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**UNILATERALISM AS A DEFENSE MECHANISM:
AN OVERVIEW OF THE IRAN AND LIBYAN
SANCTIONS ACT OF 1996**

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I. INTRODUCTION

Iran and Libya have not gone unnoticed in the international forum, and their efforts to acquire weapons of mass destruction and support of international terrorism has resulted in many persons referring to them as "rogue regimes." The United States considers these "rogue regimes" a threat to its foreign policy and national security interests. When Iran opened ten petroleum development projects to foreign investment that exceeded fifty million dollars each, the U.S. Congress recognized the need to further strengthen current U.S. policies limiting investment and future revenue in Iran's oil and gas industry.¹ In the same breath, Congress felt the need to increase pressure on Tripoli to force Libyan compliance with certain United Nations [hereinafter U.N.] Security Council Resolutions.² As a result, Congress enacted, and President Clinton signed, the Iran and Libyan Sanctions Act of 1996 [hereinafter the Act].³

The Act ultimately seeks to diminish Iran's and Libya's ability to support international terrorism and the proliferation of weapons of mass destruction by diminishing each nation's ability to

1. H.R. Rep. No. 523, Part 1, 104th Cong., 2d Sess. 8, 10 (1996).

2. *Id.* See also Resolution 748 of the Security Council of the United Nations (Mar. 31, 1992) and Resolution 883 of the Security Council of the United Nations (Nov. 11, 1993).

3. 50 U.S.C. §1701 [hereinafter 1701]; Pub. L. No. 104-172, 110 Stat. 1541; H.R. 3107, 104th Cong., 2d Sess. (1996). The Act is also referred to "warmly" by many as the "D'Amato Legislation," after Senator Alfonse D'Amato (R-NY) who was a primary sponsor of the Senate version of the House bill that is the current Act.

acquire funds through future investment in either country's petroleum resources or Libya's aviation and military resources.⁴ To accomplish this goal, the Act imposes sanctions on persons exporting certain goods or technology, or making investments that would enhance either country's ability to explore for, extract, refine, or transport petroleum resources.⁵ It appears to be Congress' belief that the threat of imposing sanctions for making oil and gas investments in Iran and Libya will further dissuade the two countries from supporting international terrorism and from acquiring weapons of mass destruction. The Act specifically declares this to be the policy of the United States with respect to both countries.⁶

The Act, however, possesses a somewhat broader purpose than merely seeking to curtail new investment in Iran or Libya.⁷ In passing what some term "secondary boycott" legislation, and what some foreign nations have condemned as controversial and extraterritorial, the U.S. Congress and President have sought to push forward using diplomatic efforts with the U.S. allies to establish a multilateral trade sanctions regime against Iran, and to

4. The expectation of Congress is that the sanctions imposed by the Act will create a shortage of hard currency and an inability to repay the national debt. S.R. Rep. No. 187, 104th Cong., 1st Sess. 4 (1996). *See also* H.R. Rep. No. 523, Part 2, 104th Cong., 2d Sess. 14 (1996).

5. H.R. Rep. No. 523, Part 1, 104th Cong., 2d Sess. 8 (1996).

6. *Id.* In signing the Iran and Libyan Sanctions Act of 1996, President Clinton stated that America has felt the "pain of terrorism" from Lockerbie to Khobar Towers and the World Trade Center to Centennial Park. Remarks by the President at Signing Ceremony for Iran-Libya Sanctions Act of 1996, The White House, Office of the Press Secretary (Aug. 5, 1996) [hereinafter Remarks by the President].

7. Because the Act applies prospectively only, it is important to note that any investments made prior to its signing on August 5, 1996 are not within the purview of the Act. Therefore, the Act applies only to new investments in Iran and Libya under the conditions so stipulated.

ensure Libyan compliance with U.N. resolutions.⁸ It is important to recognize this effort when other nations describe the Act as offensive,⁹ and encroaching on the rights of foreign corporations' and financial institutions' decision to invest in either of the two "rogue regimes'" petroleum resources.¹⁰ Immediately prior to the signing of the Act, at the G-7 Summit in Paris, several nations

8. Reacting to passage of the House bill, H.R. 3107, in a letter to members of the House International Relations Committee, the European Union stated its concern over the bill's extraterritorial reach. Jim Berger, *House Committee Approves Tough Iran Sanctions Bill*, WASH. TRADE DAILY 5 (Trade Reports Int'l Group) Mar. 21 and 22, 1996.

9. In fact, one may classify the Act as almost purely extraterritorial in nature as there are presently various regulations controlling and prohibiting trade and transactions with Iran and Libya by U.S. persons. The two nations are currently "trade embargoed" by the United States for purposes of trade with U.S. persons and entities. Such regulations are administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control. *See also* Foreign Assets Control Regulations . . . for Exporters and Importers, U.S. Department of the Treasury (Jul. 11, 1996).

The Libyan Sanctions Regulations, 31 C.F.R. § 550, *et. seq.*, established economic sanctions against Libya in 1986. The Iranian Assets Control Regulations, 31 C.F.R. § 535, *et. seq.*, controlling Iranian assets held within the United States, was effective in 1979, and the Iranian Transactions Regulations, 31 C.F.R. § 560, *et. seq.*, prohibiting or severely limiting transactions and trade with Iran was promulgated in the late 1980s. These regulations "affect all U.S. citizens and permanent residents wherever they are located, all people and organizations physically in the United States, and all branches of U.S. organizations throughout the world," and prohibit all contracts, loans, and financial transactions with Libya.

On March 15, 1995, President Clinton signed Executive Order 12957 prohibiting U.S. involvement with the development of petroleum resources in Iran. A May 6, 1995 Executive Order, No. 12959, among other things, prohibited new investments by U.S. persons in Iran. On January 2, 1997, President Clinton signed a notice continuing the Libyan Emergency which was published at 62 F.R. 587 (Jan. 3, 1997). Although there may be specific and limited instances in which trade with Iran and Libya may take place, this paper does not concentrate on or cover such topic.

10. § 1701, §§ 3-4.

agreed to a comprehensive set of measures to prevent terrorist acts and to apprehend them when they accomplish their goal.¹¹ Undoubtedly, the Act is a unilateral effort by the United States to further advance the interests of several nations to prevent the spread of terrorism, even if by the imposition of "new sanctions on foreign companies that engage in specified economic transactions with Iran or Libya."¹²

II. INVESTMENTS TARGETED BY THE ACT

The Act intentionally discusses prohibitions on investment with respect to Iran and Libya separately due to the different economic histories and distinct geopolitical circumstances of both countries. While any person who makes certain investments in Iran that enhance its ability to develop petroleum resources is subject to the Act's sanctions, the triggering of sanctions with regard to Libya is broader. A person¹³ becomes subject to sanctions not only for becoming involved in certain investments or trade within the Libyan oil and gas sectors, as with Iran, but also opens the door to the possible imposition of sanctions due to the provision of goods and services that contribute to Libya's ability to enhance its military prowess and oil and gas development.

11. Remarks by the President, *supra* note 6.

12. Fact Sheet, The Iran and Libya Sanctions Act of 1996, The White House, Office of the Press Secretary (Aug. 5, 1996).

13. § 1701, § 14(14). A "person" is defined under the Act as a natural person, corporation, business association, organization, partnership and any successor entity of such person, and the general definition does not distinguish between a U.S. and a foreign person. This list is not exclusive, but the most generally applicable terms have been cited. The Act specifically defines U.S. person and foreign person, for the purpose of designating exceptions and waivers under the Act, but provides a general definition of "any person," (that is read to include both U.S. and foreign persons) to which sanctions may be applied.

The Act subjects any person, whether a foreign person or a U.S. person, to possible sanctions.¹⁴ The Act mandates sanctions be imposed upon: (1) any person who the President determines to be a successor entity; (2) any parent or subsidiary of that person who, with actual knowledge, engaged in activities violative of the Act; and (3) any affiliate of that person who is "controlled in fact" by such person, and with actual knowledge, engaged in the sanctionable activities.¹⁵ The legislation intends that "the Administration have broad latitude in making determinations" as to the imposition of sanctions under § 5 of the Act, possibly making such determination dependent upon the circumstances of each separate investment.¹⁶ The President has delegated to the U.S. State Department's Iran and Libya Sanctions Unit, Office of Economic Sanctions Policy, the responsibility of administering the Act.¹⁷

A. *With Respect to Iran*

The President must impose sanctions on any person found, on or after August 5, 1996, to have with "actual knowledge:"

made an investment of \$40 million or more (or any combination of investments of at least \$10 million, which in the aggregate equals or exceeds \$40 million

14. Section 5(d) of § 1701 requires the President to publish in the *Federal Register* "a current list of persons and entities on whom sanctions have been imposed under this Act. The removal of persons or entities from, and the addition of persons and entities to, the list, shall also be published." Likewise, § 5(e) requires publication of a list of all significant projects publicly tendered in the oil and gas sector in Iran.

15. §1701, §5.

16. H.R. Rep. No. 523, Part 2, 104th Cong., 2d Sess. 15 (1996). The provisions of the Act do not apply to activities subject to various reporting requirements of Title 5 of the National Security Act of 1947. H.R. 3107 § 12.

17. 61 Fed. Reg. 66067 (Dec. 16, 1996).

in any 12-month period), that directly and significantly contributed to the enhancement of Iran's ability to develop petroleum resources of Iran.¹⁸

However, due to the continued threat of Iran's efforts in pursuing the proliferation of weapons of mass destruction and international terrorism, the Act imposes further constraints that effect a change in the investment threshold¹⁹ described above. Within one year of the date of enactment, the President must report to the appropriate congressional committees²⁰ on the degree of success of multilateral negotiations to establish multilateral sanctions against Iran.²¹ Once the President makes such a report, the threshold monetary amounts described in § 5(a) above will be decreased by half.²² Thus, upon making the report, the allowable threshold for investments

18. § 1701, § 5(a).

19. Otherwise known as the "trigger" amount or "trade trigger."

20. The appropriate Senate committees include Finance; Banking, Housing and Urban Affairs; Foreign Relations; the appropriate committees of the House of Representatives include Ways and Means; Banking and Financial Services; and International Relations. H.R. 3107 § 14(2).

21. § 1701, § 4(b). Such multilateral sanctions are expected to include provisions inhibiting Iran's efforts to perform, facilitate, or encourage acts of international terrorism and the nation's proliferation of weapons of mass destruction by limiting the development of petroleum resources in Iran. *Id.* at § 4(a).

22. § 1701, § 4(d). The President may grant a waiver of this section to any national of a country if that country has agreed to take substantial measures, including economic sanctions or suppressing Iran's efforts in the "proliferation of weapons of mass destruction and acts of international terrorism." Such waiver is conditioned upon the President providing (1) a report to the appropriate congressional committees as described above; and (2) notification to such committees at least thirty days before the waiver is to take place. *Id.* at § 4(c)(1)(2).

decreases with respect to Iran, and any person who makes an investment, as defined under the Act, of twenty million dollars or more, or a combination of investments of five million dollars or more that in the aggregate exceed twenty million dollars in any twelve month period, can be sanctioned.²³

If a person makes an investment of the type described above, the President is required to impose two or more of the sanctions listed in § 6 of the Act.²⁴ The language throughout § 5 of the Act is clearly prospective in nature, and sanctions may be applied only for violations after enactment.²⁵ However, the element of "intent" within the language of the Act should not be overlooked. In order for sanctions to apply, the President must determine that the violator has "acted with actual knowledge" in making an investment as described above. It is only necessary that the person act with the knowledge that the investment contributes to the country's development of petroleum resources, not that the investment contributes to the country's development of petroleum resources.

B. *With Respect to Libya*

The imposition of sanctions can be triggered for taking part in either trade or investment with Libya. Under § 5(b)(1)²⁶ of the Act, mandatory sanctions will apply to any person who, on or after the date of enactment:

exported, transferred, or otherwise provided to
Libya any goods, services, technology or other items
the provision of which is prohibited under paragraph

23. *Id.*

24. Sanctions will be discussed shortly in Section IV.

25. H.R. Res. 523, Part 2, 19.

26. §1701, §5(b).

4(b) or 5 of Resolution 748²⁷ of the Security Council of the United Nations, adopted March 31, 1992, or under paragraph 5 or 6 of Resolution 883²⁸ of the Security Council of the United Nations, adopted November 11, 1993, if the provision of such items significantly and materially -

- (1) contributed to Libya's ability to acquire chemical, biological, or nuclear weapons or destabilizing numbers and types of advanced conventional weapons or enhanced Libya's paramilitary capabilities;
- (2) contributed to Libya's ability to develop its petroleum resources; or
- (3) contributed to Libya's ability to maintain its aviation capabilities.²⁹

Sanctions under § 5(b)(2) will be imposed upon any person if it is determined that such person:

27. S.C. Res. 748, U.N. SCOR, 3063rd mtg. at 4(b) and 5 (1992). Sections 4(b) and 5 of Resolution 748 prohibit: (1) the provision of aircraft parts and components to Libya; (2) payment of claims under insurance contracts dealing with aircraft; and (3) the sale or transfer of military weapons and equipment, as well as training, assistance and advice.

28. S.C. Res. 883, U.N. SCOR, 3312th mtg. at 5 and 6 (1993). Sections 5 and 6 of Resolution 883 prohibit the export or sale of equipment for use in crude oil export terminals; pumps with certain capacity for use in transporting crude oil and natural gas; other equipment that may be used in, although not designed for, crude oil export terminals; and materials, equipment or insurance related to the maintenance, etc. of Libyan aircraft.

29. §1701, § 5(b)(1).

made an investment of \$40 million or more (or any combination of investments of at least \$10 million, which in the aggregate equals or exceeds \$40 million in any 12-month period), that directly and significantly contributed to the enhancement of Libya's ability to develop its petroleum resources.³⁰

As with Iran, sanctions may be applied only if it is determined that the person had "actual knowledge" that such an investment would directly and significantly benefit Libya's oil and gas sector, or exporting certain goods to Libya in violation of § 5 of the Act. If the President finds that a person has violated the Act, he is required to impose two or more of the sanctions listed in § 6 on such person.³¹

C. *Investments Can Still Be Made*

While the crux of the Act is intended to prohibit investments in the oil and gas sectors of both Iran and Libya, such investments are not truly forbidden. In fact, the forty million dollar trigger, or combination of four investments of at least ten million dollars in any twelve month period, limits only the type of investment that can be made given a designated monetary amount. For instance, a foreign financial institution or corporation may contract with an Iranian or Libyan entity by making an investment of under forty million dollars, or any combination of investments of less than ten million dollars each within any twelve month period, so long as in the aggregate the forty million dollars threshold is not triggered. Likewise, a person may make numerous investments of less than

30. §1701, §5(b)(2).

31. *Id.*

ten million dollars each during the course of a year without triggering the Act's sanctions.³²

It is unclear, however, whether a person may enter into a contract for the payment of a combination of investments less than ten million dollars each or payments of varying amounts, but in the aggregate exceed the forty million dollar threshold and are paid over a period greater than twelve months. In other words, it is uncertain whether such a contract having a total investment value that exceeds forty million dollars would be characterized as "making an investment of forty million dollars or more." It is also uncertain whether the Act is to be interpreted as requiring a single payment of forty million dollars or more in order to trigger the imposition of sanctions. While the Act is triggered if a person either invests forty million dollars or makes four distinct investments of ten million dollars or more in a twelve month period that in total exceed forty million dollars, the Act does not grant an explicit explanation of what is considered an investment of forty million dollars. Likewise, the accompanying legislative history neither describes nor discusses what is meant by a forty million dollar investment. It would appear that the Act, in distinguishing two types of investment activities and the monetary limitations on each, provides for two instances in which a person can be sanctioned: (1) a single investment of forty million dollars; or (2) four payments of ten million dollars that total forty million dollars.

What constitutes an investment in terms of monetary requirements and pay period may be interpreted quite conservatively by the President to mean a contract that provides a total investment of forty million dollars, regardless of the method of payment or time period over which payment is made. It is questionable, therefore, whether a contract that includes several payments that in the aggregate exceed the forty million dollar "trade

32. However, it must be recognized that with regard to Iran, as discussed earlier, the threshold amount decreases to twenty million dollars and five million dollars respectively. §1701, §4(c)(1)(2).

trigger" would be considered an investment causing the person to be subject to sanctions under the Act. Clarification by Congress through the appropriate Congressional hearings is necessary to interpret not only the Act's ambiguities, but Congressional intent, before the promulgation of regulations implementing the Act.³³

III. WHAT TYPE OF INVESTMENT ACTIVITY DOES THE ACT COVER?

While the meaning of "investment" is very narrow as stated in the Act, a reading of the House Committee reports helps to place its meaning in perspective for purposes of §§ 5(a) and (b)(2). The Act defines "investment" as:

- (A) The entry into a contract that includes responsibility for the development of petroleum resources located either in Iran or Libya (as the case may be), or 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.³⁴

33. Congressional oversight hearings are expected to take place next year to examine the Act's effectiveness and determine whether revisions in the law need to be made. The appropriate committees to hold a hearing on the Act would most likely be the Senate Finance Committee, the House International Relations Subcommittee on Banking and Financial Services, or the House Ways and Means Subcommittee on Trade.

34. § 1701, § 14(9)(A)(B)(C).

Any of the above-mentioned investment activities constitutes an investment for purposes of the Act if undertaken pursuant to an agreement, or the exercise of rights under an agreement, entered into with an Iranian or Libyan government or a nongovernmental entity.³⁵ Given the above definition, "investment" may include general contracts for: (1) the development of petroleum resources; (2) the supervision and guarantee of such development projects; and (3) the acquisition of an ownership interest (share or participation) in the profits of those projects.³⁶

The Act appears to make clear that for a person to be held liable or sanctionable for investment activities, such activities must be direct and with the intent to accomplish the objective of enhancing Iran's or Libya's development of petroleum resources. The Act does not reach so far as to include investments by foreign firms, or financing by foreign institutions, of a party who: (1) is on the Office of Foreign Assets Control [hereinafter OFAC] sanction list;³⁷ (2) may be a sanctioned person under the Act; or (3) has, will, or is currently investing in Iran or Libya or actively trading with either nation.³⁸ The language of the Act does not purport to include, or rather preclude, such dealings or transactions with particular persons by foreign entities.³⁹ What the Act does cover is

35. *Id.*

36. H. R. Rep. No. 523, Part 2, at 14 (1996).

37. OFAC has also compiled a list of persons, foreign and domestic, with whom trade and transactions are prohibited by U.S. persons. OFAC is the office within the U.S. Department of Treasury that administers regulations enacted governing trade with embargoed countries.

38. Telephone conference with Ms. Barbara Hammerle, Counsel, U.S. Department of Treasury, OFAC, Washington, D.C. (Aug. 20, 1996).

39. *Id.* The House Committee on International Relations in its report on House Bill 3107, precursor to the present enacted legislation, stated that "[t]he Committee does not intend that the sanctions provided in [section 5 of the Act] would extend to portfolio investments made by any other person in a sanctioned

the distinct transaction itself. U.S. persons, however, must maintain compliance with all other U.S. government regulations and requirements related to involvement or trade with Iran or Libya, persons sanctioned⁴⁰ under the Act, and persons on the OFAC sanctions list. The ability of the President to sanction a person will depend upon the type of discrete transaction entered into, which means that liability under the Act may be highly fact dependent in any given situation.

"Investment" does not include the financing of, performance, or entry into a contract for the sale or purchase of goods, services, or technology.⁴¹ A review of what little legislative history is available reveals that the provisions of the Act do not deal with finance or trade generally, but focus on specific transactions. The Committee on International Relations in its report on the House bill recognized:

the intent of the legislation is not to apply sanctions on the transfer of all petroleum and natural gas-related products being acquired by Iran or Libya. The Administration is specifically given the discretion of deciding which goods and services would significantly and materially enhance Iran's ability to develop its petroleum resources. In the view of the Committee, the Administration has the flexibility it needs in implementing this provision with a view toward denying Iran those key goods

person." This legislative history further signifies that the Act's intent is not to curtail investments with persons sanctioned under the Act, but rather to curtail investment in the development of Iran's and Libya's petroleum resources. H.R. Rep. No. 523, Part 1, at 14 (1996).

40. See also § 1701, § 6(3), which allows the U.S. Government at its discretion to limit the ability of U.S. financial institutions to make loans or provide credit to persons sanctioned under the Act.

41. §1701, §14(9).

and technology items needed to develop its offshore oil resources.⁴²

It is believed by Congress that such broad provisions affecting foreign trade will be far less effective against the two governments, and will be an enormous enforcement burden on any federal agency.⁴³ Thus, investment under the Act explicitly excludes the sale of goods such as those used in petroleum operations, or any other goods to be exported to Iran or Libya in compliance with OFAC and the U.S. Department of Commerce Bureau of Export Administration regulations, and with respect to Libya, U.N. Security Resolutions 748 and 883.⁴⁴

If the Act's legislative history is indicative of its application, companies "may perform existing contracts, and complete existing investments, such as subcontracts, farm-in arrangements, and the like in connection with contracts entered into prior to August 5, 1996."⁴⁵

IV. THE ACT'S SANCTIONS

Imposition of sanctions on persons violating the Act are mandatory with respect to both Iran and Libya. The Act specifically discusses sanctions with regard to the two countries separate and apart from each other, as the criteria for each differs to some extent. Under the Act, all persons are prohibited from exporting, transferring, or releasing certain listed goods and technologies to, or making certain investments in, Iran or Libya, with Iranian or Libyan nationals, or with governmental and non-

42. H.R. Rep. No. 523, Part 1, at 14 (1996).

43. *Id.*

44. *See also* H.R. Rep. No. 523, Part 2 (1996).

45. 61 Fed. Reg. 66067 (Dec. 19, 1996).

governmental entities owned or controlled by Iran or Libya.⁴⁶ The general focus of the Act is to impede the development of petroleum resources in either of the two "rogue regimes." The Act applies prospectively only, and nowhere is it stated that the President can apply or maintain sanctions against any person for contracts entered into, or investments made, before the date on which the Act became effective.⁴⁷ The law imposes sanctions upon any person that the President determines had actual knowledge that the investment contributed to the development of petroleum resources, and any successor entity to that person and any subsidiary or affiliate of that person that, with actual knowledge, engaged in the sanctionable activities.⁴⁸ Thus, only knowledge that the investment enhances the country's ability to develop petroleum resources, rather than the person's awareness of a violation of the Act, is necessary for the imposition of sanctions.

Assuming a finding is made that the person has actual knowledge that they will take part in an investment enhancing the development of petroleum resources in either Iran or Libya, it must next be determined whether such person's action contributed "directly and significantly" or "significantly and materially" to such development.⁴⁹ The Act, however, does not define what is meant by either of the two phrases or any one of the terms. The decision or determination of whether a person's investment contributes

46. H.R. Rep. No. 523, Part 2. Such goods and services are prohibited under UN Security Council Resolutions 748 and 883.

47. § 1701, §§ 5(a), (b).

48. *Id.* § 5(a). With respect to successor entities, subsidiaries, and affiliates, the House Report language suggests that such persons may be found liable under the Act if they merely had reason to know they were engaged in sanctionable activity. The report language, therefore, has a lesser degree of an intent element than does the actual language of the Act itself. H.R. Rep. No. 523, Part 1, at 14 (1996).

49. § 1701, § 5(2).

"directly and significantly" or "significantly and materially" to such development rests with the President or federal agency administering the Act.⁵⁰ The President's or agency's determination of the two phrases may be determined on a case by case basis, being fact specific, or the phrases and words as applicable to the Act may be later defined by the promulgation of regulations interpreting the Act.⁵¹ In any event, the interpretation is subject to "arbitrary and capricious" judicial review. Because of the short history of the Act, it has not yet been enforced against any single person, nor have any of the above terms been adequately defined under the Act.

The provisions of the Act do allow for the imposition of sanctions against foreign persons,⁵² entities and financial institutions, as they are included in the Act's general definition of "any person."⁵³ The Act requires mandatory sanctions to be imposed in both §§ 5(a) and (b). The President must impose two or more of the following sanctions in response to a violation of the Act:

- (1) The President may direct the Export-Import Bank of the United States not to guarantee, insure, extend credit, or participate in the extension of credit in connection with the export of any goods or services to any sanctioned person;

50. Hammerle, *supra* note 38.

51. *Id.*

52. Foreign persons include individuals who are not citizens of the United States and corporations or partnerships that are not a "U.S. person." § 1701, § 14(7). The Act intentionally provides three definitions of persons, that of "any person" (§ 14(14)), a "foreign person" (§ 14(7)), and a "U.S. person" (§ 14(17)), leading to the presumption upon review of the Act in its entirety that the definition of any person in § 5 includes foreign persons.

53. H.R. Rep. No. 523, Part 1, at 14 (1996).

- (2) The President may order the U.S. Government not to issue any specific license and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under --
 - (i) The Export Administration Act of 1979;
 - (ii) The Arms Export Control Act;
 - (iii) The Atomic Energy Act of 1954; or
 - (iv) any other statute that requires the prior review and approval of the U.S. Government as a condition for the export or re-export of goods or services.
- (3) The U.S. Government may prohibit any U.S. financial institution from making any loan or providing any credit to a sanctioned person in an amount exceeding \$10,000,000 [or two or more loans of more than \$5,000,000 each in any 12-month period] unless such person is engaged in activities to relieve human suffering and the loan(s) or credit is provided for such activities.
- (4) The following prohibitions may be imposed against a sanctioned person that is a financial institution:
 - (i) Neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate, or permit the continuation of any prior designation of, such financial institution as a primary dealer in U.S. Government debt instruments;

- (ii) Such financial institution shall not serve as agent of the U.S. Government or as repository for U.S. Government funds.⁵⁴
- (5) The U.S. Government may not procure, or enter into any contract for the procurement of, any goods or services from a sanctioned person.
- (6) The President, in accordance with the International Economic Powers Act (50 U.S.C. § 1701, *et seq.*), may impose sanctions, as appropriate, to restrict imports with respect to a sanctioned person.⁵⁵

Any sanction imposed under § 5 of the Act will remain in effect for a minimum period of two years or until the President finds that the person on whom sanctions were imposed is no longer engaging in such activities.⁵⁶ However, if the President so finds, the person must provide "reliable assurances" that he or she will not knowingly engage in such activities in the future, and that sanctions will continue to be imposed for a period of at least one year.⁵⁷ Finally, sanctions imposed, or a determination made to impose sanctions, under the Act is not reviewable in any court in the United States, whether it be a court of federal, state, or local jurisdiction.⁵⁸

54. § 1701, § 6(4)(A) or (B). The imposition of either one of the sanctions counts only as one sanction having been imposed on a person.

55. *Id.* §§ 6(1)-(6). Section 1701, *et seq.* grants the President authority to regulate or prohibit transactions, including imports/exports and entry into contracts, with other nations to deal with any "unusual and extraordinary" threat to national security.

56. *Id.* § 9(b).

57. *Id.*

58. *Id.* § 11.

V. EXCEPTIONS, DELAY, AND WAIVER OF SANCTIONS

The Act provides for specific exceptions to the application of sanctions, and for the delay and waiver of sanctions upon the President's initiative. The apparent intent is to allow activities to continue or take place with foreign nations or nationals if it is in the interest of the U.S. government. Although this may be termed by some as protectionism, it does show the need to participate in trade with the two countries. Under § 5(f), certain exceptions are provided under which the President is not required to impose sanctions upon a person violating the Act, but it is within his discretion to do so.

A majority of the exceptions are very narrow and apply to the procurement of defense articles or services for the United States in the following situations: (1) the procurement of commodities or articles by a U.S. entity or U.S. national for defense services under existing contracts or subcontracts, including the exercise of options for the production of essential quantities; (2) upon a determination by the President that the goods either cannot be obtained elsewhere as the person is a "sole source supplier" of such essential defense articles or services, and alternative sources are not readily or reasonably available; (3) the articles are essential to national security under a defense co-production agreement; and (4) the eligible product is procured pursuant to the Trade Agreements Act of 1979.⁵⁹ Exceptions also can be granted for (1) contracts for products, technology, or services entered into before the date on which the President publishes in the *Federal Register* the person's name on whom sanctions are to be imposed; (2) spare parts, component parts⁶⁰ essential to U.S. products or production, as well as routine maintenance, if not otherwise readily available; (3) information and information technology essential to U.S.

59. *Id.* §§ 5(f)(1)-(7). The Trade Agreements Act of 1979 [hereinafter Trade Agreements Act] can be found at 19 U.S.C. §§ 2518(4) and 2511(b)(1).

60. Finished products are not included in the applicable exceptions.

products or production; and (4) the export or transshipment of medicines, medical supplies and other humanitarian items.⁶¹

Sanctions under § 5(a) and (b) may be delayed with respect to a foreign person for a period of up to ninety days, allowing the President to pursue consultations with the foreign person's government regarding its policy toward Iran and/or Libya.⁶² Unless the President makes a finding that the foreign government has taken "specific and effective actions," including penalties as appropriate, to terminate the foreign person's activities causing such person to violate the Act, he must immediately impose sanctions upon such person.⁶³ However, if after the initial ninety days, the President continues consultation with the foreign government having primary jurisdiction over the person, he may further delay the imposition of sanctions for up to an additional ninety days upon certification of such consultation to Congress.⁶⁴

Not only may the President delay the imposition of sanctions, but he has the right to waive sanctions applicable to any person or to continue imposition of the sanctions. A waiver of sanctions can occur only if it is determined that a waiver is "important to the national interest."⁶⁵ This is further conditioned upon the President submitting a report notifying the appropriate Congressional committees of his intention to exercise the waiver

61. See Trade Agreements Act, *supra* note 59. Medicines, medical supplies and other humanitarian items, if exported or transhipped by a U.S. person to Iran or Libya, must be donated and cannot be included in, or be part of, a commercial transaction. See 31 C.F.R. §§ 535, *et. seq* and 550 *et. seq*.

62. *Id.* §§ 9(a)(1) and (2). The President is also required to submit to the appropriate congressional committees a report of his consultation progress with the foreign government no later than 90 days after making a determination under § 5(a) or (b). *Id.* § 9(a)(4).

63. *Id.*

64. *Id.* § 9(a)(3).

65. *Id.* § 9(c)(1).

thirty days before it is destined to take effect.⁶⁶ The report must provide "specific and detailed rationale" for the waiver, include a description of the conduct that resulted in a violation of the Act, and estimate the significance of the investment to Iran's or Libya's ability to develop petroleum and other resources as described in §§ 5(a) and (b) by the granting of a waiver.⁶⁷ If the sanctioned person is a foreign person, the report must also include a response as to the cooperation of the foreign government toward ending the sanctioned person's actions.⁶⁸

The Act does provide for a case-by-case review to determine whether a person's proposed activity would subject such person to sanctions. Upon request, the Secretary of State may issue an advisory opinion rendering such a determination.⁶⁹ "This provision provides an opportunity for persons to investigate ahead of time whether proposed behavior is of a sanctionable nature."⁷⁰ If the proposed activity or certain actions are found not to be sanctionable, the petitioner may in good faith rely upon the opinion and participate or engage in the activity without fear of being sanctioned.⁷¹

VI. TERMINATION OF SANCTIONS

Sanctions may be terminated with regard to both Iran and Libya under specific conditions. Sanctions with regard to Iran will be terminated, or shall no longer have force or effect, upon (1) a

66. *Id.*

67. *Id.* §9(c)(2).

68. *Id.* § 9(c)(2)(B).

69. *Id.* § 7.

70. H.R. Rep., No. 523, Part 2, 104th Cong., 2d Sess. 16 (1996).

71. § 1701, § 7.

determination by the President; and (2) certification to the appropriate congressional committees that Iran has become a country of non-proliferation and is removed from the list of countries that have repeatedly provided support for acts of international terrorism.⁷² With regard to Libya, sanctions are terminated if the President determines and certifies that Libya has fulfilled the requirements of U.N. Security Council Resolutions 731, 748, and 883.⁷³ However, the Act does have a "sunset provision" causing it to cease to be effective five years after the date of enactment.⁷⁴

VII. ALLIES WITH THE UNITED STATES, OR ALLIED AGAINST THE UNITED STATES?

While the Act is intended to deter Iran and Libya "from supporting acts of international terrorism and acquiring weapons of mass destruction," perhaps a more significant but less recognized purpose is the attempt at creating a multilateral sanctions regime uniting foreign nations in a unified front against Iran to prevent the nation from conducting such activities.⁷⁵ In beginning multilateral negotiations, the President is authorized by Congress to make diplomatic efforts in the "appropriate international fora" and bilaterally with U.S. allies.⁷⁶ The primary goal of such negotiations is to establish a multilateral sanctions regime against Iran through

72. *Id.* § 8(a). The list of countries that have provided support for acts of international terrorism may be found in the Export Administration Act of 1979, § 6(j).

73. *Id.* § 8(b).

74. *Id.* § 13. As stated earlier, the provisions of this Act take effect on August 5, 1996, the date of enactment.

75. H. R. Rep. No. 523, Part 2, 104th Cong., 2d Sess. 9 (1996).

76. § 1701, § 4(a).

diplomatic efforts by encouraging countries to take significant measures against Iran to restrict its ability to obtain funding from foreign sources.⁷⁷

Yet, the ultimate question of whether the Act can advance such efforts lead by the United States is difficult to predict. Although the President has great latitude in waiving and delaying the application of sanctions with respect to foreign nationals,⁷⁸ even the U.S. State Department revealed its concern that the threat of "imposing trade sanctions may decrease the amount of cooperation" that can be expected from allies.⁷⁹ The effect of the Act is without a doubt far-reaching, breeding concern by foreign firms and corporations over the extent of its application. Some foreign interests have stated their belief that the United States, or any other country, should not unilaterally use its economic prowess to dictate other countries' trading partners and investment opportunities.⁸⁰ Even so, in hearings held by the House International Relations Committee on the legislation, it was expressed by Congress that the United States should use its economic abilities as a peaceful tool of

77. *Id.* At various intervals, the President must report to the appropriate Congressional committees those countries having agreed to undertake substantial measures to further the objectives of the Act. On November 5, 1996, the President was required to submit to the appropriate Congressional Committees an interim report on multilateral sanctions stating whether the member countries of the European Union, the Republic of Korea, Australia, Israel, or Japan have either legislative or administrative standards that provide for sanctions as does the Act. §1701, § 4(e).

78. *Id.* § 4 and § 9.

79. Barbara Larkin, U.S. State Department, Testimony before the House International Relations Committee, Mark-up of the Iranian Oil Sanctions Act of 1996 (Mar. 21, 1996).

80. See Jane Collin, *European Companies Prepare Their Attack On Aide to D'Amato*, THE OIL DAILY, Oct. 29, 1996 at 7.

foreign diplomacy.⁸¹ Before the House Ways and Means Subcommittee on Trade at a hearing on the House bill, which ultimately became the Act, Ambassador Jennifer Hillman, U.S. Office of Trade Representative, stated:

[o]ur trading partners have expressed concern that H.R. 3107 and similar legislation are simply further evidence of U.S. unilateralism that will destroy the multilateral trading system. We must take care to measure the impact of any alternative on our trading partners, on the multilateral trading system and on U.S. business and economic interests.⁸²

On October 1, 1996, the European Union's Council of Ministers [hereinafter Ministers] began their legal challenge to the United States' use of measures such as the Iran and Libyan Sanctions Act.⁸³ The Ministers of the fifteen Member Nations pronounced their full-fledged support for retaliatory measures in the form of regulations that would forbid European Union companies from complying with the Act.⁸⁴ The Council stated that "wherever

81. Congressman Robert Menendez, Opening Statement before the House International Relations Committee, Mark-up of the Iranian Oil Sanctions Act of 1996 (Mar. 21, 1996).

82. Ambassador Jennifer Hillman, General Counsel, Office of U.S. Trade Representative, Testimony before the House Ways and Means Trade Subcommittee, hearing on the Iranian Oil Sanctions Act of 1996 (May 22, 1996).

83. Bureau of National Affairs, DAILY REPORT FOR EXECUTIVES, Section A, 191, Oct. 2, 1996.

84. *Id.* In the same meeting, the European Union Council of Ministers voted unanimously to give the European Commission authorization to call for a WTO dispute panel to convene and discuss the Helms-Burton Law. The Helms-Burton Law allows U.S. citizens to sue foreign corporations and firms that benefit or profit from trafficking in U.S. property expropriated by the Cuban government. This result further emphasizes the possibility that with the enforcement of the

the Iran-Libya law had specific relevant laments," retaliation measures should apply.⁸⁵ Due to the controversial nature of the Act, officials in the Clinton Administration admit that a World Trade Organization challenge is possible.⁸⁶

VIII. CONCLUSION

The Iran and Libya Sanctions Act can confidently be described as a defense mechanism to be enforced unilaterally by the United States. What should concern the United States is the view foreign nations will take regarding the extraterritorial application of the Act, and the likelihood of retaliatory measures such nations may take in response to enforcement of the Act. Presently, only the threat of enforcement and sanctions under the Act rings in the ears of foreign entities considering investment in either Iran or Libya.

Until the Act is enforced against a sanctionable party, or regulations are promulgated by the U.S. federal agency selected to administer the Act, the true reach and application of the Act will remain vague.⁸⁷ Such vagueness necessitates clarification through

Iran and Libyan Sanctions Act, application to a WTO panel to rule on its legitimacy in the international arena may be forthcoming. *Id.*

However, Denmark has threatened to veto a "blocking statute" recently proposed by the European Union which would prohibit European entities from complying with the Iran and Libya Sanctions Act. *Spanner in the Works I*, FIN. TIMES, Oct. 23, 1996. Denmark argues that the EC is exceeding its authority by basing the statute on the "catch-all Article 235" of the European Union treaty. *Id.*

85. *Id.*

86. Berger, *supra* note 8. It also has been the stated opinion of the Office of U.S. Trade Representative that "[enforcement of H.R. 3107] would violate NAFTA and WTO . . ." Testimony by Ambassador Hillman, *supra* note 82.

87. On November 1, 1996, the U.S. government formally denied that it is planning to impose sanctions against Petronas, Malaysia's national oil company, due to its "30 percent stake in a \$600 million project" in the development of

Congressional hearings to determine Congress' true intent so that appropriate regulations can be promulgated by the administering or enforcing agency. In the meantime, the threat of sanctions under the Act and the unknowing reach of the consequences of being sanctioned, has already caused both U.S. and foreign oil and gas companies to avoid highly lucrative investment opportunities with Iran.⁸⁸ The full effect of the Act on U.S. business abroad has not yet surfaced, and if it does, Congress and the President are likely to bear much pressure from U.S. corporations in taking certain enforcement actions. And, unless the U.S. government eventually follows some future directive of the World Trade Organization and sets aside the new law, financial institutions will have to perform additional due diligence in assessing the legality of underlying transactions or face denial of participation in certain U.S. programs.

The enactment of this legislation is obviously another step forward by the United States in its attempt to bring together the international community in a struggle for world peace. Whether U.S. allies will ultimately adhere to the United States' trade policies in relation to Iran and Libya remains to be seen, and the continued pursuit by the United States in assuring compliance with the Act will certainly be debated in the 105th Congress. Congress' passionate support over the past year of "extraterritorial" legislation such as the Iran and Libyan Oil Sanctions Act emphasizes the strong position certain to continue next session.

Iranian oil fields in the Persian Gulf. *No U.S. Sanctions Planned Against Malaysian Oil Firm For Iranian Dealings*, DAILY EXECUTIVE REPORTER, Nov. 11, 1996 at A-1.

88. See Jareer Ellass, *D'Amato Aide Raises Possibility of New Law To Address Petronas Stake in Iranian Fields*, THE OIL DAILY, Volume 46, No. 207 1, October 30, 1996 at 7; David Owen, *Total, Petronas in Iran Venture*, FIN. TIMES, Aug. 19, 1996 at 4.