. goods to North Korea, (with the exception of military and other sensitive technologies), but prohibit the importation of North Korean goods not licensed by OFAC to the United States.⁴⁶ In reality, this constitutes a complete ban on North Korean imports.⁴⁷ Given the tensions regarding North Korea's nuclear program and the designation of North Korea as a member of "the axis of evil," North Korean sanctions have been the source of increasing speculation over the past several years.⁴⁸ More recently, North Korea made an ominous public declaration that it had successfully produced nuclear weapons and has demonstrated fluctuating commitment to the ongoing, six-nation negotiations aimed at convincing the nation to abandon its nuclear program.⁴⁹ This has led many to speculate that U.S. sanctions might be strengthened or that the United States will bring the matter before the U.N. Security Council.⁵⁰ Nonetheless, it seems that the current American stance on North Korea is almost certain to change significantly in the near future, and the imposition of multilateral sanctions, through the United Nations or otherwise, remains a real possibil-

⁴³ *See id.*

⁴⁴ The Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (2005).

⁴⁵ *See* OFAC, U.S. TREASURY, NORTH KOREA: AN OVERVIEW OF THE FOREIGN ASSETS CONTROL REGULATIONS AS THEY RELATE TO NORTH KOREA, TITLE 31 PART 500 OF THE U.S. CODE OF FEDERAL REGULATIONS, <http://www.treas.gov/offices/enforcement/ofac/programs/nkorea/nkorea.pdf> (last visited Mar. 25, 2006).

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ BBC News World Edition, *Bush's 'Evil Axis' Comment Stirs Critics*, BBC NEWS, Feb. 2, 2002, <http://news.bbc.co.uk/1/hi/world/americas/1796034.stm>.

⁴⁹ Glenn Kessler, *U.S. Urges Nations Not to Reward North Korea*, WASH. POST, Feb. 15, 2005, at A14. *But see* BBC News International, *North Korea 'U-turn' on US Talks*, BBC NEWS, Feb. 19, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4276477.stm>.

⁵⁰ Kessler, *supra* note 49.

ity.⁵¹ However, given the current political realities involved in dealing with North Korea, any such actions are unlikely to have a substantial impact on American businesses in the short term.⁵²

Because this article focuses on the ramifications of sanctions on U.S. commerce, it will concentrate on programs with greater economic impact or whose long-term political consequences are more substantial.

C. Sanctions Programs in the Middle East

Since 2003, there have been significant changes in several Middle Eastern economic sanctions programs, each of which has the potential to have a considerable impact on American businesses and their operations in the region.⁵³ Given the natural reserves of oil and natural gas present in many of these countries, American oil companies are particularly affected.⁵⁴ Operation Iraqi Freedom resulted in the repeal of most sanctions which previously restricted trade with Iraq, and while the situation is not yet conducive to widespread investment, the Iraqi market should create extensive economic opportunities in the future.⁵⁵ Furthermore, encouraging developments in Libya have significantly altered the business environment in that nation and has opened the door for participation from U.S. firms.⁵⁶

D. Iraq

Despite the historic and potentially groundbreaking elections which recently took place in Iraq, any assessment at the current time of the economic effects on Western businesses resulting from the overthrow of Saddam Hussein's government is premature.⁵⁷ However, given that 2002 estimates put Iraq's proven oil reserve at 113.8 billion barrels, they are likely to be

⁵¹ See Peter Baker, *Bush Urges Diplomatic Solutions to Conflicts*, WASH. POST, Feb. 18, 2005, at A06. See also David E. Sanger, *U.S. Is Shaping Plan to Pressure North Koreans*, N.Y. TIMES, Feb. 14, 2005.

⁵² For example, U.S. export figures to North Korea were estimated at \$23.8 million in 2004. See U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS - TRADE IN GOODS (IMPORTS, EXPORTS AND TRADE BALANCE) WITH NORTH KOREA, <http://www.census.gov/foreign-trade/balance/c5790.html#2005> (last visited Mar. 25, 2006).

⁵³ See, e.g., Exec. Order No. 13,357, *supra* note 4; Libyan Sanctions Regulations, 31 C.F.R. § 550.575 (2006).

⁵⁴ See generally Feathers, *supra* note 28, at 175.

⁵⁵ Exec. Order No. 13,350, *supra* note 4.

⁵⁶ Exec. Order No. 13,357, *supra* note 4.

⁵⁷ Christiane Amanpour et al., *Sporadic Violence Doesn't Deter Iraqi Voters*, Jan. 31, 2005, <http://www.cnn.com/2005/WORLD/meast/01/30/iraq.main/>.

substantial once military operations have stabilized to the point that foreign firms may safely reinvest in the war-torn nation.⁵⁸ Thus, the discussion of Iraq's economic future is an appropriate topic for a later article, and the remainder of this article will focus on recent developments in Libya, Syria, and Iran.

E. *Libya*

Following a wave of terrorist acts against American interests in the Middle East during the 1980's, the United States enacted the Libyan Sanctions Regulations to penalize Libya and its government for its participation in, and active support of, international acts of terrorism.⁵⁹ Through a series of executive orders, the United States government set forth restrictions that eventually prohibited U.S. companies from operating in the country.⁶⁰ Specifically, Executive Order 12,543, signed on January 7, 1986, began the embargo on U.S. exports and Libyan imports that had the result of prohibiting almost all transactions between the United States and Libya.⁶¹ The Iran and Libya Sanctions Act of 1996 (ILSA) implemented further restrictions.⁶² In February 2004, shortly after the capture of Saddam Hussein, the White House announced that Libyan leader Moammar Qadhafi had taken "serious, credible and consistent steps to dismantle his country's weapons of mass destruction programs and fight terrorism."⁶³ As a result of this change in relations and on orders by the White House, OFAC issued a general license that repealed many of the more restrictive prohibitions relating to Libya.⁶⁴ However, this license kept many of the previous restrictions in place, such as prohibitions on flights by both U.S. and Libyan air carriers, and property that had previously been blocked under § 550 of the Libyan Sanctions Regulations remained frozen.⁶⁵ Nevertheless, this general license allowed American businesspeople to travel to Libya without restriction and more signifi-

⁵⁸ See CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK – IRAQ, (Jan. 10, 2006) <http://www.cia.gov/cia/publications/factbook/geos/iz.html>.

⁵⁹ Libyan Sanctions Regulations, 31 C.F.R. § 550 (2006).

⁶⁰ See Fact Sheet, Office of Foreign Assets Control, *Libya- What You Need to Know about the U.S. Embargo*, available at <http://www.ustreas.gov/offices/enforcement/ofac/programs/libya/libya.pdf>.

⁶¹ Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986).

⁶² Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996).

⁶³ Press Release, White House Press Secretary, Statement on Libya (Feb. 26, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040226-1.html>.

⁶⁴ Libyan Sanctions Regulations, 31 C.F.R. § 550.575 (2006).

⁶⁵ *Id.*

cantly, allowed for “the exportation of goods, software or technology. . .to Libya from the United States,”⁶⁶ signaling the potential for the full rescission of sanctions if the Libyan government took further steps to cooperate with U.S. requests.⁶⁷

Following this limited yet substantial reprieve, the United States, Britain and other allies continued to work with the Libyan government in securing its cooperation in the war on terror.⁶⁸ British Prime Minister Tony Blair, while cautioning that “trust on both sides will take time to establish,” made a historic visit to Tripoli to meet with Qadhafi in person that same month.⁶⁹ Apparently satisfied with Libya’s increased cooperation on matters of terrorism, President Bush signed Executive Order 13,357 on September 20, 2004, which lifted most of the remaining prohibitions and essentially ended all U.S. sanctions against Libya.⁷⁰ As a result, U.S. companies are now free to conduct most business transactions in Libya (subject to certain export controls and other national security restrictions),⁷¹ and assets frozen during the 1980’s have been released.⁷² This has had a particular impact on the oil industry and has allowed American companies to reestablish ties to the clear benefit to the economies of both countries.⁷³ In fact, on the day of the Blair/Qadhafi meeting, Shell announced the conclusion of a £550 million gas exploration agreement in Libya.⁷⁴ More recently, Libya awarded exploration licenses to three U.S. companies for the first time since the sanctions went into effect in the 1980’s.⁷⁵ This is a major step forward for a nation which has publicly stated its desire to

⁶⁶ *Id.*

⁶⁷ See J. Daniel Chapman, *Doing Business with Libya and Syria*, THE TEXAS LAWYER, July 5, 2004.

⁶⁸ See BBC News U.K., *Blair Hails New Libyan Relations*, BBC NEWS Mar. 25, 2004, http://news.bbc.co.uk/1/hi/uk_politics/3566545.stm.

⁶⁹ *Id.*

⁷⁰ Exec. Order No. 13,357, *supra* note 53.

⁷¹ See Chapman, *supra* note 67.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ BBC News U.K., *supra* note 68.

⁷⁵ Al-Jazeera, *U.S. Firms Win Libyan Energy Contracts*, Jan. 29, 2005, <http://english.aljazeera.net/NR/exeres/59AE3596-504E-4F89-88E5-F64DBF12DDD8.htm>. ChevronTexaco, Occidental Petroleum Corp, and Amereda Hess Corp were recently awarded these contracts. *Id.* While not earth shattering in their own right, this signals that American energy companies are now allowed to renew their investments in Libya. In the case of ChevronTexaco, the deal was the first in Libya in twenty-eight years. Press Release, ChevronTexaco Named Winner of Onshore Block in Libyan License Round (Jan. 29, 2005), <http://www.chevrontexaco.com/news/press/2005/2005-01-29.asp>.

attract over \$30 billion in foreign investment by the year 2010.⁷⁶ According to U.S. Department of Energy estimates, prior to the repeal of the sanctions, Libya had an estimated oil production of 1.5 million barrels per day.⁷⁷ However, at the time, over ninety percent of its exports were to European nations such as Spain, France, and Italy.⁷⁸ Libya has announced the goal of increasing its output to over two million barrels per day by 2010, a goal made much more viable with the contributions of American and British petroleum firms.⁷⁹

Prior to these somewhat surprising steps by the United States, the United Nations Security Council had undertaken similar measures, starting with the suspension of its sanctions in 1999.⁸⁰ This was followed by the complete repeal of sanctions in September 2003, after Libyan officials “accepted civil responsibility for the actions of its officials” in the bombing of Pan Am flight 103.⁸¹ This 1988 tragedy claimed the lives of over 270 people and stands as the most visible example of Libyan terrorism, and is one of the most notorious terrorist attacks of the past several decades.⁸²

One important caveat should be noted: while sanctions programs have been significantly reduced, Libya is still considered to be a state sponsor of terrorism by the U.S. State Department and is subject to certain export controls.⁸³ Despite these substantial steps toward normalized relations, American companies are not yet without restriction in dealing with Libya, and companies re-entering the Libyan market must be diligent in ensuring compliance with export controls and other prohibitions.⁸⁴

These actions by Libya are examples of multilateral sanctions eventually achieving their goals and successfully encouraging change in what has been a dangerous and oppressive regime.

⁷⁶ Al-Jazeera, *supra* note 75.

⁷⁷ U.S. DEP’T OF ENERGY, LIBYA COUNTRY ANALYSIS BRIEF, <http://www.eia.doe.gov/emeu/cabs/libya.html> (last visited Mar. 27, 2006).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See U.S. DEP’T OF STATE, BACKGROUND NOTE: LIBYA (Nov. 2005), <http://www.state.gov/r/pa/ei/bgn/5425.htm>. “‘Export Control’ is a broad term that refers to any of several U.S. laws that prohibit or restrict certain exports or re-exports of U.S.-origin items for reasons including national security, foreign policy, and short supply of certain commodities. Exports of controlled items require licenses from the appropriate administering agencies.” U.S. International Trade Commission, *supra* note 14, at 1-2.

⁸⁴ See U.S. DEP’T OF STATE, *supra* note 83.

While many different forces converged to produce this outcome, one could argue that it was the result of basic economics. Libya's economy relies heavily on the petroleum and natural gas industries and the country simply could not make the necessary upgrades to its infrastructure without a substantial influx of capital from the West.⁸⁵

Contrasting this outcome with, for example, the current situation in Iran, it is clear that the Libyan sanctions might have been ineffective without the support of United Nations and pressure from likeminded allies such as Britain. Thus, a strong argument exists that the United States can ill afford to act unilaterally in dealing with Iran, North Korea, and Syria.

F. *Syria*

Another sanctions program which has received increased attention within the past year involves Syria.⁸⁶ In response to the Syrian government's support of terrorism and actions related to security situation in Iraq, President Bush signed Executive Order 13,338 on May 11, 2004, which severely restricted the export of American goods into Syria.⁸⁷ This action extended the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, and essentially prohibits the export of all goods, technology and software of U.S. origin to Syria.⁸⁸

In contrast to other programs, these export controls do not prohibit U.S. persons from participating in transactions with most Syrian nationals and entities, provided that these transactions do not involve the export of U.S. goods *or are not* otherwise prohibited.⁸⁹ So while many U.S.-based transactions are prohibited, foreign subsidiaries of U.S. companies are not completely prohibited from conducting business in and with Syria.⁹⁰ How-

⁸⁵ See WorldNetDaily, *Libya Wants Sanctions to End*, Sept. 7, 2001, http://www.freedomdomain.com/Templemount/9_07a.html.

⁸⁶ See Exec. Order No. 13,338, 3 C.F.R. 168 (2005).

⁸⁷ *Id.* (The E.O. cites "the actions of the Government of Syria in supporting terrorism, continuing its occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining United States and international efforts with respect to the stabilization and reconstruction of Iraq"), <http://www.whitehouse.gov/news/releases/2004/05/20040511-6.html>. *Id.* ("With the exception of food & medicine, the Secretary of Commerce shall not permit the exportation or re-exportation to Syria of any product of the United States not included in section 1(b)(i) of this order.")

⁸⁸ Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482.

⁸⁹ See Chapman, *supra* note 67.

⁹⁰ *Id.*

ever, as discussed in further detail later in this article, such business can have damaging political and commercial consequences. Recent events, such as the February 2005 assassination of former Lebanese Prime Minister Hariri in Beirut, have increased pressure on Damascus to crack down on terrorist organizations operating within its borders and have added to international discontent with the Syrian Government.⁹¹ It appears that the specter of multilateral sanctions has had somewhat of an impact on the Syrian government, as it recently withdrew its troops and intelligence services from Lebanon.⁹² Nonetheless, tensions clearly remain, and recent reports indicate that the U.S. government is considering a variety of options, ranging from the further freezing of Syrian assets to increased sanctions under the Syrian Accountability Act.⁹³ On May 5, 2005, President Bush renewed the export controls of 2004 for an additional year, and at this time, it is unclear if further actions will be taken.⁹⁴

G. *Iran*

Another sanctions program garnering a great deal of attention in recent months involves Iran, and is one which many cite as unsuccessful.⁹⁵ In fact, several commentators have observed that Iran's inclusion in the "axis of evil" clearly establishes the sanctions' failure.⁹⁶ Given the current state of affairs in the Middle East and the post-9/11 American mindset, the United States has a strong and legitimate interest in preventing Iran from ac-

⁹¹ Steven R. Weisman, *Bush Calls Syria 'Out of Step' on Democracy in the Mideast*, N.Y. TIMES, Feb. 18, 2005.

⁹² Albert Aji, *Syria Committed to Withdraw Troops From Lebanon*, Feb. 24, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050225/Syria_Lebanon_050224. Additionally, Syria recently handed over a senior member of the Iraqi insurgency to the Iraqi government, accordingly as a "gesture of goodwill." Ali Al-Fatlawi, *Suicide Car Bomber Kills 115 South of Baghdad*, Mar. 1, 2005, <http://www.washingtontimes.com/world/20050301-121948-1294r.htm>.

⁹³ Robin Wright and Peter Baker, *U.S. Tensions With Syria Escalate: White House Weighs Punitive Economic and Political Measures*, WASH. POST, Feb. 17, 2005, at A01.

⁹⁴ See Press Release, White House, Notice: Continuation of the National Emergency Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria, (May 5, 2005), <http://www.whitehouse.gov/news/releases/2005/05/20050505-11.html>.

⁹⁵ Despite the Iranian sanctions, Iran has continued to defy U.S. demands to end its nuclear program. See Louis Charbonneau & Francois Murphy, *U.S. Piles Pressure on Iran Over Atomic Plans*, WIRED NEWS (Mar. 2, 2005), <http://www.buzztracker.org/2005/03/02/cache/479320.html>; see also ASKARI, *supra* note 1, at 70-71.

⁹⁶ ASKARI, *supra* note 1, at 71.

quiring weapons of mass destruction, particularly nuclear weapons.⁹⁷ In a way, the sanctions program which has been in place against Iran and has evolved in the years since 1979 is at a bit of a crossroads and arguably, the stakes have never been higher.⁹⁸ Considering the increased attention given to U.S./Iranian relations from the media, government, and general public, some significant diplomatic actions related to the Iranian sanctions programs are inevitable, as evidenced by the IAEA's February 2006 referral of Iran to the United Nations Security Council.⁹⁹

It is speculated that much of the younger Iranian population is becoming increasingly dissatisfied with the current government and is more "pro-Western" than many people realize.¹⁰⁰ Given that the average age in Iran is twenty three, the validity of this view could have notable implications for future relations with the United States.¹⁰¹ This belief that the "silent majority" in Iran is primed for change is the cornerstone of a bill proposed by Senator Santorum, which is discussed in greater detail later in the article.¹⁰²

1. Historical Background

The Islamic Republic of Iran's current government came to power in 1979, and a theocratic system of government¹⁰³ has been in power in some form since.¹⁰⁴ During the 1979 revolution, armed Iranian students took over the American embassy in Iran and held fifty-two Americans hostage for 444 days.¹⁰⁵ This action caused the United States to end its diplomatic relations with

⁹⁷ See John R. Bolton, Under Sec'y for Arms Control & Int'l Sec., Remarks to the Hudson Institute: Preventing Iran from Acquiring Nuclear Weapons, (Aug. 17, 2004), <http://www.state.gov/t/us/rm/35281.htm>.

⁹⁸ See generally M. McCary, *End Run on Sanctions (A Case Study On Contemporary Energy Investment in Iran)*, 12 FLA. J. INT'L L. 263, 279-80 (1998)(stating that "the Iranian sanctions regulations place a significant damper on the ability of a U.S. company to invest in the Iranian energy sector.").

⁹⁹ See, e.g., George Jahn, *IAEA Reports Iran to U.N. Security Council*, ASSOCIATED PRESS, Feb. 4, 2006, <http://abcnews.go.com/International/print?id=1579579>.

¹⁰⁰ See *id.* at 271.

¹⁰¹ Bob Borek, *Brown Prof. Speaks on Iran*, STANFORD DAILY, Apr. 25, 2005, http://www.stanford.edu/group/psa/events/2004-05/ipap/daily_life.html.

¹⁰² See Iran Freedom and Support Act of 2005, S. 333, 109th Cong. § 301 (2005).

¹⁰³ A 'theocracy' is defined as a "government ruled by or subject to religious authority." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

¹⁰⁴ See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK - IRAN, (Jan. 10, 2006), <http://www.cia.gov/cia/publications/factbook/geos/ir.html>.

¹⁰⁵ U.S. DEP'T OF STATE, BACKGROUND NOTE - IRAN (Aug. 2005), <http://www.state.gov/r/pa/ei/bgn/5314.htm>.

Iran in 1980, and implement economic sanctions which have evolved over the years and currently prohibit most transactions with Iran and Iranian companies.¹⁰⁶

2. Sanctions

The nucleus for economic sanctions programs against Iran is the Iranian Transactions Regulations (“ITR”).¹⁰⁷ In short, the ITR shuts down any and all economic dealings between the United States and Iran.¹⁰⁸ First, it prohibits, with very few exceptions, the importation of goods or services to the United States from Iran.¹⁰⁹ It likewise prohibits the export of U.S. goods, technology and services to Iran by U.S. persons.¹¹⁰ The inclusion of the “services” language extends the sanctions to encompass bank transfers and other financial transactions.¹¹¹ Thus, an Iranian transaction which includes the routing through any American bank, either in the U.S. or overseas, is prohibited.¹¹²

In the 1990’s, President Clinton issued a series of executive orders that tightened the restrictions prohibiting U.S. corporations from doing any business with Iran, or from forming any “contract for the financing of the development of petroleum resources located in Iran.”¹¹³ Due to concerns over Iranian support of terrorism and a potential nuclear weapons program, President Bush extended these restrictions in both 2004 and 2005.¹¹⁴

One of the more controversial sanctions programs of recent times is the Iran and Libya Sanctions Act of 1996 (ILSA), enacted in 1996 and extended by President Bush for an additional five years in 2001.¹¹⁵ By establishing a \$20 million annual limit on investments in the Iranian oil industry, ILSA places restrictions on foreign investment in Iran and allows the U.S. to sanction for-

¹⁰⁶ *Id.*

¹⁰⁷ Iranian Transactions Regulations, 31 C.F.R. § 560 (1997).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See also McCary, *supra* note 98, at 279-80.

¹¹¹ See McCary, *supra* note 98, at 279-80.

¹¹² See *id.* See also Iranian Transactions Regulations, 31 C.F.R. § 560 (1997).

¹¹³ McCary, *supra* note 98, at 278-81.

¹¹⁴ See Press Release, George W. Bush, Notice: Continuation of the National Emergency with Respect to Iran (Mar. 10, 2005),

<http://www.whitehouse.gov/news/releases/2005/03/20050310-9.html>.

¹¹⁵ Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 (West 2003 & Supp. 2005)); see also Press Release, George W. Bush, Statement by the President (Aug. 3, 2001), available at <http://www.whitehouse.gov/news/release/2001/08/20010803-11.html>.

eign firms for violating this American law.¹¹⁶ Due to the questionable legality of allowing the U.S. to sanction foreign companies for acts occurring outside its borders, the United States has yet to take any significant action against foreign corporations, and is unlikely to do so in the near future.¹¹⁷

Despite the potential threats to U.S. interests posed by Iran's current regime, the country is a crucial oil producing nation and the absence of American companies in this country has a negative impact on the economy of the United States.¹¹⁸ According to U.S. government estimates, Iran has the world's second largest natural gas reserves and holds close to ten percent of the world's proven oil reserves.¹¹⁹ Other estimates predict that the country exports 2.7 million barrels of oil per day and that eventually, this amount could be increased to almost five million barrels per day.¹²⁰ Needless to say, its ample reserves and potential for expansion make Iran a very attractive market for oil companies.¹²¹ Not only would more normalized relations result in a more secure environment in the Middle East, the termination of sanctions would bring sizeable financial benefits for both nations.¹²² Like Libya, the Iranian oil industry's infrastructure is dated and in need of foreign investment to develop to its full potential.¹²³ Thus, the Iranian people have as much to gain from an improvement in relations with the United States and the easing of economic sanctions programs as Americans do.¹²⁴

However, the obstacles to a renewed cooperation between the two nations are numerous and extensive.¹²⁵ For example, on June 30, 2005, President Bush issued Executive Order 13,382, which gives the Department of the Treasury authority to freeze the U.S. assets of foreign entities that have

engaged, or attempted to engage, in activities or

¹¹⁶ Feathers, *supra* note 28, at 178.

¹¹⁷ *Id.*

¹¹⁸ U.S. DEP'T OF ENERGY, IRAN COUNTRY ANALYSIS BRIEF (Jan. 2006), <http://www.eia.doe.gov/emeu/cabs/Iran/Background.html>.

¹¹⁹ U.S. DEP'T OF ENERGY, IRAN COUNTRY BRIEF - OIL (Jan. 2006), <http://www.eia.doe.gov/emeu/cabs/Iran/Oil.html>.

¹²⁰ *Id.* Another U.S. estimate places Iran's proved oil reserves at 94.39 bbl as of January 1, 2002. See Central Intelligence Agency, *supra* note 103.

¹²¹ See U.S. Department of Energy, *supra* note 118.

¹²² See McCary, *supra* note 98 at 273 (citing Andrew Rathnell, *Iran's Liquid Lifeline*, 7 JANE'S INTELLIGENCE REV. 411, 412 (1998)).

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ Parisa Hafezi, *Iran Warns U.S. Not to 'Play with Fire,'* REUTERS, Feb. 13, 2005, <http://in.news.yahoo.com/050213/137/2jlbv.html>.

transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer, or use such items, by any person or foreign country of proliferation concern.¹²⁶

This bold step is an additional sanction targeted at the Iranian and North Korean nuclear programs and has already created a great deal of controversy overseas, particularly among Chinese and Russian companies.¹²⁷

Other profound developments, such as the continuation of uranium enrichment activities and recent inflammatory comments by Iranian President Mahmoud Ahmadinejad reinforce the international community's deep concern regarding Iran.¹²⁸ Significant action by the United States and likeminded allies in Europe is all but a certainty, however, the timing and severity of such action is difficult to predict.

IV. "PIERCING THE CORPORATE VEIL" AND ECONOMIC SANCTIONS

Most U.S. economic sanctions programs only apply to "U.S. persons."¹²⁹ As a result, a critical element of compliance with economic sanctions programs is determining what constitutes a "U.S. person" under U.S. economic sanctions laws. The Iranian Transactions Regulations, ("ITR") define a "U.S. person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches),

¹²⁶ Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (July 1, 2005). *See also* Guy Dinmore & Edward Alden, *U.S. Sanctions Threat to Foreign Companies Doing Business with Iran Nuclear Agency*, THE FINANCIAL TIMES, (London), June 30, 2005, at 1; Dafna Linzer, *U.S. Plans New Tool to Halt Spread of Weapons*, THE WASH. POST, June 27, 2005, at A01.

¹²⁷ Linzer, *supra* note 125, at A01.

¹²⁸ *See* William Branigin & Robin Wright, *Ex-Hostages Finger Iran's President-Elect*, WASHINGTON POST, June 30, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/30/AR2005063000215.html>; *see also* John Ward Anderson, *Calls Rise to Refer Iran to U.N. Body; Europeans' Demands Echoed by Rice After Nuclear Resumption*, WASHINGTON POST, Jan. 13, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/12/AR2006011200380_pf.html.

¹²⁹ Feathers, *supra* note 28, at 180-81.

¹²⁹ Iranian Transactions Regulations, 31 C.F.R. § 560.314 (2006).

¹³⁰ *See id.*

or any person inside the United States.”¹³⁰ Thus, economic sanctions would apply to the following persons and entities:

- U.S. corporations;
- U.S. banks and financial institutions;
- Foreign branches of U.S. corporations and financial institutions;
- Foreign nationals located within the United States.¹³¹

Perhaps more significantly, this definition excludes foreign subsidiaries of U.S. companies that are fully independent (i.e., those incorporated under the laws of another country) from coverage under the sanctions laws.¹³² It follows that these subsidiaries may lawfully conduct transactions that would otherwise be illegal if conducted by the parent, provided that no U.S. persons or goods are involved.¹³³ While complete compliance is much more complicated, this brief overview lays the foundation for understanding the greater issue that has garnered so much attention within the halls of Congress and in the media. “The corporate veil” may be pierced under certain circumstances to establish a violation of U.S. economic sanctions or export controls by establishing that a subsidiary is actually controlled by its U.S. parent corporation.¹³⁴ As in any “veil piercing” exercise, the analysis hinges on a variety of factors, including:

- Failure to observe corporate formalities;
- Co-mingling of assets;
- Gross under-capitalization;
- Non-payment of dividends;
- Insolvency of debtor corporation;
- Siphoning of funds from the debtor corporation by the dominant stockholder;
- Nonfunctioning of officers and directors;
- Absence of corporation records; or
- Whether the corporation is merely a facade for the operations of the dominant stockholder.¹³⁵

The fact-intensive and case-specific nature of these analyses makes compliance in the sanctions context extremely difficult to gauge.¹³⁶

¹³² See Chapman, *supra* note 67.

¹³³ See Feathers, *supra* note 28, at 180.

¹³⁴ See generally *id.*

¹³⁵ Trs. of the Nat’l Elevator Indus. Pension, Health Benefit and Educ. Funds v. Lutyk, 332 F.3d 188, 194 (3d Cir. 2003) (citing Am. Bell, Inc. v. Fed’n of Tel. Workers, 736 F.2d 879, 886 (3d Cir. 1984)).

¹³⁶ See Iranian Transactions Regulations, 31 C.F.R. § 560.417 (2006).

With very little case law to provide guidance, corporations must be proactive in educating their workforces regarding these sanctions programs, while at the same time, striking the delicate balance of not “facilitating” illegal transactions. “Facilitation” is an even more elusive term to define; however, in this context the term has a similar meaning to “enable.”¹³⁷ Examples of prohibited facilitation in the ITR include referring sanctioned business to other persons and altering or otherwise changing business practices or procedures to allow foreign subsidiaries to participate in sanctioned transactions.¹³⁸ In other words, U.S. persons may not assist, participate or act as brokers in transactions that they may not personally participate due to economic sanctions.¹³⁹

Another emerging concern is that of successor liability for companies that acquire businesses of questionable compliance with export controls and economic sanctions laws.¹⁴⁰ The U.S. Department of Commerce recently upheld a \$1.76 million civil fine against an acquiring company for previous actions by an acquired company, stating that “corporations will be held accountable for violations of U.S. export control laws committed by companies that they acquire.”¹⁴¹ Earlier this year, a major global company was forced to pay a \$10 million dollar fine under similar circumstances.¹⁴² Commentators have stated that this liability could also be used by OFAC and the Department of the Treasury to hold acquiring companies liable for violations of U.S. economic sanctions.¹⁴³ Both of these fines are substantial and should get the attention of corporations in their own right; however, when coupled with the resulting adverse publicity and potential for the loss of export privileges, non-compliance comes with a heavy price.¹⁴⁴

A. Corporate Blacklisting by the Media and Increasing Pressure Within the United States Government

There is little doubt that the war in Iraq and the more widespread war on terror have heightened tensions between the United States and many Middle Eastern countries. Keeping with

¹³⁷ *See id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Peter D. Trooboff, *Foreign Trade Controls Successor Liability*, NAT'L L.J., Apr. 4, 2005, at P14.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

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this trend, many citizens, rightly or wrongly, have rallied against the governments of several nations in the region. Consequently, foreign subsidiaries of American companies that conduct business with sanctioned countries are beginning to garner an increasing amount of attention.¹⁴⁵ The media has fueled the debate in recent months by conducting “investigations” into “illegal activities” involving U.S. companies and sanctioned countries.¹⁴⁶ Likely fueled by the strong sentiments of a politically-charged election year, outlets such as CBS News’ “60 Minutes” have scrutinized Halliburton’s foreign subsidiaries and their business dealings in countries like Iran.¹⁴⁷ In an August 29, 2004, story by Leslie Stahl, it was alleged that Halliburton Products and Services, Ltd., a company registered in the Cayman Islands, was a “shell company”¹⁴⁸ whose business contracts with Iran were completely controlled by the American arm of the company.¹⁴⁹ Such actions, as discussed above, could be sufficient to constitute improper control over a subsidiary and to “pierce the corporate veil.”¹⁵⁰ This story quoted the New York City Comptroller as saying (in reference to U.S. sanctions) that “if the intent was to try to prevent United States-based companies from doing business in these rogue nations, then it appears as if they’ve gotten around what the law had intended.”¹⁵¹

It is probably too early to determine how this public outcry will affect American businesses. However, the public relations consequences could be devastating. Given the recent mantra of “either you are with us or you are with the terrorists,”¹⁵² companies do not want to be viewed by the consuming public as conducting business with or helping to fund the same terrorists that

¹⁴⁵ See 60 Minutes, *supra* note 6.

¹⁴⁶ See, e.g., *id.*

¹⁴⁷ *Id.*

¹⁴⁸ In this case, the accusation was that Halliburton’s U.S. division actually ran the business from the U.S., while the Cayman Office was nothing but an office to receive mail. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* text accompanying note 134 for veil piercing factors; see also *Trs. of the Nat’l Elevator Indus. Pension*, 332 F.3d at 194 (citing *American Bell*, 736 F.2d at 886).

¹⁵¹ 60 Minutes, *supra* note 6 (New York City’s pension fund has invested in General Electric and ConocoPhillips. Each of these companies has been criticized for the actions of their foreign subsidiaries in recent months.).

¹⁵² President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

the United States military is fighting around the world.¹⁵³

In the case of Halliburton, this public perception problem had a significant impact on its subsidiaries' interests in Iran.¹⁵⁴ On January 28, 2005, after stating that that "the business environment in Iran is not conducive to our overall strategies and objectives," the company's CEO announced that it was ending its operations in Iran.¹⁵⁵ This is a strong indication that the increased pressure has had, and will continue to have, a substantial effect on American commerce, particularly with regard to overseas subsidiaries.¹⁵⁶

Until Congress weighs in with a more detailed or substantive analysis of the current state of the law, foreign subsidiaries would be well served to, at a minimum, re-evaluate their operations to ensure complete compliance with applicable sanctions and avoid any semblance of impropriety. A more prudent step might be to terminate all subsidiary dealings with sanctioned countries, as this might be the only sure way to guarantee compliance.

B. *Congressional & Other Governmental Initiatives*

In response to the ensuing public outcry from these and other news reports, Congress has also begun to re-evaluate sanctions programs over the past several years.¹⁵⁷ As discussed in more detail below, Senator Richard Lugar (R-IN) proposed the "Sanctions Policy Reform Act," in 2003, and resubmitted it to the Senate in early 2005, Senator Rick Santorum (R-PA) has introduced significant legislation related to the Iranian sanctions, while many other members have become increasingly vocal in expressing their views on the shortcomings of sanctions.¹⁵⁸ For example, Senators Chuck Grassley (R-IA) and Max Baucus (D-

¹⁵³ For a general discussion of the dangers of business' involvement in terrorist activities, see Angela A. Barkin, *Corporate America- Making A Killing: An Analysis of Why it is Appropriate to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism*, 40 CAL. W. L. REV. 169 (2003). See also Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil and Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L. J. 183, 220-21 (2001).

¹⁵⁴ See generally Wälde, *supra* note 152; See also Simon Romero, *Halliburton Will Withdraw From Energy Projects in Iran*, N.Y. TIMES, Jan. 29, 2005, at C4.

¹⁵⁵ Romero, *supra* note 153, at C4.

¹⁵⁶ See generally Wälde, *supra* note 152, at 220-21.

¹⁵⁷ See Sanctions Policy Reform Act, S. 270, 109th Cong. (2005) (originally introduced on Nov. 11, 2004, later reintroduced as Sanctions Policy Reform Act, S. 270, Feb. 2, 2005).

¹⁵⁸ *Id.* See also Iran Freedom and Support Act of 2005, S. 333, 109th Cong.

MT) of the Senate Finance Committee recently mounted a strong and very public challenge to the Department of the Treasury's (specifically OFAC's) enforcement methods.¹⁵⁹ In February 2004, the Committee sent OFAC a letter asking for a detailed explanation of how OFAC monitors the foreign subsidiaries of U.S. corporations and the applicable punishments for those that violate sanctions laws.¹⁶⁰ Specifically, the letter named three U.S. corporations, Halliburton, Conoco-Phillips and General Electric, all of which the Committee suggested "are doing business with such nations in what might violate the spirit, if not the letter, of the law."¹⁶¹ In the words of Senator Baucus, "OFAC is responsible for enforcing sanctions against nations that support terrorism and our investigation will determine if they are fulfilling their responsibilities. If these companies are going through the back door to invest in terrorist nations, Congress must take action to immediately close, lock, and seal those doors."¹⁶² The Senate Finance Committee also sent similar letters to the chief executive officers of the above-mentioned companies.¹⁶³

Since the spring of 2004, Senator Frank Lautenberg (D-NJ) has emerged as a relentless advocate for change in U.S. economic sanctions laws. On May 4, 2004, Senator Lautenberg proposed an amendment¹⁶⁴ to a then-pending bill (S. 1637)¹⁶⁵ that would have broadened the International Emergency Economic Powers Act ("IEEPA")¹⁶⁶ to give it jurisdiction over foreign subsidiaries of U.S. companies "controlled over 50%" by their U.S. parent corpo-

¹⁵⁹ Press Release, U.S. Senate Comm. On Finance, Grassley, Baucus Seek Answers on U.S. Companies' Dealings with Countries Named as Terrorism Supporters, (Feb. 19, 2004), <http://finance.senate.gov/press/Gpress/2004/prg021904.pdf> (quoting Senator Grassley as saying:

We're asking whether the Treasury Department is taking enforcement steps toward foreign subsidiaries that appear to be 'foreign' and 'subsidiary' in name only. We also want the department's viewpoints on whether current law is adequate to address subsidiaries that appear to exist only on paper with nothing more than a p.o. box in the Caribbean. We also want to hear from the companies involved on how they believe their actions comply with both the spirit and letter of the law).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ S. 3115, 108th Cong., 150 CONG. REC. S4849 (2004).

¹⁶⁵ S. 1637, 108th Cong. (2004).

¹⁶⁶ See International Emergency Economic Powers Act of 1977, 50 U.S.C.A. § 1702(a)(1)(B) (West 2003 & Supp. 2005).

rations.¹⁶⁷ Specifically, Senator Lautenberg's amendment would have added language that defined a corporation as being "controlled" by U.S. interests if a U.S. person "holds at least fifty percent (by vote or value) of the capital structure of the corporation."¹⁶⁸ Senator Lautenberg proposed almost identical legislation on May 17, 2004, wedged in as an amendment to the FY 2005 Defense authorization bill.¹⁶⁹ This amendment was also defeated on the Senate floor in a 50-49 vote several days later.¹⁷⁰ The close margin indicated that Senator Lautenberg was likely to propose similar measures again in the future; this proved to be the case as he proposed similar legislation on several more occasions.¹⁷¹ The "Lautenberg Amendment" was defeated once again on July 21, 2005, by a vote of 47-51.¹⁷² While it is unclear if Lautenberg will continue to propose similar legislation, the amendment has garnered significant support and it is likely that he will continue to push forward with some variation of his proposals. However, that same week, a "kinder and gentler" bill designed to prevent U.S. companies from circumventing economic sanctions laws was introduced by Senator Susan Collins (R-ME) and passed 98-0.¹⁷³ Senate Amendment 1377 gives the President additional authority to enforce sanctions under IEEPA, increases penalties for violations, and prohibits U.S. companies and their subsidiaries from taking actions to circumvent U.S. economic sanctions.¹⁷⁴

C. *The Sanctions Policy Reform Act*

One of the more extensive and innovative proposals for addressing the shortcomings of the American economic sanctions

¹⁶⁷ S. 3115, 108th Cong., 150 CONG. REC. S4849 (2004).

¹⁶⁸ *Id.*

¹⁶⁹ S. 3151, 108th Cong., 150 CONG. REC. S5548-49 (2004).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (Forty-nine votes on the Senate floor is no small feat. Republicans, Democrats and Independents all supported this legislation.) Furthermore, the amendment was co-sponsored by Senators Clinton, Feinstein and Feingold, all established, powerful and respected members of the Senate. See News from Frank Lautenberg, *Lautenberg and NYC Comptroller William Thompson Join Forces to Stop U.S. Companies from doing Business with Terrorist States*, Apr. 22, 2004, <http://lautenberg.senate.gov/~lautenberg/press/2003/01/2004422B08.html>.

¹⁷² S. Amdt. 1351, text available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP1351>: (last visited Apr. 4, 2006).

¹⁷³ S. Amdt. 1377, text available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP01377>: (last visited Apr. 4, 2006).

¹⁷⁴ *Id.*

policy is Senator Lugar's "Sanctions Policy Reform Act."¹⁷⁵ This piece of legislation, known as S. 270, was reintroduced on February 2, 2005, and has been submitted to the Senate Committee on Foreign Relations.¹⁷⁶ The bill, as proposed in the summer of 2005, would require all unilateral sanctions, whether proposed by the Executive or Legislative branch, to

- 1) terminate within two years;
- 2) provide contract sanctity;
- 3) target a sanction as narrowly as possible on foreign governments, entities, and officials responsible for the conduct being targeted;
- 4) exclude restrictions on the provision of medicine, medical equipment, or food;
- 5) seek to minimize any adverse impact on the humanitarian activities of U.S. and foreign non-governmental organizations in any country against which the sanction may be imposed;
- 6) direct the Secretary of Agriculture to expand agricultural export assistance under U.S. market development, food assistance, or export promotion programs to offset any potential damage to incomes of producers of any affected agricultural commodity.¹⁷⁷

It would also "require Congress to take into consideration findings by Executive Branch officials that evaluate the impact of proposed sanctions on American agriculture, energy requirements, and capital markets."¹⁷⁸ Essentially, this legislation protects sanctions programs from being placed on the backburner and forgotten.¹⁷⁹ By forcing the U.S. government to revisit and evaluate the success of these programs, as well as to assess their consequences, they may be adjusted continually to achieve the most beneficial results. In so doing, this proposal allows the U.S. to constantly tweak the provisions so that the ends justify the means.¹⁸⁰

One potential weakness of this legislation is that it would

¹⁷⁵ Sanctions Policy Reform Act, S. 1861, 108th Cong. (introduced on Nov. 11, 2003). Senator Richard Lugar is a Republican from Indiana and is Chairman of the Senate Foreign Relations Committee.

¹⁷⁶ Bill Summary & Status for the 108th Congress, <http://thomas.loc.gov/cgi-bin/query/z?c109:S.270>: (last visited Mar. 28, 2006). See also Press Release, Lugar Introduces Sanctions Policy Reform Act (Feb. 3, 2005), <http://lugar.senate.gov/pressapp/record.cfm?id=231513>.

¹⁷⁷ Bill Summary & Status, *supra* note 175.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ See generally *id.*

force the President to provide a laundry list of assessments and explanations to “specified congressional committees” before putting any new unilateral sanctions programs into place.¹⁸¹ While in theory this is a commendable goal, it could subject a sensitive area of American foreign policy to the partisan posturing of members of Congress on C-SPAN. Further, it would make it more difficult for the President to mold timely and effective policies if he or she were unable to implement adequate sanctions programs at his or her discretion. There are several other problems with this legislation that will probably necessitate some fairly substantial changes before it is enacted. First, while a systematic review of sanctions programs annually or bi-annually would ensure that programs are up to date and that required parties are fully versed on their results, doing so could create new difficulties. The punitive psychological effect of sanctions is crucial in sending clear messages to target countries that their actions are strongly condemned and come with the full force of the United States government. Sanctions could very well lose much of their effectiveness if foreign leaders read about congressional squabbles and disagreements concerning sanctions in *The New York Times* or *Newsweek*. These aspects need to be discussed, debated and further developed to come to a more equitable compromise for both branches of government.

Interested parties such as USA Engage have strongly supported this legislation.¹⁸² Robert Haines, Co-Chairman of USA Engage says “Senator Lugar recognizes that all too often the United States has imposed unilateral sanctions without fully examining either the likelihood of success or the potential for unintended consequences. This legislation is designed to restore reason to the process.”¹⁸³

An additional caveat: this proposal would not affect any sanctions programs currently in place and would only apply to

¹⁸¹ *Id.*

¹⁸² See Press Release, Eric Thomas & Fratellu Group, USA ENGAGE Praises Introduction of Sanctions Reform Legislation (Feb. 3, 2005), [http://www.usaengage.org/MBR0088-](http://www.usaengage.org/MBR0088-USAEn-)

USAEn-
gage/newsflash/newsflash.asp?Mode=View&articleid=1558&Category=pressreleases. (USA Engage is an interest group supported by approximately 650 businesses interested in reforming American sanctions policies.).

¹⁸³ Press Release, USA Engage Issues Strong Endorsement of Sanctions Reform Legislation “Sanctions Policy Reform Act” Would Establish a Common Sense Approach to Future Unilateral U.S. Sanctions (Nov. 19, 2003) *available at* http://www.usaengage.org/press_releases/2003/20031119%20SRA%20introduced.html.

subsequent programs implemented after its enactment.¹⁸⁴ As a result, it does little to address the current shortcomings found in the Iranian sanctions and other existing programs.¹⁸⁵ However, it is a very reasonable first step and allows the United States to act in a more deliberative manner in addressing concerns that are almost certain to escalate over the next several years, if not months.

D. *Iran Freedom and Support Act of 2005*

Even more recently, Senator Rick Santorum (R-PA) introduced a bill intended to alter the sanctions programs involving Iran commonly known as the "Iran Freedom and Support Act."¹⁸⁶ Now in the Senate Committee on Foreign Relations after being read twice on the floor, this bill has steadily garnered backing since its introduction to the Senate in February 2005.¹⁸⁷ As of this writing, the Iran Freedom and Support Act enjoys significant bipartisan support among its twenty-seven co-sponsors.¹⁸⁸ In its current form, it focuses on supporting the Iranian 'resistance' by officially backing regime change and providing assistance to "foreign and domestic pro-democracy groups opposed to the non-democratic Government of Iran, including the award of grants to qualified pro-democracy radio and television broadcasting organizations."¹⁸⁹ In addition to this very public showing of support for Iranian opposition groups, the act would significantly alter the sanctions programs in place against Iran, by revising the language of the "Iran and Libya Sanctions Act of 1996."¹⁹⁰ The bill would codify ILSA by eliminating the five year sunset provision and require the President to make more frequent and more detailed reports to Congress on the effectiveness of U.S. efforts to implore multilateral sanctions against Iran, as well as provide detailed descriptions of those persons, companies and governments that have refused to do so.¹⁹¹ The act calls for mandatory sanctions against any person or entity that "aids Iran acquire or

¹⁸⁴ See Sanctions Policy Reform Act, S. 270, 109th Cong. (2005) (originally introduced on Nov. 11, 2004, later reintroduced as Sanctions Policy Reform Act, S. 270, Feb. 2, 2005).

¹⁸⁵ *Id.*

¹⁸⁶ Iran Freedom and Support Act of 2005, S. 333, 109th Cong.

¹⁸⁷ Bill Summary & Status for the 109th Congress, S. 333.,

<http://www.govtrack.us/data/us/bills.text/109/s333.pdf> (last visited Mar. 28, 2006).

¹⁸⁸ *Id.* (The bill has added co-sponsors steadily since February, and most recently Senator Corzine on June 23, 2005.).

¹⁸⁹ Iran Freedom and Support Act of 2005, S. 333, 109th Cong.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

develop weapons of mass destruction or destabilizing types and numbers of conventional weapons,” and removes the “actual knowledge” requirement for the imposition of these sanctions.¹⁹² By including “financial institutions, insurers, underwriters, reinsurers and guarantors,” ILSA’s reach is significantly widened.¹⁹³ In addition, the President would be required to appoint a “special assistant to the President for matters related to Iran,” who would be responsible for coordinating Iranian policy among the various government and intelligence agencies.¹⁹⁴ In its current format, this legislation has the potential to significantly alter the current climate in American/Iranian relations, and could very well lead to changes in U.S. economic sanctions laws in other nations, such as Syria.¹⁹⁵

E. *Office of Global Security Risk*

An additional initiative designed to address the common concerns of foreign subsidiaries was included in the 2004 Consolidated Appropriations Act, and directs the Securities and Exchange Commission (“SEC”) to create an “Office of Global Security Risk” to protect investors from “unwittingly investing in companies with ties to countries that sponsor terrorism and countries linked to human rights violations.”¹⁹⁶ Given the relative infancy of this office, very little information is available at this time. However, former SEC Chairman Donaldson has publicly stated that the new office:

will focus on asymmetric risk by assisting review staff in giving consideration to whether U.S. or foreign companies that are registered with the SEC have operations or other exposure with or in areas of the world that may subject it and its investors to material risks, trends or uncertainties. This consideration would include whether a company has operations in a country or area of activity where political, economic or other risks exist that are material, or whether a company faces public or gov-

¹⁹² *Id.*

¹⁹³ Iran Freedom and Support Act of 2005, S. 333, 109th Cong.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ 2004 Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3; Gibson, Dunn & Crutcher LLP, *Publication Detail- SEC Office of Global Security Risk Publication*, Feb. 23, 2004,

<http://www.gibsondunn.com/practices/publications/detail/id/766/?pubItemId=7284>

ernment opposition, boycotts, litigation, or similar circumstances that are reasonably likely to have a material adverse impact on a company's financial condition or results of operations.¹⁹⁷

In short, this office will investigate American companies to ensure that their foreign subsidiaries do not conduct business in or with sanctioned countries.¹⁹⁸

If nothing else, the creation of this office and these other bold initiatives should send a clear message that the U.S. government is becoming much more aggressive in pursuing these foreign subsidiaries and that American corporations should be proactive in analyzing, reviewing, and reassessing the business activities of their foreign operating divisions overseas. Furthermore, these actions are a strong indication that Congress is serious about making changes, perhaps radical ones, to the economic sanctions laws in the near future, and that it is placing increasing pressure on the Executive Branch to bring about change as well.¹⁹⁹ It certainly appears that this debate will likely continue well into the future, and is one that will have a substantial influence on corporate America.

F. *Executive Branch Response*

Economic sanctions also became an issue during the 2004 Presidential contest, most publicly during the Vice Presidential debates in October 2004.²⁰⁰ During the debate, Vice President Cheney was asked about a statement he had made while in the private sector, when he was quoted as saying that "unilateral sanctions almost never work."²⁰¹ The implication of the question was that Mr. Cheney had been in favor of a less aggressive stance against the Iranians while a corporate figure in the energy industry.²⁰² In his response, the Vice President explained that

¹⁹⁷ *Testimony Concerning Fiscal 2005 Appropriations Request for the U.S. Securities and Exchange Commission Before the Subcomm. on Commerce, Justice, State, and the Judiciary of the House Comm. on Appropriations*, 108th Cong. (Mar. 31, 2004) (statement of William H. Donaldson, Chairman, U.S. Sec. and Exchange Comm'n).

¹⁹⁸ *Id.*

¹⁹⁹ The fact that Senator Lugar has reintroduced the Sanctions Policy Reform Act is further evidence that some members of Congress are insistent on changing sanctions policy. See Press Release, *supra* note 175.

²⁰⁰ Richard B. Cheney, Remarks of Vice President Cheney and Senator Edwards in the Vice Presidential Debate (Oct. 6, 2004), <http://www.whitehouse.gov/news/releases/2004/10/print/20041006.html>.

²⁰¹ *Id.*

²⁰² See *id.*

“at the time, I was talking specifically about this question of unilateral sanctions. What happens when we impose unilateral sanctions is, unless there’s a collective effort, then other people move in and take advantage of the situation and you don’t have any impact, except to penalize American companies.”²⁰³ The Vice President’s words from 1999 are even more accurate today than when they were spoken some five years ago.²⁰⁴ Common sense dictates that as long as foreign companies from non-participating nations are willing to deal with sanctioned countries, the target countries will not suffer dramatic economic losses.²⁰⁵ Vice President Cheney also made clear his belief that multilateral sanctions can be effective when put in place with the cooperation of other nations and organizations such as the United Nations, provided that all parties are committed and are equally vigilant in ensuring that sanctioned parties adhere to their obligations.²⁰⁶ In addition, he spoke of the United States’ willingness to take the Iranian matter to the United Nations in the future.²⁰⁷ U.N. sanctions would bind companies from a greater range of nations, have a much more profound economic impact, and would ultimately be more successful in forcing Iran to end its nuclear program and enact other reforms desired by the United States and its allies.²⁰⁸

During this same exchange, then-Senator John Edwards (D-NC) echoed the sentiments of Senators Baucus and Grassley by stating that “we need to strengthen sanctions on Iran, including closing the loophole that allows companies to use subsidiaries, offshore subsidiaries, to do business in Iran.”²⁰⁹

President Bush also has declared that he does not believe that unilateral sanctions have been or will be effective in changing Iranian behavior. During a year-end press conference in 2004, he stated that:

[T]he best way to convince him to disarm is to get others to weigh-in, as well. . . We’re relying upon others, because we’ve sanctioned ourselves out of

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See O’Quinn, *supra* note 34.

²⁰⁶ *Id.*

²⁰⁷ See Remarks of Vice President Cheney and Senator Edwards in the Vice Presidential Debate, *supra* note 199. Vice President Cheney said “we’ve got sanctions on Iran now, we may well want to go to the U.N. Security Council and ask for even tougher sanctions if they don’t live up to their obligations under the initial-the International Atomic Energy Agency, a non-proliferation treaty.” *Id.*

²⁰⁸ See O’Quinn, *supra* note 34.

²⁰⁹ See Remarks of Vice President Cheney and Senator Edwards in the Vice Presidential Debate, *supra* note 199.

influence with Iran. . . in other words, we don't have much leverage with the Iranians right now, and we expect them to listen to those voices . . .²¹⁰

This is the crux of the dilemma facing the United States government, the concern shared by many opponents to unilateral sanctions and is the underlying reason the United States needs to take a more holistic approach not only to the implementation of sanctions programs, but to their continued effectiveness and renewal.²¹¹ When other nations choose not to participate in a sanctions program and instead fill the void left by the absence of American companies, any incentive for the sanctioned country to instigate significant reforms or negotiate with the U.S. is removed.²¹²

The President has stated repeatedly that in order to pressure Iran into giving up its nuclear program, all options remain open, including the use of military force.²¹³

Secretary of State Rice has also spoken of the Iranian issue repeatedly since taking over at Foggy Bottom, and during a 2005 interview, she expressed gratitude for European efforts to coax Iran into compliance, while reiterating that Iran must act in accordance with its international obligations.²¹⁴ She has also said

²¹⁰ President George W. Bush, Remarks during Presidential Press Conference (Dec. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html>.

²¹¹ *Id.* See, e.g., Susan E. Rice, *We Need a Real Iran Policy*, WASH. POST, Dec. 30, 2004, at A27.

²¹² See O'Quinn, *supra* note 34.

²¹³ David Gregory, *Bush on Iran- No Option 'off the table'*, MSNBC.com, (Jan. 17, 2005), <http://msnbc.msn.com/ID/6836247> (transcript of NBC Nightly News, quoting the President as saying "I hope we can solve it diplomatically, but I will never take any option off the table."); The President elaborated on this sentiment during his 2005 State of the Union, where he said,

Today, Iran remains the world's primary state sponsor of terror—pursuing nuclear weapons while depriving its people of the freedom they seek and deserve. We are working with European allies to make clear to the Iranian regime that it must give up its uranium enrichment program and any plutonium reprocessing, and end its support for terror. And to the Iranian people, I say tonight: As you stand for your own liberty, America stands with you.

George W. Bush, Remarks by the President during the State of the Union Address (Feb. 2, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

²¹⁴ See, e.g., Anne Gearan, *Rice: Attack on Iran Not on Agenda*, ASSOCIATED PRESS, Feb. 4, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2005/02/04/international/i061230S57.DTL&type=printabl>

that the United States will continue to deal with Iran “in a variety of ways” and with “a variety of different partners.”²¹⁵ These partners have included the so called “E-3 nations,” (Britain, France and Germany) whose dialogue with Iran has, as of this writing, failed to result in any substantial concessions by the Iranian government.²¹⁶ However, recent declarations from the Iranian government indicate that it is unlikely to abandon the development of its nuclear program and it is equally clear that the patience of the United States and its allies is not unlimited.²¹⁷ These actions also reinforce the view that the United Nations Security Council will be forced to consider the implementation of multilateral sanctions.²¹⁸ This diplomatic standoff has significant economic and national security implications for the United States and its allies, and it is one that is not likely to be resolved in the near future.

e; *see also* Interview by Reuters & Agence France-Presse with Secretary of State Condoleezza Rice (Feb. 1, 2005), <http://www.state.gov/secretary/rm/2005/41460.htm>. Secretary Rice stated that,

the possibility of taking Iran to the Security Council continues to exist. And our view is that Iran will have to be held accountable for its noncompliance with its international obligations. But again, if we—any way that we can get compliance—true compliance—with the Iranians is helpful. We’ve been in close coordination with the Europeans. We’ve made clear that we hope for the best. But the Iranians have not demonstrated over time that they’ve been doing good on living up to their international obligations. We’ll see.

Id.

²¹⁵ Robin Wright, *Rice Says Military Action Against Iran Not on Agenda*, WASH. POST, Feb. 5, 2005, at A12.

²¹⁶ Michael A. Fletcher & Keith B. Richburg, *Bush Tries to Ally E.U. Worry Over Iran*, WASH. POST, Feb. 23, 2005, at A01; *see also* John Ward Anderson, *Calls Rise to Refer Iran to U.N. Body*, WASH. POST, Jan. 13, 2006, at A10.

²¹⁷ *See* Anderson, *supra* note 215; *See also* Ali Akbar Dareini, *Iran Says it Will Never Scrap Its Nuke Program*, BOSTON GLOBE, Feb. 2, 2005, (quoting Ali Agha Mohammadi, spokesman of Iran’s powerful Supreme National Security Council as saying “we have the power to negotiate because we keep our (nuclear) achievements in our hands and we are negotiating to protect them. It’s definite that we will protect our scientific achievements as a basic pillar, whether talks make progress or not.”).

²¹⁸ *See* Anderson, *supra* note 215. A recent statement by Iran’s Supreme Leader, Ayatollah Ali Khamenei, indicates a thaw in relations in the near future is unlikely - “America is like one of the big heads of a seven-headed dragon. The brains directing it are Zionist and non-Zionist capitalists who brought Bush to power to meet their own interests.” Gearan, *supra* note 213.

G. Are Economic Sanctions Effective?

Enforcement issues aside, a more fundamental question is quite simply, do these programs work? With regard to unilateral sanctions, the growing consensus among pundits and policymakers is no.²¹⁹ Robert P. O'Quinn, a policy analyst for the Heritage Foundation, is a strong critic of the imposition of unilateral economic sanctions, and argues that economic sanctions programs in general have proven marginally effective in bringing about significant changes in their target countries.²²⁰ O'Quinn has offered a very persuasive summary of the problem:

Although multilateral sanctions might succeed under the appropriate circumstances, unilateral sanctions will fail more often than not. By itself, a unilateral trade or investment embargo may not be enough to persuade a country's government to change its objectionable policies. In today's global economy, foreign rivals quickly and easily replace American companies to meet the needs of a target country's market.²²¹

In describing the minimal results from unilateral sanctions, O'Quinn stated that:

Unilateral economic sanctions are not likely to place a sufficiently large financial burden on a target country's economy to persuade its government to change objectionable policies. There are few industries in the United States that dominate the global market and are unchallenged by foreign rivals. When the United States imposes a unilateral export embargo, foreign suppliers can replace the American companies with minimal damage to the

²¹⁹ See Eric Schmitt, *U.S. Backs Off Sanctions, Seeing Poor Effect Abroad- Their Use is Said to Hurt American Business*, N.Y. TIMES, July 30, 1998, at A1.

²²⁰ See O'Quinn, *supra* note 34. O'Quinn stated that, [H]istorically, economic sanctions have a poor track record. Between 1914 and 1990, various countries imposed economic sanctions in 116 cases. They failed to achieve their stated objectives in 66 percent of those cases and were at best only partially successful in most of the rest. Since 1973, the success ratio for economic sanctions has fallen precipitously to 24 percent for all cases.

(citing Gary Clyde Hufbauer, et al., *Economic Sanctions Reconsidered: History and Current Policy*, Second edition (Washington: Institute for International Economics, 1990)).

²²¹ *Id.*

target country's economy.²²²

O'Quinn also explains that during President Clinton's first term (1993-1997), the United States instituted sanctions programs sixty-one times.²²³ These actions sanctioned countries representing nineteen percent of the world's export market.²²⁴ Another corollary statistic is that over fifty percent of American sanctions imposed by the United States since the end of World War I have been put in place since 1994!²²⁵ These figures underscore that in the 1990s, the United States increasingly relied on the use of sanctions to deal with problem areas of foreign policy. Many of these programs remain in place - either unchanged or substantially similar as the day they were enacted.²²⁶

Others have suggested that the true economic effects of sanctions programs differ drastically from those that are intended.²²⁷ By hindering the growth of the middle class in these already volatile countries, they have the potential to result in increased anti-American sentiments.²²⁸ Given the focus on terrorism and the emerging United States policy of promoting democratization and the spread of freedom around the world²²⁹, it is very possible that these programs do more harm than good.²³⁰ Other commentators have questioned the effectiveness of sanctions as a tool in battling terrorism, suggesting that while important, they are one of many options and should not be used exclusively.²³¹

H. *The Economic Effects on American Business*

How do these sanctions affect American business interests?

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*; "These [35] countries are home to 2.3 billion people, or 42 percent of the world's population, and purchase exports of \$790 billion." *Id.*

²²⁵ See Bhala, *supra* note 10, at 568-69.

²²⁶ See Hufbauer, et al., *supra* note 219.

²²⁷ See *id.* See also O'Quinn, *supra* note 34.

²²⁸ See O'Quinn, *supra* note 34.

²²⁹ See generally George W. Bush, Inaugural Address by President George W. Bush (Jan. 20, 2005),

<http://www.whitehouse.gov/news/releases/2005/01/20050120-3.html>.

²³⁰ George W. Bush, Remarks by the President during the State of the Union Address (Feb. 2, 2005),

<http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>. (President Bush said that "we've declared our own intention: America will stand with the allies of freedom to support democratic movements in the Middle East and beyond, with the ultimate goal of ending tyranny in our world.")

²³¹ See Hardister, *supra* note 26, at 655-60.

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While difficult to approximate, several recent projections suggest that they have a considerable impact on American companies.²³² One commentator dubbed “American companies and their workers, suppliers, and shareholders” “friendly-fire casualties” of sanctions policy.²³³ This statement, while perhaps overly dramatic, is founded on legitimate concerns. One estimate has predicted that these programs cost \$15-19 billion per year in lost export revenues, and that this has resulted in the loss of between 200,000 and 250,000 jobs!²³⁴ Other estimates have placed the one-year export losses in excess of \$30 billion.²³⁵ Commentators have also pointed out that while the loss of the initial sale in a sanctioned country can be a major loss to an American company, the residual losses of subsequent maintenance, service and replacement contracts is even more damaging in the long run.²³⁶

V. CONCLUSION

It is clear that some sanctions programs have not and never will achieve the policy goals for which they were implemented.²³⁷ The current policies open the door for other nations to make foreign policy decisions on the basis of financial opportunism at the expense of their own people, and while jeopardizing the security of the rest of the world. They discourage other nations from joining the United States in sanctioning problem nations based on the prospect of lucrative contracts for their own companies and citizens.²³⁸ Recent controversies surrounding policies in the Middle East, such as the decision to go to war in Iraq, have proven that this is a dangerous reality.

Senator Lugar succinctly summarized the shortcomings of unilateral sanctions during a presentation on the Senate floor by stating that “unilateral sanctions are often the result of a knee-jerk impulse to take action combined with a timid desire to avoid the risks and commitments involved in more potent foreign policy steps that have greater potential to protect American interests.”²³⁹ Recent congressional initiatives, while not “cure alls,”

²³² See Bhala, *supra* note 10, at 575.

²³³ O’Quinn, *supra* note 34.

²³⁴ Bhala, *supra* note 10, at 575.

²³⁵ See Smith, *supra* note 9, at 339.

²³⁶ *Id.* (citing James B. Burnham, *The Heavy Hand of Export Controls*, SOCIETY, Jan. 11, 1997, at 39).

²³⁷ Cuba, for example, is a sanctions program which many have declared unsuccessful. See Sanger, *supra* note 51.

²³⁸ *Id.*

²³⁹ S. 1861, 108th Cong., 149 CONG. REC. S 14815 (2003).

are certainly constructive steps toward meaningful sanctions reform and exhibit elements that should be incorporated into the American sanctions regime.²⁴⁰ The United States should have a more organized, flexible and proactive approach to the assessment of the effectiveness of its sanctions programs so that the results yielded are in fact worth the sacrifices made by the people of the target nation and those of American businesses shut out of the marketplace.²⁴¹

The United States has and should have no greater priority than that of fighting global terrorism around the world, and clearly, restricting the financing of such terrorism is a crucial weapon in winning the war on terror. However, while we protect the American people, we should, whenever possible, also protect the interests of American businesses and allow them to compete globally in competitive markets. This author certainly does not condone or suggest that the United States make security decisions based on economic or business concerns. However, if and when these policies have proven to be or appear ineffective, the government should re-evaluate them in their entirety and consider taking a different course of action. At the same time, other nations that share similar concerns regarding the security threats posed by nations like Iran and Syria should step up to the plate and join the United States' efforts in combating the spread of terrorism by planting the seeds of freedom. The result will be improved security at home and a more equitable marketplace abroad.

While recent proposals might indicate that such changes are inevitable, at the current time, no significant alterations to the sanctioning process have been passed. However, given the uncertainty surrounding the situations with Iran and North Korea, current events could result in almost immediate action. In the meantime, businesses can do little more than their best to ensure that their company is in full compliance with the applicable U.S. trade sanctions laws and await further action or clarification from the United States government.²⁴²

Harry Wolff

²⁴⁰ See Sanctions Policy Reform Act, S. 270, 109th Cong. (2005).

²⁴¹ See, e.g., O'Quinn, *supra* note 34.

²⁴² See Feathers, *supra* note 28, at 180.

