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CHAPTER XIII

THE USE OF TRADE CONTROLS FOR POLITICAL PURPOSES

The trade restrictions discussed to this point derive from a combination of economic motivations, including a desire to protect one's own trade. There is another major category of trade restrictions, imposed much more explicitly, but with motivations usually other than protectionist. These include a desire to avoid participation in foreign wrongdoing, a desire to avoid providing technology or assistance to one's enemies, a desire to demonstrate political disapproval of another state's policies, and a desire to resist foreign manifestations of political disapproval of one's own policies.

A. THE FOREIGN CORRUPT PRACTICES ACT

1. Direct Effect

The United States Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. §§78dd-1 *et seq*., as amended, criminalizes bribery of foreign officials (beyond the "grease" level of small payments to low-level officials). This act supplements efforts by several U.S. government agencies in the mid-1970s to reach bribery under other legal authority, primarily the duty to report income accurately to the Internal Revenue Service and the Securities and Exchange Commission's creation of a duty to report corruption to shareholders. The FCPA has been very controversial. Many have criticized it as extending U.S. moral principles extraterritorially and as making it harder for U.S. business to compete for export sales. Supporters respond that foreign corruption might extend into the nation, that foreign corruption often robs the poorest in a developing nation, and that it creates an entangling web, which, like that in Iran under the Shah, ultimately hurts U.S. interests.

The following excerpt presents a report on a survey of corporate attitudes toward the act. You should note that the report is discussing the original version of the FCPA, which has been amended several times since 1981, the year the report was released. In the subsection that follows, we shall examine the effect of those amendments.

Comptroller General, Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business

AFMD-81-34, March 4, 1981

PERSPECTIVE

Beginning in 1973—as a result of the work of the Office of the Watergate Special Prosecutor—the Securities and Exchange Commission (SEC) became aware of a pattern of conduct involving the use of corporate funds for illegal domestic political contributions. Subsequent SEC investigations and enforcement actions revealed that instances of undisclosed questionable or illegal corporate payments, both domestic and foreign, were widespread.

SEC announced a program in 1975 whereby companies could voluntarily disclose questionable activities. Under this program more than 450 corporations admitted making questionable or illegal payments exceeding $300 million.

PASSAGE OF THE FOREIGN CORRUPT PRACTICES ACT

The disclosures of widespread corporate bribery of foreign officials initiated the congressional action which eventually resulted in the December 19, 1977, passage of the Foreign Corrupt Practices Act of 1977 (Public Law 95-213—title I). Reports that accompanied the House and Senate versions of the act clearly indicated that the Congress perceived corporate bribes to foreign officials as (1) unethical, (2) unnecessary to the successful conduct of business, and (3) harmful to our relations with foreign governments.

In addition to addressing the bribery issue, the Congress also responded to SEC's recommendation that legislation be enacted that would enhance the accuracy of corporate books and records and strengthen corporate systems of internal accounting control. These legislative changes were intended to operate in tandem with the act's other provisions to deter corporate bribery. SEC found that millions of dollars had been inaccurately recorded in corporate books and records to facilitate making bribes. The falsification of these records was known to corporate employees and often to top management.

REQUIREMENTS OF THE ACT

The Foreign Corrupt Practices Act is a significant and far-reaching law regulating the conduct of American business in foreign countries. However, it covers a much broader area than is suggested by its title. The act is not limited to companies doing business abroad, nor is it restricted to corrupt payments. It contains significant internal accounting control objectives and recordkeeping requirements that go beyond corrupt foreign payments.

The act contains two important segments: (1) an antibribery prohibition and (2) standards for maintaining records and objectives for systems of internal accounting control. The antibribery provision applies to SEC registrants and domestic concerns, as well as to officers, directors, employees, or agents acting on behalf of such companies. The accounting standards apply only to SEC registrants. "SEC registrants" are defined as all U.S. companies that have a class of securities registered with SEC and/or file

reports with SEC under the Securities Exchange Act of 1934. A "domestic concern" is defined as (1) any U.S. citizen, national, or resident or (2) any business entity (other than an SEC registrant) that either has its principal place of business in the United States or is organized under the laws of any U.S. State, territory, commonwealth, or possession.

Antibribery Provisions

The act prohibits both SEC registrants and domestic concerns from corruptly offering or giving anything of value to

- a foreign official, including any person acting in an official capacity for foreign government;
- a foreign political party official or political party; or
- a candidate for foreign political office.

The above prohibitions relate to offers or payments made to influence these officials in order to help a registrant or domestic concern obtain or retain business or direct business to any person.

The act also prohibits the offering or paying of anything of value to any person if it is known or if there is reason to know that all or part of the payment will be used for the above prohibited actions. This provision covers situations when intermediaries, such as foreign affiliates or agents, are used to channel payoffs to foreign officials.

The potential penalties for violating the antibribery provisions are severe. SEC registrants and domestic concerns (other than an individual) can be fined up to $1 million. Individuals who are domestic concerns and any officer, director, or stockholder who acts on behalf of a registrant or domestic concern and who willfully violates the law can be fined up to $10,000 and imprisoned for not more than 5 years. The law prohibits companies from directly or indirectly paying a fine imposed on an individual.

Accounting Provisions

These provisions, which apply only to SEC registrants, contain requirements for recordkeeping and internal accounting controls. They were adopted in response to SEC and congressional discoveries that foreign bribery was accomplished mainly by (1) off-the-books slush funds and (2) transactions inaccurately recorded on a firm's books.

The recordkeeping standard requires that a company's books, records, and accounts, in reasonable detail, accurately and fairly reflect its transactions and the disposition of its assets. The internal accounting control provision requires that a company's system of internal accounting controls be sufficient to provide reasonable assurances that certain control objectives are met.

SEC registrants and any person authorized to control the direction, management, and policies of a corporation who willfully violate the accounting provisions are subject to the general penalties imposed by the Securities Exchange Act of 1934. These penalties include a fine of up to $10,000 and imprisonment for up to 5 years, or depending upon the circumstances, a violation may result in an SEC civil enforcement action.

SHARED RESPONSIBILITY FOR ENFORCEMENT

SEC and the Department of Justice share responsibility for enforcing the act. SEC

is responsible for conducting investigations of SEC registrants suspected of violating the antibribery and accounting provisions. SEC can bring civil action against these violators and/or refer them to Justice for criminal prosecution. Justice is also responsible for proceeding civilly and criminally against domestic concerns alleged to have violated the antibribery provisions. . . .

CORPORATE CODES OF CONDUCT HAVE BEEN GREATLY AFFECTED

Written codes of conduct are policies defining the standards of acceptable business conduct for corporate employees. Ninety-eight percent of our questionnaire respondents reviewed their policies to see if they were adequate in light of the act's requirements.

Over 60 percent of the respondents reported that these reviews had resulted in changes not only in what the policies said, but also in how they were communicated. Also, more than 50 percent reported making changes during the turbulent 4-year period before passage of the act; 25 percent did not find it necessary to make any further changes as a result of the act.

What effect the changes in the codes will have in reducing questionable payments is difficult to determine. However, more than 70 percent of the respondents believed that the act has effectively reduced questionable foreign payments by U.S. companies. . . .

THE COST OF COMPLYING WITH THE ACT'S ACCOUNTING PROVISIONS IS PERCEIVED TO EXCEED BENEFITS

As discussed above, corporate systems of internal accounting control have undergone extensive change. In many cases, however, these compliance efforts were perceived as costing more than the benefits received.

About 55 percent of the questionnaire respondents reported that their compliance efforts have resulted in costs that exceeded the benefits. The remaining 45 percent did not believe this to be the case. For the respondents who reported that the costs incurred exceeded the benefits, the extent of the cost burden varied as follows:

- 50 percent believed the burden has increased their accounting and auditing costs by 11 to 35 percent.
- 22 percent reported that the burden has increased their accounting and auditing costs more than 35 percent.
- 28 percent estimated the cost burden at less than 11 percent. . . .

THE ACT IS PERCEIVED AS ADVERSELY AFFECTING U.S. OVERSEAS BUSINESS

As with the accounting provisions, the antibribery provisions may have created a cost burden. More than 30 percent of the questionnaire respondents engaged in foreign business said they had lost overseas business as a result of the act. In addition, over 60 percent perceived that—assuming all other conditions were similar—American companies could not successfully compete against other companies abroad that were bribing.

These beliefs are neither supported nor rejected by hard verifiable data. Attempts to quantify the act's impact have had only limited success. Due to the sensitivity of the foreign bribery issue and the complexities inherent in international trade, conclusive

evidence of the act's impact on U.S. foreign business may never be forthcoming. However, the perceptions by themselves are important. . . .

In particular, business has charged that American companies are forgoing legitimate export opportunities because certain aspects of the act's antibribery provisions are ambiguous. In addition, the lack of an international antibribery agreement may be giving foreign competitors an advantage in international markets.

Throughout its deliberations on the act, the Congress was inundated with statements that corporate bribery to obtain overseas business was unnecessary. Then Secretary of the Treasury Blumenthal, testifying before one congressional committee, stated that

> Paying bribes . . . is simply not necessary to the successful conduct of business in the United States or overseas. My own experience as Chairman of the Bendix Corp. was that it was not necessary to pay bribes to have a successful export sales program.

Other governmental officials held similar views. The SEC Chairman Hills stated that in every industry in which companies were bribing, other companies of equal size in that industry proclaimed that they saw no need to engage in such practices. Then Secretary of Commerce Richardson was quoted as saying that, in a number of instances, payments were made not to outcompete foreign competitors but rather to gain an edge over other U.S. manufacturers.

BUSINESS' PERCEPTION OF THE ACT'S IMPACT AN OVERSEAS SALES

Although the majority of our questionnaire respondents reported that the act has had little or no effect on their overseas business, more than 30 percent of our respondents engaged in foreign business reported they had lost overseas business as a result of the act. In addition, over 60 percent reported that, assuming all other conditions were similar, American companies could not successfully compete abroad against foreign competitors that were bribing.

Almost all the respondents that reported decreases in business stated that the act had discouraged foreign buyers and agents from doing business with their firms. In some countries, the use of foreign agents is a recommended practice; in other countries, it is necessary. About 45 percent of the respondents that reported lost business stated that the act has limited the number of countries in which they do business. The impact on overseas business was felt more by respondents from the top 500 companies. Whereas 25 percent of the respondents from the second 500 reported decreases in business, about 42 percent of the top 500 respondents reported losses.

How much the act can affect a company's overseas sales is influenced by many factors, including:

- The country in which the company conducts its business.
- The type of product or service it sells.
- The identity of the purchasers (government versus non-government).
- The business practices of its competitors.
- The honesty of foreign government officials.
- Whether or not the company previously made questionable payments to obtain foreign business.

Our respondents believed that companies in the construction and aircraft industries

were more likely to be adversely affected by the act. Because of these perceptions, we sent additional questionnaires to a number of leading companies in these industries. The response rate of these two samples was slightly lower than that of our overall sample; 13 of 20 aircraft companies and 15 of 25 construction firms responded. However, those responding supported the perception that the aircraft and construction industries have been significantly affected by the act; 54 percent reported that the act had adversely affected their overseas business.

The loss of business by construction companies was reiterated in a recent Wall Street Journal article which implied that the firms hardest hit were large international construction companies dealing mainly with foreign governments or government-run industries. According to the article, some construction companies have stated that in certain countries, it is impossible even to get on the bidding lists without paying what amounts to an entry fee to a local agent who has good connections with the government in power. What impact this has had is hard to tell. However, industry statistics show that in 1977, the United States ranked fourth in worldwide construction and industrial project activity; in 1979, the United States ranked seventh. Further, one construction firm has alleged that it lost a $40 million overseas contract because its foreign competitor made a payment to a foreign official. . . .

2. Amendments of the FCPA

Since its enactment in 1977, the FCPA has been the subject of three major amendments.[1] Interestingly enough, among many other detailed substantive changes, the 1988 amendment of the act changed the title of section 78dd-1 from "Foreign Corrupt Practices by Issuers" to "Prohibited Foreign Trade Practices by Issuers,"[2] a more polite if somewhat misleading title.

The 1998 amendment implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[3] excerpted and discussed in subsection 5, *infra*. Among other things, the 1998 amendment added new prohibitions to § 78dd-1(a) against bribery by a registered issuer of a foreign official, foreign political party, party official or candidate for the purpose of "securing any improper advantage."[4] The new prohibition also applies to bribing "any person" acting as a conduit for a foreign official, political party, party official or candidate.[5] The amendments also added § 78dd-1(g), which prohibits acts outside the United States "in furtherance of" any act prohibited by § 78dd-1(a), regardless of whether there was use of the mails or any means or instrumentality of interstate commerce.[6] Parallel changes are made to § 78dd-2,[7] which prohibits the same foreign trade practices by a "domestic

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1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Aug. 23, 1988, § 5003(a), (c), 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd-1, 78dd-2); Pub. L. No. 103-322, Sept. 13, 1994, § 330005, 108 Stat. 2142 (1994) (codified at 15 U.S.C. § 78dd-2).; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, Nov. 10, 1998, §§ 2, 3 112 Stat. 3302, 3306 (1998) (codified at 15 U.S.C. §§ 78dd-1, 78dd-2; adding § 78dd-3).

2. Pub.L. 100-418, *supra*, § 5003(a).

3. *Reprinted in* 37 INT'L LEGAL MAT. 1 (1998).

4. 15 U.S.C. § 78dd-1(a)(1)(A)(iii), (2)(A)(iii).

5. *Id.* § 78dd-1(a)(3)(A)(iii).

6. *Id.* § 78dd-1(g).

7. *Id.* § 78dd-2(a)(1)(A)(iii), (2)(A)(iii), (3)(A)(iii), (i).

concern"[8] other than a registered issuer.

The 1998 amendment also added a new provision, § 78dd-3,[9] which applies the prohibitions of §§ 78dd-1 and 78dd-2 to any "person"[10] other than a registered issuer or a domestic concern, while that person is "in the territory of the United States."[11]

NOTES AND QUESTIONS

1. Is it wise to prohibit U.S. firms from corrupt practices abroad? What are the arguments in favor of doing so? What are the arguments in favor of not doing so?

2. If you were drafting a statute or regulation to prohibit corrupt practices, how would you handle the following situations:

(a) gifts in the $5 to $100 range to a foreign official?
(b) buying an expensive dinner for a foreign official?
(c) contributions to a foreign political party?
(d) contributions to a charity suggested by a foreign official?

3. Should the FCPA, which explicitly authorizes enforcement only by the SEC and the Justice Department, be interpreted as authorizing a parallel private damage action by a firm alleging that a competitor gained a contract by bribery? Most commentators assume not. On this issue, see *Lamb v. Phillip Morris, Inc., infra.*

4. If the representative of a U.S. business firm provides payments to an official of a state-owned enterprise in the Peoples' Republic of China (PRC) to assist in the generation of profits for the firm, does that raise an FCPA issue? Does it make a difference if the PRC official is acting in a private capacity when she passes the payments to acquaintances in another PRC enterprise?

5. What if the PRC official is moonlighting with a private PRC firm when the U.S. firm gives her a payment in connection with the business of that private firm? Does that raise FCPA issues?

3. Possible Antitrust Implications

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8. For these purposes, the term "domestic concern" is defined to mean:

> (A) any individual who is a citizen, national, or resident of the United States; and
> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id. § (h)(1)(A)-(B).

9. Pub.L. 105-366, *supra*, § 3.

10. For these purposes, the term "person" is defined to mean:

> any natural person other than a national of the United States . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

15 U.S.C. § 78dd-3(f)(1).

11. *Id*. § 78dd-3(a).

It is generally agreed that no tort-style private cause of action is implicit in the FCPA. Nevertheless, litigants have frequently sought to use the FCPA to bolster a suit under another statute. The following case exemplifies this approach in the antitrust area. As will be recalled from the preceding chapter, a firm that loses a foreign government sale because its competitor bribed the foreign official might attempt a treble-damage antitrust action, based on the argument that the firm and the foreign official conspired in restraint of trade. Such a suit will normally be met with an act of state defense[1]—the FCPA provides the plaintiff with a new argument that the congressional policy against corruption should be taken into account in interpreting the act of state defense.

Lamb v. Phillip Morris, Inc.

915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 498 U.S. 1086

▬ GUY, CIRCUIT JUDGE.

In this antitrust action, plaintiffs Billy Lamb and Carmon Willis appeal from the dismissal of their claims against defendants Phillip Morris, Inc. (Phillip Morris), and B.A.T. Industries, PLC (B.A.T.). Because we find that the act of state doctrine presents no impediment to adjudication of the plaintiffs' antitrust claims, we reverse the district court's dismissal of those claims and remand them for further consideration. Since we find that no private right of action is available under the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1, 78dd-2, we affirm the dismissal of the plaintiffs' FCPA claim.

I.

. . .

Plaintiffs Lamb and Willis . . . produce burley tobacco for use in cigarettes and other tobacco products. Defendants Phillip Morris and B.A.T. routinely purchase such tobacco not only from Kentucky markets serviced by the plaintiffs, but also from producers in several foreign countries. Thus, tobacco grown in Kentucky competes directly with tobacco grown abroad, and any purchases from foreign suppliers necessarily reduce the defendants' purchase of domestic tobacco.

[Venezuelan subsidiaries of Phillip Morris and B.A.T. entered into a contract with La Fundacion Del Nino ("the Children's Foundation") of Caracas, Venezuela. The agreement was signed on behalf of the Foundation by its president, the wife of the then President of Venezuela. Under the terms of the agreement, the two subsidiaries were to make periodic donations to the Foundation totalling about $12.5 million dollars. In return, they were to obtain tax deductions for the donations, price controls on

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1. The act of state doctrine provides that courts of one state's jurisdiction are barred from inquiring into the validity of the acts of a foreign state performed in the latter's own territory. *See, e.g., Underhill v. Hernandez,* 168 U.S. 250 (1897) (enunciating doctrine); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (presenting modern version of doctrine); *United Bank Ltd. v. Cosmic International, Inc.*, 542 F.2d 868, 872-74 (2d Cir. 1976) (emphasizing territorial requirement); *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied* 382 U.S. 1027 (1966) (same). It is unsettled whether the doctrine should be restricted, as sovereign immunity is, by an exception for "commercial acts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-704 (1976) (plurality opinion); *id.* at 725 (dissent) (citing *Sabbatino*). *See also IAM v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981). Strictly speaking, an act of state argument is a device of issue preclusion–not a defense–raised by a private defendant in litigation, whose title to disputed property depends upon some act of an alleged sovereign that may not even be a party to the litigation.

Venezuelan tobacco, elimination of controls on Venezuelan retail cigarette prices, and assurances that existing tax rates applicable to tobacco companies would not be increased. The defendants apparently had similar contracts in Argentina, Brazil, Costa Rica, Mexico, and Nicaragua.

[Lamb and Willis argued that the donations amounted to "unlawful inducements" designed to restrain trade. They asserted that the agreement resulted in artificial depression of tobacco prices to the detriment of domestic tobacco growers, while ensuring lucrative retail prices for tobacco products sold abroad. They asked for treble damages and injunctive relief against the reduction in domestic tobacco prices.

[The defendants moved for dismissal on several grounds, and the plaintiffs then sought leave to amend their complaint to add a claim under the FCPA. The district court dismissed the antitrust claims as barred by the act of state doctrine, and dismissed the FCPA claim as an impermissible private action.]

II.

[The court held that the antitrust claim was not barred by the act of state doctrine. It summarized its position in the following terms.]

Because the antitrust claims at issue in this suit merely call into question the contracting parties' motivations and the resulting anticompetitive effects of their agreement, not the validity of any foreign sovereign act, the district court erred in applying the act of state doctrine to dismiss the plaintiffs' claims. Accordingly, the order of dismissal is reversed insofar as the antitrust claims are concerned; the claims shall be remanded for further consideration.[7]

III.

Although the Foreign Corrupt Practices Act was enacted more than a decade ago, the question of whether an implied private right of action exists under the FCPA apparently is one of first impression at the federal appellate level.[9] Thus, we must analyze the FCPA, which generally forbids issuers of registered securities and other "domestic concerns" (as well as their agents) to endeavor to influence foreign officials by offering, promising, or giving "anything of value," *see* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), to ascertain whether the plaintiffs may assert a private cause of action. ...

[O]ur central focus is on congressional intent . . . "with an eye toward" the four *Cort* [*v. Ash*, 422 U.S. 66, 78 (1975),] factors: (1) whether the plaintiffs are among "the class for whose especial benefit" the statute was enacted; (2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action; (3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme'"; and (4) whether the cause of action is "'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.'" . . .

A. "ESPECIAL BENEFICIARIES"

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7. In rejecting the district court's invocation of the act of state doctrine, we do not pass judgment on whether the plaintiffs have set forth viable antitrust claims. The defendants interposed several alternative justifications for dismissal that the district court has not yet addressed. The defendants are free to raise these arguments to support a subsequent motion for dismissal or summary judgment following remand.

9. The Ninth Circuit has applied the act of state doctrine to bar a private plaintiff's claim under the FCPA. *See Clayco* [*Petroleum Corp. v. Occidental Petroleum Corp.*], 712 F.2d [404,] 408-09. *Clayco*, however, offers no guidance on the issue before us. Additionally, at least one district court has referred to the issue without resolving it. *See, e.g., Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Illinois Nat'l Bank and Trust Co.*, 576 F.Supp. 985, 990 & n. 4 (N.D.Ill.1983).

The defendants contend, and we agree, that the FCPA was designed with the assistance of the Securities and Exchange Commission (SEC) to aid federal law enforcement agencies in curbing bribes of foreign officials. According to the Senate report regarding the FCPA, the Senate Committee on Banking, Housing and Urban Affairs initially "ordered reported a bill, S. 3664, which incorporated the SEC's recommendations and a direct prohibition against the payment of overseas bribes by any U.S. business concern." S.Rep. No. 114, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S.Code Cong. & Admin.News 4098, 4099. As the Senate report indicates, the resulting enactment of the FCPA represents a legislative endeavor to promote confidence in international trading relationships and domestic markets; *see id*. at 3, 1977 U.S.Code Cong. & Admin.News at 4100-01; the authorization of stringent criminal penalties amplifies the foreign policy and law enforcement considerations underlying the FCPA. *See, e.g.*, 15 U.S.C. § 78dd-2(g). The House Conference report refers to the "jurisdictional, enforcement, and diplomatic difficulties" of broadening the FCPA's reach, *see* H.R.Conf.Rep. No. 831, 95th Cong., 1st Sess. 14, reprinted in 1977 U.S.Code Cong. & Admin.News 4121, 4126, thereby addressing concerns typically of special interest to law enforcement officials. In light of these comments and the general tenor of the FCPA itself, which requires the Attorney General to participate actively in encouraging and supervising compliance with the Act,[11] *see, e.g.*, 15 U.S.C. §§ 78dd-1(e), 78dd-2(f), we find that the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs. The plaintiffs, as competitors of foreign tobacco growers and suppliers of the defendants, cannot claim the status of intended beneficiaries of the congressional enactment under scrutiny.

B. CONGRESSIONAL INTENT CONCERNING PRIVATE RIGHTS OF ACTION

. . . The plaintiffs have identified only one reference in a House report to a private right of action: "The committee intends that courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery." H.R.Rep. No. 640, 95th Cong., 1st Sess. 10 (1977). Unlike the House, the Senate initially included a provision that expressly conferred a private right of action under the FCPA on competitors. *See* S. 3379, 94th Cong., 2d Sess. § 10, 122 Cong.Rec. 12,605, 12,607 (1976). Significantly, the Senate committee deleted that provision. *See* S.Rep. No. 1031, 94th Cong., 2d Sess. 13 (1976). The availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action. *See* 15 U.S.C. §§ 78dd-1, 78dd-2; H.R.Conf.Rep. No. 831, 95th Cong., 1st Sess., reprinted in 1977 U.S.Code Cong. & Admin.News 4121. Because the conference report accompanying the final legislative compromise makes no mention of a private right of action, we infer that Congress intended no such result. Accordingly, we reject the plaintiffs' assertion that one isolated comment in an earlier House report

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11. The Ninth Circuit has noted that, in practice, "[t]he Justice Department and the SEC share enforcement responsibilities under the FCPA. They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions." *Clayco*, 712 F.2d at 409 (footnote omitted).

mandates recognition of a private right of action.

C. CONSISTENCY WITH THE LEGISLATIVE SCHEME

Recognition of the plaintiffs' proposed private right of action, in our view, would directly contravene the carefully tailored FCPA scheme presently in place. . . . [The statute] clearly evinces a preference for compliance in lieu of prosecution, the introduction of private plaintiffs interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.

D. ALTERNATIVE AVENUES OF REDRESS

Regulation of bribery directed at foreign officials cannot be characterized as a matter traditionally relegated to state control. In this respect, implying a private right of action under the FCPA–a statutory scheme aimed at activities ordinarily undertaken abroad–would not intrude upon matters of state concern. Nevertheless, the international reach of federal antitrust laws dilutes the plaintiffs' assertion that a private cause of action under the FCPA constitutes the only viable mechanism for redressing anticompetitive behavior on a global scale.... Because the potential for recovery under federal antitrust laws in this case belies the plaintiffs' contention that an implied private right of action under the FCPA is imperative, we attach no significance to the absence of state laws proscribing bribery of foreign officials. More importantly, since none of the *Cort* factors supports the plaintiffs' private right of action theory, we affirm the district court's dismissal of the FCPA claim.

QUESTIONS

1. Is this case consistent with *Timberlane*, *supra* at ▬-▬?
2. If you were drafting legislation to restrict private international antitrust actions, how would you deal with the situation exemplified by *Lamb*?
3. If there is no implied private right of action under the FCPA, would it still be possible to use the alleged fact of an FCPA violation defensively? *Instituto Nacional De Comercializacion Agricola (Indeca) v. Continental Illinois Nat. Bank and Trust Co.*, 576 F.Supp. 985 (N.D.Ill.1983), suggests that an alleged FCPA violation might be the basis for an affirmative defense against a breach of contract action, though the opinion does not reach the ultimate question whether there was in fact an affirmative defense in that case. Does the following case give any encouragement to such an approach?

CITICORP INTERNATIONAL TRADING CO., INC. v. WESTERN OIL & REFINING COMPANY, INC.

771 F.Supp. 600 (S.D.N.Y. 1991)

▬ SWEET, DISTRICT JUDGE.

[Citicorp International Trading Company (CITC), an affiliate of Citibank, brought suit against Western Oil and its shareholders, Robert and Karin Zander, on a note that Western and the Zanders had signed. In a nightmare of *pro se* pleading, the Zanders had responded with counterclaims and a third-party complaint, totalling some 220 paragraphs alleging 13 causes of action. CITC moved to dismiss the counterclaims and third-party complaint. The district court heroically waded through the lengthy, irregular

and repetitive pleadings of the Zanders,[a] refused to dismiss the counterclaims for violations of pleading rules,[b] but did dismiss many of the claims, which repeated allegations of earlier claims that did not provide a basis for relief. The court dealt specifically with the Zander's claim under FCPA. The statement of facts included in this excerpt is adapted from an earlier unreported opinion in the same case.

[In 1986 Western entered into negotiations with the Nigerian National Petroleum Corporation (NNPC) for NNPC to supply oil for Western to export from Nigeria. On 30 December 1986, Western and CITC entered into a Representative Agency Trade Agreement, under which certain security agreements were reached, and pursuant to which CITC would provide letters of credit in connection with the proposed transaction with NNPC.

[The transaction was to go forward in the Spring 1987, but, according to the Zanders, CITC failed to provide the appropriate letters of credit, NNPC failed to supply the oil, and as a result demurrage charges and other expenses were incurred. On 21 August 1987, after the transaction had foundered, the Zanders executed a promissory note on behalf of Western and themselves individually in the amount of $1,572,429.00 in favor of CITC. Western and the Zanders defaulted on the note. Litigation ensued.]

DISCUSSION

. . .

In their Fourth Counterclaim, the Zanders allege that CITC personnel were responsible for an unsuccessful attempt to bribe the NNPC in order to buy time for CITC to comply with its duties under the Agreement. As pled, this counterclaim asserts a violation of the Foreign Corrupt Practices Act ("FCPA"). In the January [1991] Opinion, a less detailed version of this counterclaim was dismissed with the comment that

> While the FCPA itself neither contains nor implies any private cause of action for damages, *see McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir.1987), that question need not be decided at this time, as the pleading is insufficiently particular to state a claim.

January Opinion at 13. As repled, the counterclaim is sufficiently particular, identifying the alleged briber, the person to whom the bribes were offered, and the motive for offering the bribe. Therefore, it is now necessary to determine whether an FCPA violation can support a private tort claim.

While this issue has never been addressed by the Second Circuit, the few cases that have addressed the question have concluded that no private right of action ought to be implied. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir.1990); *McLean, supra*, 817 F.2d at 1219; *see also Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F.Supp. 686, 688 (N.D.Ill.1989) (no private right under FCPA provisions requiring adequate financial and accounting controls); *Lewis v. Sporck*, 612 F.Supp. 1316, 1332-33 (N.D.Cal.1985) (same).

To decide this question, it is necessary to apply the four part test set forth in *Cort v.*

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a. Karin was a graduate of Yale Law School, somewhere on the East Coast. *Citicorp Intern. Trading Co., Inc. v. Western Oil & Refining Co.*, 1991 WL 4502 at 1 (S.D.N.Y. Jan 16, 1991) (unreported opinion on earlier cross motions to dismiss).

b. *See* note a, *supra*.

Ash, 422 U.S. 66, 78 (1975). . . . [The court identified the factors discussed in the excerpt from *Lamb, supra*, and concluded that no private right of action existed.]

[T]he claim which the Zanders seek to assert here is in fact one traditionally relegated to state law, namely tortious interference with a business relationship or prospective business relationship.

However, while the counterclaim may be inadequate under the FCPA, it may yet survive if its allegations can establish a different claim. In view of the preceding discussion, and particularly the conclusion that state law generally covers this type of behavior, it is appropriate to consider whether it states [a] tortious interference claim. Because Western was the entity which had contracted with NNPC, the Zanders cannot allege that CITC's action constituted tortious interference with contractual relations.

The counterclaim might be construed, however, to allege a claim for tortious interference with prospective business relations between the Zanders and NNPC. Relevant in this regard is that, after the arrangement between NNPC and Western had collapsed, NNPC agreed to offset Western's indebtedness to it in exchange for Zander personally accepting a lifetime banishment from acting as a contract buyer of Nigerian crude oil. However, the counterclaim does not plead facts sufficient to indicate that the alleged bribe attempt was solely responsible for the alleged damages. In other words, Zander has not alleged that were it not for the bribe attempt he would have had an opportunity for future dealings with NNPC. Therefore, this counterclaim does not state a claim for tortious interference with a prospective business relationship.

4. Possible Corporate Law Implications

In the corporate law area, there have also been efforts to use the FCPA to obtain support for a private cause of action. Here, the typical suit is by shareholders against management believed to have participated in illegal payments. *See, e.g., Gaines and Fitzpatrick v. Haughton*, 645 F.2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) (upholding dismissal of state law and federal proxy claims). Such actions are usually based on two similar, but conceptually distinct theories.

One legal theory is that of the shareholder derivative suit, a suit in which the shareholders bring a suit against directors or management on behalf of the corporation, usually based on an argument that these directors or management have hurt the corporation and that they are unwilling to represent the corporate interest against themselves. The suit is formally one between the corporation and the allegedly offending directors or management, and recovery (save for legal fees) would go to the corporation.

The other legal theory is built on the idea that the directors defrauded the shareholders by failing to disclose the corrupt payments. As with any suit for fraud, there has to be an action in reliance; here, presumably, the shareholders' action in voting for or against retention of particular directors. The international scope of this body of law, which relies heavily on federal statutes, together with the subtleties of what constitutes a fraudulent statement and an action in reliance, will be considered again in Chapter XVIII.

NOTES AND QUESTIONS

1. What precisely would a shareholder's interest be in ensuring that the management

of a corporation does not participate in corrupt foreign payments?

2. Suppose that the successor government of a foreign state sues the former chief executive of the state to recover the proceeds of allegedly corrupt actions of the executive. Should courts in the United States grant recovery? Note that such a suit against the family of the former Shah of Iran was envisaged as part of the 1981 U.S.-Iran settlement of the hostage crisis, but was rejected by the New York courts. *See Islamic Republic of Iran v. Pahlavi*, 478 N.Y.S.2d 597 (Ct.App. 1984).

3. Assume that Byteboards, Inc., a high-tech U.S. firm, has—almost certainly by corrupt means—obtained enormously favorable concessions on the tax, labor, construction, and environmental arrangements for a large new electronic printed circuit fabrication facility in Southeast Asia. As a result of the cost savings associated with these concessions, Byteboards has been able to displace a large portion of the competing domestic and foreign manufacturer's sales of printed circuits.

Several of these U.S. and foreign manufacturers, along with the U.S. Printed Circuit Manufacturers' Association, have filed a complaint with the ITC under § 337, alleging the necessary damage to trade, and putting forward the ideas that the import of goods made under significantly lower health and safety and environmental regulations amounts to an unfair trade practice and that acquisition of these advantages by corrupt means also amounts to an unfair trade practice. They hope to exclude Byteboards' boards.

Before facing the merits of the individual case, the members of the ITC are planning a discussion of the idea of extending ITC jurisdiction to these new areas. Assume that you are a new appointee of the ITC. Outline your position on the jurisdictional issues posed by this case, so that you can present it to your colleagues.

5. International Developments

One troubling criticism of the FCPA, reflected in the Comptroller General's 1981 Report, has been that the imposition of the FCPA on U.S. business firms adversely affects U.S. competitiveness in the transnational market. The factual assumption behind this criticism, unverified but generally accepted by interested U.S. parties, is that non-U.S. firms have been relatively unconstrained by FCPA-like prohibitions, either in their respective home states or in host states in which they compete for business with U.S. firms. Yet the motivations that underpin the FCPA–that foreign corrupt practices may leech back into the domestic market, that the practices often exacerbate the impoverishment of developing countries, and that these practices may have a harmful effect on U.S. foreign policy interests–are not without their cogency, both for the United States and its trading partners. The legitimacy of the FCPA may therefore depend upon breaking the factual assumption of competitive disadvantage.

Recent international developments may show some promise of addressing this problem. As in other areas of international regulation–including, of course, trade regulation itself–the key to the solution depends upon establishing a set of genuinely international rules of behavior accepted by the relevant national players. The materials that follow lay out some of the basic efforts undertaken recently to create an international regime to address bribery and corruption. Review the material with the questions on pages ▬-▬ in mind.

REPORT OF THE UNITED NATIONS SECRETARY-

GENERAL ON THE WORK OF THE ORGANIZATION

37 I.L.M. 913 (1998)

. . .

The causes of conflict and the promotion of durable peace and sustainable development in Africa

. . .

IV. Building a durable peace and promoting economic growth

. . .

A. Good governance

. . .

Promoting transparency and accountability in public administration

75. Corruption is a serious worldwide phenomenon. It has critically hobbled and skewed Africa's development. Addressing the problem of corruption requires targeting both payer and recipient. I welcome the recent initiative of the Organisation for Economic Cooperation and Development to reduce the scope for corruption in aid-funded procurement. I also welcome the signing of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which commits signatories to introducing legislation defining bribery and sanctions to punish it. These are important first steps, but much more still needs to be done. African Governments in particular must get tough on this issue, and make the fight against corruption a genuine priority. The costs of not doing so are very high–in lost resources, lost foreign investment, distorted decision-making, and failing public confidence. I call for agreement on a timetable for the early enactment of legislation in countries implementing the Convention, and call upon OAU to devise by the year 2000 a uniform African convention on the conduct of public officials and the transparency of public administration.

OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

37 I.L.M. 1 (1998)

. . .

Article 1 The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party. . . .

Article 2 Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons [*i.e.*, corporate and other artificial persons] for the bribery of a foreign public official.

Article 3 Sanctions

. . .

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable. . . .

Article 4 Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. . . .

Article 5 Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. . . .

Article 8 Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery. . . .

Article 9 Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the

status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10 Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention. . . .

COUNCIL OF EUROPE: CRIMINAL LAW CONVENTION ON CORRUPTION

38 I.L.M. 505 (1999)

. . .

Chapter II - Measures to be taken at national level

Article 2 - Active bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

Article 3 - Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions. . . .

Article 5 - Bribery of foreign public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State. . . .

Article 7 - Active Bribery in the private sector

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

Article 8 - Passive Bribery in the private sector

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties. . . .

Article 12 - Trading in influence

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result. . . .

Article 14 - Account offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent the Party has not made a reservation or a declaration:

a. creating or using an invoice or any other accounting document or record containing false or incomplete information;

b. unlawfully omitting to make a record of a payment.

Article 15 - Participatory acts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences established in accordance with this Convention. . . .

QUESTIONS

1. To what extent do these two conventions eliminate the concerns of FCPA critics that U.S. business firms are competitively disadvantaged by the prohibitions of the act? How do the conventions resolve the perceived competitive disadvantage charged against the FCPA?

2. The enlightened self-interest of OECD member states–typically Western, industrialized democracies, the home states of most globalized business enterprises–is obviously served by establishing a mutually agreed set of anti-bribery rules for international business practice. A level playing field might be created, with everyone competing under the same rules of the game, and this would eliminate the extraneous costs associated with either paying bribes or suffering from unfair trade practices. Should eliminating bribery and corruption appeal to the enlightened self-interest of developing states that are host states of globalized business enterprises? These host states are unlikely to be signatories of the two conventions. Are the conventions at all likely to align host state self-interest with the self-interest of the home states that do sign such conventions?

3. How do the provisions of the two conventions compare with those of the FCPA? Is the FCPA consistent with the obligations imposed by the OECD Convention? With the European Convention?

4. To what extent are either of the conventions extraterritorial in application? Will either be more likely to be effective in proscribing bribery than the FCPA?

5. Nusquam is a newly industrialized country with a history of tribal governance and competing tribal loyalties. In the 50 years since independence, it has been the custom for a business firm to offer a "courtesy" to the hereditary chief of a tribe, whenever the firm planned to establish a branch in the area traditionally under tribal control. At one time the courtesy would have consisted of a symbolic offering representing the product of the firm. In the past twenty years, however, the courtesy has been a sum of money equal to five percent of the projected first-year sales of the firm's proposed branch. Widget International Technologies ("WIT"), a U.S. corporation with extensive international operations, is planning a widget processing plant in a region of Nusquam subject to traditional tribal control. The WIT General Counsel has asked you to brief her on the legality of Nusquami courtesy under the OECD Convention and under the FCPA. How will you advise her?

6. In the previous question, would it make any difference if Nusquam was a signatory of the OECD Convention?

7. Assume that WIT's international operations are managed and coordinated by EuroWit, WIT's European subsidiary. Would your advice to the WIT General Counsel be any different if EuroWit's home state was a signatory of the European Convention?

8. If the proposed transaction did violate the OECD Convention and/or the FCPA, could the Justice Department prosecute the hereditary chief for asking for or accepting the courtesy? Consider the following pre-convention decision in answering this question.

UNITED STATES v. BLONDEK

741 F.Supp. 116 (N.D.Tex. 1990), *affirmed sub nom.*
United States v. Castle, 925 F.2d 831 (5th Cir. 1991)

▬ SANDERS, CHIEF JUDGE.

[Blondek, Castle, Lowry and Tull were charged with conspiring to violate the FCPA. Castle and Lowry were Canadian officials, and they moved to dismiss the indictment, arguing that they could not be convicted of the offense charged. Blondek and Tull were U.S. citizens employed by a U.S. company, Eagle Bus Co. According to the indictment, they paid a $50,000 bribe to Castle and Lowry in connection with a bid to provide buses to a Canadian provincial government.]

There is no question that the payment of the bribe by Defendants Blondek and Tull is illegal under the FCPA, and that they may be prosecuted for conspiring to violate the Act. Nor is it disputed that Defendants Castle and Lowry could not be charged with violating the FCPA itself, since the Act does not criminalize the receipt of a bribe by a foreign official. The issue here is whether the Government may prosecute Castle and Lowry under the general conspiracy statute, 18 U.S.C. § 371, for conspiring to violate the FCPA. Put more simply, the question is whether foreign officials, whom the Government concedes it cannot prosecute under the FCPA itself, may be prosecuted under the general conspiracy statute for conspiring to violate the Act.

In *Gebardi v. United States*, 287 U.S. 112 (1932), the Supreme Court confronted a similar issue: whether a woman who agreed to be transported by her lover across state lines to engage in sexual intercourse could be convicted of a conspiracy to violate the Mann Act. The Mann Act prohibited the transportation of women across state boundaries for immoral purposes, but did not criminalize the conduct of the women being transported. Acknowledging that it could not prosecute the woman for violating the Mann Act itself, the Government prosecuted her instead for conspiring to violate the Mann Act. The woman objected to her conviction on the grounds that the Mann Act exempted her from prosecution for her participation.

The Court noted first that the incapacity of a person to commit the substantive offense does not necessarily imply that he may conspire with others to commit the offense with impunity, since the state may criminalize the collective planning of the criminal conduct. . . . For example, it is a crime for a bankrupt to conceal property from his trustee, and thus only bankrupts may be convicted of the substantive offense of concealing property. But convictions of others for conspiring with the bankrupt to conceal property have been upheld. . . .

The Court distinguished the case before it on the grounds that a violation of the Mann Act necessarily required the agreement of the woman to the criminal act -- her transportation across a state line. Yet the Act did not make the woman's consent a crime. The Court concluded that by excluding the transported woman from prosecution under the Mann Act, Congress evinced an affirmative legislative policy "to leave her acquiescence unpunished." *Id*. at 123. A necessary implication of that policy was that the woman's agreement to participate was immune from any kind of prosecution, including prosecution for conspiring to violate the Mann Act. To do otherwise, the Court reasoned, would allow the Executive Branch to extend the reach of the Act beyond the scope of Congress' intention. . . .

The principle enunciated by the Supreme Court in *Gebardi* squarely applies to the case before this Court. Congress intended in both the FCPA and the Mann Act to deter

and punish certain activities which necessarily involved the agreement of at least two people, but Congress chose in both statutes to punish only one party to the agreement. . . .

In drafting the Mann Act, Congress was probably motivated by a protective instinct toward women based on a belief that most women would not participate in the activity without coercion or duress by the man involved. The Government tries to distinguish *Gebardi* on this ground, asserting that "the exception" provided in *Gebardi* to prosecution for conspiracy only applies to individuals belonging to the class of persons the criminal statute was designed to protect.

Nothing in *Gebardi* indicates that only "protected" persons are exempted from conspiracy charges; rather, the Court explicitly built its analysis on Congress' clear intention, evinced by the plain language of the statute, to exempt the transported women from all prosecutions for their involvement in the prohibited activities. A similar intent is apparent from the language of the FCPA, especially when compared to other bribery statutes which criminalize both the payment and receipt of bribes. ...

Even accepting the general idea that Congress must have some reason for exempting from prosecution a class of persons necessarily involved in the proscribed conduct, Congress was quite explicit about its reasons, but none of these reasons have anything to do with foreign officials. Instead, the exclusive focus was on the U.S. companies and the effects of their conduct within and on the United States. . . .

Most likely Congress made this choice because U.S. businesses were perceived to be the aggressors, and the efforts expended in resolving the diplomatic, jurisdictional, and enforcement difficulties that would arise upon the prosecution of foreign officials was not worth the minimal deterrent value of such prosecutions. Further minimizing the deterrent value of a U.S. prosecution was the fact that many foreign nations already prohibited the receipt of a bribe by an official. *See* S.Rep. No. 114 at 4, 1977 U.S. Cong. & Admin.News at 4104 (testimony of Treasury Secretary Blumenthal that in many nations such payments are illegal). In fact, whenever a nation permitted such payments, Congress allowed them as well. *See* 15 U.S.C. § 78dd-2(c)(1).

Based upon the language of the statute and the legislative history, this Court finds in the FCPA what the Supreme Court in *Gebardi* found in the Mann Act: an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law. The Government has presented no reason why the prosecution of Defendants Castle and Lowry should go forward in the face of the congressional intent not to prosecute foreign officials. If anything, the facts of this case support Congress' decision to forego such prosecutions since foreign nations could and should prosecute their own officials for accepting bribes. Under the revised statutes of Canada the receipt of bribes by officials is a crime, with a prison term not to exceed five years. . . , and the Royal Canadian Mounted Police have been actively investigating the case, apparently even before any arrests by U.S. officials. . . . In fact, the Canadian police have informed Defendant Castle's counsel that charges will likely be brought against Defendants Castle and Lowry in Canada. . . . Thus, prosecution and punishment will be accomplished by the government which most directly suffered the abuses allegedly perpetrated by its own officials, and there is no need to contravene Congress' desire to avoid such prosecutions by the United States.

B. ECONOMIC SANCTIONS AND TRADE CONTROLS

1. Introduction[1]

Economic sanctions have become an increasingly prevalent feature of U.S. international economic and foreign policy. The general impermissibility of the use or threat of armed force has to some degree increased the relative importance of economic sanctions, a form of economic warfare.[2] This is not necessarily a fortuitous development. The less apparent costs of economic sanctions, as compared to those of armed force, may encourage a facile resort to economic sanctions that would have been intolerable in the case of armed force. We may see something of this result in the increased frequency of use of economic sanctions in U.S. practice over the past twenty years.

While "economic sanctions" may have a distinct meaning as a term of art, this is not to say that there is no blurring at the edges. "Emergency" sanctions maintained over a long period of years (such as is the case with sanctions against Cuba) may be assimilated into normal trade and foreign policy, official disclaimers notwithstanding. On the other hand, ordinary penalties available for violations of settled trade policy may reach such critical proportions that they appear to partake of the quality of aggressive sanctions in a burgeoning trade war. Similar problems exist when we consider attempts at denying favorable or preferential trade treatment, itself a feature of trade policy, on the basis of criteria other than those appurtenant to that policy. Economic sanctions may be viewed as existing on a spectrum in which related governmental actions may blend into "sanctions" at their outer edges.

In terms of policy objectives, what is the relationship between economic sanctions and U.S. trade policy? In a narrow sense, economic sanctions are not a part of U.S. trade policy and are antithetical to the basic rubrics of that policy. In the Omnibus Trade and Competitiveness Act of 1988[3] for example, Congress made a specific finding that "there has arisen a new global economy in which trade, technological development, investment, and services form an integrated system[,] and in this system these activities affect each other and the health of the United States economy."[4] In light of this situation, Congress found it to be essential "to ensure future stability in external trade of the United States."[5] Obviously, the imposition or threat of economic sanctions does not, in the short term, reinforce stability in external trade.

The United States has several bodies of export control law that serve a number of purposes–ranging from efforts to prevent strategic military goods and technology from moving freely into international commerce,[6] to implementation of U.N. embargos, for example, against Iraq, the former Yugoslavia, and most recently terrorists[7] and imposition of unilateral sanctions against states disfavored by U.S. foreign policy, such as

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1. This section draws on Michael P. Malloy, U.S. Economic Sanctions: Theory and Practice (Kluwer Law International: 2001). Reprinted with permission.

2. *See, e.g.*, U.N. Charter, art. 2, para. 4, art. 33, para. 1. For an excellent historical analysis of the persistence of the legality of "non-forcible counter-measures" in light of the emerging impermissibility of the use of force, see O. Y. Elagab, The Legality of Non-forcible Counter-measures in International Law 24-29, 37-41 (1988).

3. Pub. L. No. 100-418, 102 Stat. 1107 (1988) (OTCA).

4. OTCA, § 1001(a)(1), 102 Stat. at 1120.

5. *Id.* § 1001(a)(4)(B), 102 Stat. at 1120.

6. *See, e.g.*, Export Administration Act, 50 U.S.C. App. §§ 2401 *et seq.*

7. *See, e.g.*, United Nations Participation Act of 1945, § 5, 22 U.S.C. § 287c.

North Korea and Cuba[8] and more recently Libya and Iran.[9] These laws are administered by a variety of bureaucracies, some in Commerce, some in State, some in Defense, and some in Treasury, in addition to the Sanctions Committee of the U.N. Security Council. They have spawned an extremely complex and detailed body of regulation that significantly restricts and complicates both the export of high-tech products, and, in the case of Treasury's Office of Foreign Assets Control, the movement goods, services, financial credits and investment.

2. *The Export Administration Act*

The United States has attempted to apply some of these bodies of law extraterritorially–the legal problems of doing so (and of a firm caught in the middle) will be examined in Chapter XIX. The Export Administration Act, 50 U.S.C. App. §§ 2401 *et seq*. (EAA), is the basic statutory authority for regulating the export of most goods and technology. It established a very elaborate licensing system for export control, and it includes authority for special "national security" and "foreign policy" export restrictions. However, the EAA has always included a termination provision, which has required Congress periodically to review the act and to make a formal decision to continue the act's effectiveness. Repeatedly in the 1980s, controversy over the proper approach to export control has resulted in the expiration of the act by its own terms, and the president would declare a national emergency under the authority of the International Emergency Economic Powers Act (IEEPA)[1] to keep the act artificially alive. The deadlock with Congress was temporarily broken and the program reenacted, in modified form, in 1985. Unfortunately, the EAA expired by its own terms on 20 August 1994. Export control authorities were again rescued by declaration of a national emergency under the IEEPA.[2] Congress finally intervened, but the EAA expired again on 20 August 2001, and the President again invoked the IEEPA to keep the export program alive.[3] This emergency authority has been continued by the President for successive one-year periods ever since. The legal implications of running the EAA program through an IEEPA executive order are explored in the excerpt from *Bernstein, infra*.

Export administration law poses a number of difficult issues, some relatively technical—for example, the precise definition of which materials should be controlled on national security grounds, taking into account such issues as foreign availability. This particular problem has traditionally pitted industry against the government, as have the associated procedures—industry fears that delay will often mean a lost sale. Another group of issues is based on the fear of circumvention through foreign transshipment, issues typically faced by prohibiting any export contacts with domestic or foreign firms found to have been involved in circumvention.

The foreign policy regulations raise a much broader category of questions. The

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8. *See, e.g.*, Trading With the Enemy Act, § 5(b), 50 U.S.C. App. § 5(b); Cuban Liberty and Democratic Solidarity Act, Pub. L. No. 104-114, Mar. 12, 1996, 109 Stat. 826 (1996) (codified at scattered sections of 22 U.S.C.), popularly known as the Helms-Burton Act.

9. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*; Iran and Libya Sanctions Act, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified at 50 U.S.C. § 1701 Note).

1. *Supra* § 1, note 9.

2. Ex. Order No. 12,924, Aug. 19, 1994, 59 Fed. Reg. 43,437 (1994).

3. Ex. Order No. 13,222, Aug. 17, 2001, 66 Fed. Reg. 44,025 (2001).

central one is effectiveness—when will an embargo lead a foreign government to change its policies, and when will it instead create a siege mentality that actually strengthens commitment to the policy? What if an embargo appears more likely to hurt the foreign populace than to contribute to changing the foreign leaders' policies? Debate here is often extremely sloppy, with people (in both parts of the political spectrum) making arguments with respect to the embargos against Cuba and Nicaragua that they would reject when considering an embargo against South Africa. This debate has been renewed in the case of the U.N.-mandated sanctions against Iraq, which have now lasted over nine years. Are the sanctions depriving innocent Iraqi civilians of the basic requirements of life, health and safety, while having a negligible effect on the Iraqi Government, the declared target of the sanctions? On the other hand, would lifting or significantly loosening the sanctions at this point be perceived by the Iraqi Government as a vindication of its aggressive and dangerous tendencies towards military adventure in the region of the Persian Gulf?

A relatively new set of issues concern the treatment of technology–often disembodied from any particular physical product–under export control regulations. What does it mean to "export" technology? Should physical media "containing" technology (*e.g.*, books and scientific journals, CDs, floppy disks or tapes) be treated the same way as the technology itself for purposes of export controls? These and other issues are confronted in the next case.

BERNSTEIN v. U. S. DEPT. OF STATE

974 F. Supp. 1288 (N.D.Cal. 1997), *affirmed sub nom. Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132 (9th Cir. 1999), *rehearing granted and opinion withdrawn*, 192 F.3d 1308

■ PATEL, DISTRICT JUDGE.

[A mathematician named Bernstein sought declaratory and injunctive relief against enforcement of the Arms Export Control Act (AECA), 22 U.S.C. § 2778 (1990), and the International Traffic in Arms Regulations (ITAR), 22 C.F.R. pts. 120-130 (1994), on the ground that they were unconstitutional on their face and as applied to his cryptographic computer source code. On cross-motions for summary judgment, the district court, 945 F.Supp. 1279, invalidated parts of the regulations. A new executive order transferred regulatory authority to the Department of Commerce, Ex. Order No. 13,026, 61 Fed. Reg. 58,767 (1996), and Bernstein filed an amended complaint challenging the interim Commerce rule regulating the export of certain encryption products, 61 Fed. Reg. 68,572 (1996). In the portion of the opinion excerpted below, the district court held that there was no basis for a statutory, non-constitutional challenge to the executive order. However, in another portion of the opinion, excerpted in Chapter III, the court went on to hold that the encryption regulations issued by Commerce's Bureau of Export Administration (BXA) were directed by their own terms at the entire field of applied scientific research and discourse and, thus, were subject to a facial prior restraint analysis under the First Amendment, even though the export of commercial cryptographic software programs was not undertaken for expressive reasons. Applying that analysis, the court invalidated the regulations as unconstitutional prior restraints, since encryption software was singled out and treated differently from other software

regulated under the Export Administration Regulations (EAR).[*]]

BACKGROUND

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I. CRYPTOGRAPHY

Encryption basically involves running a readable message known as "plaintext" through a computer program that translates the message according to an equation or algorithm into unreadable "ciphertext." Decryption is the translation back to plaintext when the message is received by someone with an appropriate "key." The message is both encrypted and decrypted by compatible keys.[2] The uses of cryptography are far-ranging in an electronic age, from protecting personal messages over the Internet and transactions on bank ATMs to ensuring the secrecy of military intelligence. In a prepublication copy of a report done by the National Research Council ("NRC") at the request of the Defense Department on national cryptography policy, the NRC identified four major uses of cryptography: ensuring data integrity, authenticating users, facilitating nonrepudiation (the linking of a specific message with a specific sender) and maintaining confidentiality. . . .

Once a field dominated almost exclusively by governments concerned with protecting their own secrets as well as accessing information held by others, the last twenty years has seen the popularization of cryptography as industries and individuals alike have increased their use of electronic media and have sought to protect their electronic products and communications. . . . As part of this transformation, cryptography has also become a dynamic academic discipline within applied mathematics. . . .

II. PRIOR REGULATORY FRAMEWORK

Plaintiff's original complaint and both of the court's decisions in this action were directed at the regulations in force at the time, the ITAR, promulgated to implement the AECA. The ITAR, administered within the State Department by the Director of the Office of Defense Trade Controls ("ODTC"), Bureau of Politico-Military Affairs, regulates the import and export of defense articles and defense services by designating such items to the United States Munitions List ("USML"). 22 U.S.C. § 2778(a)(1).[3] Items listed on the USML, which at the time included all cryptographic systems and software, require a license before they can be imported or exported. 22 U.S.C. § 2778(b)(2). The ITAR allows for a "commodity jurisdiction procedure" by which the ODTC determines if an article or service is covered by the USML when doubt exists about an item. 22 C.F.R. § 120.4(a).

As a graduate student, Bernstein developed an encryption algorithm he calls "Snuffle." He describes Snuffle as a zero-delay private-key encryption system.... Bernstein has articulated his mathematical ideas in two ways: in an academic paper in English entitled "The Snuffle Encryption System," and in "source code" written in "C",

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***.** Some of the information in this summary is taken from the court's opinion and from its previous opinions in *Bernstein v. U.S. Dept. of State*, 922 F.Supp. 1426 (N.D.Cal.1996) (*Bernstein I*), and *Bernstein v. U.S. Dept. of State*, 945 F.Supp. 1279 (N.D.Cal.1996) (*Bernstein II*).

2. In symmetric cryptography the encryption key is the same as the decryption key. Asymmetric, or public-key, cryptography uses different keys for encryption and decryption and generally only the encryption key is disclosed.

3. For a full description of the ITAR, see *Bernstein I*, 922 F.Supp. at 1429-30 and *Bernstein II*, 945 F.Supp. at 1283-84.

a high-level computer programming language,[4] detailing both the encryption and decryption, which he calls "Snuffle.c" and "Unsnuffle.c", respectively. Once source code is converted into "object code," a binary system consisting of a series of 0s and 1s read by a computer, the computer is capable of encrypting and decrypting data.

In 1992 plaintiff submitted a commodity jurisdiction ("CJ") request to the State Department to determine whether Snuffle.c and Unsnuffle.c (together referred to as Snuffle 5.0), each submitted in C language source files, and his academic paper describing the Snuffle system, were controlled by ITAR. The ODTC determined that the commodity Snuffle 5.0 was a defense article on the USML ... and subject to licensing by the Department of State prior to export. The ODTC identified the item as a "stand-alone cryptographic algorithm which is not incorporated into a finished software product." . . .

Alleging that he was not free to teach, publish or discuss with other scientists his theories on cryptography embodied in his Snuffle program, plaintiff brought this action challenging the AECA and the ITAR on the grounds that they violated the First Amendment. In *Bernstein I* this court found that source code was speech for purposes of the First Amendment and therefore plaintiff's claims presented a colorable constitutional challenge and were accordingly justiciable. In *Bernstein II* the court concluded that the licensing requirements for encryption software under the ITAR constituted an unlawful prior restraint. The court also considered vagueness and overbreadth challenges to certain terms contained in the ITAR. . . .

III. THE TRANSFER OF JURISDICTION AND THE CURRENT REGULATORY FRAMEWORK

On November 15, 1996, President Clinton issued Executive Order 13026, titled "Administration of Export Controls on Encryption Products," in which he ordered that jurisdiction over export controls on nonmilitary encryption products and related technology be transferred from the Department of State to the Department of Commerce. The President's Executive Order specifies that encryption products that would be designated as defense articles under the USML and regulated under the AECA are now to be placed on the Commerce Control List ("CCL") under the EAR. The White House Press Release accompanying the Executive Order clarified that encryption products designed for military applications would remain on the USML and continue to be regulated under the ITAR. ... The Executive Order also provides a caveat that is repeated . . . throughout the new regulations: "the export of encryption software, like the export of other encryption products described in this section, must be controlled because of such software's functional capacity, rather than because of any possible informational value of such software. . . ." The Press Release states that encryption products must be controlled for foreign policy and national security interests and concludes by noting that if the new regulations do not provide adequate controls on encryption products then such products will be redesignated as defense articles and placed again on the USML. . . .

The EAR were promulgated to implement the EAA, but the EAA is not permanent legislation. Lapses in the EAA have been declared national emergencies and the

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4. Source code is the text of a source program and is generally written in a high-level language that is two or more steps removed from machine language which is a low-level language. High-level languages are closer to natural language than low-level languages which direct the functioning of the computer. Source code must be translated by way of a translating program into machine language before it can be read by a computer. The object code is the output of that translation. It is possible to write a source program in high-level language without knowing about the actual functions of the computer that carry out the program. . . .

President has issued Executive Orders authorizing continuation of the EAR export controls under the authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706. *See e.g.*, Exec. Order No. 12924, 59 Fed.Reg. 43437 (1994). Executive Order 13026 states that the authority of the President to administer these changes in the export control system under the EAR derives in part from the IEEPA and that the new controls on encryption products are "additional steps with respect to the national emergency described and declared" in the previous Executive Orders continuing in effect the EAR. Exec. Order No. 13026, 61 Fed.Reg. 58767 (1996).

On December 30, 1996, the Bureau of Export Administration ("BXA") under the Department of Commerce issued an interim rule amending the EAR "by exercising jurisdiction over, and imposing new combined national security and foreign policy controls on, certain encryption items that were on the [USML]." 61 Fed.Reg. 68572 (1996) (to be codified at 15 C.F.R. Pts. 730-774) ("encryption regulations" or "new regulations"). The EAR is structured around the CCL, 15 C.F.R. Pt. 774, 61 Fed.Reg. 12937 (1996), which categorizes items whose export is regulated according to various criteria, including the reason for their control. The new regulations add a category called "Encryption Items" or "EI" as a reason for control. 61 Fed.Reg. 68579 (1996) (to be codified at 15 C.F.R. § 738.2(d)(2) (I)(A)). Encryption items are defined as "all encryption commodities, software, and technology that contain encryption features and are subject to the EAR." 61 Fed.Reg. 68585 (to be codified at 15 C.F.R. § 772). This does not include those items still listed on the USML and controlled by the Department of State. With certain exceptions, one must obtain a license from the BXA prior to exporting any item listed on the CCL. See 15 C.F.R. Pts. 740-44. All items on the CCL are given an Export Control Classification Number ("ECCN") which can be used to determine the categories under which an item is controlled and the reasons for its control.

The new regulations add three categories of items to the CCL which are controlled for EI reasons, all of them more generally classified in Category 5, which covers telecommunications and information security. *See* 15 C.F.R. § 738.2(a). Those items are ECCN 5A002, covering encryption commodities; ECCN 5D002, covering encryption software; and ECCN 5E002, covering encryption technology. 61 Fed.Reg. 68586-87 (to be codified at 15 C.F.R. § 774 supp. I). For export licensing purposes, encryption software is treated the same as an encryption commodity. *See* note following ECCN 5D002. A commodity is defined generally as "[a]ny article, material, or supply except technology and software." 61 Fed.Reg. 68585 (to be codified at 15 C.F.R. Pt. 772). Encryption software is regulated differently from other software controlled by the CCL and is defined as "[c]omputer programs that provide capability of encryption functions or confidentiality of information or information systems. Such software includes source code, object code, applications software, or system software." 61 Fed.Reg. 68585 (to be codified at 15 C.F.R. Pt. 772).[7] Definitions of encryption source

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7. Under Part 772 of the new regulations which is dedicated to definitions of terms, the term "commodity" contains the following note:

> Note that the provisions of the EAR applicable to the control of software (*e.g.* publicly available provisions) are not applicable to encryption software. Encryption software is controlled because, like the items controlled under ECCN 5A002, it has a functional capacity to encrypt information on a computer system, and not because of any informational or theoretical value that such software may reflect, contain

code and encryption object code have also been added.[8] Technology has not been amended by the encryption regulations and is defined generally as the technical data or technical assistance necessary for the development or use of a product. 15 C.F.R. Pt. 772. Controlled technology is that technology required for the development or use of items on the CCL. 15 C.F.R. Pt. 774 supp. 2 (General Technology Note). New restrictions on technical assistance have been added, however, to require a license to provide technical assistance (including training) to foreign persons with the intent to aid them in the foreign development of items that if they were domestic would be controlled under ECCNs 5A002 and 5D002.[9] 61 Fed.Reg. 68584 (to be codified at 15 C.F.R. § 744.9(a)); 61 Fed.Reg. 68579 (to be codified at 15 C.F.R. s 736.2(b)(7)(ii)).

The EAR defines export as "an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States. . . ." 15 C.F.R. § 734.2(b)(1). The encryption regulations add a specific definition of export for encryption source code and object code software controlled under ECCN 5D002 which includes

> downloading, or causing the downloading of, such software to locations (including electronic bulletin boards, Internet file transfer protocol, and World Wide Web sites) outside the United States, over wire, cable, radio, electromagnetic, photooptical, photoelectric or other comparable communication facilities accessible to persons outside the United States, including transfers from electronic bulletin boards, Internet file transfer protocol and World Wide Web sites, unless the person making the software available takes precautions adequate to prevent unauthorized transfer of such code outside the United States.

61 Fed.Reg. 68578 (to be codified at 15 C.F.R. § 734.2(b) (9)).

A number of licensing exceptions are available under the EAR. *See* 15 C.F.R. Pt. 740. Under the encryption regulations, after a one-time review by BXA, licensing exceptions will be available for certain commercial encryption items, including mass-market encryption software, key-recovery software and commodities, and non-recovery encryption items up to 56-bit key length DES or equivalent strength software accompanied by a commitment to develop recoverable items. 61 Fed.Reg. 68581 (to be codified at 15 C.F.R. § 742.15). In general, items that are already publicly available or contain "de minimus" domestic content are not subject to the EAR. 15 C.F.R. §§ 734.3(b)(3) & 734.4. However, as directed by the President and implemented by the new regulations, these exceptions do not apply to encryption commodities or software. 61 Fed.Reg. 68577-78 (to be codified at 15 C.F.R. §§ 732.2(b) & (d), 734.3(b)(3), 734.4(b)); Exec. Order No. 13026, 61 Fed.Reg. 58768 (1996) ("I have determined that

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> or represent, or that its export may convey to others abroad.

61 Fed.Reg. 68585 (to be codified at 15 C.F.R. Pt. 772).

8. Encryption source code is defined as "[a] precise set of operating instructions to a computer that, when compiled, allows for the execution of an encryption function on a computer." Encryption object code is defined as "[c]omputer programs containing an encryption source code that has been compiled into a form of code that can be directly executed by a computer to perform an encryption function." 61 Fed.Reg. 68585 (to be codified at 15 C.F.R. Pt. 772).

9. This provision notes "that the mere teaching or discussion of information about cryptography, including, for example, in an academic setting, by itself would not establish the intent described in this section, even where foreign persons are present." 61 Fed.Reg. 68584 (to be codified at 15 C.F.R. § 744.9(a)).

the export of encryption products described in this section could harm national security and foreign policy interests even where comparable products are or appear to be available from sources outside the United States . . . "). This exception for encryption software to the general exclusion of publicly available items appears to pertain to publicly available or published information and software within the United States as well. 61 Fed.Reg. 68578 (to be codified at 15 C.F.R. § 734.7(c)). In addition, the EAR allows for broadly defined exceptions from the regulations for information resulting from fundamental research and educational information. 15 C.F.R. §§ 734.8, 734.9, & supp. 1. Neither of these exceptions applies to encryption software controlled under ECCN 5D002. 61 Fed.Reg. 68579 (to be codified at 15 C.F.R. §§ 734.8, 734.9). They do appear to apply to encryption technology. Finally, phonographic records and most printed matter are not subject to the EAR and encryption software is not exempted from this exclusion. 15 C.F.R. § 734.3(b)(2). Indeed, an intriguing if somewhat baffling note appears in the new regulations: "A printed book or other printed material setting forth encryption source code is not itself subject to the EAR (*see* § 734.3(b)(2)). "However, notwithstanding § 734.3(b)(2), encryption source code in electronic form or media (*e.g.* computer diskette or CD ROM) remains subject to the EAR (*see* § 734.3(b)(3))."[10] 61 Fed.Reg. 68578 (to be codified at 15 C.F.R. § 734.3).

Licenses are required for export of items controlled by ECCNs 5A002, 5D002 and 5E002 for all destinations except Canada. 61 Fed.Reg. 68580 (to be codified at 15 C.F.R. § 742.15(a)). Applications for licenses "will be reviewed on a case-by-case basis by BXA, in conjunction with other agencies, to determine whether the export or reexport is consistent with U.S. national security and foreign policy interests." 61 Fed.Reg. 68581 (to be codified at 15 C.F.R. § 742.15(b)). The EAR provides that license applications will be resolved or referred to the President within 90 days. 15 C.F.R. § 750.4(a). While an applicant who is denied a license is informed of appeal procedures, 15 C.F.R. § 750.6(a)(6), the EAR does not appear to allow for judicial review. 15 C.F.R. § 756.2(c)(2); 50 U.S.C.App. § 2412(e). . . .

DISCUSSION

Plaintiff contends that the EAR, specifically the amendments regulating encryption items, both facially and as applied, constitutes a prior restraint on plaintiff's right to free speech, is unconstitutionally vague and overbroad, is content-based, and violates his freedom of association. Plaintiff also claims that the presidential transfer of jurisdiction to the Commerce Department and the encryption regulations themselves exceed their statutory authority and are *ultra vires*. Plaintiff requests declaratory and nationwide injunctive relief. In addition to opposing plaintiff's claims, defendants seek to dismiss certain defendants as extraneous and ask that the court vacate its decision in *Bernstein II*.

I. STATUTORY AUTHORITY OF THE PRESIDENT AND THE AGENCY TO REGULATE ENCRYPTION ITEMS

In his amended complaint plaintiff alleges that the presidential transfer of jurisdiction and the subsequent agency regulations are *ultra vires* because the President and the Department of Commerce lacked statutory authority under the IEEPA to regulate

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10. The introductory information about the new regulations includes the following with respect to the exception for printed materials: "The administration continues to review whether and to what extent scannable encryption source or object code in printed form should be subject to the EAR and reserves the option to impose export controls on such software for national security and foreign policy reasons." 61 Fed.Reg. 68575.

encryption products. Plaintiff contends that the IEEPA, by its own terms, restricts the regulation of information protected by the First Amendment. Plaintiff also argues that use of the IEEPA requires an international emergency, which is not identified in the President's Executive Order. Plaintiff also maintains that the regulation of encryption products by the President and the Secretary violates the APA [Administrative Procedures Act].

Defendants contend that the court lacks jurisdiction to review presidential determinations under the IEEPA. To the extent a claim may still lie against the Secretary, defendants argue that the IEEPA does not preclude export controls on encryption items. . . .

A. THE IEEPA

The IEEPA authorizes the President "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." 50 U.S.C. § 1701(a). Under this authority the President may "investigate, regulate, or prohibit any transaction in foreign exchange," 50 U.S.C. § 1702(a)(1)(A)(i), and "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any . . . exportation of . . . any property in which any foreign country or a foreign national thereof has any interest. . . ." 50 U.S.C. § 1702(a)(1)(B). However, the IEEPA explicitly excludes any authority

> to regulate or prohibit, directly or indirectly--
> any postal, telegraphic, or other personal communication, which does not involve a transfer of anything of value; . . . or the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.

50 U.S.C. § 1702(b)(1) & (3) (1991 & Supp.1996). The statute goes on to limit the above exemption to those exports which are not otherwise controlled under sections 2404 and 2405 of the EAA. 50 U.S.C. § 1702(b)(3).

The IEEPA was passed in 1977 as a refinement of the Trading With the Enemy Act of 1917 ("TWEA"), which at the time provided a source of presidential emergency authority. S.Rep. No. 95-466, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. In the Senate Report accompanying the passage of the IEEPA, the Committee suggests that what became section 1702(b) was intended to exclude donations and humanitarian contributions from emergency regulation so long as such transfers did not subvert the effective exercise of emergency authority. S.Rep. No. 95-466, at 5. Section 1702(b)(3) of the IEEPA was enacted in 1988 and amended in 1994 to broaden and strengthen the exemption for informational materials. According to the House Conference Report, language adopted in 1988 was intended to ensure "that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution. The language was explicitly intended, by including the words 'directly or indirectly' to have a broad scope." H.R. Con. Rep. No. 103-482, at 239 (1994), *reprinted in* 1994 U.S.C.C.A.N. 302, 483. However, overly-narrow interpretations of section 1702(b)(3) by the Treasury Department prompted the 1994 amendment to "facilitate transactions and activities incident to the flow of information and informational materials without regard to the type of

information, its format, or means of transmission, and electronically transmitted information. . . ." H.R. Con. Rep. No. 103-482, at 239.

B. STATUTORY AUTHORITY OF THE PRESIDENT TO REGULATE ENCRYPTION ITEMS UNDER THE IEEPA

Plaintiff argues that President Clinton exceeded his authority under the IEEPA because the encryption items regulated are properly exempt from regulation under section 1702(b) and because the transfer was not a temporary exercise of emergency authority. Defendants claim that the President's actions are not reviewable.

It is clear that the President's order is not reviewable under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). In *Franklin*, an action seeking APA review of the decennial reapportionment of the House of Representatives, the Supreme Court concluded that "the final action complained of is that of the President, and the President is not an agency within the meaning of the [APA]." *Id.* The Court went on to note that the President's actions were still reviewable for constitutionality. *Id.* at 801.

Less clear is the extent to which a court may review a non-APA claim that the President exceeded his statutory authority where there is no allegation of a constitutional violation. Not long after *Franklin* the Supreme Court decided *Dalton v. Specter*, 511 U.S. 462 (1994), in which it reviewed a claim that the President exceeded his statutory authority under the Defense Base Closure and Realignment Act. The court below had attempted to follow Franklin by reasoning that when the President's actions exceed his statutory authority he also violates the constitutional separation of powers doctrine. *Id.* at 471. The *Dalton* Court rejected this conclusion, holding that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in *Franklin*." *Id.* at 473-74 (footnote omitted). However, the Court did not rule out the possibility of judicial review of statutory claims entirely.

We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President. *Id.* at 474 (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)). The Court went on to conclude that the statute in question did not limit the President's discretion and was therefore unreviewable.

Notably, *Dames & Moore*, the case cited by the Court for the proposition that some non-APA statutory claims may still be subject to judicial review, involved review of various Executive Orders and regulations issued pursuant to the IEEPA which nullified attachments on Iranian assets in the United States and suspended claims against Iran following the hostage crisis. While the Court did not address the reviewability of the claims, it did indicate that when the President acts under authorization from Congress "the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.' " *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)). The Court concluded that the IEEPA did authorize the nullification of attachments but did not directly authorize the suspension of claims. *Id.* at 675. However, despite this conclusion, the Court went on to find that due in part to the tenor and breadth of the IEEPA and congressional acquiescence in the practice of claim settlement by executive agreement, the President did not lack the power to settle claims against Iran.

Although the Supreme Court suggested the possibility of judicial review of non-APA

statutory claims, it did not indicate, beyond the very narrow and specific instance identified in *Dames & Moore*, under what circumstances that review might take place. One appellate court has concluded that *Dalton* does not preclude judicial review of executive action for conformity with an authorizing statute, or any other statute. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C.Cir.1996). Unlike the actions in *Franklin* and *Dalton* where the final action taken was by the President, and much like the present case, *Chamber of Commerce* involved an Executive Order which initiated agency regulations where the regulations carried direct and final consequences for the plaintiff. However, the court in *Chamber of Commerce* speaks boldly about the reviewability of executive action without readily distinguishing between whether such review lies equally for the President as for an executive official.[13] In fact, in a footnote the court concedes that the "*Dalton* Court's hesitancy to review presidential action . . . suggests a reluctance to bring judicial power to bear directly on the President. Of course, here we are concerned with the long established non-statutory review of a claim directed at a subordinate executive official." *Id.* at 1331 n. 4. Indeed, the court goes on to note that in all the cases cited by the Dalton court, "special reasons existed for concluding that judicial review was precluded." *Id.* at 1331 n. 5. Those reasons involved matters of political discretion and national security.

Finally, in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir.1982), the Ninth Circuit, in a case predating *Franklin* and *Dalton*, reviewed an Executive Order by President Ford under the IEEPA's predecessor, the TWEA, continuing the EAA export regulations pending expiration of that Act. The Spawrs were convicted of the unlicensed exportation of laser mirrors after the EAA's expiration "when the sole basis for the regulations was the Executive Order." *Id.* at 1080. Much like plaintiff here, the Spawrs argued on appeal that the government lacked authority to prosecute them because there was no genuine emergency, the regulations were not related to any emergency then in effect, and Congress had intended to let the regulations lapse. *Id.* Reviewing language very similar to that of the IEEPA, the court found that the statute afforded broad and extensive powers. *Id.* Noting that in the face of such broad discretion, courts have been wary of reviewing the political considerations involved in declaring or continuing a national emergency, the *Spawr* court declined to do so as well. *Id.* However, the court then concluded that "[a]lthough we will not address these essentially-political questions, we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress." *Id.* at 1081 (citing *United States v. Yoshida International, Inc.*, 63 C.C.P.A. 15, 526 F.2d 560, 579 (Cust. & Pat.App.1975)). In swift analysis the court went on to find that the regulations were rationally related to the emergency claimed and that Congress did not intend to terminate the regulations. *Id.* In fact, the court noted that each time the EAA had lapsed previously the President had issued an Executive Order declaring a national emergency to continue the export regulations and "Congress not only tolerated this practice, it expressed approval of the President's reliance on the TWEA to maintain the export regulations." *Id.* Such has been the case under the IEEPA as well.[14] *See, e.g.*,

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13. The Ninth Circuit on at least one occasion has declined to endorse the *Chamber of Commerce* decision. *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1419 (9th Cir.1996).

14. In fact, as defendants point out, when the TWEA was amended and the IEEPA enacted (as Title II of the same bill), the House Report on the legislation indicated that while it rejected a suggestion by the committee to make the EAA permanent legislation, the committee expected that in the case of future lapses of the EAA "the authority of Title II of this bill could be used to continue the Export Administration

Exec. Order No. 12444, 48 Fed.Reg. 48215 (1983); Exec. Order No. 12730, 55 Fed.Reg. 40373 (1990), *reprinted in* 50 U.S.C.App. § 1701 at 598 (1991); Exec. Order No. 12924, 59 Fed.Reg. 43437 (1994). Plaintiff notes that in recent years Congress has criticized use of the IEEPA to extend export regulations when the EAA lapses. . . . Be that as it may, it is within Congress' power to change this practice and it has chosen not to.

While the analysis in *Spawr* is useful given that the facts are strikingly similar to the instant action, this court cannot ignore the skepticism with which the Supreme Court recently has approached judicial review of a presidential exercise of statutory authority absent a constitutional claim. As noted above, this case differs from *Franklin* and *Dalton* in that the final action is taken by the agency rather than the President. But that does not significantly change the analysis of whether the actions the President took are reviewable. On this score *Chamber of Commerce* is not illuminating and the Supreme Court's allusion to *Dames & Moore* remains opaque. Indeed, given that the law is still unsettled on this question and that considerations precluding review do not apply to agencies–thereby allowing plaintiff to seek the same relief from agency action on the basis of a claim that the agency acted in excess of statutory authority–the court favors deference to the executive. In light of the recent Supreme Court decisions in this area, this court concludes that it cannot review whether the President exceeded his statutory authority under the IEEPA to transfer jurisdiction of encryption items to the Commerce Department.

C. STATUTORY AUTHORITY OF THE COMMERCE SECRETARY TO REGULATE ENCRYPTION ITEMS UNDER THE IEEPA

Of critical importance in both *Franklin* and *Dalton* was the fact that the President was responsible for the final action under the statutes at issue. "What is crucial is the fact that '[t]he President, not the [Commission], takes the final action that affects' the military installations." *Dalton*, 511 U.S. at 470 (quoting *Franklin*, 505 U.S. at 799). Here we have the situation at issue in *Chamber of Commerce*, where the President's Executive Order initiated the regulatory process and left it to the agency to finalize the rules. "That the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review. . . ." *Chamber of Commerce*, 74 F.3d at 1327; *see also Milena Ship Management Co. Ltd. v. Newcomb*, 804 F.Supp. 846, 850 (E.D.La.1992) (reviewing agency action taken pursuant to an unchallenged executive order under the IEEPA). Accordingly, this court will examine whether the Commerce Department's regulation of encryption items is consistent with the IEEPA.[16]

To the extent that plaintiff argues that the regulations governing encryption are not a temporary exercise of emergency power, the question really belongs to the legitimacy of the Executive Order in the first instance and the court declines to address it. The declaration of a national emergency is an action that rests with the President and is based on his broad discretion under section 1701 of the IEEPA. Moreover, the question of employing the IEEPA–or the TWEA before it–to maintain export regulations during lapses in the EAA was essentially laid to rest by the Ninth Circuit in *Spawr* and by the legislative history of the IEEPA.

Regulations in effect if, and to the extent that, the President declared a national emergency as a result of such lapse according to the procedures of the National Emergencies Act." H.R.Rep. No. 95-459, at 3 (1977).

16. Since the EAA has expired, the "sole basis for the regulations" is the Executive Order, which itself is premised on the IEEPA. *Spawr*, 685 F.2d at 1080.

> [I]t is unmistakable that Congress intended to permit the President to use the TWEA to employ the same regulatory tools during a national emergency as it had employed under the EAA. We, therefore, conclude that the President had the authority during the nine-month lapse in the EAA to maintain the export regulations.

Spawr, 685 F.2d at 1082.

The gravamen of plaintiff's *ultra vires* argument is that the IEEPA does not authorize the regulation of speech, particularly speech that does not involve a foreign interest in property, and that as speech, encryption software fits well within the exemption for personal communications and informational materials in sections 1702(b)(1) & (3).

With respect to whether encryption software fits within the scope of "property in which any foreign country or a national thereof has any interest", the court finds that section 1702(a)(1) is sufficiently broad to allow for many forms of property, both tangible and intangible, and many forms of interest, both direct and indirect. *See* 31 C.F.R. §§ 500.311, 500.312; *see also Spawr*, 685 F.2d at 1081 n. 10 (finding that section 5(b) of the TWEA was broad enough to allow regulation "of any property to any foreign country"). Encryption software or other technology comes within this section.

Plaintiff also alleges that the regulations are beyond the statutory authority of the IEEPA because they affect personal communications and informational materials. Section 1702(b)(1) prohibits direct or indirect regulation of "any postal, telegraphic, telephonic or other personal communication" which does not transfer anything of value. As defendants convincingly argue, to the extent this argument is directed at academic discussion of cryptographic ideas, the regulations attempt to exempt such communications–although whether they do so according to the demands of the First Amendment is a separate question. To the extent this argument is directed at cryptographic software generally, it does not appear to fit within this seemingly narrow and simple provision. Nor can it be assured that software would have no value. Indeed, there are potentially billions of dollars at stake in the export of commercial encryption software. . . . Thus, the regulations do not exceed this statutory provision.

Finally, plaintiff contends that the regulations go beyond the authority provided by section 1702(b)(3) which specifically limits regulation of information or informational materials regardless of format or medium of transmission. Plaintiff argues that the broad scope of this provision precludes regulation of encryption software. In addition, plaintiff contends that by specifically referencing sections 2404 and 2405 of the EAA, and exempting–from the informational materials exemption–items "otherwise controlled for export" under those sections, the court is bound by principles of statutory construction to consider only those items controlled when section 1702(b)(3) was last amended, or April 30, 1994. Plaintiff then concludes that because encryption software fits within the scope of this provision and was not otherwise controlled under the EAA as of April of 1994, it cannot be regulated under the IEEPA.

Defendants contend that section 1702(b)(3) does not expressly provide for software, and that to include software in those items exempted from regulation for their informational value would lead to absurd results. Moreover, defendants counter plaintiff's statutory construction argument and claim that the items exempted from this provision by virtue of being controlled under the EAA are not only those that were on the Commerce Control List as of April of 1994 but any others that have since been added–including the encryption technology at issue here. Defendants also argue that to read section 1702(b)(3) as exempting encryption software on the basis that it is protected under the First Amendment would be to impose a novel theory of free speech not

contemplated by Congress.

As noted above, the IEEPA explicitly excludes any authority

> to regulate or prohibit, directly or indirectly -- . . . the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States. . . .

50 U.S.C. § 1702(b)(3) (Supp.1996).

First, the court must consider whether software–in this case, encryption software–comes within the exception to the exception; if so, then the instant regulations do not exceed their statutory authority. In other words, anything controlled by sections 2404 and 2405 of the EAA may be regulated regardless of its informational content. Under the referenced sections of the EAA the President may "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States" for either national security or foreign policy reasons. 50 U.S.C.App. § 2405(a)(1) (foreign policy controls); 50 U.S.C.App. § 2404(a)(1) (national security controls). It is not disputed that Executive Order 13026, by transferring encryption products to the Commerce Control List ("CCL"), subjected them to regulation under sections 2404 and 2405 of the EAA.

The question becomes whether reference to sections 2404 and 2405 of the EAA should be understood to include all items currently on the CCL–in which case the present regulations effectively remove encryption products from the exemption–or whether rules of statutory construction require the court to construe the reference to those sections as including only those items listed at the time section 1702(b) was last amended, or April 30, 1994. A secondary issue complicates this already complicated matter further: since sections 2404 and 2405 do not themselves designate specific items on the CCL, which is governed by regulation, does the construction of the IEEPA with respect to those sections also apply to their implementing regulations?

Plaintiff relies on a canon of statutory construction discussed in *Hassett v. Welch*, 303 U.S. 303, 314 (1938) and *Pearce v. Director, Office of Workers' Comp. Programs*, 603 F.2d 763, 767 (9th Cir.1979) which holds that without clear congressional indication to the contrary, where one statute adopts provisions of another by specific reference to the provisions adopted (known as a statute of specific reference) the effect is that such adoption takes the provision as it existed at the time of adoption and does not include subsequent amendments; conversely, where a statute adopts the general law in a given area (a statute of general reference), it is construed to adopt that law's subsequent amendments. . . . Plaintiff claims that the IEEPA is a statute of specific reference and cannot be read as adopting subsequent changes to sections 2404 and 2405 of the EAA. Plaintiff further supports this position by pointing to the fact that at least one agency has interpreted the "informational materials" provision to exclude items that were, as of April 30, 1994, controlled for export under sections 5 and 6 of the EAA. 31 C.F.R. § 560.315(b) (Office of Foreign Assets Control regulation of Iranian transactions).

Defendants contend that the IEEPA is more like the statute in *United States v. Smith*, 683 F.2d 1236 (9th Cir.1982), in which the Ninth Circuit read the Youth Corrections Act

("YCA") as not incorporating specific provisions of the general probation statute. The court concluded that while there were persuasive arguments on both sides, the YCA did not really appear to adopt or incorporate the referenced provisions of the probation statute. "Rather, it merely provides that the YCA is not to 'be construed in any wise to amend, repeal, or affect the provisions of' the probation statute." *Id.* at 1239. According to the court this was not properly a statute of specific reference in which certain provisions of another statute are incorporated into it, but one that "actually emphasizes that these are distinct statutes". *Id.* Under defendants' reasoning, section 1702(b)(3) of the IEEPA does not incorporate sections 2404 and 2405 of the EAA but rather distinguishes them and as such those sections are to be read with their full and current force.

This court believes that defendants have the better argument. The rules of statutory interpretation are not hard and fast. "A provision which, in terms, however, reads as a specific reference may, in context, be construed as a general reference." *United States v. Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989). Such is the case here. Read in context, section 1702(b)(3) excludes rather than incorporates those items covered under the EAA. Moreover, the sections referenced are themselves fairly general and are clearly intended to be fleshed out by regulations suited to meet the changing needs of national security and foreign policy. Given the goals of the IEEPA and the powers it gives the President, it would seem odd indeed for Congress to exclude from the exemption those items the President deems sensitive to the national security under the EAA, but to freeze that list of items as of a certain date. As the court noted in *Smith*, this "is the more appropriate interpretation in view of the policies that the [statute] is designed to advance. It is proper, and indeed essential, to interpret the words of a statute in the light of the purposes Congress was seeking to serve." 683 F.2d at 1240 (citations omitted). Therefore, because encryption products are currently regulated under sections 2404 and 2405 of the EAA they do not fall within the exemption for informational materials.[17]

Accordingly, this court finds that the regulation of encryption items is not prohibited by section 1702(b)(3) and therefore does not exceed the statutory authority provided by the IEEPA. It is worth noting at this juncture that this court's rather narrow determination that source code is speech protected by the First Amendment does not serve to remove encryption technology from all government regulation. Both parties exaggerate the debate needlessly. Plaintiff does so by aggrandizing the First Amendment, by assuming that once one is dealing with speech that it is immaterial what the consequences of that speech may be. Defendants do so by minimizing speech, by constantly referring to "mere speech" or "mere ideas" in their briefs and assuming that the functionality of speech can somehow be divorced from the speech itself. This controversy is before this court precisely because there is no clear line between communication and its consequences. While defendants may have the authority to regulate encryption source code, they must nonetheless do so within the bounds of the First Amendment.

NOTES AND QUESTIONS

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17. Even assuming the exemption excludes from regulation only those items designated before April 30, 1994, many software products were regulated at that time. That being so, there is no support for the contention that software generally would fall within the exemption.

1. Are you satisfied with the logic of this case? If Congress enacted the EAA with a termination provision–known as a "sunset" provision–the legislative intent would appear to be that export control power is temporary and subject to congressional review and renewal. Why then would the court allow the President to evade congressional power over foreign commerce by invoking the IEEPA?

2. Does there seem to be an unusual degree of overlap among the federal statutes concerning international trade regulation? What is the purpose of the Arms Export Control Act supposed to be? Of the EAA? How could something like encryption software be subject to both acts?

3. To complicate matters further, it turns out that there are a number of alternative bases for regulating exports under the EAA itself. Principal among these are: (*i*) "national security" controls, 50 U.S.C. App. § 2404, providing authority to prohibit or curtail exports of goods or technology subject to U.S. jurisdiction or by any person subject to U.S. jurisdiction to prevent any country that poses a threat to the security of the United States from obtaining critical goods or technology; (*ii*) "foreign policy" controls, *id*. § 2405, providing authority to prohibit or curtail exports of goods, technology, "or other information" to the extent necessary to further significantly U.S. foreign policy or to fulfill declared international obligations of the United States (*e.g.*, to comply with a U.N.-mandated embargo); and, (*iii*) "short supply" controls, *id*. § 2406, providing authority to respond to a shortage of any goods within the U.S. market.

4. Whichever statute applies in the case of software, what forms of limitation on technical data export are likely to be wise? What forms are practicable? And what does it mean to say that we are "exporting" technology? Would the answers to these questions differ if we were considering computer software, technical conferences, employment or education of foreign nationals, transnational consulting, information about the genome of a microorganism?

5. Assume that you represent the *Wijǿtiu Copaty Nusqaami* [Nusquami Widget Company] (WCN), incorporated and operating in Nusquam, a newly industrialized country. WCN wants to buy a U.S. silicon chip manufacturing machine, in connection with its long-range plan to automate the design and production of industrial-quality widgets. It has been told by one U.S. supplier that the EAA bans export of the machine, which is currently manufactured only by two U.S. companies. What would you do if you believed that the ban had been imposed only to protect the U.S. widget industry, rather than to protect national security?

6. Transborder data flows are subject to a number of other legal regimes and restraints besides export controls. Though they are beyond the scope of this text, consider a few examples: foreign requests under the Freedom of Information Act, 5 U.S.C. § 552; differing privacy rules for data files with personal aspects,[1] dependence on a distant computer for emergency or security matters, economic nationalism to obtain employment from building the computer data base, etc. *See generally* William L. Fishman,

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1. On differing national law privacy rules applicable to transborder data flows, see Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law: a Study of United States Data Protection (1996); Peter P. Swire & Robert E. Litan, None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive (1998); Gregory Shaffer, Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards, 25 Yale J. Int'l L. 1 (2000); Patricia Mell, A Hitchhiker's Guide to Trans-Border Data Exchanges Between EU Member States and the United States under the European Union Directive on the Protection of Personal Information, 9 Pace Int'l L. Rev. 147 (1997).

Introduction to Transborder Data Flows, 16 STAN. J. INT'L L. 1 (1980).

7. What about nonresearch export restriction on, for example, hazardous products? Drugs that have not yet been approved? Materials in short supply in the United States?

8. Could actions by players other than the federal government that interrupt or prevent exports have a legitimate role in international trade? When should a labor union be entitled to boycott shipping? Assume that the union representing dockworkers wants to halt loading of shipments destined for Nusquam, which makes it a criminal offense for Nusquami workers to unionize. *Cf. Jacksonville Bulk Terminals v. Int'l Longshoremen's Assn.*, 457 U.S. (1982).

9. When should an individual state of the United States be entitled to adopt its own policy about doing business with a foreign state ruled by what it views as a reprehensible foreign regime? Assume West Dakota considers Nusquam to be violating human rights because Nusquami law refuses to recognize a right of criminal defendants to be represented by counsel. Can West Dakota refuse to purchase goods exported from Nusquam? Can it refuse to deal with any U.S. company that deals with Nusquam? Could it prohibit the sale of Nusquami products within West Dakota? In this regard, recall our discussion of the *Crosby* case in Chapter III, *supra* at ▬.

10. For other cases exploring export restrictions, *see National Resources Defense Council v. Nuclear Regulatory Comm.*, 647 F.2d 1345 (D.C.Cir. 1981) (involving export of nuclear reactor); *United States v. Salem Carpet Mills*, 632 F.2d 1259 (5th Cir. 1980) (involving export of flammable fabric); *Nuclear Pacific v. Department of Commerce*, (No. C84-49R, W.D.Wash., June 8, 1984), *noted in* 79 AM. J. INT'L L. 460 (1985) (upholding judicial authority to review EAA regulation extended under IEEPA); *Daedalus Enterprises v. Baldridge*, 563 F.Supp. 1345 (D.D.C. 1983) (reviewing government delay of export license application for 29 months).

3. *Foreign Policy and Economic Warfare*[1]

Economic sanctions are sometimes invoked by a sanctioning state (such as the United States) or an international organization (such as the United Nations Security Council) with the objective of attacking or isolating a target state or group by economic means. However, are economic sanctions a necessary or effective way of achieving such objectives? In preventing the movement of financial credits and investment, for example, generally applicable banking law principles, supplemented by private commercial law, may be sufficient to sanction a target state. Panama and the Noriega regime were the targets of rather limited U.S. sanctions in 1985, to little effect.[2] In contrast, litigation brought by officials of the exiled legitimate Panamanian Government immobilized significant assets of the Noriega regime.[3] Which approach was more cost-effective?

Whatever its costs, the IEEPA has been applied more frequently since its enactment in 1979–and with greater variation of circumstances–than the Trading With the Enemy Act of 1917 had been in the preceding 62 years. In November 1979, the Iranian hostage

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1. This section draws on Michael P. Malloy, U.S. Economic Sanctions: Theory and Practice (Kluwer Law International: 2001). Reprinted with permission.

2. *See, e.g.*, Michael P. Malloy, Economic Sanctions and U.S. Trade 414-433, 438-442 (1990 & Cum. Supp.) (discussing U.S. economic sanctions against Panama).

3. Republic of Panama v. Republic Nat. Bank of N.Y., 681 F.Supp. 1066 (S.D.N.Y. 1988).

crisis triggered the first use of the IEEPA authority, prohibiting trade, financial transactions, investment and travel with respect to Iran. In contrast to these very extensive sanctions, in 1985 the IEEPA was invoked to impose a peculiarly limited set of trade sanctions against Nicaragua and the ruling Sandinista regime. Also in 1985, the President invoked the IEEPA as the authority for a range of sanctions against the government of South Africa, largely in an effort to forestall congressional action. This effort was ultimately unsuccessful; in 1986, Congress enacted the Comprehensive Anti-Apartheid Act of 1986 (CAAA) over the President's veto.[4] In January 1986, the IEEPA was invoked as the basis for extensive sanctions against Libya.[5] The Libyan sanctions were later expanded as a result of U.N. Security Council resolutions,[6] so that their statutory authority became based in part on the United Nations Participation Act (UNPA).[7] In 1988, the IEEPA was invoked as statutory authority for the relatively limited financial sanctions against Panama and the regime led by the military dictator Noriega.[8] In other major sanctions programs that followed, the IEEPA authority was accompanied or followed by invocation of the UNPA as well. This was the case, for example, in the Iraqi sanctions,[9] the Haitian sanctions,[10] the Yugoslav sanctions[11] and the UNITA/Angola arms embargo,[12] and the 2001 antiterrorism sanctions.[13]

There have been two recent exceptions to this trend. The IEEPA has been invoked as the sole substantive authority for the January 1995 blocking of assets of terrorists who threaten the Middle-East peace process,[14] and the March 1995 ban on contracts for the development of Iranian petroleum resources.[15]

4. Economic Sanctions in Practice: A Hypothetical Case

To illustrate the legal problems that typically emerge in a sanctions episode, the following material provides a hypothetical problem, consisting of an executive order imposing sanctions against a target state, implementing regulations, and questions illustrating the legal fallout that begins to accumulate as business enterprises begin to

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4. *See* Pub. L. No. 99-440, 100 Stat. 1086 (1986); Pub. L. No. 99-631, 100 Stat. 3515 (1986); Ex. Order No. 12,571, 51 Fed. Reg. 39,505 (1986) (amending implementing regulations in light of CAAA).

5. Ex. Order No. 12,543, 51 Fed. Reg. 875 (1986); Ex. Order No. 12,544, 51 Fed. Reg. 1235 (1986). For the implementing Treasury regulations, see 51 Fed. Reg. 1354 (1986) (codified at 31 C.F.R. pt. 550). *See generally Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (upholding Libyan embargo over Fifth Amendment challenge with respect to invalidated employment contracts).

6. Sec. Council Res. No. 731, Jan. 21, 1992, and No. 748, Mar. 31, 1992).

7. *See* Ex. Order No. 12,801, 57 Fed. Reg. at 14,319 (invoking UNPA).

8. Ex. Order No. 12,635, 53 Fed. Reg. 12,134 (1988). For the implementing Treasury regulations, see 53 Fed. Reg. 20,566, 23,620 (1988) (codified at 31 C.F.R. pt. 565), as amended. These sanctions were terminated in April 1990. Ex. Order No. 12,710, 55 Fed. Reg. 13,099 (1990) (revoking Ex. Order No. 12,635).

9. *See* Ex. Order No. 12,722, 55 Fed. Reg. 31,803 (1990) (invoking IEEPA); Ex. Order No. 12,724, 55 Fed. Reg. 33,089 (1990) (invoking UNPA and IEEPA).

10. *See* Ex. Order No. 12,775, 56 Fed. Reg. 50,641 (1991) (invoking IEEPA); Ex. Order No. 12,853, 58 Fed. Reg. 35,843 (1993); Ex. Order No. 12,872, 58 Fed. Reg. 54,029 (1993) (invoking UNPA).

11. *See* Ex. Order No. 12,808, 57 Fed. Reg. 23,299 (1992) (IEEPA invoked); Ex. Order No. 12,810, 57 Fed. Reg. 24,347 (1992) (UNPA and IEEPA invoked).

12. *See* Ex. Order No. 12,865, 58 Fed. Reg. 51,005 (1993) (invoking UNPA and IEEPA).

13. *See* Ex. Order No. 13,224, 66 Fed. Reg. 49,079 (2001) (invoking IEEPA and IEEPA), as amended, Ex. Order No. 13,284, 68 Fed. Reg. 4075 (2003).

14. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995) (invoking IEEPA).

15. *See* Ex. Order No. 12,957, 60 Fed. Reg. 14,615 (1995) (invoking IEEPA).

bump into the sanctions. The hypothetical executive order and implementing regulations are composites of actual orders and regulations issued in recent sanctions programs.

a. A Presidential Order

Assume that the Government of Nusquam, incensed by public criticism of its human rights abuses against Nusquami workers attempting to unionize,[16] has shot down a small plane piloted by two U.S. nationals. In response, the President of the United States has issued the following executive order:

> I hereby determine that the recent events in Nusquam constitute an unusual and extraordinary threat to the national security, foreign policy and economy of the United States. Accordingly, under the authority granted to me by the International Emergency Economic Powers Act . . . I hereby declare a national emergency with respect to such threat, and order as follows:
>
> § 101. Any transaction involving any property in which the Government of Nusquam, any agency, instrumentality or controlled entity thereof has any interest is hereby prohibited if such transaction involves:
>
> a. any person subject to the jurisdiction of the United States; or,
>
> b. any property subject to the jurisdiction of the United States.
>
> § 102. Any transaction which is intended to, or has the effect of, evading the prohibitions imposed by section 101 of this order is hereby prohibited.
>
> § 201. The Secretary of the Treasury is hereby delegated all power granted to me under the International Emergency Economic Powers Act to carry out the purposes and terms of this order. . .

b. Implementing Regulations

Pursuant to the authority under § 201 of the Executive Order, the Secretary of the Treasury delegated his authority to Treasury's Office of Foreign Assets Control. The Office has issued the Nusquami Transaction Regulations (NTRs), which provide in part as follows:

Department of the Treasury
Office of Foreign Assets Control
31 CFR Part 599
Nusquami Transaction Regulations

. . .

Subpart B. Prohibitions

§ 599.201 Transactions involving Nusquam and its nationals.

(a) All of the following transactions are prohibited, unless licensed under this part, if either such transactions are by, or on behalf of, or pursuant to the direction of Nusquam, or such transactions involve property in which Nusquam has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution

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16. Unfortunately, official anti-union actions remain a serious problem worldwide. *See Anti-Union Repression Found Worldwide, But Killings Declined in 2003, ICFTU Reports*, BNA INT'L BUS. & FIN. DAILY, June 14, 2004, available at http://pubs.bna.com/ip/BNA/ibd.nsf/is/A0A8X7C2A3 (discussing report by Confederation of Free Trade Unions on country-by-country survey of violations of labor union rights in 2003). The survey is available at http://www.icftu.org.

or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States; and

(2) All transactions in foreign exchange by any person within the United States.

(b) All of the following transactions are prohibited, unless licensed under this part, if such transactions involve property in which Nusquam has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) is hereby prohibited.

(d) The terms "effective date" and "effective date of this section" mean 12:01 a.m. eastern standard time on [the date of promulgation of the regulations].

§ 599.202 Effect of transfers violating the provisions of this part.

(a) Any transfer after the effective date, which is in violation of any provision of this part or of any regulation, ruling, instruction, license, or other direction or authorization hereunder and involves any property in which Nusquam has or has had an interest since such date, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.

(b) No transfer before the effective date shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property in which Nusquam has an interest, or has had an interest since such date, unless the person with whom such property is held or maintained, prior to such date, had written notice of the transfer or by any written evidence had recognized such transfer.

(c) Unless otherwise provided, an appropriate license or other authorization issued by or pursuant to the direction or authorization of the Director of the Office of Foreign Assets Control before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent that it would be valid or enforceable but for the provisions of the International Emergency Economic Powers Act, this part, and any ruling, order, regulation, direction, or instruction issued hereunder.

(d) Transfers of property which otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of the Director of the Office of Foreign Assets Control each of the following:

(1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property was held or maintained;

(2) The person with whom such property was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization by or pursuant to this part and was not so licensed or authorized, or if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or the withholding of material facts or was otherwise fraudulently obtained; and

(3) Promptly upon discovery that:

(i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license, or other direction or authorization hereunder, or

(ii) Such transfer was not licensed or authorized by the Director of the Office of Foreign Assets Control, or

(iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or the withholding of material facts or was otherwise

fraudulently obtained;
the person with whom such property was held or maintained filed with the Office of Foreign Assets Control a report setting forth in full the circumstances relating to such transfer. The filing of a report in accordance with the provisions of this paragraph shall not be deemed evidence that the terms of paragraphs (d) (1) and (2) of this section have been satisfied.

(e) Unless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which, on or since the effective date, there existed an interest of a designated national. . . .

Subpart C. Definitions

§ 599.301 Blocked account; blocked property.

The terms "blocked account" and "blocked property" shall mean any account or property in which Nusquam has an interest, and with respect to which payments, transfers, exportations, withdrawals, or other dealings may not be made or effected except pursuant to an authorization or license from OFAC authorizing such action.

§ 599.302 Nusquam.

The term "Nusquam" includes:

(a) The state and the Government of Nusquam, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Nusquam;

(b) Any partnership, association, corporation, or other organization substantially owned or controlled by the foregoing;

(c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing; and

(d) Any other person or organization determined by the Director of the Office of Foreign Assets Control to be included within this section. . . .

§ 599.303 Interest.

Except as otherwise provided in this part, the term "interest" when used with respect to property (e.g., "an interest in property") means an interest of any nature whatsoever, direct or indirect.

§ 599.304 Person.

The term "person" means an individual, partnership, association, corporation, or other organization.

§599.305 Person subject to the jurisdiction of the United States.

The term "person subject to the jurisdiction of the United States" means any United States citizen; permanent resident alien; juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; any person in the United States; and any person, wheresoever located, that is owned or controlled by any of the foregoing.

§ 599.306 Property; property interest.

The terms "property" and "property interest" include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

§ 599.307 Transfer.

The term "transfer" means any actual or purported act or transaction, whether or not evidenced

by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and, without limitation upon the foregoing, shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decrease of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security. . . .

Subpart E. Licenses and Statements of Licensing Policy

§ 599.501 Payments and transfers to blocked accounts in U.S. financial institutions.

(a) Any payment of funds or transfer of credit or other assets, including any payment or transfer by any U.S. person outside the United States, to a blocked account in a U.S. banking institution located in the United States in the name of a designated national is hereby authorized, including incidental foreign exchange transactions, provided that such payment or transfer shall not be made from any blocked account if such payment or transfer represents, directly or indirectly, a transfer of any interest of a designated national to any other country or person.

(b) This section does not authorize any transfer from a blocked account within the United States to an account held outside the United States.

§ 599.502 Payment by designated nationals of obligations to persons within the United States authorized.

(a) The transfer of funds after the effective date by, through, or to any U.S. banking institution or other person subject to the jurisdiction of the United States solely for the purpose of payment of obligations of a designated national to persons or accounts within the United States is authorized, provided that the obligation arose prior to the effective date, and the payment requires no debit to a blocked account. Property is not blocked by virtue of being transferred or received pursuant to this section.

(b) A person receiving payment under this section may distribute all or part of that payment to any person, provided that any such payment to a designated national must be to a blocked account in a U.S. banking institution. . . .

Subpart H. Procedures

§ 599.801 Procedures.

(a) General Licenses. General licenses have been issued authorizing under appropriate terms and conditions certain types of transactions which are subject to the prohibitions contained in Subpart B of this part. All such licenses in effect on the date of publication are set forth in subpart E of this part. It is the policy of the Office of Foreign Assets Control not to grant applications for specific licenses authorizing transactions to which the provisions of an outstanding general license are applicable. Persons availing themselves of certain general licenses may be required to file reports and statements in accordance with the instructions specified in those licenses. Failure to file such reports or statements will nullify the authority of the general license.

(b) Specific licenses -- (1) General course of procedure. Transactions subject to the prohibitions contained in subpart B of this part which are not authorized by general license may be effected only under specific licenses.

(2) Applications for specific licenses. Applications for specific licenses to engage in any transactions prohibited by or pursuant to this part may be filed by letter with the Office of Foreign Assets Control. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing such transaction, but the applicant for a specific license is required to make full disclosure of all parties in interest to the transaction so that a decision on

the application may be made with full knowledge of all relevant facts and so that the identity and location of the persons who know about the transaction may be easily ascertained in the event of inquiry.

(3) Information to be supplied. The applicant must supply all information specified by relevant instructions and/or forms, and must fully disclose the names of all the parties who are concerned with or interested in the proposed transaction. If the application is filed by an agent, the agent must disclose the name of his principal(s). Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with the Office of Foreign Assets Control may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed necessary to a proper determination by the Office of Foreign Assets Control. Any applicant or other party in interest desiring to present additional information or discuss or argue the application may do so at any time before or after decision. Arrangements for oral presentation shall be made with the Office of Foreign Assets Control.

(4) Effect of denial. The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) Reports under specific licenses. As a condition for the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.

(6) Issuance of license. Licenses will be issued by the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury or licenses may be issued by the Secretary of the Treasury acting directly or through any specifically designated person, agency, or instrumentality.

§ 599.802 Decisions.

The Office of Foreign Assets Control will advise each applicant of the decision respecting filed applications. The decision of the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury with respect to an application shall constitute final agency action.

c. Some Practical Problems

In light of these developments, consider the following problems:

1. Gadget Fabricators, Inc. ("GFI"), of Palo Alto, CA, signed a contract six months before the executive order was issued to supply 1,000 cartons of gadgets to a Nusquami joint venture owned equally by GFI and the Nusquami Development Corporation ("NDC"). Under the joint venture agreement, NDC personnel manage the joint venture. GFI had already obtained a Commerce export license for the shipment. Is it permitted to ship the goods?

2. Pursuant to the terms of the joint venture agreement, NDC has requested a draw on a letter of credit established by GFI with Quarter National Bank ("QNB"), of Sacramento, CA, in favor of NDC, as a guarantee of certain GFI obligations under the agreement. QNB has wired the payment to Quirki Bank of Nusquam City, and has requested reimbursement from GFI. Is GFI permitted to reimburse QNB?

3. QNB's British subsidiary, QNB-London, has agreed to participate in a syndicate of international banks that is assisting in the privatization of the Nusquami Rhinestone Mining Authority ("RMA"), pursuant to which a controlling interest in RMA will be transferred from the Nusquami Ministry of Public Finance to private European investors. The transaction is denominated in British pounds. Is QNB-London permitted to participate in the syndicate?

4. If QNB-London refuses to participate in the privatization, despite its prior participation agreement with several London banks involved in the transaction, could

the London banks successfully sue it in British court for breach of contract?[1]

5. The RMA would like to apply for a license from the Office of Foreign Assets Control in connection with the privatization transaction. It has asked you to represent it before the Office. Are you permitted to do so?[2]

5. *Boycotts and Anti-Boycotts*

A *boycott* is a systematic refusal to deal with a business enterprise because of an action or position it has taken; it may be a privately organized effort or a government-sponsored or -mandated program. A *secondary boycott* is a boycott directed at a third party for its dealing with the primary target of a boycott. Official U.S. policy of long standing is to oppose the use of secondary boycotts, particularly against U.S. allies and trading partners.[1] *Anti-boycott rules* are sometimes employed in an attempt to neutralize the effects of a primary or secondary boycott. However, the United States itself in recent years has imposed secondary boycotts in a number of situations, and this naturally throws into doubt the credibility of this policy. This section examines a number of examples of secondary boycotts, including U.S.-mandated ones, and considers the implications of such programs as a matter of U.S. and public international law.

a. The Arab Boycott of Israel

The United States is not the only country to impose trade embargos and other sanctions for foreign policy or other political purposes. One of the most important and complex examples of other embargoes is the Arab boycott of Israel, a collective (but sporadically enforced) refusal to purchase from firms that have done business with Israel. During the 1970s, the United States decided to respond to this embargo. One part of that response is the provision of the Export Administration Act that makes it unlawful "to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States."[2] This provision was drafted and enacted under very unusual circumstances: in essence it and its implementing regulations were written in a negotiation between the Business Roundtable and the American Jewish Congress, and then enacted and promulgated without significant change.[3]

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1. *Cf.* Libyan Arab Foreign Bank v. Bankers Trust Company, [1988] 1 Lloyd's L. Rep. 259 (holding U.S. bank liable under British banking law for wrongful dishonor of transfer request by Libyan depositor).

2. *Cf.* American Airways Charters, Inc. v. Regan, 746 F. Supp. 865 (D.C. Cir. 1984) (rejecting Treasury attempt to limit Cuba-dominated company's attempt to retain U.S. counsel of its choice). Since the American Airways court based its decision on an interpretation of the Trading With the Enemy Act, Treasury has continued to assert in principle its power to regulate retention of U.S. counsel by targets of sanctions imposed under other statutes. *See generally* Michael P. Malloy, Economic Sanctions and Retention of Counsel, 9 Admin. L.J. Am. U. 515 (1995) (discussing issue).

1. *See, e.g.*, 50 U.S.C. App. § 2402(5)(A)-(B) (Export Administration Act; congressional declaration of policy condemning boycotts).

2. 50 U.S.C. App. § 2407(a)(1).

3. For discussion of the anti-boycott provision, see Saltour, Regulation of Foreign Boycotts, 33 Bus. Law. 559 (1978); Symposium: The Arab Boycott and the International Response, 8 Ga. J. Int'l & Comp. L. 529 (1978).

b. The Status of Traditional U.S. Sanctions Programs[4]

It is not unusual for U.S. sanctions, imposed against a particular target country, to affect the interests of third parties who are not citizens or subject of the target. For example, under the Foreign Assets Control Regulations (FACRs)[5] persons subject to U.S. jurisdiction are prohibited, *inter alia*, from engaging in any financial or trade transactions with North Korea or any "national" thereof. However, in addition to persons covered by the traditional conception of "national" (*e.g.*, citizens and subjects),[6] the FACRs go so far as to include as a "national" of North Korea any person acting or purporting to act for or on behalf of North Korea or any national thereof,[7] and any other person determined by the Secretary of the Treasury to be "or . . . deemed to be" within the definition.[8] These "nationals" may in fact be individuals or companies that are citizens or nationals of third countries, but they will subject to the sanctions imposed by the FACRs on North Korea–essentially because they are or have been dealing with North Korea or its nationals.

These third-country nationals are included under the sanctions to heighten the economic isolation of the primary target. If a foreign firm may be (specially) designated as a national of the target--and hence be directly subject to the blocking prohibitions--simply by acting "for or on behalf of" that country, the firm may hesitate engage in transactions with the target or its nationals, for fear that it will thereafter be determined to be acting for their benefit. Assume, for example, that *X, S.A.*, a third-country corporate entity, enters into an agreement to supply *Y*, a North Korean national, with certain merchandise. The agreement requires that *X* make certain acquisitions of goods -- ultimately, if indirectly, on behalf of *Y* -- in the market. Such activity could render *X* blocked under the regulations as a specially designated national of North Korea.

Practical considerations aside, the question remains whether this particular consequence of the broad definition of "national" represents a questionable secondary boycott of third-country persons dealing with a target country, or simply the defensible result of application of the broadly crafted technical term "national." There is an important distinction to be maintained between the two situations.[9] In a secondary boycott, the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings have no jurisdictional relationship to the sanctioning state. However, in the case of the FACRs, the Cuban Assets Control Regulations (CACRs)[10]

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4. This subsection draws on Michael P. Malloy, U.S. Economic Sanctions: Theory and Practice (Kluwer Law International: 2001). Reprinted with permission.

5. 31 C.F.R. pt. 500 (2000).

6. *See generally* Ian Brownlie, Principles of Public International Law 385-394 (3d ed. 1979) (discussing concept of "national"). *Cf.* Nottebohm Case (Second Phase), [1955] I.C.J. 4 (requiring "effective link" to establish "nationality").

7. 31 C.F.R. § 500.302(a)(3) (including any person "to the extent that" person is so acting); *id*. § 500.306(a)(2) (including any person so acting -- apparently without regard to "extent" -- as "specially designated national").

8. *Id*. § 500.302(a)(4) (providing for Secretary's determination that person is "national"); *id*. § 500.306(a)(1) (providing for Secretary's determination that person is "specially designated national").

9. A similar distinction was suggested during 1965 congressional debate over the anti-boycott policy provision of the Export Control Act, predecessor to the EAA. *See* Michael P. Malloy, Economic Sanctions and U.S. Trade 51-52 (1990) (discussing argument).

10. 31 C.F.R. pt. 515 (2000).

and many other U.S. programs using similar concepts,[11] the "specially designated national" is sanctioned to the extent the person is or has been acting "for or on behalf of the Government or authorities exercising control over any designated foreign country,"[12] and then only to the extent the prohibited transaction also involves property or a person subject to U.S. jurisdiction.[13] In this sense, one could argue, such a person's exposure to sanctions is not secondary, but vicarious.

c. The Gas Pipeline Incident

This justification of the secondary effects of U.S. sanctions does not seem to fit the controversial episode known as the gas pipeline incident. From December 1981 to November 1982, in response to the declaration of martial law in Poland, the United States imposed a variety of limited sanctions against Poland,[14] and a range of sanctions against the Soviet Union. The latter included extraterritorial sanctions against the construction of the Yamal pipeline, by attempting to bar European firms from using previously licensed U.S. technology in the production and sale of equipment for the pipeline project.[15] The sole jurisdictional basis for the extraterritorial effect of these sanctions was the U.S. origin of technology already legitimately in the control of non-U.S. nationals.

The sanctions were, as a practical matter, unenforceable, and this first departure from traditional U.S. unilateral sanctions was generally judged to have been a failure.[16] At the time, the sanctions were viewed as unprecedented in U.S. practice, involving a secondary boycott feature generally offensive to U.S. trade policy. However, an emerging trend has recently advanced far beyond this incident.

d. The Helms-Burton Act[17]

The Cuban Liberty and Democratic Solidarity Act,[18] better known as the Helms-Burton Act, was enacted in March 1996, in response to the actions of Cuba in shooting down two civilian U.S. aircraft off the Cuban coast in February 1996. The act creates very serious concerns for third-country enterprises with direct and indirect business interests in Cuba. It also raises significant questions about its use as a secondary boycott

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11. For example, the Libyan Sanctions Regulations include as part of the target "Government of Libya" "[a]ny person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been . . . acting or purporting to act directly or indirectly on behalf of" the Government or any entity substantially owned or controlled by the Government, and "[a]ny other person or organization determined by the Secretary of the Treasury to be included within" the definition of the "Government of Libya." 31 C.F.R. § 550.304(c)-(d) (2000).

12. 31 C.F.R. § 500.306(a)(2) (FACRs definition of "specially designated national"). *See also id.* § 515.306(a)(2) (corresponding CACRs provision).

13. *See, e.g., id.* §§ 500.201(a)(1), (b)(1)-(2), 515.201(a)(1), (b)(1)-(2).

14. *See* Barry E. Carter, International Economic Sanctions 29-30 (1988) (discussing Poland sanctions).

15. *See* 15 C.F.R. pt. 390 (1982) (establishing Commerce Department controls, effective 30 December 1981).

16. *See* Moyer & Mabry, Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases, 15 L. & Pol. Int'l Bus. 1, 60-92 (1983) (discussing the gas pipeline incident).

17. This subsection draws on Michael P. Malloy, U.S. Economic Sanctions: Theory and Practice (Kluwer Law International: 2001). Reprinted with permission.

18. Pub. L. No. 104-114, Mar. 12, 1996, 109 Stat. 826 (1996) (codified at scattered sections of 22 U.S.C.).

device, by targeting third-country nationals that trade with Cuba, with broad extraterritorial implications.

The principal features of the act are as follows. First, it requires the President to instruct the Secretary of the Treasury and the Attorney General "to enforce fully" the CACRs. 22 U.S.C. § 6033(c). This suggests that the Cuban embargo is no longer a sanctions program operated within the President's discretion. *See id*. § 6064 (conditioning presidential termination of Cuban embargo on fulfillment of statutory requirements). Second, the act prohibits persons subject to U.S. jurisdiction from extending any financing to a foreign or U.S. national "for the purpose of financing transactions involving any property confiscated by the Cuban Government" from a U.S. national. *Id*. § 6034(a).

Third, the act authorizes U.S. nationals whose property was confiscated by the Cuban Government to bring suit against any person "trafficking" in confiscated property. *Id*. § 6082(a). For these purposes, "trafficking" includes any transaction involving confiscated property; engaging in any commercial activity using or benefitting from the property; or, participating in such trafficking by another person. *Id*. § 6023(10)(A)(i)-(iii). For example, assume that Alfie Uphill Company, Ltd., a British company, purchased, or financed the purchase or sale of, the crop of a confiscated Cuban tobacco plantation formerly owned by a U.S. tobacco company or by a Cuban who is now a U.S. national. Uphill might find itself subject to suit in U.S. district court for "trafficking" in confiscated property. Liability under this cause of action could equal the current fair market value of the property, plus reasonable costs and attorneys' fees. *Id*. § 6082(a)(1)(A)(i)-(ii). However, liability could equal treble damages and costs and fees, if Uphill had prior notice of the U.S. national's claim to the confiscated property. *Id*. § 6082(a)(3).

These liability provisions were not effective until September 1996 at the earliest. *Id.* § 6082(a)(1)(A). Acting under authority granted by the act, the President postponed the effectiveness of these provisions until March 1997, that is, well after the 1996 presidential election. The President has continued to extend the waiver for successive six-month periods under the act.

The fourth major provision of the act requires the Secretary of State to exclude from the United States any alien whom the Secretary determines to have confiscated or to have trafficked in confiscated property. *Id*. § 6091(a)(1)-(2). This exclusion provision extends to anyone who is a corporate officer, principal, or controlling shareholder of an enterprise that has been involved in confiscation or trafficking, and anyone who is the spouse, minor child or agent of an excludable person. *Id*. § 6091(a)(3)-(4).

e. The Iran and Libya Sanctions Act[19]

The perception in the U.S. Congress that the Helms-Burton Act was likely to be effective against Cuba almost immediately led to the development of similar devices to be applied against other target states. Even with controversy steadily growing over the Helms-Burton Act, the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified at 50 U.S.C. § 1701 Note) (ILSA), was signed into law by the President on 5 August 1996. It imposes economic sanctions on third-country persons

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19. This subsection draws on Michael P. Malloy, U.S. Economic Sanctions: Theory and Practice (Kluwer Law International: 2001). Reprinted with permission.

engaging in specified transactions with Iran or Libya.

The ILSA sanctions are triggered in one of two ways. First, a foreign company will trigger the sanctions when it provides over $40 million in new investment for the development of Iran's or Libya's petroleum industry. Alternatively, a foreign company will trigger the sanctions if it violates U.N. Security Council Resolutions against trade with Libya in specified goods and services.[20] Once a foreign company has triggered the sanctions, the President is then required to impose two out of seven possible sanctions.

The ILSA begins with a series of congressional findings and statements of policy that reflect current congressional attitudes. For the most part, the act focuses on Iran, with additional references to Libya tacked on to the preexisting structure of the act. As to Iran, the ILSA declares that U.S. national security and foreign policy interests are endangered by the Iranian government's attempts to acquire weapons of mass destruction and to support terrorism. ILSA, § 2(1). The interests of other countries sharing U.S. strategic and foreign policy objectives are also potentially endangered. Beyond existing bilateral and multilateral initiatives, additional efforts are necessary to curtail Iran's financial capabilities for maintaining nuclear, chemical, biological and missile weapon programs. *Id*. § 2(2). In addition, the Iranian Government promotes terrorism through the use of diplomatic facilities and quasi-governmental facilities. *Id*. § 2(3). Iran also takes part in the proliferation of nuclear, chemical, biological and missile weapon programs.

The ILSA then repeats most of the same congressional findings with respect to Libya, with slight variations. *Id*. § 2(4). Libya is also a threat to international peace and security by its failure to comply with U.N. Security Council Resolutions 731, 748, 883.[21] In addition, Congress found that Libya supports international terrorism and is involved in efforts to acquire weapons of mass destruction. As with its Iran findings, the ILSA asserts that the national security and foreign policy interests of other countries are also endangered.

Based on these findings, the Congress made the following declarations of policy with respect to the two target countries. It is U.S. policy to deny Iran the capability of supporting terrorism and the development of weapons capable of mass destruction. *Id*. § 3(a). In denying Iran the capability of extracting, refining, processing, storing and transporting by pipeline Iran's petroleum resources, the United States expected effectively to eliminate an Iranian threat to U.S. interests.

As to Libya, it is U.S. policy to seek Libya's compliance with U.N. Security Council Resolutions 731, 748 and 883.[22] In addition, the ILSA seeks to deny Libya the capability to support terrorism and develop an industry of mass destruction weapons. ILSA, § 3(b).

The unilateral sanctions required by ILSA are directly imposed on third-country nationals, not on Iran or Libya or nationals thereof. ILSA, § 5. As to Iran, for example, ILSA generally requires, on a prospective basis, that the president impose two or more ILSA-listed sanctions under the following circumstances:

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20. ILSA § 5. U.N. Security Council Resolutions 731, 748 and 883 are concerned with efforts to force Libya to extradite the accused perpetrators of the bombing of a Pan Am flight over Lockerbie, Scotland. White House Fact Sheet on Iran, Libya Sanctions Act of 1996, U.S. Newswire, Aug. 5, 1996, available in LEXIS, News Library, Wires File. Libya has since extradited the two suspects for trial before a Scots tribunal sitting at the Hague.

21. *See supra* note 20.

22. *Id*. § 3(b). Libya has since complied. *See supra* note 20.

> if the President determines that a person has, with actual knowledge, on or after the date of enactment of [ILSA], made an investment of $40,000,000 or more (or any combination of investments of at least $10,000,000 each, which in the aggregate equals or exceeds $40,000,000 in any 12-month period), that directly and significantly contributed to the enhancement of Iran's ability to develop petroleum resources of Iran.[23]

However, after the president submits a required one-year report, the monetary triggers drop to $20,000,000 (instead of $40,000,000) and $5,000,000 (instead of $10,000,000) for nationals of any country that has not joined the United States in imposing sanctions against Iran. ILSA, § 4(d)(1).

The Libya sanctions regarding investment are virtually identical to the Iran sanctions. *Id.* § 5(b)(2) The major difference between the two is the addition of a broader trade prohibition with respect to Libya, based upon prior Security Council resolutions. Thus, two or more sanctions would also be required to be imposed if the president determined that a person, with actual knowledge, after the date of the enactment of ILSA "exported, transferred, or otherwise provided goods, services, technology or other items" prohibited under paragraph 4(b) or 5 of U.N. Security Council Resolution 748, or under paragraph 5 or 6 of U.N. Security Council Resolution 883. *Id.* § 5(b)(1). The test is whether such items "significantly and materially" contributed either to Libya's military or paramilitary capabilities; to its ability to develop its petroleum resources; or, to its ability to maintain its aviation capabilities. ILSA, § 5(b)(1)(A)-(C).

The Iran and Libya sanctions reach not only persons determined by the president to have engaged in the prohibited activities detailed above, but also to any successor entity, and also any parent organization, subsidiary, or affiliate that engaged in prohibited activities with actual knowledge. *Id.* § 5(c)(2)(A)-(C).

ILSA gives the President the option of choosing any combination of sanctions, but at least two out of seven specified types of sanctions. *Id.* § 6. First, the President may deny Export-Import Bank assistance with respect to any exports to a sanctioned person. Second, he may order the denial of export licenses for exports to a sanctioned person. Third, he may prohibit loans or credits to any sanctioned person from any U.S. financial institutions of over $10 million in any twelve-month period. (This sanction does not apply to loans or credits for projects intended to relieve human suffering. *Id.* § 6(3).)

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23. ILSA, § 5(a). For these purposes, "investment" is defined to mean:

> any of the following activities if such activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Iran or a nongovernmental entity in Iran, or with the Government of Libya or a nongovernmental entity in Libya, on or after the date of the enactment of [ILSA]:
>
> (A) The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya (as the case may be), or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract.
>
> (B) The purchase of a share of ownership, including an equity interest, in that development.
>
> (C) The entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation. The term "investment" does not include the entry into, performance, or financing of a contract to sell or purchase goods, services, or technology.

Id. § 14(9).

Sanctions four and five are available only against sanctioned persons that are financial institutions.[24] The fourth sanction is a prohibition on the designation or continuation of a financial institution as a primary dealer in U.S. Government debt instruments (a profitable, relatively risk-free market for financial institutions). The fifth sanction is a prohibition on serving as a U.S. fiscal agent or as a repository for U.S. Government funds.

Sixth, the President may deny a sanctioned person U.S. Government procurement opportunities. This is the only sanction that is explicitly required to be administered consistent with international trade obligations. *See id.* § 5(f)(2) (excepting from mandatory procurement prohibition "eligible products" under Trade Agreements Act of 1979).

Seventh, the President may ban all or some imports of a sanctioned person. This sanction is required to be implemented consistent with the IEEPA. As originally proposed, ILSA would have affected exports but not imports; the inclusion of imports was perceived as an effective means of forcing U.S. trading partners to choose between U.S. and sanctioned markets. H.R. Rep. No. 104-523, 104th Cong., 2d Sess., pt. 1, at 17 (1996). As enacted, the import and export sanctions provisions were kept separate, so as to provide more sanctioning options.

ILSA contains a procedural provision for advisory opinions, a feature not found in any other U.S. sanctions authority. If a person relies in "good faith" on an advisory opinion issued by the Secretary of State finding that a particular activity will not violate the act, that person cannot be sanctioned for engaging in that activity. ILSA, § 7. This provision was included to allow a person the opportunity to investigate the applicability of sanctions for a specific activity prior to engaging in such activity. H.R. Rep. No. 104-523, *supra* at 18.

If the President determines and reports to Congress that Iran has ceased the unfriendly activities detailed in ILSA and has been removed from the EAA list of countries that support terrorism, the force and effect of the ILSA sanctions is removed. ILSA, § 8(a). Likewise, if the President determines and reports to Congress that Libya has complied with the U.N. Resolutions 731, 748 and 883, the ILSA sanctions with respect to Libya no longer have force or effect. *Id.* § 8(b).[25]

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24. For these purposes, the term "financial institution" is defined to include:

(A) a depository institution (as defined in section 3(c)(1) of the Federal Deposit Insurance Act[, 12 U.S.C. § 1813(c)(1) (defining "depository institution" as including banks and savings associations)]), including a branch or agency of a foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978);

(B) a credit union;

(C) a securities firm, including a broker or dealer;

(D) an insurance company, including an agency or underwriter; and

(E) any other company that provides financial services.

Id. § 14(5).

25. Libya has since complied. *See supra* note 20. However, the President has not made the determination required by ILSA.

NOTES AND QUESTIONS

1. If you had been a U.S. senator or representative in 1978, what would have influenced your vote for or against the legislative response to the Arab boycott? Does it seem fair to impose the burden on a U.S. multinational firm to resist the efforts of an Arab state that is a potential customer to have the firm cooperate in a secondary boycott of Israel?

2. Is the U.S. anti-boycott provision likely to be an effective weapon against the Arab boycott? The detailed Commerce regulations turn out to include more form than substance–*e.g.*, it is a violation for a firm explicitly to identify to an Arab nation which employees proposed for a project in that nation are Jewish, but it is all right for the firm to pass out visa applications (for return to the Arab nation) that ask the same question. *See* 15 C.F.R. § 760.2(c), Examples (iv), (v).

3. Is there a private right of action under the anti-boycott law? *Israel Aircraft Industries Ltd. v. Sanwa Business Credit Corp.*, 16 F.3d 198 (7th Cir. 1994), holds that there is not; *Abrams v. Baylor College of Medicine*, 581 F.Supp. 1570 (S.D.Tex. 1984), *affirmed in part & reversed in part*, 805 F.2d 528 (11th Cir.), suggests that there is. Should there be?

4. Could the Arab boycott be dealt with under the antitrust laws? *See United States v. Bechtel Corp.*, 1979 WL 1581 (N.D.Cal. 1979), *affirmed*, 648 F.2d 660 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083. Note also that there are anti-boycott tax law provisions, the basic principle of which is that tax advantages should not accrue to a firm from its compliance with the boycott. 26 U.S.C. §§ 908, 999. *See* Department of the Treasury, Notice, *List of Countries Requiring Cooperation With an International Boycott*, 69 Fed. Reg. 42,085 (2004) (complying with requirement of § 999(a)(3); publishing U.S. Treasury current list of countries that may require participation in, or cooperation with, any international boycott). The current list consists of the following countries: Bahrain, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, and the Republic of Yemen.

5. Was the Commerce Department attempt to limit the use of U.S.-origin goods and technology in the building of the Yamal pipeline a secondary boycott? What about the Helms-Burton Act? The ILSA? To the extent that any of these are secondary boycotts, can the United States reconcile this with its general opposition to the use of boycotts?

6. The Helms-Burton Act immediately triggered vigorous criticism from U.S. trading partners. *See* Paul Lewis, *Ire and Votes: U.S. Vents Its Rage at Cuba in Trade Law*, N.Y. Times, March 15, 1996, at D1, col. 6 (noting protests from U.S. trading partners). This criticism led to a legal challenge by the European Union before the WTO. *See The European Request for Arbitration over the Helms-Burton Law Reaches WTO; Negative American Reaction*, Agence Europe, Oct. 8, 1996, Reuter Textline (discussing WTO challenge). The proceedings were eventually suspended by agreement of the parties. What would have been the basis for the EU's complaint? What would have been the United States legal response to this complaint?

7. Throughout the congressional debate over imposing the ILSA sanctions, the possible effects on U.S. businesses was of prime importance. Congress recognized that protecting national security sometimes involved costs for the United States. *See* H.R. Rep. No. 104-523, 104th Cong., 2d Sess., pt. 1, at 22 (1996). However, the concern here was that the cost *to the United States* not be greater than the cost to Iran and Libya. Retaliation against U.S. exporters and investors by other nations was the prime focus of the debate over possible costs to the United States. Washington's extraterri-torial

imposition of its laws on third parties has not been readily welcomed by the rest of the world. *See* Youssef M. Ibrahim, *Planned U.S. Sanctions Anger Europeans,* N.Y. Times, July 25, 1996, at A1. The EU views the sanctions as an attack on the sovereignty of its members. *See* Jerry Gray, *Foreigners Investing in Libya or in Iran Face U.S. Sanctions*, N.Y. Times, July 25, 1996, at A14. Would it have been a stronger or weaker case if the EU had challenged the ILSA before the WTO, instead of the Helms-Burton Act?

8. Reconsider the congressional findings in the ILSA, discussed *supra* at ▬. Does it seem curious that Congress is purporting to protect the security and foreign policy interests of other states? Does this reflect some unstated acknowledgement by Congress that the most effective method of achieving U.S. objectives regarding states like Iran entailed a multilateral approach? *See, e.g.*, H.R. Rep. No. 104-523, *supra* at 205 (making such an acknowledgement). However, the congressional approach to *multilateral* sanctions is essentially sanctions *on U.S. terms*. The ILSA separates out for favorable treatment nationals of those countries that agree to undertake "substantial measures, including economic sanctions, that will inhibit Iran's efforts." ILSA, § 4(c)(1). The ILSA "urged" the president to undertake diplomatic efforts to establish a multilateral sanction regime against Iran. *Id.* § 4(a). It also requires the President to submit a report to Congress, one year after enactment of ILSA and periodically thereafter, regarding the status of these diplomatic efforts and details of the efforts of other countries to stop Iran's capabilities. *Id.* § 4(b). For nationals of states that do not undertake such measures, unilateral ILSA sanctions will be triggered at even lower levels of investment in Iran. *Id.* § 4(d)(1).

9. The ILSA provisions further restrict presidential discretion in the sanctions field. They are intended to ensure that the sanctions will terminate only when U.S. objectives are met to congressional satisfaction. H.R. Rep. No. 104-523, *supra* at 18. This is a feature that ILSA shares with other recent congressionally-initiated sanctions programs, such as the Helms-Burton Act and the 1986 South African sanctions contained in the CAAA. However, unlike those programs, ILSA by its own terms expires five years after its effective date of 5 August 1996. ILSA, § 13(b). ILSA was not intended to be permanent; Congress considered reevaluation of the situation after five years to be warranted. H.R. Rep. No. 104-523, *supra* at 20. In light of the experience of the Export Administration Act (see discussion, *supra*, at ▬), do you think that the ILSA will survive its automatic expiration provision?

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