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Foreign Sanctions Countermeasures

and Other Responses to U.S. Extraterritorial Sanctions

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Executive Summary

As requested by USA Engage, this study examines countermeasures and other responses by foreign jurisdictions to U.S. extraterritorial economic sanctions imposed for foreign policy reasons.[1]

The United States maintains a range of economic sanctions that are extraterritorial in the sense that they extend to foreign persons acting outside the United States. Some U.S. trade and investment embargoes, on their face, apply directly to foreign persons acting abroad if they are owned or controlled by U.S. persons. Others purport to apply to overseas exports by non-U.S. persons of items over which the U.S. government claims jurisdiction. Finally, certain U.S. statutes authorize or direct the executive branch to impose sanctions, such as import bans, against foreign persons who engage in certain business activities with embargoed countries. These types of statutes are referred to as "secondary boycott" measures.

Particularly when U.S. extraterritorial sanctions are imposed to advance U.S. foreign policy interests, they have generated substantial opposition by the international community and U.S. trading partners, including U.S. allies. The European Union (the "EU"), Canada and Mexico have promulgated countermeasures consciously designed to block application of U.S. sanctions within these jurisdictions. These "blocking measures" generally: (1) forbid compliance with particular U.S. extraterritorial sanctions, such as the Cuba embargo; (2) provide for non-recognition of judgments and administrative determinations that give effect to the sanctions; (3) establish a "clawback" cause of action for recovery of damages incurred for sanctions violations; and (4) require reporting of activity related to the sanctions. Other countries have applied and threatened to apply generic prohibitions on invidious discrimination to block extraterritorial application of U.S. sanctions.

Efforts by trading partners against U.S. extraterritorial sanctions through blocking measures and other means have a long history and have been increasing in intensity. During the Cold War, U.S. allies obstructed U.S. extraterritorial restrictions on the supply of materials for Soviet Union gas pipelines in Europe. Since the end of the Cold War, U.S. trading partners have supplemented blocking measures by challenging U.S. sanctions as being contrary to World Trade Organization ("WTO") trade agreements. In a 1996 EU case at the WTO regarding U.S. sanctions against Cuba, including the "Helms-Burton Act," the U.S. government indicated that it would boycott the proceedings. This threat to the legitimacy of the WTO was suspended by a tenuous, uncertain political compromise in 1998.

[1] This study does not present legal advice regarding U.S. or non-U.S. legal requirements.

United States extraterritorial sanctions have been the subject of other, successful legal challenges, and more challenges are likely. In September 1998, Japan and the EU began WTO dispute proceedings against a Massachusetts law that disallowed the granting of government procurement contracts to companies doing business in or with Burma (Myanmar). The WTO case became moot when the U.S. Supreme Court invalidated the Massachusetts sanctions as being preempted by federal law in a case brought by the National Foreign Trade Council.

In June 2000, the EU challenged a U.S. law, "Section 211," that prohibits U.S. courts from considering or enforcing certain trademark claims of Cuban nationals. The WTO Appellate Body found that Section 211 violates WTO national treatment and most-favored nation requirements. To date, the United States has not brought Section 211 into compliance with the WTO ruling, and the EU retains the right to retaliate against the United States for its failure to do so.

Most recently, many countries have made it clear that they will not abide application of U.S. embargo requirements to domestic firms regardless of their connection to the United States. In March 2006, the Mexican government fined a Sheraton hotel in Mexico City for expelling Cuban guests in accordance with the U.S. embargo of Cuba. A similar controversy erupted in January 2007 when Hilton hotels in Norway and the United Kingdom refused bookings by Cuban trade delegations because of U.S. sanctions. In April 2007, Austria brought charges against its fifth-largest bank, BAWAG, for violating the EU blocking regulation after the bank cancelled the accounts of Cuban nationals to comply with U.S. sanctions. Facing strong public disapproval, the U.S. parent corporation of BAWAG was forced to pursue a waiver from the U.S. Treasury Department.

While there has long been a consensus in the international community -- including among U.S. allies -- in opposition to U.S. extraterritorial sanctions, the inclination of U.S. trading partners to acquiesce to those sanctions is diminishing every year. Beyond promulgating countermeasures consciously to block U.S. sanctions, countries are, as noted above, increasingly enforcing other measures, such as civil rights laws, to block exterritorial enforcement of U.S. sanctions. Possible legal defenses aimed at reconciling application of U.S. sanctions and foreign countermeasures, always uncertain, seem more and more unreliable. Contrary to suggestions, penalizing U.S. parent companies for their foreign subsidiaries' contravention of extraterritorial sanctions requirements will not neutralize trading partners' blocking actions.

Further, the United States continues to be exposed to legal challenges by its trading partners at the WTO and through other international dispute settlement proceedings. The United States has sought to defend against these types of actions by contending that it has plenary discretion to invoke national security exemptions of international agreements, such as WTO agreements. The trend in international decision-making is decidedly against the broad U.S. government view of these exemptions.

The conflicts that emerge from enforcing extraterritorial sanctions could impede U.S. leadership and international collaboration needed to advance U.S. national security and foreign policy interests. This includes coordination to suppress international terrorism. At the same time, extraterritorial sanctions are placing U.S. companies in legal double jeopardy. It would be useful to consider whether these types of disadvantages are outweighed by any utility from applying foreign policy sanctions extraterritorially.

I. Background

The U.S. government administers a range of trade and investment embargoes against countries such as Burma (Myanmar), Cuba, Iran, North Korea, Sudan and Syria.[2] To varying degrees, these sanctions are extraterritorial: they purport to apply to foreign persons acting overseas. There are two principal extraterritorial aspects of U.S. embargoes. First, sometimes, as with the Cuba sanctions, the regulations on their face apply to foreign companies if they are U.S. owned or controlled. Second, they often purport to impose license requirements on reexports by foreign persons of items that are of U.S. origin or that contain more than a specified level of U.S.-origin content (e.g., parts and components).

In addition, the Congress has enacted legislation directed specifically at sanctioning foreign companies that do business with or in certain embargoed countries in particular circumstances. These statutes authorize and sometimes direct the executive branch to impose sanctions -- such as import bans and prohibitions on participation in federal procurements -- in response to the objectionable business activity. These statutes are sometimes referenced as "secondary boycott" provisions.[3]

United States extraterritorial measures regarding Cuba, Iran and, until recently, Libya have drawn the most opposition from the international community and U.S. trading partners.

[2] The principal embargo requirements are embodied in regulations administered by the U.S. Treasury Department. Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2006); Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2006); Iranian Transactions Regulations, 31 C.F.R. pt. 560 (2006); Foreign Assets Control Regulations (as they relate to North Korea), 31 C.F.R. pt. 500 (2006); Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (2006); Syrian Sanctions Regulations, 31 C.F.R. pt. 542 (2006). Some embargoes' export-related prohibitions are reinforced and broadened in some respects by the Export Administration Regulations ("EAR") administered by the U.S. Commerce Department. 15 C.F.R. § 746.2 (2006) (Cuba); 15 C.F.R. § 746.7 (2006) (Iran); 15 C.F.R. § 746.4 (2006) (North Korea); 15 C.F.R. § 746.9 (2006) (Syria).

[3] United States sanctions directed at overseas transfers of items based on national security -- rather than foreign policy -- rationale have not generated as much controversy, presumably due to a consensus among developed countries that controls are needed on such items. Such sanctions include, for example, secondary boycott measures relating to the proliferation of weapons of mass destruction. 22 U.S.C. § 2798 (2000) (setting forth chemical and biological weapons proliferation sanctions).

Cuba: The United States has maintained a comprehensive embargo on business with Cuba since February 1962.[4] The Cuban Assets Control Regulations ("CACR") broadly prohibit trade and investment with Cuba by "any person subject to the jurisdiction of the United States," defined to include foreign companies that are owned or controlled by U.S. persons.[5]

At the end of the Cold War, the Congress expanded and reinforced the Treasury Department's regulatory embargo of Cuba through special legislation. The Cuban Democracy Act of 1992 statutorily codified continued application of the embargo to foreign subsidiaries of U.S. companies.[6] A provision of the statute commonly known as the "Mack Amendment" forbids issuance of licenses for such foreign subsidiaries to engage in business relating to Cuba.[7] Finally, the Cuban Democracy Act authorizes imposition of sanctions against countries that provide assistance to Cuba.[8]

In 1996, the Congress passed even more rigorous sanctions in the form of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, popularly known as the "Helms-Burton Act."[9] Three portions of the Helms-Burton Act affect or authorize extraterritorial requirements and have caused significant concern among other countries: (1) Title I codifies the CACR and urges intensified enforcement efforts; (2) Title III provides for a cause of action to recover from foreign persons for "trafficking" in confiscated Cuban property; and (3) Title IV prohibits entry into the United States by natural persons who are affiliated with persons who "traffick" in confiscated Cuban property. To date, President Bush has continually kept the right to bring suit under Helms-Burton (Title III) suspended, as did President Clinton.[10]

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[4] Proclamation No. 3447, Embargo on All Trade with Cuba, 3 C.F.R. 157 (1959-1963 Comp.). The Cuba embargo was expanded through regulations in July 1963. Cuban Assets Control Regulations, 28 Fed. Reg. 6,974 (July 9, 1963) (codified at 31 C.F.R. pt. 515).

[5] 31 C.F.R. §§ 515.201(b)(2), 515.329(d) (2006).

[6] Cuban Democracy Act, Pub. L. No. 102-484, Title XVII, 106 Stat. 2578 (1992) (codified at 22 U.S.C. §§ 6001-6010 (2000)).

[7] Id. at § 1706(a), 106 Stat. at 2578 (codified at 22 U.S.C. § 6005(a) (2000)); accord 31 C.F.R. § 15.559(a) (2006).

[8] Id. § 1704, 106 Stat. at 2576 (codified at 22 U.S.C. § 6003(b)(2000)).

[9] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021-6091 (2000)).

[10] The President may suspend the right to bring suit under Title III for six-month intervals upon reporting to Congress that "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(b)-(c). This authority has consistently been exercised. Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 Weekly Comp. Pres. Doc. 1078 (July 16, 1997); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 34 Weekly Comp. Pres. Doc. 1397-98 (July 16, 1998); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 35 Weekly Comp. Pres. Doc. 1383 (July 16, 1999); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 36

Iran and Libya: Later in 1996, the U.S. government enacted the Iran and Libya Sanctions Act.[11] The Iran and Libya Sanctions Act was a secondary boycott measure which generally mandated imposition of sanctions against foreign companies and sometimes their affiliates in response to petroleum-related investment in Iran and Libya and certain other transactions with Libya.[12] The legislation authorized the President to waive the sanctions requirements,[13] and President Clinton exercised this authority to forego sanctions otherwise required to address investments in Iran.[14]

The Iran and Libya Sanctions Act has been replaced by the Iran Freedom Support Act, which was enacted in September 2006.[15] The Iran Freedom Support Act omits provisions directed at Libya, but strengthens provisions that require, in some circumstances, sanctions against third country persons who invest in Iran or who have knowingly exported items that contribute materially to Iran's acquisition of weapons and related technology.[16]

Views of International Community: The international community has expressed strong disapproval of these types of extraterritorial sanctions measures. For example, and apart from countermeasures described below, the United Nations (the "UN") General Assembly has adopted a series of resolutions that criticize "unilateral extraterritorial coercive measures [used] as a means of political and economic compulsion."[17] The resolutions call for "the immediate repeal of unilateral extraterritorial laws that impose

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Weekly Comp. Pres. Doc.1651 (July 14, 2000); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 37 Weekly Comp. Pres. Doc. 1047 (July 16, 2001); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 38 Weekly Comp. Pres. Doc. 1212 (July 16, 2002); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 39 Weekly Comp. Pres. Doc. 925 (July 16, 2003); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 40 Weekly Comp. Pres. Doc. 1323 (July 16, 2004); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 41 Weekly Comp. Pres. Doc. 1177 (July 15, 2005); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 42 Weekly Comp. Pres. Doc. 1354 (July 16, 2006); Statement of Action on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 43 Weekly Comp. Pres. Doc. 45 (Jan. 16, 2007).

[11] Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5, 110 Stat. 1541, 1543-45 (1996) (codified at 50 U.S.C.A. § 5 note (2000)).

[12] Id.

[13] Id. §§ 5(f), 9, 110 Stat. at 1544, 1547 (codified at 50 U.S.C.A. § 5 note (2000)).

[14] EU, US Avoid Clash on Cuba, Iran Trade Laws, WASH. TRADE DAILY, May 19, 1998, at 1.

[15] Iran Freedom Support Act, Pub. L. No. 109-293, 120 Stat. 1344 (2006) (codified at 50 U.S.C.A. § 1701 note (West Supp. 2006)).

[16] Id. § 202(b), 120 Stat. at 1345-46 (codified at 50 U.S.C.A. § 1701 note (West Supp. 2006)).

[17] Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, Resolutions of the United Nations General Assembly, A/RES/51/22 (Dec. 6, 1996), A/RES/53/10 (Nov. 3, 1998), A/RES/57/5 (Nov. 1, 2002).

sanctions on corporations and nationals of other States."[18] Further, the resolutions encourage "all States not to recognize or apply unilateral extraterritorial coercive economic measures imposed by any State, which are contrary to recognized principles of international law."[19] The UN General Assembly has expressed particular concern about

> the negative impact of unilaterally imposed extraterritorial coercive economic measures on trade and financial and economic cooperation, including at the regional level, because they are contrary to recognized principles of international law and pose serious obstacles to the freedom of trade and the free flow of capital at the regional and international levels.[20]

In February 2007, the UN General Assembly reaffirmed its disapproval of unilateral extraterritorial sanctions and again invited "all States to consider adopting administrative or legislative measures, as appropriate, to counteract the extraterritorial applications or effects of unilateral coercive measures."[21]

The UN General Assembly has been particularly critical of the United States embargo against Cuba. The General Assembly has passed a resolution calling for the "necessity of ending the economic, commercial, and financial embargo imposed by the United States of America against Cuba" every year since enactment of the Cuban Democracy Act in 1992.[22] As one UN Member noted in 2006, "support has grown steadily from 59 Member States opposing the United States embargo of Cuba in 1992 to 182 last year."[23]

In voting for the resolution to end the U.S. embargo in 2006, the EU announced that it "cannot accept the fact that unilateral measures imposed by the United States on specific countries limit the Union's economic and commercial relations with third countries -- in this case, Cuba."[24] The EU recently confirmed that, although it "strongly supports" strengthening multilateral sanctions to address Iran's nuclear program, it opposes

[18] Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, Resolution of the United Nations General Assembly, A/RES/53/10 (Nov. 3, 1998).

[19] Id.

[20] Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, Resolution of the United Nations General Assembly, A/RES/57/5 (Nov. 1, 2002).

[21] Human Rights and Unilateral Coercive Measures, Resolution of the United Nations General Assembly, A/RES/61/170 (Feb. 27, 2007).

[22] Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba, Resolutions of the United Nations General Assembly, A/RES/47/19 (Nov. 24, 1992), A/RES/61/11 (Nov. 8, 2006).

[23] Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba, Official Records of the United Nations General Assembly, A/61/PV.50, at 2 (Nov. 8, 2006) (statement of South Africa on behalf of the Group of 77 and China).

[24] Id. at 21 (statement of Finland on behalf of the European Union).

"unilateral sanctions with extraterritorial effect, as they can disturb the ongoing multilateral process."[25]

II. Current Foreign Countermeasures and Other Regulatory Responses

Several trading partners have promulgated measures consciously to disrupt extraterritorial application of U.S. sanctions and to protect local persons from liability under U.S. sanctions. Other jurisdictions have applied pre-existing statutory measures to block enforcement of U.S. sanctions.

A. Countermeasures Developed Consciously to Block U.S. Extraterritorial Sanctions

The Helms-Burton Act and other U.S. extraterritorial sanctions measures led the EU, Canada and Mexico to enact countermeasures specifically to block enforcement of sanctions within their jurisdiction and to impede the ability of U.S. authorities to assess liability against domestic companies for U.S. embargo violations.

1. European Union

The EU's vigorous opposition to the Helms-Burton Act and Iran and Libya Sanctions Act led to the issuance of European Council Regulation 2271/96 in November 1996.[26] The regulation imposed four principal countermeasures to address extraterritorial application of the Helms-Burton Act, sanctions provisions of the Cuban Democracy Act, the CACR, and the Iran and Libya Sanctions Act ("Covered Sanctions").[27]

First, the "blocking" provisions of Regulation 2271/96 forbid EU persons, "actively or by deliberate omission," to comply with requirements "based on or resulting, directly or indirectly, from" the Covered Sanctions "whether directly or through a subsidiary or other intermediary person."[28]

Second, Regulation 2271/96 mandates non-recognition of judgments and administrative

[25] EU, Business Caution Congress Against Tough Iran Sanctions, INSIDE U.S. TRADE, July 20, 2007, at 18.

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

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

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

determinations that give effect, "directly or indirectly," to the Covered Sanctions "or to actions based thereon or resulting therefrom."[29]

Third, Regulation 2271/96 establishes "clawback" provisions, which provide a cause of action for EU persons conducting commercial activities between the EU and third countries to "recover any damages . . . caused to" such persons by the enforcement of a Covered Sanction "or by actions based thereon or resulting therefrom."[30]

Fourth, Regulation 2271/96 directs EU persons to report to the European Commission, either directly or through their Member States, within thirty days any instances in which "the economic and/or financial interests" of the person "are affected, directly or indirectly," by a Covered Sanction "or by actions based thereon or resulting therefrom."[31]

Regulation 2271/96 instructs EU Member States to impose penalties for violations of the regulation that are "effective, proportional and dissuasive."[32] In addition to Regulation 2271/96, the EU issued a supplemental regulation directing the Member States to impose measures which they consider "necessary to protect the interests" of EU persons who are affected by a Covered Sanction "insofar as these interests are not protected" under Regulation 2271/96.[33]

2. Canada

Similar to the countermeasures contemplated by Regulation 2271/96, Canada's Foreign Extraterritorial Measures Act (the "FEMA") authorizes the Canadian Attorney General to issue orders that block compliance by "person[s] in Canada" with non-Canadian trade laws that "adversely affect" Canadian trade interests involving commercial activities conducted in Canada or that would infringe on Canadian sovereignty.[34] A FEMA order may also "require any person in Canada to give notice" regarding such foreign trade

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[29] Id. art. 4.

[30] Id. art. 6.

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

[32] Council Regulation 2271/96, art. 9.

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

[34] Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 5(1) (1985) (Can.) [hereinafter FEMA]. Such orders require the concurrence of the Canadian Secretary of State for External Affairs. Id.

If a foreign tribunal purports to exercise jurisdiction in a manner that infringes on Canada's trade and sovereignty interests, the Canadian Attorney General may issue an order to prohibit or restrict the production of records and the giving of information in connection with foreign legal proceedings. Id. § 3(1)(a)-(c).

The FEMA authorizes courts to issue warrants for the temporary seizure of any records if there is reason to believe that the Canadian Attorney General's blocking order will be disobeyed, and the records are likely to be turned over to foreign authorities. Id. § 4.

laws.[35]

In October 1992, the Canadian Attorney General issued a FEMA order directing companies incorporated and organized in Canada to refrain from complying with the "Mack Amendment" of the U.S. Cuban Democracy Act.[36] As explained above, the Mack Amendment prohibits, as a matter of U.S. law, foreign subsidiaries of U.S. companies from trading with Cuba by preventing the U.S. Treasury Department from issuing the requisite licenses under the CACR.[37]

The Canadian government amended the FEMA order in January 1996 to address the CACR and any other U.S. measure "having a purpose similar to that of" the CACR.[38] The amendment broadened the FEMA order's original blocking provision. It now provides that:

> No Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States [e.g., the CACR or a similar measure] or with any directive, instruction, intimation of policy or other communication relating to such a measure that the Canadian corporation or [corporate official] has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.[39]

It appears that the order was designed to reach not only U.S. government mandates but also "communications" from U.S. corporate parents to their Canadian subsidiaries to the effect that the subsidiaries should comply with the U.S. embargo of Cuba.[40] The amended FEMA order further specifies that the blocking order applies to an "act or omission constituting compliance" with such a measure or communication "whether or not compliance with that measure or communication is the only purpose of the act or omission."[41] Finally, Canadian corporations, including the board of directors and

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[35] Id. § 5(1)(a).

[36] Foreign Extraterritorial Measures (United States) Order, 1992, 126 C. Gaz. Part II 4049 (1992).

[37] The Cuban Democracy Act, Pub. L. No. 102-484, § 1706(a), 106 Stat. 2315, 2578 (codified at 22 U.S.C. § 6005(a) (2000)).

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

[39] Id. § 5, at 613.

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

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

officers, are required to notify the Canadian Attorney General of any "communication" relating to the CACR or a similar measure "from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada."[42]

Later in 1996, the Canadian government passed amendments to FEMA in response to the United States' enactment of the Helms-Burton Act. The amended FEMA authorizes the Canadian Attorney General to prohibit recognition and enforcement of judgments and orders issued by foreign tribunals under foreign trade laws that would "adversely affect" Canadian interests.[43] In addition, the amended FEMA provides a cause of action for "clawback" suits by Canadian persons to recover monetary losses that were made to satisfy orders issued under the Helms-Burton Act and other foreign trade laws that are covered under the FEMA.[44] The Canadian Attorney General is authorized by the FEMA amendments, with the concurrence of the Secretary of State for External Affairs, to maintain a register of foreign trade laws that are, in the opinion of the Attorney General, "contrary to international law or international comity."[45] The initial entry on the register is the Helms-Burton Act.[46]

Further, the FEMA amendments impose penalties for compliance with foreign laws that adversely affect Canadian trade and sovereignty interests. Violations may result in fines of up to C$1,500,000 for corporations and C$150,000 for individuals along with imprisonment of individuals for up to five years.[47]

3. Mexico

In October 1996, Mexico enacted the Law to Protect Trade and Investment from Foreign Laws that Contravene International Law with the conscious intent to block the extraterritorial application of the Helms-Burton Act and other U.S. sanctions against Cuba.[48]

Similar to the countermeasures enacted by the EU and Canada, the Mexican statute prohibits acts by Mexican nationals and, oddly, foreign persons that would "affect trade and investment when such acts are the consequence of the extraterritorial effects of

[42] Id. § 3(1), at 612.

[43] Id.

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

[45] Id. §§ 5(1), 8.

[46] Id.

[47] Id. § 7(1).

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

foreign statutes."[49] The jurisdictional reach of the Mexican statute extends to acts which would "produce effects" in Mexican territory.[50]

The statute contains "clawback" provisions, which would enable Mexican parties to recover damages under the extraterritorial foreign laws.[51] The statute also provides for the non-recognition and non-enforcement of foreign judgments issued under extraterritorial laws.[52] Finally, the statute forbids Mexican nationals to issue responses to inquiries from foreign countries under extraterritorial measures. The Mexican government must be notified of such inquiries or activities that may be impeded by the foreign laws.[53]

B. Other Foreign Measures That Have Been or Could Be Used to Block U.S. Sanctions

In addition to legislation enacted specifically to counter U.S. sanctions, foreign countries have begun applying generic antidiscrimination measures to block extraterritorial enforcement of U.S. sanctions. As discussed below in more detail, the United Kingdom's Commission for Racial Equality recently invoked the U.K. Race Relations Act to block a U.K. hotel's compliance with U.S. sanctions against Cuba.[54] Similarly, Norway's Equality and Anti-Discrimination Ombudsman recently applied the country's civil rights legislation in response to a hotel's denial of services to Cuban nationals based on U.S. sanctions against Cuba.[55]

Measures maintained by other jurisdictions also have the potential of being used to block U.S. extraterritorial sanctions. The United Kingdom's Protection of Trading Interests Act of 1980, among other things, authorizes the U.K. Secretary of State to "give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance" with non-U.K. measures that govern international trade in a way that damages U.K. trading interests.[56] In addition, legislation authorizes the Australian

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

[50] Id.

[51] Id. art. 5.

[52] Id. art. 4

[53] Id. arts. 2 & 3.

[54] Hilton Hotels Face Serious Dilemma, GRANMA DAILY (Cuba), Mar. 28, 2007; Race Relations Act of 1976, ch. 74 (Eng.).

[55] Doug Mellgren, Hilton slammed in Oslo for Cuba embargo, ASSOCIATED PRESS, January 5, 2007.

[56] Protection of Trading Interests Act of 1980, ch. 11, § 1 (Eng.). In response to the Mack Amendment, see Section 2.1.1, the United Kingdom issued the Protection of Trading Interests Act, 1980, ch. 11, § 1 (3) (Eng.) (U.S. Cuban Assets Control Regulations) Order 1992 to block compliance by U.S.-owned U.K. companies with the CACR prohibition on trade with Cuba. The Extraterritorial U.S. Legislation (Sanctions

Attorney General to render unenforceable a foreign judgment or order which contravenes Australian trade and commercial interests.[57] South Africa maintains similar legislation, which would prohibit or limit enforcement of foreign judgments issued in contravention of national interests.[58]

The governments of countries such as Benin, Japan, Nauru, Senegal and Yemen have publicly stated that they would not recognize or apply any extraterritorial coercive measures of another country.[59]

III. Application of Countermeasures and Other Efforts Against U.S. Extraterritorial Sanctions

The United States' trading partners have responded to U.S. extraterritorial sanctions by promulgating countermeasures against the U.S. policies, as described above, by forbidding sanctions compliance on an *ad hoc* basis, and by challenging the U.S. policies through international dispute settlement proceedings. This section describes notable examples of foreign government efforts in opposition to U.S. extraterritorial sanctions.

A. Energy-Related Sanctions Against the Soviet Union

In the early 1960s, the Soviet Union began construction of an oil pipeline from the Soviet Union to West Germany, commonly known as the "Friendship Pipeline" project.[60] Amid concerns about the Soviet Union's increasing trade with Western European nations and the fallout from the Cuban missile crisis, President Kennedy staunchly opposed the Friendship Pipeline project.[61] The United States inititally sought a formal Western embargo against construction of the pipeline, but was unable to obtain full support from its trading partners.[62] Instead, the United States was only able to secure passage of an

against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 was issued to reconcile the 1992 order with EU Regulation 2271/96.

[57] Foreign Proceedings (Excess of Jurisdiction) Act of 1984, § 14 (Australia).

[58] Protection of Business Act of 1978, No. 99, § 1 (S. Africa).

[59] Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, Report of the U.N. Secretary General, A/55/300 (Aug. 17, 2000); Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political and Economic Compulsion, Report of the U.N. Secretary General, A/59/266 (Aug. 16, 2004).

[60] ANGELA STENT, FROM EMBARGO TO OSTPOLIK: THE POLITICAL ECONOMY OF WEST GERMAN-SOVIET RELATIONS 1955-1980, at 101-103 (Cambridge University Press 1981) ("From Embargo to Ostpolik").

[61] Steve Mufson, U.S. Efforts to Block Soviet Gas Pipeline Recalls Failed Embargo of 20 Years Ago, WALL ST. J., July 14, 1982, at A-32 ("Mufson July 14, 1982 Article").

[62] Id.

informal North Atlantic Treaty Organization ("NATO") resolution calling for an embargo of large-diameter steel pipes to the Soviet Union.[63]

The NATO resolution, however, went largely ignored by the United States' trading partners. The United Kingdom, Italy, Japan and Sweden all publicly announced that they would continue to supply the Soviet Union for the Friendship Pipeline project.[64] Only West Germany agreed to abide by the NATO resolution.[65] The Soviet Union responded by shifting resources to increase its own production of large-diameter steel pipes and was able to complete construction of the Friendship Pipeline on time in 1964.[66]

Almost twenty years later, in June 1982, the United States imposed a similar embargo on supply of energy-related equipment to the Soviet Union by U.S. companies, foreign affiliates, and foreign companies with U.S. patents and licensing.[67] Although the Reagan administration characterized the embargo as a response to the declaration of martial law in Poland in 1981,[68] it was broadly understood that the export restrictions were motivated principally by concerns regarding the Soviet Union's plans to construct a 3,700-mile natural gas pipeline from Siberia to West Germany, commonly known as the "Yamal Pipeline" project.[69] The Yamal Pipeline project was designed to supply West Germany, France and Italy with more than 30 percent of their natural gas needs, and involved lucrative construction contracts with European countries, such as West Germany, Great Britain, France and Italy.[70]

United States trading partners sharply criticized the second U.S. pipeline embargo. The European Economic Community ("EEC") issued a formal protest, stating that:

> [t]he United States measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of United States nationality in respect to their conduct outside the United States and particularly the

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[63] From Embargo to Ostpolik at 103-104.

[64] Mufson July 14, 1982 Article.

[65] Id.

[66] Id. The Soviet Union increased its production of 40-inch diameter pipes from zero tons in 1961 to over 600,000 tons a year in 1965.

[67] Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250, 27,250-52 (1982) (not codified) (proposing amendment to 15 C.F.R. § 385.2(c)); R. Hardt & D. Gold, Soviet Gas Pipeline: U.S. Options, Congressional Research Service, IB82020, at CRS-2 (Oct. 8, 1982) ("Soviet Gas Pipeline CRS Report").

[68] Id.

[69] Leslie Gelb, U.S. Hardens Curbs on Soviet Gas Line, N.Y. TIMES, June 19, 1982, at A-1.

[70] Id.

> handling of property and technical data of these companies not in the United States.[71]

The EEC warned that one consequence of the ban "is that the claim of U.S. jurisdiction accompanying U.S. investment will create a resistance abroad to the flow of U.S. investment."[72]

The governments of France and the United Kingdom ordered companies operating in their countries to perform the existing contracts for the Yamal Pipeline project.[73] The United Kingdom invoked the Trading Interests Act to compel several British-based subsidiaries of U.S. corporations to honor their supply contracts.[74] Similarly, the French Ministry of Research and Industry ordered a French subsidiary of the U.S. company, Dresser Industries Inc. ("Dresser Industries"), to fulfill its contract for the Yamal Pipeline project. The French government cited as authority for its action a 1959 French law that permits the government to requisition the services of a French company "when it is necessary to assure the needs of the country."[75] The French subsidiary was ordered immediately to deliver three gas compressors for the Yamal Pipeline project and was required to resume production of 18 other gas compressors for export to the Soviet Union.[76] Production had been halted at the request of Dresser Industries when President Reagan initially issued the embargo.[77]

The Italian Foreign Ministry issued a statement that all Italian contracts established with respect to the Yamal Pipeline project "must be honored."[78] Foreign companies that abided by their countries' orders by defying the U.S. embargo were ultimately barred from receiving any exports of U.S. oil and gas-related equipment.[79]

Following several months of tense discussion, the United States lifted the pipeline sanctions in November 1982 after an agreement was reached with European leaders to "strengthen existing controls on the transfer of strategic items to the Soviet Union."[80] In

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[71] Text of Common Market Statement on Embargo, N.Y. TIMES, Aug. 13, 1982, at A-4.

[72] Id.

[73] Associated Press, Europe Protests Bans by Reagan on Gas Pipeline, N.Y. TIMES, Aug. 13, 1982, at A-1.

[74] Soviet Gas Pipeline CRS Report at CRS-13 to CRS-17; Rita Dallas, Britain Orders Firms to Defy Pipeline Bans, WASH. POST, Aug. 3, 1982, at A-6.

[75] Soviet Gas Pipeline CRS Report at CRS-15.

[76] Georges Sibera, Untitled, UNITED PRESS INTERNATIONAL, Aug. 23, 1982.

[77] Id.

[78] Id. at CRS-15.

[79] Id. at CRS-13.

[80] Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250, 27,250-52 (1982) (not codified) (proposing amendment to 15 C.F.R. § 385.2(c)); President Ronald W. Reagan, Radio Address to the Nation on East-West Trade Relations and the Soviet Pipeline Sanctions, Nov. 13, 1982.

the end, the Yamal Pipeline project was completed without significant delay based on a higher-than-expected supply of Soviet equipment for use in its construction.[81]

B. Foreign Responses to the Helms-Burton Act and Iran and Libya Sanctions Act

In June 1996, the U.S. Department of State issued procedures to implement the alien-entry requirements of the Helms-Burton Act (Title IV).[82] Title IV forbids entry into the United States by corporate officers of, principals of and shareholders with a controlling interest in a company that "has been involved in" trafficking in confiscated property that is the subject of a claim by a U.S. national.[83] As a result of the implementing procedures, the State Department notified major shareholders and senior executives of the following corporations that they and their families were barred from entry into the United States under Title IV: (1) Sherritt International, a Canadian mining company; (2) Grupo Domos, a Mexican telecommunications firm; and (3) Grupo B.M., an Israeli citrus company.[84]

United States trading partners sharply criticized implementation of Title IV of the Helms-Burton Act. In October 1996, the EU began WTO dispute settlement proceedings against the United States to address the Helms-Burton Act and the U.S. embargo of Cuba. The EU alleged that these U.S. measures deny EU Members of their rights under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the General Agreement on Trade in Services ("GATS") to engage in trade with Cuba and Cuban origin goods.[85] The EU also expressed major concerns about the Iran and Libya Sanctions Act, but ultimately chose not to include the statute in its WTO case.

The United States insisted that the EU discontinue the WTO panel proceedings on the grounds that the Helms-Burton Act addresses national security and foreign policy issues,

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[81] Jonathan Stern, Gas pipeline co-operation between political adversaries: examples from Europe, Report to Korea Foundation (Jan. 2005).

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

[83] 22 U.S.C. § 6091.

[84] Michael Dobbs, U.S. Announces Measures Against Canadian Firm, WASH. POST, July 11, 1996, at A14; WASH. TRADE DAILY, Nov. 18 & 19, 1997, at 2; Treasury Reviewing Wal-Mart Canada Decision to Sell Cuban-Made Pajamas, DAILY REP. FOR EXECUTIVES (BNA), Mar. 17, 1997, at A-15 (discussing the four additional Sherritt executives); Gary G. Yerkley, U.S., E.U. Making 'Significant' Progress in Helms-Burton Law Talks, Aide Says, DAILY REP. FOR EXECUTIVES (BNA), Mar. 13, 1998, at A-13.

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

which are outside the scope of the GATT 1994 and GATS. The United States indicated that it might defend the measures before the WTO panel through invocation of the GATT and GATS national security exemptions,[86] but instead, upon formation of the panel, the United States unilaterally withdrew from the WTO proceedings and announced that it simply would not participate in the case.[87] The United States' refusal to participate in the WTO proceedings caused concerns that non-recognition of a panel decision by the United States would undermine the legitimacy of the WTO dispute settlement process.

Following formal initiation of the WTO proceedings, the United States and the EU began negotiations to address the EU's concerns over the extraterritorial effects of the Helms-Burton Act and the Iran and Libya Sanctions Act and the United States' proposals for coordinated sanctions policies. In December 1996, as a part of the negotiations, the EU announced that it had adopted a "Common Position" on Cuba that emphasized an EU policy of promoting a transition in Cuba to "pluralist democracy and respect for human rights."[88] The Clinton Administration viewed the EU's Common Position as a positive step in the negotiations, which helped justify continued suspension of the right to initiate a suit under the Helms-Burton Act.[89]

In April 1997, shortly before the deadline for the EU's first substantive submission in the WTO proceeding, the United States and the EU announced that they had reached an "understanding" on the basis of which the WTO case was placed in suspension.[90] The United States announced that its "presumption of continued suspension" of the Helms-Burton Act was based on the EU's and its other trading partners' continued "stepped up

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[86] For example, the national security exemption of the GATT provides that:

> Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

World Trade Organization, General Agreement on Tariffs and Trade, Art. XXI (1947).

[87] Paul Blustein & Anne Swardson, U.S. Vows to Boycott WTO Panel, WASH. POST, Feb. 21, 1997, at A12. It would seem that the Clinton Administration proceeded on the basis that the United States had unilateral discretion to determine whether the GATT 1994 and GATS agreements' national security provisions applied.

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

[89] Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 33 WEEKLY COMP. PRES. DOC. 3, 4 (Jan. 3, 1997).

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

efforts to promote democracy in Cuba."[91] The "understanding" specified that the "U.S. Administration" would seek from the Congress the authority to waive Title IV of the Helms-Burton Act (the alien-exclusion provisions).[92] The authority to reinitiate the EU's suspended WTO challenge expired in April 1998 in accordance with WTO dispute settlement rules, although the EU remains free to initiate a new case.

In May 1998, the United States and the EU entered into an "Understanding with Respect to Disciplines for the Strengthening of Investment Protection" ("Investment Understanding") and the "Transatlantic Partnership on Political Cooperation" ("Partnership Accord"). The Partnership Accord includes limited commitments by the United States to forgo the imposition of new extraterritorial sanctions.[93] The Clinton Administration and the European Commission agreed "not to seek or propose" and to "resist" "the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other [partner] behave in a manner similar to that required of [the partner's] own economic operators."[94]

In return for the United States' commitments in the Partnership Accord, the EU conditionally pledged -- as did the United States -- in the Investment Understanding to impose certain sanctions on investments and certain other transactions with regards to property that was confiscated in violation of international law. The sanctions include, among other things, denial of public credit and, in certain limited situations, prohibition of the entire transaction.[95] In contrast to the Helms-Burton Act, the Investment Understanding obligations do not apply to past transactions.

The United States and the EU agreed jointly to propose that the Investment Understanding's sanctions commitments be established as legal requirements of a "Multilateral Agreement on Investment,"[96] which was then being negotiated within the Organization for Economic Cooperation and Development. Pending the outcome of those negotiations, the EU stated that it intended to apply the sanctions commitments of

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[91] Id. at 529.

[92] Id. at 530.

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

[94] Id.

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

[96] Id. § II.2.

the Investment Understanding "on a policy basis."[97] Even the EU's limited commitments were made contingent on the United States' waiver of Title IV of the Helms-Burton Act to EU persons,[98] which would require the Congress to amend the Act. The EU subsequently issued a statement indicating that its implementation of the Investment Understanding's sanctions commitments and abeyance of a WTO challenge depended not only on the United States' waiver of Title IV but also on: (1) the waiver of sanctions against EU persons under the Iran and Libya Sanctions Act; and (2) continued waivers under Title III of the Helms-Burton Act (right-of-action provisions).[99] Prospects for obtaining binding EU sanctions commitments ended in late 1998 when the Multilateral Agreement on Investment negotiations ended unsuccessfully.[100]

Shortly after the United States' publication of implementing procedures for Title IV in June 1996, Canada and Mexico announced their intentions to initiate a challenge of the Helms-Burton Act under the North American Free Trade Agreement ("NAFTA"). Ultimately, those countries chose not to pursue NAFTA dispute settlement proceedings given the outcome of the U.S.-EU WTO negotiations. [101]

C. Legal Challenges to Massachusetts's Sanctions Against Burma (Myanmar)

In September 1998, Japan and the EU requested establishment of a WTO panel to examine a Massachusetts law that disallowed the granting of government procurement contracts to any U.S. or foreign company doing business in or with Burma (Myanmar).[102] Japan and the EU challenged the state law based on an alleged violation of the WTO Agreement on Government Procurement.[103] The WTO panel was suspended in February 1999 pending the National Foreign Trade Council's challenge against Massachusetts's

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[97] Id.

[98] Id. § II.4.

[99] EU Unilateral Statement, May 18, 1998 available at http://www.europa.eu.int/comm/dg01/0518uni.htm. In its statement, the EU indicated that any new WTO panel that it might bring would challenge not only the Helms-Burton Act but also the Iran and Libya Sanctions Act. Id.

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

[101] Anne Swardson, Canada Vows Sanctions Against U.S. for Enforcement of Anti-Cuba Trade Law, WASH. POST, June 18, 1996, at A7; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296, 297 (1993) (citing as its purpose the reduction of trade barriers and the establishment of mutually advantageous trade laws); International Trade: Canada Delays Challenge of Helms-Burton Pending EU Negotiations with United States, DAILY REP. FOR EXECUTIVES (BNA), Feb. 14, 1997, at A-37.

[102] Request for Establishment of a Panel by the European Communities, United States - Measure Affecting Government Procurement, World Trade Organization, WT/DS88/3 (Sept. 8, 1998).

[103] Id.; Press Release, Panel Established in Government Procurement Dispute, DSB Considers 3 New Panel Requests, World Trade Organization (Oct. 29, 1998).

sanctions in U.S. courts.[104] In June 2000, the U.S. Supreme Court invalidated Massachusetts's embargo on the grounds that it was preempted by federal law.[105] Consequently, the WTO challenge expired on February 11, 2000, in accordance with WTO dispute settlement rules.[106]

D. WTO Challenge to U.S. "Section 211" Prohibition

In June 2000, the EU initiated WTO dispute settlement proceedings against Section 211 of the U.S. Omnibus Appropriations Act of 1998 ("Section 211").[107] Among other requirements, Section 211 prohibits U.S. courts from considering or enforcing the trademark claims of Cuban nationals, or their successors in interest, regarding property confiscated on or after January 1, 1959.[108]

Section 211 was enacted as a result of a dispute between French spirits company Pernod Ricard and the Bermuda-based Bacardi Ltd. over the trademark for "Havana Club."[109] Pernod Ricard had entered into a joint venture with the Cuban government to produce "Havana Club" rum, but Bacardi Ltd. claimed that it was the original and rightful owner of the trademark. While Pernod Ricard could not market its rum in the United States because of the restrictions of the CACR, it sought to protect its future distribution rights should the U.S. embargo be lifted.[110]

The EU argued that Section 211 violated the WTO Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement").[111] The WTO Appellate Body ultimately found that Section 211 violated national treatment and most-favored nation provisions of the TRIPS Agreement.[112] The WTO Appellate Body held that the United States has violated its WTO obligations by denying foreign trademark owners access to U.S. courts to enforce their intellectual property rights when such restrictions did not

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[104] Communication from the Chairman of the Panel, United States - Measure Affecting Government Procurement, World Trade Organization, WT/DS88/5, WT/DS95/5 (Feb. 12, 1999).

[105] Crosby v. National Foreign Trade Council, 530 U.S. 363 (June 19, 2000).

[106] Lapse of Authority for Establishment of a Panel, United States - Measure Affecting Government Procurement, World Trade Organization, WT/DS88/6, WT/ DS95/6 (Feb. 14, 2000).

[107] Request for the Establishment of a Panel by the European Communities, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176/2 (July 7, 2000) (accepting the European Communities' June 30, 2000 request) ("European Communities Section 211 WTO Request").

[108] M. Lee, Restricting Trademark Rights of Cubans: WTO Decision and Congressional Response, Congressional Research Service, RS21764 (Mar. 9, 2004) ("WTO Section 211 CRS Report").

[109] M. Sullivan, Cuba: Issues for the 110th Congress, Congressional Research Service, RL33819 at CRS-20 (May 8, 2007) ("Cuba Legislative Issues CRS Report").

[110] Id.

[111] WTO Section 211 CRS Report at CRS-2; European Communities Section 211 WTO Request.

[112] Report of the Appellate Body, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176AB/R, at §§ XII-XIII (Jan. 2, 2002); WTO Section 211 CRS Report at CRS-3 to CRS-5.

apply to U.S. nationals attempting to assert the same rights.[113] Such disparate treatment has fueled calls for the United States to repeal Section 211 in order to comply with the WTO ruling and to protect U.S. trade names currently registered in Cuba by U.S. companies, which has been in jeopardy since the passage of Section 211.

To date, the United States has not brought Section 211 into compliance with the WTO ruling.[114] In July 2005, the EU agreed not to retaliate against the United States at that time, but reserved the right to do so in the future.[115]

E. Other Recent Foreign Responses to U.S. Extraterritorial Sanctions

In February 2006, the Sheraton Maria Isabel Hotel in Mexico City ordered 16 Cuban guests to leave an energy conference hosted by the U.S.-Cuba Trade Association on orders from the U.S. Treasury Department.[116] The U.S. Treasury Department order was issued pursuant to the Cuba embargo regulations, the CACR, which forbid even non-U.S. companies to transact with Cuban persons if, like the Sheraton Maria Isabel Hotel, they are U.S. owned or controlled.[117] Mexican Foreign Minister Luis Ernesto Derbez immediately criticized the U.S. Treasury Department's decision: "There does not exist and neither should there exist the extraterritorial application of this law [the embargo] in our nation."[118]

On March 24, 2006, the Mexican government fined the Sheraton Maria Isabel Hotel in Mexico City 1.2 million pesos for expelling the Cuban guests.[119] The Mexican Foreign Ministry said the fine was imposed for the hotel's violation of Mexico's sanctions countermeasures law, Law to Protect Trade and Investment from Foreign Laws that Contravene International Law.[120] The controversy led to the hotel's temporary closure for unrelated, alleged safety code violations.[121]

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[113] Id.

[114] Cuba Legislative Issues CRS Report at CRS-21.

[115] Id.; WTO Dispute Settlement Appellate Body, Minutes of Meeting, WT/DSBIM/157 (Dec. 18, 2003) (expressing its concern at the lack of U.S. progress in achieving compliance with the WTO ruling).

[116] Danna Harman, Mexico hotel 'reopens' after US-Cuban spat, CHRISTIAN SCIENCE MONITOR, March 3, 2006 ("Harman Mar. 3, 2006 Article").

[117] James C. McKinley Jr., Mexico and Cuba protest hotel's expulsion of Havana Delegation, N.Y. TIMES, Feb. 7, 2006, at A-1.

[118] Id.

[119] Mexico fines hotel involved in U.S.-Cuba spat, SAN DIEGO UNION TRIBUNE, Mar. 24, 2006.

[120] Id.

[121] Harman Mar. 3, 2006 Article. The alleged safety code violations included failing to have Braille written on the menus and the absence of anti-skid strips on 10 percent of the hotel's stairs. When asked how city officials became aware of the safety code violations, the borough president, Virginia Jaramillo Flores stated "because of the controversy over the Cubans." Id.

In January 2007, a Norwegian hotel owned by the U.S. hotel chain Hilton Hotels Corporation ("Hilton Corporation") refused a booking by a Cuban trade delegation to the city's travel fair because of U.S. sanctions.[122] It appears that the Norwegian hotel was likewise seeking to comply with the CACR. Referencing Norwegian law, Oslo's Anti-Racist Center filed a police complaint against the hotel, Scandic, and a Hilton Corporation director.[123] Hilton Corporation stated that it was banning Cuban delegations from all of its hotels around the world, as were other American hotel companies.[124]

A Norwegian Foreign Ministry official stated that businesses operating in Norway must obey Norwegian law, regardless of their headquarters, but deferred to other agencies to determine which laws applied in the case.[125] Norway's Equality and Anti-Discrimination Ombud said it would demand an explanation from Scandic and would then decide whether to open a case against the company.[126] Following the controversy, Hilton Corporation announced in March 2007 that it had sold the Scandic hotel chain to EQT, a Stockholm private equity firm.[127]

On February 7, 2007, the United Kingdom's Commission for Racial Equality announced that it had warned Hilton Corporation in London that "[t]he Hilton would be acting unlawfully under the Race Relations Act by refusing to provide services to Cuban people."[128] The Commission for Racial Equality confirmed on March 1, 2007 that it was "unlawful to instruct or induce a person to discriminate on racial grounds" under the U.K.'s Race Relations Act of 1976. The Commission also confirmed that it was "investigating" complaints made against Hilton hotels.[129]

On March 1, 2007, Hilton Corporation reversed its ban on Cuban delegations staying at its hotels in Europe, and called on the United Kingdom and the United States to resolve the issue.[130] The Hilton Corporation sent a letter to the British Prime Minister and Foreign Secretary and the U.S. State Department, stating that:

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[122] Doug Mellgren, Hilton slammed in Oslo for Cuba embargo, ASSOCIATED PRESS, Jan. 5, 2007 ("Mellgren Jan. 5, 2007 Article").

[123] Id.

[124] Duncan Campbell, Hilton hotels lift European ban on Cubans, THE GUARDIAN, Mar. 2, 2007 ("Campbell Mar. 2, 2007 Article").

[125] Mellgren Jan. 5, 2007 Article.

[126] Id.

[127] Dominic Walsh, Hilton Hotel sells Scandic chain, THE TIMES (LONDON), Mar. 3, 2007, at p. 60.

[128] Emily Manson, Hilton stands by its ban on Cubans despite protests, CATERER AND HOTELKEEPER, Feb. 15, 2007.

[129] Id.

[130] Id.

> As a U.S.-based company, we face a legal dilemma, with a strict ban on trading with Cuba imposed by the U.S. government, and contradictory legislation in the United Kingdom making it illegal to discriminate on the grounds of nationality.[131]

Hilton Corporation called for a "U.S. bilateral agreement to reform and ease the trade sanctions within the tourism industry . . . so that this contradiction between our laws is annulled."[132]

In April 2007, Austria brought charges against its fifth-largest bank, BAWAG P.S.K. ("BAWAG"), for violating EU sanctions countermeasures provisions, EU Regulation 2271/96, after the bank cancelled the accounts of approximately 100 Cuban nationals.[133] BAWAG stated that its pending acquisition by U.S. equity firm Cerberus Capital ("Cerberus") could not be completed without the cancellation of all Cuban accounts because of compliance issues with the Helms-Burton Act.[134] Austrian Foreign Minister Ursula Plassnik immediately denounced BAWAG's actions, stating that:

> U.S. law is not applicable in Austria. We are not the 51st state of the United States. Neither the EU nor the U.N. have implemented a general economic or contact embargo against Iran or Cuba.[135]

Facing strong public disapproval in Austria, Cerberus was forced to apply to the U.S. Treasury Department for authority to proceed contrary to general U.S. embargo requirements.[136] The U.S. Treasury Department granted a license in May 2007, thereby allowing BAWAG to resume business relations with Cuban nationals.[137] In June 2007, Austria formally announced that it would drop the charges against BAWAG for violating EU Regulation 2271/96.[138]

IV. Exposure for United States

As shown above, there has long been a consensus in the international community -- including among U.S. allies -- in opposition to extraterritorial U.S. sanctions. And this

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131 Campbell Mar. 2, 2007 Article.

132 Id.

133 Austria charges bank after Cuban accounts cancelled, REUTERS, Apr. 27, 2007.

134 Press Release, Statement of BAWAG P.S.K. on Reports About Termination of Business Relationships With Clients of Cuban Nationality, BAWAG P.S.K. (Apr. 13, 2007).

135 Austria charges bank after Cuban accounts cancelled, REUTERS, April 27, 2007.

136 Austria drops charges against BAWAG on Cuban accounts, AUSTRIA PRESSE AGENTUR, June 21, 2007.

137 Id.

138 Id.

opposition has intensified in recent years. Previously, the Cold War and other considerations tended to lead to compromises that forestalled vigorous anti-sanctions action by U.S. allies. Today, as highlighted by the recent hotel/Cuba embargo cases, foreign governments are much less hesitant to apply domestic laws and other tools to ensure domestic non-compliance with U.S. extraterritorial sanctions. Beyond promulgating countermeasures consciously to block U.S. sanctions -- as the EU, Canada and Mexico did in the mid-1990s -- there is a trend towards countries using generic laws against invidious discrimination to block exterritorial enforcement of U.S. sanctions.

Conflict of laws concerns are becoming acute, particularly as foreign countries increasingly use non-sanctions-specific measures to block extraterritorial application of U.S. sanctions. Possible means of reconciling application of U.S. sanctions and foreign countermeasures, always uncertain, are becoming plainly unreliable. Some have highlighted the "foreign state compulsion" doctrine as a basis to excuse foreign subsidiaries' noncompliance with U.S. sanctions. But, even if this doctrine is found to be potentially relevant, it may require, among other things, a "true," direct conflict between the foreign countermeasure and the U.S. extraterritorial sanction.[139] Particularly when foreign jurisdictions rely on general civil rights policies, it could be difficult for U.S. companies to establish a foreign direct compulsion defense.

Proposals before the Congress would make U.S. parent companies liable for actions of their foreign subsidiaries that conflict with extraterritorial sanctions.[140] Some have suggested that this approach would eliminate the risk of legal double jeopardy entailed by foreign blocking measures. There is no apparent reason to believe that this would be so. Rather, the company would continue to face a threat of penalties for both complying and not complying with U.S. requirements.

Furthermore, the United States continues to be exposed to legal challenges by its trading partners at the WTO and through other international dispute settlement proceedings. In prior proceedings, the United States has taken the position that national security exemptions to treaty commitments are "self-judging," meaning that it is the prerogative of an individual country to determine whether a particular statute qualifies as being necessary to protect essential security interests.[141]

The United States' reliance on national security exemptions to insulate it from decisions against extraterritorial sanctions may prove unavailing, as international tribunals have adopted increasingly narrow interpretations of these exemptions. Although no WTO panel or Appellate Body report has addressed the scope or application of trade agreement national security exemptions, the International Court of Justice ("ICJ") has held that it

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[139] Hartford Fire Insurance v. California, 509 U.S. 764 (1993); Restatement (Third) of Foreign Relations Law of the United States, § 441 (1987).

[140] Iran Counter-Proliferation Act of 2007, S. 970, 110th Cong. § 8 (Mar. 22, 2007).

[141] U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle, 14 INT'L TRADE REP. 351 (1997).

has jurisdiction to determine which measures are necessary to protect the "essential security interests" of a country.[142] In a case involving Iran and the United States regarding the destruction of three offshore Iranian oil platforms by the U.S. Navy, the ICJ rejected the United States' claim that the national security exemption of a 1955 U.S.-Iranian treaty deprived the tribunal of jurisdiction to adjudicate Iran's claims.[143] The ICJ held that questions of what constitutes "essential security interests" are matters subject to treaty interpretation and proceeded to rule on the merits of Iran's claims in 2003.[144] Consequently, successful challenges to U.S. extraterritorial sanctions before international bodies and authorized trade retaliation against the United States as a result of such cases are more and more likely.

An alternative, as with the 1996 EU-U.S. WTO case regarding the Cuba embargo, would be for the United States to forego participation in the proceeding. This could severely undermine the legitimacy of international institutions, however.

More broadly, the conflicts that emerge from enforcing U.S. extraterritorial sanctions seem likely to be detrimental to the United States itself in important ways. First, and most importantly, they could impede U.S. leadership and international collaboration needed to advance U.S. national security and foreign policy interests, including coordination to suppress international terrorism. Second, as described above, conflicts with authorities in other major economies, like the EU, are placing U.S. companies at risk of legal double jeopardy. It would be useful to consider whether these types of disadvantages are outweighed by any utility from applying foreign policy sanctions extraterritorially.

[142] Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 1996 I.C.J. 803 (Dec. 12, 1996).

[143] Id.

[144] Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6, 2003). Ruling on the parties' numerous arguments, the ICJ ultimately dismissed competing claims for reparations by Iran and the United States under their bilateral 1955 Treaty of Amity, Economic Relations and Consular Rights.