

# Michigan Journal of International Law

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Volume 20 | Issue 3

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1999

## Mrs. Watu: Seven Steps to Trade Sanctions Analysis

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### Recommended Citation

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# MRS. WATU: SEVEN STEPS TO TRADE SANCTIONS ANALYSIS

Raj Bhala\*

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## I. THE USUAL NORMATIVE AND EMPIRICAL FOCUS OF THE SANCTIONS DEBATE

Sanctions, and international trade law and policy in general, are a subset of American foreign policy. Sanctions are one way in which America interacts—or does not interact—with the rest of the world. Ronald Steel argues in his excellent book, *Temptations of a Superpower*, that the central, unresolved problem in America's post-Cold War foreign policy is the translation of unparalleled military might built up during the Cold War into political influence.<sup>1</sup> America was, for example, embarrassingly

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An earlier version of this article was published as *MRS. WATU and International Trade Sanctions*, 33 INT'L LAW Spring 1999, and I am grateful to *The International Lawyer* and the American Bar Association for re-publication permission.

The first draft of this article was presented in Washington, D.C. on 14 May 1998 at *The Department of Commerce-George Washington University Third Annual Institute on International Trade and Investment*. The author would like to thank his colleague at The George Washington University Law School, Professor John A. Spanogle, for the opportunity to make the presentation, and for his encouragement in developing the article. A second draft was presented on 4 June 1998 as a Sir John Lubbock Distinguished Lecture at the Institute for Advanced Legal Studies, University of London. The author is indebted to the attendees of the Washington and London lectures for their many helpful comments.

1. See RONALD STEEL, *TEMPTATIONS OF A SUPERPOWER* 1-7 (1995).

unable to dissuade Pakistan from testing nuclear devices in response to India's nuclear tests.<sup>2</sup> This problem is manifest whenever sanctions are used, particularly when they are deployed unilaterally by the United States, as is typically the case. Through sanctions, instead of military force, America is trying not simply to express displeasure, but more importantly to induce a change in the behavior of another country's government, or even cause the downfall of that government. As psychologists would tell us, sanctions are a Skinnerian tool for positive or negative reinforcement. Potential targets are akin to rats in a cage who receive a food pellet for correct behavior (*i.e.*, no sanction, but rather a reward like foreign assistance), but the punishment of an electric shock for wrong behavior (*i.e.*, imposition of a sanction).

The powerful psychology analogy rightly suggests that the debate about America's use of sanctions is interdisciplinary. Lawyers, diplomats, economists, political scientists, historians, and philosophers offer a variety of perspectives, along with human rights activists, environmentalists, and other concerned lobbying groups and citizens.<sup>3</sup> Despite this motley collection of voices, nearly the entire debate is focused on just two issues. First, is the *normative* purpose for invoking the sanction appropriate? For example, is it proper policy to use sanctions to pry open an overseas market to American business? To combat human rights abuses and religious persecution? To confront or contain a stubborn dictator? To prevent nuclear proliferation? For some, these suggestions may be easy cases. But what about using sanctions to combat corruption,<sup>4</sup> or discourage abortion?<sup>5</sup> The normative issue, then, is

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2. Headlines from some of the world's most prestigious English-speaking newspapers belittled America's impotence. See *e.g.*, Jim Hoagland, *The Lone Superpower Is Falling Behind the Curve*, INT'L HERALD TRIB., June 4, 1998, at 10; John F. Burns, *Nuclear Anxiety The Overview: Pakistan, Answering India, Carries Out Nuclear Tests; Clinton's Appeal Rejected*, N.Y. TIMES, May 29, 1998, at A1; Farhan Bokhari et al., *Pakistan Resists U.S. Pressure Over Nuclear Test*, FIN. TIMES (London), May 16, 1998, at 1.

3. For an excellent collection of perspectives, see ECONOMIC SANCTIONS (David Cortright & George A. Lopez eds., 1995). See also BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD US LEGAL REGIME (1988) (discussing the haphazard nature of American sanctions regimes).

4. See, *e.g.*, Nancy Dunne, *Kantor Calls for Bribery Action*, FIN. TIMES, July 26, 1996, at 3 (noting the loss to American companies of \$20 billion worth of contracts as a result of rival firms offering bribes); Helene Cooper, *Kantor Suggests Using Trade Sanctions As A Way To Fight Foreign Corruption*, WALL ST. J., Mar. 7, 1996, at A2 (discussing former United States Trade Representative Mickey Kantor's suggestion that the United States use trade sanctions to fight foreign corruption).

5. See, *e.g.*, Mary Ann Glendon, *On Abortion, It's Clinton vs. the U.N.*, WALL ST. J., May 5, 1998, at A22 (concerning President Clinton's threat to veto legislation that authorizes payment of America's dues to the United Nations but contains a provision barring "federal funding for groups that perform abortions in violation of foreign laws . . . or that lobby for abortion in foreign countries"); Bruce Clark, *When Life is at Stake*, FIN. TIMES, Apr. 11-12,

one of drawing lines, and of delineating legitimate from illegitimate purposes without sliding down a slippery slope of indefensible sanctions.

The second commonly debated issue concerns the *efficacy* of sanctions. Do sanctions work, *i.e.*, do they modify the behavior of their target? If so, do sanctions work only after imposing an unacceptably large opportunity cost on American businesses and their workers? After all, these businesses would otherwise (1) offer goods and services to trade with the target country, (2) win lucrative procurement contracts from the target country's government, and (3) engage in profitable foreign direct investments in the target country. Even if the opportunity cost is acceptable, what about the strain on relations between America and its trading partners? Overall, the heart of this empirical issue is whether the cost of sanctions exceeds their benefits based on historical experience.<sup>6</sup> Fortunately, Congress has taken up this issue. In June 1998, Senate Majority Leader Trent Lott (R-Miss.) and Senate Minority Leader Thomas A. Daschle (D-S.D.) established a bipartisan Senate Task Force on Economic Sanctions, headed by Senator Mitch McConnell (R-Ky.), to examine the efficacy of sanctions.<sup>7</sup>

A corollary to this issue is the danger of overuse. The corollary is also an empirical problem, though one that looks forward and calls for a prediction, as opposed to sizing up the past. Even if a proposed sanction is well-grounded on policy and likely to achieve a desired outcome, the proposal still needs to be viewed in the overall context of extant sanctions and possible future, more justified, sanctions. There is a legitimate fear that too frequent deployment of the sanctions weapon will render it ineffective. Potential targets will be nonplused by the threat of sanctions. They will build that threat into their rational calculus when considering a course of conduct at which America is sure to look askance. This fear is manifest in the efforts—as yet unsuccessful—by Senator Richard Lugar (R-Ind.), and Congressmen Lee H. Hamilton (D-Ind.) and Philip M. Crane (R-Ill.) in the House. They are trying to slow

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1998, at I (discussing efforts of the anti-abortion lobby to persuade Congress to withhold disbursement of funds from America's \$13 billion foreign assistance with respect to countries that practice abortion).

6. There are a large number of excellent empirical studies on this topic. For a discussion of several of the major recent studies, see Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1, 116–21 (1997). See also *Ex-Im Bank Head Criticizes Sanctions Bills*, 15 Int'l Trade Rep. (BNA) 824 (May 13, 1998) (reporting that the Chairman of the United States Export-Import Bank opposes the proposed Freedom from Religious Persecution Act, and other sanctions legislation, in part because they deny American firms business but have little effect on the targeted countries, which find non-American companies to sell to them).

7. See *Senators to Review U.S.-Imposed Sanctions*, WASH. POST, June 27, 1998, at A8.

the pace of imposition of unilateral sanctions by the United States through a new law that would require greater consultation between the White House and Congress on the use of sanctions, including the consideration of alternative measures such as diplomacy and multilateral pressure.<sup>8</sup>

The Clinton Administration has been widely criticized for its handling of both the normative and empirical issues. It stands accused of failing to distinguish the reasonable from the ridiculous as to predicates for sanctions, of not thinking through the effect of sanctions on the target, and of seeing very few sanctions proposals it did not, in the end, support. The accusation is not unfair. For example, the Administration has rather eagerly resorted to sanctions against Burma, China, Cuba, India, Iran, Iraq, Libya, and Pakistan.<sup>9</sup> (To be thorough, a sizeable portion of the blame lies at the steps of Capitol Hill. In June 1998, the President vetoed the Iran Missiles Sanctions Act, which would have punished persons transferring items to Iran that would help Iran build ballistic missiles. Congress may yet override this veto,<sup>10</sup> and as of late July 1998 it still had over two dozen other sanctions bills under consideration that would hit nations from Azerbaijan to Vietnam.<sup>11</sup>) It is a

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8. See Hamilton, *Crane Introduce Bill to Slow Imposition of Unilateral Sanctions by U.S.*, 14 Int'l Trade Rep. (BNA) 1863 (Oct. 29, 1997). Their bill is known as the "Sanctions Reform Act." See *Curb Unilateral Sanctions, Lawmakers Urge Colleagues*, 15 Int'l Trade Rep. (BNA) 553 (Apr. 1, 1998).

9. See generally L. Kirk Wolcott, *Seeking Effective Sanctions*, 11 EMORY INT'L L. REV. 351 (1997) (discussing the increasing use of sanctions by the United States government).

10. See Nancy Dunne, *Sanctions Overload*, FIN. TIMES, July 21, 1998, at 19; Nancy Dunne, *Clinton Vetoes New Sanctions*, FIN. TIMES, June 25, 1998, at 6.

11. See Dunne, *Sanctions Overload*, *supra* note 10; Nancy Dunne, *U.S. Congress Considering Wide Range of Sanctions*, FIN. TIMES, June 5, 1998, at 3.

In the fall of 1998, President Clinton said "yes" to two more sanctions bills. He signed the International Religious Freedom Act of 1998, H.R. 2431, Pub. L. No. 105-292 on 27 October 1998. This Act is not directed at any particular country, or in support of any particular faith. The Act creates the position of "Ambassador at Large" to monitor the state of religious freedom overseas. It directs the President to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. In the event the violations of religious freedom are systematic, ongoing, and egregious, and are accompanied by flagrant denials of the right to life, liberty, or personal security (e.g., torture, enforced and arbitrary disappearances, or arbitrary prolonged detention), the Act directs the President to impose economic sanctions. These sanctions may be waived if the violations cease, if a waiver would further the purposes of the Act, or if required by important national interests. Medicines, food, and other humanitarian assistance are excepted from the sanctions scheme. See William J. Clinton, *Statement on Signing the International Religious Freedom Act*, 34 *Weekly Comp. Pres. Doc.* 2149 (Oct. 27, 1998). For the legislative history to the Act, see *Freedom from Religious Persecution Act of 1998*, H.R. REP. NO. 105-480, 105th Cong., 2d Sess., pt. 1 (April 1, 1998) and pt. 2 (May 8, 1998).

stunning fact that two-thirds of the world's population is subject to one type or another of American sanctions, and more than half of the 115 sanctions schemes implemented by the United States after World War One have been initiated since 1994.<sup>12</sup> As De Gaulle might have said, this fact hardly bespeaks the grandeur of a nation. The sanctions schemes typically reflect a hodgepodge of at best translucent, but very often simply wrong-headed policies. The success of the sanctions against targets is usually dubious,<sup>13</sup> yet their effects on the innocent are often dreadful. Accordingly, it is difficult even for the most impartial observers to rebut the proposition that "America has a sanctions-based foreign policy," or to see anything more than *post hoc* casuistry in the efforts to defend this policy.

## II. TOWARDS A GENERIC CONCEPTUAL FRAMEWORK

It is tempting to dive further into this fray, but of what use is it to add to the heap of criticism of the sanctions-based foreign policy? A more valuable contribution is to step back and consider how to think more clearly about "sanctions" in a *non*-normative, *non*-empirical manner. Would not our sanctions debate be better informed if we first read carefully what sanctions legislation provide? In turn, would we not be able to peruse the statute better if we knew what questions to ask before we opened the United States Code? Brushing by these points, many American media accounts of sanctions are long on hype, yet short on examination.<sup>14</sup> They inflame rather than instruct, providing no guidance

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Also in October 1998, the President signed an omnibus appropriations bill, H.R. 4328, Pub. L. No. 105-277, title IX of which was the India-Pakistan Relief Act of 1998. See *infra* notes 38-48 and accompanying text.

12. Dunne, *Sanctions Overload*, *supra* note 10. See also Thomas Omestad, *Addicted to Sanctions*, U.S. NEWS & WORLD REP., June 15, 1998, at 30 (stating that "[n]o other country on Earth opts for sanctions as often as America," and that American sanctions apply to 70 countries).

13. In Congressional testimony by witness after witness, in studies by think tank after think tank, and in editorials by writer after writer, the point has been made that American unilateral sanctions schemes very rarely cause their target to change its behavior in any material "positive" way. See, e.g., *Ex-Im Bank Head Criticizes Sanctions Bills*, 15 Int'l Trade Rep. (BNA) 824 (May 13, 1998); Willard Berry, *Why Sanctions Don't Work*, FIN. TIMES, Dec. 1, 1997, at 14; *Unilateral Sanctions Are Not Effective, Private Sector Witnesses Tell Senate Panel*, 15 Int'l Trade Rep. (BNA) (Mar. 4, 1998); *Group Says U.S. Sanctions Are Largely Ineffective*, WALL ST. J., Mar. 3, 1997, at B16.

14. Consider an article about American sanctions against India in the aftermath of India's May 1998 detonation of five nuclear devices in the Rajasthan desert. *The Wall Street Journal*, hardly known for a titillating editorialism, carried the headline *India Provokes U.S. Sanctions with New Tests*. See WALL ST. J., May 14, 1998, at A14. The word "provokes" in the title may suggest to some readers that India deserved the sanctions. The suggestion would not be inappropriate were it not for the failure of the article to explain the legal basis

on how to think critically and dispassionately about sanctions. Setting aside the normative issue of purpose and the empirical issue of efficacy, how ought we to confront *any* existing or proposed sanctions legislation? Might it be possible to develop a conceptual framework—or, put less pretentiously, an algorithm—that can be used generically?

This article provides an affirmative answer, using a seven-step model. This model helps to understand what any unfamiliar, complex sanctions legislation says, and what it purports to do. The Table below offers a synopsis of the model. The model is positivist in nature: it seeks to reveal legal doctrine and consequences, and eschew the interesting but messy and over-played normative debate about the content of the law. All seven steps rely heavily on conventional legal reasoning, endeavoring to draw careful, critical distinctions.

The seven steps, discussed below, can be remembered by the simple acronym, “*MRS. WATU.*” Step One calls for an identification of the *Method* of sanction threatened by the legislation. Step Two seeks to discern whether the legislation creates a private *Right* of action. Step Three considers whether the legislation organizes a *Secondary* boycott. Step Four asks whether *Waiver* authority exists, and if so, who has it and what are the waiver criteria. Step Five concerns the *Aim* of the sanction, namely, whether it focuses on bad commodities or bad actors, or possibly even production processes. Step Six examines the statutory criteria, if any, for *Termination* of the sanctions. Finally, Step Seven looks at whether the sanction scheme is *Unilateral*, as opposed to multilateral, in nature.

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for the provocation. Yet, it fails to provide readers with the name of the applicable sanctions legislation, much less a glimpse of the criteria for and exceptions to imposition of the sanctions. Instead, the article wanders casually from a discussion of how other countries might react to India's nuclear tests, to the popularity of the tests in India, to military matters, to President Clinton's telephone call to the Pakistani Prime Minister, and finally back to India, with a treatment of the performance of the Bombay Stock Exchange and India's ability to survive sanctions.

TABLE: SYNOPSIS OF THE MRS. WATU MODEL

Acronym/Step	Issue for Examination	Possible A Priory Expectation Regarding Controversy
M—Method(s) of Sanction(s)	What method(s) of sanction(s) is used?	A larger number of methods affects more constituencies and suggests greater force, thus it is likely to cause greater controversy.
R—Right of Action	Is there a private right of action?	A private right of action is almost certain to cause controversy because it is private and extraterritorial.
S—Secondary Boycott	Is there a secondary boycott?	A secondary boycott is almost certain to cause controversy because it is seen as bullying and an infringement on sovereignty, and it is likely to evoke blocking legislation.
W—Waiver Authority	Who (if anyone) has the authority to waive the sanction, and what are the waiver criteria?	Waiver decisions are inherently political, and the degree of controversy is likely to depend partly on the wording of the criteria.
A—Aim of Sanction	Is the sanction aimed at a regime or commodity, or possibly a production process?	A sanction aimed at a commodity or at a production process may be particularly controversial, because of substitution effects and perceived protectionism, respectively.
T—Termination Criteria	What criteria, if any, exist to terminate the sanction?	A lack of termination criteria will be controversial in the long term, and if they exist, then the degree of controversy is likely to depend partly on their wording.
U—Unilateral Nature	Is the sanction imposed unilaterally?	A de jure and de facto unilateral sanction is almost certain to be particularly controversial.



The *MRS. WATU* model is not limited to analyzing what a particular piece of sanctions legislation says and does. Significantly, it also reveals why one sanction regime might be more controversial than another. The explanation is typically provided by referring to normative purposes or empirical effects. It might be said, for instance, that the 1996 Helms-Burton Act<sup>15</sup> is controversial because sanctions are not the way to deal with the Castro government, or that sanctions against India and Pakistan under the Nuclear Proliferation Prevention Act of 1994 (“Nuclear Proliferation Act”)<sup>16</sup> are pointless now that the “nuclear genie is out of the bottle.” In contrast, *MRS. WATU* provides an *independent basis* for understanding why a sanction regime is controversial, or relatively more controversial than another. *This basis is neither normative nor empirical, but doctrinal.* *MRS. WATU* focuses on what the law says and does, not its underlying policy or economic efficacy. In the discussion below, conclusions about controversies surrounding different sanctions schemes are drawn *without basing those conclusions on the purpose, economic effect, or policy success of those schemes.*

The existence of an independent ground for such conclusions ought to give rise to even greater pause about the use of sanctions. It is bad enough that the normative and empirical dimensions of sanctions are problematic; worse yet, the doctrinal basis renders at least some of the schemes even more controversial.

Yet this conclusion calls for an admission. While the *MRS. WATU* model tries to avoid the normative, the two premises on which the model is constructed are not both value free. The first premise, which is value free, is that understanding sanctions legislation can be difficult, and comparing distinct sanctions regimes can be frustrating indeed.

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15. The formal title of this legislation is the “Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996”, Pub. L. No. 104-14, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 6021-91). Guidelines and implementing regulations for the Helms-Burton Act have been published. See Cuban Assets Control Regulations; Indirect Financing in Cuba, Civil Penalties, 61 Fed. Reg. 37, 385 (1996) (to be codified at 31 C.F.R. pt. 515) (bringing existing Cuban asset control regulations into conformity with the Act); Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30, 655 (1996) (implementing provisions of the Act and authorizing the Secretary of State and Attorney General to deny Visas to certain foreigners); Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996) (summarizing the Act and discussing persons who knowingly and intentionally traffic in confiscated property).

16. Pub. L. No. 103-236, 108 Stat. 507 (1994) (codified as amended at 22 U.S.C. §§ 6301-6305, and amending various other sections of titles 12 and 22 of the United States Code).

Both practitioners and scholars need to know what the law says and does, and when the law is unclear or poorly drafted, an effective analytical tool is welcome.

The second premise, however, is normative. Controversy over sanctions should be anticipated and minimized wherever possible, particularly controversy between the United States on the one hand, and her major trading partners like the European Union (EU), Canada, Japan, and China on the other hand. Such controversy is yet another form of trade friction, just like disputes about tariff barriers or quantitative restrictions that may wind up before a World Trade Organization (WTO) panel. Trade friction is bad, especially when it could have been foreseen and reduced or even avoided. Why? First, because it carries a potentially large opportunity cost. America's attention, and the attention of her trading partners, is diverted from more important issues—such as trade-liberalizing, wealth-generating initiatives like a trans-Atlantic free trade area, a Multilateral Agreement on Investment (MAI), or an expansion of the list of covered items subject to duty-free treatment under the Information Technology Agreement (ITA). These three examples are deliberate: as of this writing, progress on all three is stalled. The snags are not all related to trade friction caused by sanctions. Surely everyone's mind would be fresher and more receptive to constructive solutions on these three initiatives if sanction-induced trade friction were not poisoning the atmosphere. In other words, America and her trading partners fight about whether and how to sanction a rogue that may be of little consequence in the world economy. They lose the broader vision of global free trade, and in the process lose the decorum and trust so essential to implementing this vision. Second, despoiling diplomacy undermines the stability and smooth operation of the world trading system and its institutions. As America and her trading partners become entrenched in contrasting approaches to a rogue, they warn each other about dire consequences if sanctions are, or are not, adopted. They threaten each other with a WTO action, or even, ironically, trade measures to force or counter the imposition of sanctions on the rogue. How can the system and its flagship but fledgling institution, the WTO, function under these strains?

In sum, one of *MRS. WATU's* virtues is that the model can be used to help steer anyone, regardless of personal political or economic views on sanctions, through the thicket of sanctions legislation. It is not designed to lead to biased analytical outcomes. Along with this virtue is the subjective belief that applying the seven steps might help avoid or reduce trade friction, and that is a good thing.

### III. THE SEVEN STEPS

#### *Step One: M—The Method of Sanction*

*What method(s) of sanction(s) is used?* This question does *not* go to the purpose of the sanction; rather, it seeks to classify sanctions regardless of purpose. Broadly speaking, any sanction may be placed in one or more of three methodological categories: foreign aid, trade, and ostracism. By classifying a sanction correctly, it is easier to understand its potential severity and the controversy it is likely to provoke.

When the United States withdraws bilateral assistance from a target country, it is imposing a foreign aid sanction on that country.<sup>17</sup> It is typical that only humanitarian aid, such as the sort going to North Korea in 1997-98 for famine relief, is exempt from the sanction.<sup>18</sup> Likewise, when the United States withdraws support for multilateral assistance—for example, lending programs sponsored by the World Bank or International Monetary Fund—for the target, it is utilizing a foreign aid sanction.

A trade sanction may take one of three forms. First, the United States may deny the target country or person market access with respect to bilateral trade in goods and services. In other words, that country's businesses are precluded from selling their wares or offering their services in the United States. Second, the United States may prohibit American businesses from exporting goods to, or providing services in, the target country. Whereas the first manifestation of a trade sanction amounts to an import embargo, this second manifestation is an export embargo.<sup>19</sup> Both sorts of embargoes exist, for instance, with respect to

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17. Frequently, the bilateral assistance at issue is authorized under the Foreign Assistance Act of 1961, as amended. 22 U.S.C. §§ 2151-2430.

18. The humanitarian assistance may, for example, be provided under the Agricultural Trade Development and Assistance Act of 1954, as amended, commonly known as "Public Law 480," 7 U.S.C. § 1701-36d. See, for example, the discussion of Public Law 480 in *House Comm. on Ways and Means, Overview and Compilation of U.S. Trade Statutes*, 105th Cong., 1st Sess. 164 (1997) concerning Title II of P.L. 480, which authorizes donations of American agricultural commodities for emergency humanitarian relief and development projects, and which is implemented primarily through private voluntary organizations and the United Nations world food program, and Title III of P.L. 480, which authorizes donations to governments of least developed countries for direct feeding programs, emergency food reserves, and recipient government sales that are used to finance economic development activities.

19. Commonly used statutory authorities for such embargoes are the 1917 Trading With the Enemy Act (TWEA), 50 App. U.S.C. §§ 1-44, and the International Emergency Economic Powers Act of 1977 (IEEPA), 50 U.S.C. §§ 1701-06, though with respect to Cuba, specific authority for a total embargo is set forth in Section 620(a) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1). See *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 167-75, 178-80.

Iran. Third, the United States may bar its own domestic businesses from engaging in foreign direct investment ("FDI") in the target country. Conceptually, a fourth form exists, where FDI from the target country into the United States is banned, but this is rarely relevant in practice because most targets or potential targets have little in the way of multinational enterprises.

Naturally, the second and third forms are devilishly controversial. They are seen to deny profitable opportunities to American businesses. By one of many estimates, the opportunity cost in 1995 of foregone American exports was \$15-19 billion and 200,000-250,000 American jobs.<sup>20</sup> The first form, banning importation of target products, ought to enrage American consumers of the banned products and services, assuming no acceptable substitutes exist. That it does not in some instances may simply reflect consumer ignorance, or a lack of consumer organization.

The distinction between foreign aid and trade sanctions is not necessarily ironclad. Some foreign assistance programs are designed to boost trade. The financing programs of the United States Export-Import Bank ("Ex-Im") and the financing and political risk insurance programs of the Overseas Private Investment Corporation ("OPIC"), are examples. In barring Ex-Im Bank and OPIC support for American business operations in or with the target country, the United States is denying the target assistance that would facilitate trade with and investment in the target. One general aim of many foreign assistance programs is to help the recipient develop into a healthy trading partner of the United States. Still, foreign aid sanctions are fundamentally different from trade sanctions. Cutting off foreign aid is a self-imposed restraint on public generosity; the United States government refuses to provide what it otherwise would give to the target. In contrast, a trade sanction addresses private actors: the United States says to private businesses "cease your trade (and/or investment) activities."

Foreign aid and trade sanctions are economic in nature. They concern the economic relations between the United States and the target. In contrast, ostracism sanctions are political in nature.<sup>21</sup> Through an

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20. See *U.S. Sanctions Against Other Countries Cost Exporters Up To \$19 Billion, Study Says*, 14 Int'l Trade Rep. (BNA) 736 (Apr. 23, 1997); Robert Corzine & Nancy Dunne, *U.S. Business Hits at Use of Unilateral Sanctions*, FIN. TIMES, Apr. 16, 1997, at 6.

21. See generally Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51 (1998) (arguing that legal analysis alone is not sufficient to settle the Helms-Burton controversy under international laws, and offering three policy options to ensure the "polemic" law does not jeopardize efforts to achieve hemispheric free trade).

ostracism sanction, the United States attempts to isolate the target from the world community. Like a foreign assistance sanction, and unlike a trade sanction, an ostracism is a self-imposed restraint on public behavior. The United States government avoids official contact with the target. For example, it tries to deny the target membership in important organizations (such as the IMF or WTO), or supports resolutions that denounce the target if it already has membership in the organization in question (for example, United Nations General Assembly resolutions). The United States may also seek to isolate individual officials from the target government or from target country businesses by denying them entry visas into the United States. Political ostracism may have a serious economic effect on the target. For instance, denial or deferral of accession to the WTO means a target will not enjoy most-favored nation ("MFN") treatment with those WTO Members WITH WHICH IT HAS NOT ALREADY NEGOTIATED ON A BILATERAL BASIS FOR SUCH TREATMENT.<sup>22</sup> Nonetheless, this effect is an externality; the thrust of ostracism is to treat the target like a child told by an authority figure to stand alone and face a corner because of bad behavior.

Categorizing sanctions by method highlights the severity of a sanctions regime. The Helms-Burton Act uses all three methods, thus it is as severe as possible: the United States denies assistance, both bilateral and through multilateral organizations, to Cuba until a transition government is in place;<sup>23</sup> the United States seeks to restrict investment in Cuba that uses American property confiscated by the Castro government;<sup>24</sup> and the United States forbids officials and their families who have trafficked in confiscated property from entering the U.S.<sup>25</sup> In contrast, the 1996 Iran and Libya Sanctions Act ("ILSA")<sup>26</sup> focuses primarily on trade and investment sanctions, and then only in the petroleum resource industry,<sup>27</sup> so its scope is far less draconian (though these

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22. For a discussion of the MFN principle, see RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* § 1-2 (1998). For a discussion of MFN treatment and WTO accession with specific reference to China, see RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* 91-97, 215-17 (1996).

23. See, e.g., 22 U.S.C. §§ 6033(a) (barring loans and extensions of credit), 6042(1)(A) (concerning Presidential reports on assistance to Cuba). See also Bhala, *supra* note 6, at 59.

24. See 22 U.S.C. § 6082; Bhala, *supra* note 6, at 69-78; *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 180.

25. See 22 U.S.C. § 6091; Bhala, *supra* note 6, at 81-85; *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 180-81.

26. Pub. L. No. 104-72, 110 Stat. 1541. The State Department has published guidelines on the implementation of the ILSA at 61 Fed. Reg. 66, 67 (1996).

27. See 50 U.S.C. § 1701; Bhala, *supra* note 6, at 98-101, 103-12; *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 177-78. In the ILSA menu of sanction choices for the President, there is one that affects foreign aid, namely, a ban on official

sectors are particularly important to the Iranian and Libyan economies). American sanctions against India and Pakistan under the 1994 Nuclear Proliferation Prevention Act are still narrower in scope, as they primarily affect the flow of foreign assistance from the United States to India and Pakistan.<sup>28</sup> Notwithstanding the bar on lending by American banks to the Indian and Pakistani governments, all trade and investment transactions not relying on such flows, and all political contacts, are untouched. Likewise, the Narcotics Control Trade Act of 1986 ("Narcotics Trade Act") relies on foreign assistance sanctions.<sup>29</sup>

Why is it that, at least *prima facie*, the broader the sanctions methodology the more controversial the sanctions legislation is likely to be? One intuition is that if more sanctions are used, then more constituencies are potentially affected in an adverse manner. The constituencies are sure to be not only in the United States, but also in the target country, and possibly also in third countries if a secondary boycott (discussed later) is involved. Whether the predicted relationship actually is manifest depends on the other *MRS. WATU* variables and possibly other factors. Moreover, it is common sense to expect greater controversy if the United States is attacking a target on more, rather than fewer, fronts. Notwithstanding adverse effects on constituencies, deploying a multiplicity of methods may be perceived as bully-like behavior, unfairly beating up on a vulnerable, somewhat defenseless target.

### *Step Two: R—Whether A Private Right of Action Exists*

*Does the sanctions legislation create a private right of action?* It is somewhat unusual for such legislation to empower a private party to sue wrongdoers identified in the legislation. Indeed, in the context of foreign assistance and ostracism sanctions, a private right of action would make little sense. These methods of sanctions are public in nature; thus, it would be incongruous if not doctrinally indefensible to grant private parties the right to sue for wrongful provision or receipt of foreign

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United States credits or credit guarantees to support the export of goods or services to the target.

28. See 22 U.S.C. §§ 6301(a)(1) (the government procurement sanction), 6303(d) (ban on designation as a primary dealer in United States treasury securities, and restriction on expansion of business operations in the United States) (Supp. II 1996); JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, reprinted in 1994 U.S.C.C.A.N. 398, 507-09 (discussing additional sanctions such as a ban on arms sales, opposition to multilateral development bank lending, and a bar on United States Export-Import Bank assistance); *President Imposes Tough Sanctions Against India in Response to Nuclear Tests*, 15 Int'l Trade Rep. (BNA) 814 (May 13, 1998).

29. This Act is Pub. L. No. 99-570, § 9001, 100 Stat. 3207-4164 (codified as amended at 19 U.S.C. §§ 2491-95 (1986)).

assistance, or wrongful political relations. In some cases, however, trade sanctions legislation may afford a private right of action. The argument is that a private party whose international business transactions are adversely affected by a violation of a trade sanction ought to have a right of redress.

Here is another reason the Helms-Burton Act is so controversial. Whereas the ILSA, Narcotics Trade Act, and Nuclear Proliferation Act create no private rights of action, the Helms-Burton Act allows private persons whose property was confiscated by the Castro government to sue alleged traffickers of that property.<sup>30</sup> The justification in this context is that such persons were victimized once if not twice: once by the initial expropriation, and perhaps again by the profitable use of their assets by firms from third countries. However, the prospect of being hauled into federal district court is understandably upsetting to foreign corporations.<sup>31</sup> They might not have had contact with the United States. Moreover, the governments of the home countries of those corporations understandably seek to protect their corporations. They may even enact legislation to block extraterritorial enforcement of the American sanction—as the Canadian and a number of other governments have done with respect to the Helms-Burton Act.<sup>32</sup> A private right of action thus renders sanctions legislation particularly controversial for two reasons: it is private and it is extraterritorial. Were a private right of action to exist against a foreign sovereign, and IF SANCTIONS LEGISLATION WERE TO DENY the sovereign the traditional public international law defenses of act of state or sovereign immunity, then to say the legislation would be controversial would be an obvious understatement.

### *Step Three: S—Whether A Secondary Boycott is Involved*

*Does the sanctions legislation penalize third countries for dealing with the target?* In other words, does the sanction call for a secondary boycott of the target, or does the sanction simply restrain the behavior of the United States and its firms vis-à-vis the target?

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30. See 22 U.S.C. § 6082 (Supp. II 1996); Bhala, *supra* note 6, at 69–78; *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 180.

31. For a thoughtful argument that the Helms-Burton Act misuses the judiciary as a weapon of foreign policy, and more generally that federal courts are a poor institution to use to pursue coordinated policies against other nations because they are not unified, swift, or rational but rather are decentralized, plagued by delay, and focus on the facts of a particular case, see John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747 (1997).

32. See, e.g., Peter Glossop, *Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba*, 32 INT'L LAW. 93 (1998) (discussing the Canadian blocking legislation).

All three methods of sanctions—foreign aid, trade, and ostracism—can entail a secondary boycott. If so, then a third country that violates America's primary boycott (*e.g.*, by providing aid to, engaging in trade with, or having political relations with, the target) itself becomes a target of sanctions. This specter is designed to have an *in terrorem* effect to promote widespread, if not multilateral, participation in the sanctions. The analogy to domestic labor law is obvious: baggage handlers and mechanics, for instance, might strike against an airline in sympathy with a strike by that airline's flight attendants.

The analogy is also a clue to the consequent mess. Baggage handlers might not like being told by an authority that they had to strike "or else." In the global economy of the late twentieth century, the legal problem created by secondary boycotts is one of extraterritoriality that can be stated in terms of a clash of sovereign interests. To supporters of the legislation, the rule of law is at stake; the Helms-Burton Act helps protect American property rights, and the ILSA is a bulwark against outlaw nations.<sup>33</sup> Virtually no American trading partner, however staunch a military and political ally, is pleased at being compelled under threat of punishment to participate in a unilaterally-conceived American sanctions regime. It is an infringement on each partner's freedom to choose among foreign policy options with respect to the target of America's sanctions.<sup>34</sup> It is also blatantly hypocritical, as the United States has blocking legislation against the Arab boycott of Israel, which entails *inter alia* a secondary boycott.<sup>35</sup> Small wonder, then, why the Helms-Burton Act and ILSA are so controversial: both call for secondary boycotts.<sup>36</sup> Further, because the Helms-Burton Act encompasses all

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33. See, *e.g.*, *Big-Hearted President*, WALL ST. J., May 20, 1998, at A14.

34. For a French legal view of this problem, see Brigitte Stern, *Can the United States Set Rules for the World?*, 31 J. WORLD TRADE 5 (1997). Canadian and Mexican views are set out in *Fifteenth Annual Symposium on International Legal Practice—The Helms-Burton Act: Domestic Initiatives and Foreign Responses*, 20 HASTINGS INT'L & COMP. L. REV. 709, 799, 809 (1997). For an American view on the legality of the Helms-Burton secondary boycott regarding trafficking in confiscated property, see Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1 (1998); Antroy A. Arreola, Note, *Who's Isolating Whom?: Title III of the Helms-Burton Act and Compliance with International Law*, 20 HOUSTON J. INT'L L. 353 (1998); Brian J. Welke, Note, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997); Stephen V. Iglesias, Note, *The Legality of the Helms-Burton Act Under NAFTA: An Analysis of the Arguments the United States, Canada, and Mexico May Present to a Chapter 20 Dispute Resolution Panel*, 3 NAFTA: L. & BUS. REV. OF THE AMERICAS 116 (1997).

35. See 50 U.S.C. App. § 2407; Fitzgerald, *supra* note 34, at 49–60.

36. Regarding the Helms-Burton Act, see 22 U.S.C. §§ 6003(b)(1)(A) (authorizing the President to terminate aid to countries that provide assistance to Cuba), 6082 (civil liability for trafficking in confiscated American assets); Bhala, *supra* note 6, at 78–81; *Overview and Compilation of U.S. Trade Statutes*, *supra* note 18, at 180. Regarding the ILSA, see 19



three methods of sanctions, and creates treble-damage liability for trafficking in confiscated American property, this Act is uniquely contentious. In contrast, the Narcotics Trade Act and the Nuclear Proliferation Act are less controversial with respect to this factor because neither calls for a secondary boycott.

*Step Four: W—The Existence and Nature of Waiver Authority*

Does the sanctions legislation contain waiver authority, and if so, who has it and what are the criteria for obtaining a waiver? Most, if not all, sanctions legislation provides some mechanism to “call off the dogs.” (Even if no such mechanism were to exist in the statute, there is always the possibility, however cumbersome or unlikely, of Congress revising the statute.) In many instances, such as the 1996 Helms-Burton Act and the ILSA, the authority to waive imposition of sanctions rests with the President.<sup>37</sup> Yet there are contrasting illustrations, such as the Nuclear Proliferation Act, where the President’s hands are tied rather snugly, and the balance of discretion seems to lie in Congress. Assuming waiver authority exists, criteria will be articulated in the legislation explaining the circumstances under which sanctions need not be imposed on an otherwise deserving target.

The Nuclear Proliferation Act is interesting in part because the exact waiver criteria differ depending on the sanction at issue. Not including the amendments to this Act made in October 1998 by the India-Pakistan Relief Act of 1998 (Relief Act), as discussed below, the criteria are as follows.<sup>38</sup> For some sanctions, such as opposition to financial assistance to a target country from the World Bank and IMF and lending to the target by United States banks, no presidential waiver

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U.S.C. § 1701 note (Iran and Libya Sanctions, Sec. 5. Imposition of sanctions); Bhala, *supra* note 6, at 101–03; *Overview and Compilation*, *supra* note 18, at 177–78.

37. Regarding the Helms-Burton Act, see 22 U.S.C. §§ 6085(a)-(b) (concerning suspension of the effective date of the Act), 6033(b) (concerning suspension of the foreign assistance sanctions), 6085(c)(1)(B) (concerning suspension of the right to bring a lawsuit for trafficking in confiscated property), and 6091(c)-(d) (concerning exceptions to the rule against excluding foreigners); Bhala, *supra* note 6, at 56–58, 84; *Overview and Compilation*, *supra* note 18, at 180–81. Regarding ILSA, see 50 U.S.C. § 1701 note (Iran and Libya Sanctions, Sec. 9. Duration of sanctions; Presidential waiver); Bhala, *supra* note 6, at 114–16; *Overview and Compilation*, *supra* note 18, at 177–78. Concerning the ILSA, the President’s waiver authority is more limited with respect to Libya than Iran. It is possible for the President to waive sanctions against Iran if Iran agrees to undertake “substantial measures,” including economic sanctions, to combat international terrorism. No such authority exists with respect to Libya.

38. In October 1998, the President signed an omnibus appropriations bill, H.R. 4328, Pub. L. No. 105-277, title IX of which was the India-Pakistan Relief Act of 1998. The Relief Act is reprinted in H. REP. NO. 105-825, 144 CONG. REC. H11054-55 (Oct. 19, 1998) and discussed below.

authority is provided.<sup>39</sup> As a result, the American directors of the World Bank and IMF at least could argue to their fellow directors they had no choice as to how to vote. Regarding official credit and credit guarantees (such as by the Ex-Im Bank and OPIC), as well as military financing, the President's waiver authority is limited to instances where withholding such assistance "would have a *serious adverse effect on vital United States interests*."<sup>40</sup> With respect to foreign aid and sales of military equipment and technology by the United States to the target, the Congress by joint resolution first must approve a request from the President for a one-time only delay (but not waiver) of imposition of sanctions of not more than 30 days.<sup>41</sup> This request must take the form of a certification that "an immediate imposition of sanctions . . . would be *detrimental to the national security* of the United States."<sup>42</sup> If Congress approves the joint resolution, then the President may waive the sanction following the delay period (*i.e.*, provide foreign aid and continue with sales of military equipment and technology to the target), but then only upon a certification to Congress that imposing the sanction "would be *seriously prejudicial* to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security."<sup>43</sup> Why is the process for waiving the prohibition on military sales and foreign aid so stringent, requiring a Congressional resolution? Possibly because military sales and foreign aid are politically very sensitive (though official credits, credit guarantees, and military financing hardly are unimportant).

The details of the 1998 Relief Act are rather confusing because they directly implicate an array of other intricate statutes. In brief, the Relief Act seems to do the following. First, Section 902(a) of the Relief Act allows the President to waive, for a period of up to one year, certain sanctions that otherwise would be mandatorily imposed on India,

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39. See 22 U.S.C. § 2799aa-1(b)(2)(E)-(F) (1994). As of this writing, it is not clear whether the sanction against "United States bank[s]" applies only to commercial banks (e.g., Chase Manhattan), or to investment banks as well (e.g., Merrill Lynch). See Michael M. Phillips, *U.S. Institutions say Curbs Could Shut Them Out of Subcontinent Market*, WALL ST. J., May 22, 1998, at A15.

40. 22 U.S.C. § 2799aa-1(b)(6)(B) (1994) (emphasis added).

41. See *id.* § 2799aa-1(b)(4)(A) (1994).

42. See *id.* § 2799aa-1(b)(4)(A) (1994) (emphasis added).

43. See *id.* § 2799aa-1(b)(5) (1994) (emphasis added). An additional waiver mechanism, not requiring a Congressional resolution, is provided in Section 2799aa-1(2) with respect to foreign assistance sanctions only. Here also, the President must certify in writing that terminating aid "would be *seriously prejudicial* to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security." (Emphasis added).

Pakistan, or both.<sup>44</sup> The sanctions eligible for waiver are non-military foreign assistance, American opposition to World Bank and International Monetary Fund lending or financial or technical assistance, United States bank lending or credit extension, and Export-Import Bank credits and guarantees. It also appears that the conditional ban on certain military equipment sales and technology transfers to Pakistan may be waived, specifically, with respect to those sales and transfers referred to in Section 620E(e) of the Foreign Assistance Act of 1961,<sup>45</sup> but not with respect to those sales and transfers exempted under Section 902(b) of the Relief Act from the one-year waiver authority. Section 902(b) explains that the military sales and transfers that are not encompassed by the waiver are listed in Sections 102(b)(2)(B)-(C) and (G) of the Arms Export Control Act, set forth in 22 U.S.C. § 2799aa-1(b)(2)(B)-(C) and (G). Section 620E(e) of the 1961 Act bars the United States from providing Pakistan with military assistance, equipment, or technology unless the President certifies to Congress that Pakistan does not have a nuclear explosive device and that American military assistance to Pakistan would reduce significantly the chance that Pakistan would possess one.<sup>46</sup> Obviously, as a declared nuclear power, Pakistan does have such a device (or can put one together reasonably quickly), so this condition no longer makes any sense.

Second, under Section 903 of the Relief Act, the President must consult with the appropriate congressional committees before exercising his waiver authority.<sup>47</sup> Section 905 defines these committees to be the Senate Foreign Relations Committee, House International Relations Committee, and the Senate and House Appropriations Committees.

Third, under Section 904, no later than 30 days before the expiration of a one-year waiver period, the Secretary of State must provide these congressional<sup>48</sup> committees with a report on economic and national security developments in India and Pakistan.

If the Relief Act illustrates a broader proposition about the Administration's sanctions "policy," it is that it seems quite content to impose ostensibly tough sanctions up front, and soon thereafter back off, hence

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44. See H. Rep. No. 105-825, 144 CONG. REC. H11054-55 (Oct. 19, 1998) and 22 U.S.C. §§ 2375(e) (Section 620E(e) of the Foreign Assistance Act of 1961, which is amended by Section 902(a) of the Relief Act), 2799aa and 2799aa-1(b) (Sections 101 and 102 of the Arms Export Control Act, which is amended by Section 902(a) of the Relief Act), and 12 U.S.C. § 635 (Section 2(b)(4) of the Export Import Bank Act of 1945, which is amended by Section 902(a) of the Relief Act).

45. See 22 U.S.C. § 2375(e).

46. See *id.* § 2375(e)(1).

47. See H. REP. NO. 105-825, 144 CONG. REC. H11054 at 11055 (Oct. 19, 1998).

48. See *id.*

undermining the long-term credibility of the sanctions. For example, on November 7, 1998, President Clinton announced he was exercising his new waiver authority to restore Export-Import Bank (and Overseas Private Investment Corporation) programs for India and Pakistan, lift restrictions on American banking operations in India and Pakistan, and resume military education and training programs in Indian and Pakistan.<sup>49</sup> Six days later, the Department of Commerce identified 40 Indian and 46 Pakistani entities covered by American export restrictions because of their suspected involvement in nuclear weapons and missile proliferation.<sup>50</sup>

It is important to step back from the details of the Nuclear Proliferation Act as modified by the Relief Act, and ask why understanding waiver authority is important. The answer is that it leads to three insights about prospective sanctions controversies. First, politics ineluctably enter into presidential waiver decisions. Congressional waiver decisions hardly are immune from outside influences. Yet when discretion lies with the President, naturally the White House becomes (ironically) the target for pressure. The existence of one all-important target, instead of 535 members of Congress, none of whom individually is where "the buck stops," may even galvanize constituencies politically affected by impending sanctions. Indeed, following intense and ultimately successful lobbying efforts by the EU and American businesses, President Clinton was roundly (and here too, not unfairly) criticized for "fudging the facts," and disingenuously using the waiver authority granted to him under the Helms-Burton Act and ILSA. Factors Congress might not have intended to enter into presidential waiver decisions—such as broad foreign policy concerns or linkages among diverse issues—manage to creep into White House decision making. A case in point is the arrangement negotiated in April and May of 1998 between President Clinton and the European Union to manage the controversy over the Helms-Burton Act and ILSA.

The deal calls for the President: (1) to grant waivers to European companies that otherwise would be snared by the law (*e.g.*, the French oil giant, Total, which is involved in a \$2 billion natural gas project in Iran), (2) to seek from Congress statutory waiver authority for the one key part of the Helms-Burton Act currently bereft of such authority, namely, exclusion from entry into the United States of officers (and their relations) of foreign corporations that invest in confiscated

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49. See *President Clinton Eases Some Sanctions Against India, Pakistan After Nuke-Test Ban*, 15 Int'l Trade Rep. (BNA) 1931 (Nov. 18, 1998).

50. See *Commerce Announces Export Controls Against Indian, Pakistani Entities*, 15 Int'l Trade Rep. (BNA) 1931 (Nov. 18, 1998).

property, and (3) to consult Congress on the possibility of removing the six-month time limit on the duration of Presidential waivers with respect to civil liability for trafficking in confiscated assets.<sup>51</sup> In exchange, the EU agrees: (1) to discourage the kind of behavior the law seeks to penalize (*e.g.*, trafficking in American property confiscated by the Castro government and selling sensitive technologies to Iran and Libya), work towards binding disciplines against such behavior and create a global registry of confiscated American property so that multinational companies will be on notice regarding prospective business investments in Cuba that should be avoided, and (2) to drop its WTO complaint against the United States regarding the Helms-Burton Act. This political solution must be seen as one piece of the overall framework of United States-EU relations. It reflects a mutual desire to avoid a nasty WTO dispute resolution proceeding, or possibly a trade war, and get on with preliminary consideration of a U.S.-EU free trade agreement to create a "New Transatlantic Marketplace" ("NTM").<sup>52</sup> By smoothing some of the rough edges of the Helms-Burton Act and ILSA, it gives these statutes new life, and ensures that prudent companies around the world will do a "Helms-Burton check" before investing in Cuba and an "ILSA check" before investing in the petroleum resource industry of Iran or Libya.<sup>53</sup>

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51. See Pascal Fletcher, *Castro Denounces EU-U.S. Accord on Cuba*, FIN. TIMES, May 20, 1998, at 1; Neil Buckley, *France Wary of Sanctions Agreement*, FIN. TIMES, May 20, 1998, at 8; Helene Cooper et al., *U.S. Ends Penalties Against Cuba Trade*, WALL ST. J., May 19, 1998, at A2; Guy De Jonquieres & Gerard Baker, *Brussels and U.S. End Sanctions Dispute*, FIN. TIMES, May 19, 1998, at 1; *France Blocks Trans-Atlantic Trade Talks; Cuba, Iran-Libya Resolution a Precondition*, 15 Int'l Trade Rep. (BNA) 733 (Apr. 29, 1998). The initial agreement, dated April 11, 1997 and formally known as *The Understanding Between the United States and the European Union*, was supplemented by a second pact on May 18, 1998, in the aftermath of the May 15-16, 1998 Group of Eight Summit in Birmingham, England.

52. For brief but excellent discussions of the sanctions legislation in the context of trans-Atlantic relations, see *Transatlantic Relations*, FIN. TIMES, May 19, 1998, at 17; *That Awkward Relationship*, THE ECONOMIST, May 16, 1998, at 51; *Burying ILSA*, FIN. TIMES, May 13, 1998, at 25. Interestingly, an ulterior motive for France's objections to the sanctions deal may be a desire to slow NTM negotiations, see, Bruce Stokes, *Winning Combination*, FIN. TIMES, May 14, 1998, at 28, though in fairness the French are rightly concerned that acceptance of a sanctions waiver is an implicit acknowledgment that American sanctions law can have an extraterritorial reach. See Bhushan Bahree & David Pearl, *French Threaten to Kill U.S.-EU Sanctions Pact*, WALL ST. J., May 20, 1998, at A9. Arguably, the French objection is also an effort to save face for the United States.

53. The other side of the argument, put forth by fans of the Helms-Burton Act and ILSA, is that the United States-EU agreement makes the international competitive playing field un-level, because American companies are barred from dealings with Cuba, Iran, and Libya, whereas European companies get lasting waivers for such dealings. See, *e.g.*, Gerard Baker & Stephen Fidler, *U.S. Companies Will Lose Out in Brussels Accord*, FIN. TIMES, May 19, 1998, at 7.

A corollary to the first insight, politics and presidential waivers, is that in spite of any statutory requirement incumbent on the President to report the basis for his or her exercise of waiver authority, the decision-making process and the real grounds for the waiver granted may not be transparent. For example, are recent Presidential explanations of the "vital national interests" waivers for Laos or Afghanistan, but not for Burma and Syria, under the Narcotics Trade Act<sup>54</sup> really the "whole truth"? Exactly what pressures were brought to bear on the White House to grant such waivers, and the relative importance of the articulated justifications, may be ambiguous, even hidden. When the waiver criteria involve "national interests" or "national security," perhaps a veil is all the more likely. Why offer publicly anything more than a pithy, conclusory explanation that meets just the minimum statutory threshold for reporting to Congress?

A second insight about prospective sanctions controversies drawn from an understanding of waiver authority concerns the waiver criteria. The degree of controversy generated by exercise of the authority (whether presidential or congressional) is likely to depend very much on the statutory wording of the criteria. A narrow, tightly-drafted, and technical rule gives little room for argument about whether the stated condition is fulfilled. An illustration would be a provision empowering the President to waive imposition of sanctions on Libya if Libya extradites to the United States named indicted suspects accused of bombing Pan Am flight 103. In contrast, a broad and malleable rule leaves great room for argument about whether it is satisfied. One example (alluded to above) is the often-used phraseology that the President may waive sanctions if he or she determines it is in the "national interest" to do so. Another example (found in ILSA<sup>55</sup>) is the authority of the President to waive sanctions against a third country if it agrees to "undertake substantial measures" that further the purposes of the legislation. Exactly what the "national interest" is, and what measures might be "substantial," are left to the President's judgment, and for Congress and the public to second-guess.

Politics aside, is it the case that narrow waiver criteria are economically more efficient to administer than broad criteria? It seems difficult to offer an a priori generalization here.<sup>56</sup> On the one hand, narrow "rules" may be simple and mechanical to administer, and what facts

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54. The waiver provision is set forth at 19 U.S.C. § 2492(b)(1)(A)(ii). See also Bhala, *supra* note 6, at 32–34 (discussing use of this waiver authority).

55. See 50 U.S.C. § 1701(4); Bhala, *supra* note 6, at 115–16.

56. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 557 (1992) (using microeconomic analysis to explore "the extent to which legal commands should be promulgated as rules or standards").

need to be gathered in order to render a determination may be fairly obvious. Bureaucrats can possibly get the facts, verify whether the criteria are met, and supply a straightforward recommendation to the President. In contrast, broad "standards" may give rise to vigorous internal debates about the meaning of the criteria and conclusions to be drawn from their application to a factual predicate. On the other hand, it is not at all clear that the facts to be investigated are any easier to gather when the waiver criteria are narrow than when they are broad. It depends on precisely what facts are required by the criteria. It may not be any easier to apply narrow criteria to a set of facts than to apply broad criteria to them, particularly if a few arguably critical facts cannot be obtained and hence judgment calls must be made. In brief, an efficiency argument about drafting waiver criteria can cut both ways.

Third, understanding waiver authority may reveal some of the controversies that occurred during the legislative process in which a sanctions bill was enacted. It may be that a strong consensus did not exist for a particular sanctions bill, so Congress had no choice but to create several "outs" by giving the President expansively-worded waiver authority. The logic is that it may not be too costly for Congress to create a vague standard (as opposed to trying to hammer out specific waiver criteria), and thereby shift costs (defined in terms of interpretation of the standard) to the President. Conversely, where a strong majority in Congress is set against a group of potential target countries, it may be easy for Congress to reach agreement on narrow waiver rules. The President may be less likely to get waiver authority, and any authority he or she gets may afford little room to maneuver. In this regard, the Helms-Burton Act and ILSA contrast well with the Nuclear Proliferation Act.

#### *Step Five: A—The Aim of the Sanction*

*Are the sanctions called for by the legislation directed at a regime or a commodity?* Some sanctions are aimed at a commodity because the commodity is harmful. The Narcotics Trade Act is an example. Malefactors are identified as those countries involved in the cross-border illicit drug trade. The Nuclear Proliferation Act is another example; it aims at possession of a particular commodity: nuclear devices.

In contrast, some sanctions are aimed at a political regime because the regime has behaved badly. For example, American sanctions against Burma, which ban all new investment there and hence are trade sanctions, are designed to express displeasure at the government of Burma,

particularly its alleged human rights abuses.<sup>57</sup> Likewise, the ILSA takes aim at two perceived “bad guys,” Iran’s governing mullahs and Colonel Qaddafi.

Some sanctions may be a hybrid, being aimed at both a commodity and a regime. The Helms-Burton Act is a good example. Its aim is not simply to deter trafficking in confiscated American property. In addition, it is unabashed about seeking to overthrow the Castro government.<sup>58</sup> Here again the particularly controversial nature of the Helms-Burton Act is apparent. A sanction aiming at both a commodity and regime is sure to raise howls.

Identifying the aim of the legislation highlights why from an empirical perspective a sanction may be dubious. Microeconomic logic suggests regime-aimed sanctions might be more effective than commodity-aimed sanctions. Where a government is a target of a commodity-aimed sanction, the illicit product can still be acquired from other sources. Consequently, the policy of stamping out trade in the commodity is unlikely to be realized. The sanctions regime simply causes a shift in trading patterns. Narcotics, for example, can come from Laos and Afghanistan, if not Burma, and nuclear materials can be—and are—obtained by India and Pakistan, if not North Korea. In other words, commodity-based sanction schemes are susceptible to being undermined by a substitution effect. Existing and would-be transactors in the contraband are encouraged to substitute sources, from a country hit with sanctions to one on which sanctions have yet to be imposed.

A commodity-based sanction is likely to be successful only if there are no substitutes and sanctions are imposed on the monopoly supplier. Even this success is not likely to persist for very long. The relatively rare instance of a monopoly held by one sanctioned country over an illicit product may create an incentive for rogue third countries to steal the illicit product from, or smuggle it out of, the sanctioned monopolist—thus leading to a collapse of the monopoly.

In contrast, by definition a regime-aimed sanction is directed at a unique political *status quo*. Anything short of a meaningful change in that *status quo* will not lead to a lifting of the sanctions. The target may be forced to try to substitute some of the foreign assistance, political relationships, or trade and investment being withheld by the sanction-imposing countries. The target, in other words, may try to make new, or

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57. See Ted Bardacke, *Burmese Junta Digs in its Heels as Sanctions Bite Harder*, FIN. TIMES, May 5, 1998, at 9; *ASEAN Governments Denounce U.S. Sanctions Action*, 14 Int'l Trade Rep. (BNA) 779 (Apr. 30, 1997); *Citing Deepening Political Repression, U.S. Bans All New Investment in Myanmar*, 14 Int'l Trade Rep. (BNA) 718 (Apr. 23, 1997); *U.S. Sanctions Against Burma*, FIN. TIMES, May 21, 1997, at 8.

58. See Bhala, *supra* note 6, at 37–53.



lean on old, allies. To the extent the target is unsuccessful, the sanctions may bring about the desired change in regime or its behavior.

In sum, the criticism that sanctions are ineffectual might be somewhat less biting with respect to regime-aimed sanctions than with respect to commodity-aimed sanctions. The rationale is that, absent monopoly, it may be easier for consumers of an illicit product to find alternative suppliers when one source is sanctioned than for a target of a regime-based sanction to substitute willing and able friends. Whether this rationale bears out in practice depends on the relative elasticities of substitution: for commodity-aimed sanctions, the elasticity of substitution of one source of the illicit product for another in response to a sanction; and for regime-aimed sanctions, the elasticity of substitution of one friend for another in response to a sanction. Undoubtedly, there will be plenty of controversy about these elasticities before and after sanctions are imposed.

It ought to be noted that a third direction at which sanctions are aimed appears to be emerging, at least in the view of recent international environmental law adjudications. As of this writing, the United States has controversial bans on imports of tuna caught using the so-called encirclement method (which involves use of purse-seine nets), because of the incidental killing of dolphins associated with this method.<sup>59</sup> It also has an import ban on shrimp caught by trawlers from countries not requiring the use of turtle excluder devices (TEDs), because of the incidental killing of turtles.<sup>60</sup> Panels established under the pre-Uruguay Round General Agreement on Tariffs and Trade (GATT) dispute resolution system considered the tuna-dolphin case, and a panel established under the Uruguay Round's new dispute resolution mechanism considered the shrimp-turtle case.<sup>61</sup> Both panels ruled against the use of GATT Article XX, which contains general exceptions to GATT obligations, to justify an import ban that aims not at products but at a production process. The panels found the American bans were not directed at tuna or shrimp, but at the encirclement method and the lack of TEDs, respectively. This distinction is a minute one indeed, and anathema to environmentalists. Nevertheless, it is welcome to developing countries, which see the bans as disguised protectionism and fear the United States will drive up their production costs by imposing its environmental regulations extraterritorially. The United States has taken

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59. See BHALA, *INTERNATIONAL TRADE LAW*, *supra* note 22, at 1190–1210.

60. See *Trade and the Environment: Options for Resolving the WTO Shrimp-Turtle Case*, 15 *Int'l Trade Rep. (BNA)* 294 (Feb. 18, 1998).

61. The panel reports may be obtained through the WTO's website, <<http://www.wto.org>>.

steps to remove the tuna ban by negotiating a multilateral agreement on dolphin protection, the 1995 Declaration of Panama, and signaling its willingness to allow importation of tuna from signatory countries.<sup>62</sup> The United States lost its appeal of the shrimp ruling before the WTO's Appellate Body.<sup>63</sup> Thus, the future of process-based sanctions in the GATT-WTO context seems bleak.

#### *Step Six: T—Termination of the Sanction*

What criteria, if any, exist in the sanctions legislation for terminating the sanctions? Careful legislators ought to specify conditions, and/or provide discretionary authority to the President, for ending the punishment. Legislators are not always careful, however. As sponsored by Senator John Glenn (D-Ohio) and enacted by Congress, the Nuclear Proliferation Act, for example, had no such criteria or authority and still has none.

There is no formula for termination criteria; sanctions legislation differs widely in this regard. At one extreme, the criteria can be as simple as a built-in sunset provision stating that sanctions are to have a life-span of only the specified number of years. The ILSA sanctions, for example, have a five-year time limit.<sup>64</sup> At the other extreme, the criteria can be a lengthy, inscrutable list of conditions, many of which are either chimerical or ambiguous, and which are foolishly harsh. As such, the list will conjure up memories of John Maynard Keynes' 1920 work, *The Economic Consequences of the Peace*, a brief *tour de force* against what Keynes astutely dubbed the Carthaginian peace imposed by the 1919 Treaty of Versailles. In between these extremes lie innumerable possibilities.

There may be, for example, a prescribed minimum period during which sanctions must remain in effect, followed by the possibility of lifting sanctions under certain conditions. Here again the ILSA is instructive. After the minimum one-year period, sanctions on a target may be lifted if the President certifies that the target no longer is engaged in a prohibited transaction and has provided reliable assurances that it will not knowingly commit a violation in the future. Sanctions on Iran may be lifted if the President certifies that Iran no longer supports international terrorism and has abandoned efforts to obtain weapons of mass

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62. See *Accord Brings Tuna/Dolphin Dispute Closer to Final Resolution, Official Says*, 15 Int'l Trade Rep. (BNA) 284 (Feb. 18, 1998).

63. See *United States Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 November 1998, WT/DS58/AB/R.

64. See 50 U.S.C. § 1701 note (Iran and Libya Sanctions, Sec. 13. Effective date; sunset); Bhala, *supra* 6, at 113.

destruction, and sanctions on Libya may be lifted if it complies with certain United Nations Security Council resolutions.<sup>65</sup>

The ILSA termination provisions raise the problem of Presidential discretion. Again, there is no invariable formulaic phrase by which Congress simultaneously delegates and constrains the President's discretion. At one extreme, the statute might contain reasonably detailed criteria, as does the ILSA. At the other extreme, the President's discretion may be constrained by what is in the "national interest." Often, this term is modified with adjectives such as "important," "essential," or "vital" that muddy the waters, and perhaps also by a requirement of reporting to Congress.

Assuming there are termination criteria, understanding exactly what they are is important for at least two reasons. First, the criteria themselves are statements of expectation. They bespeak to the world what the United States wants the target to do or not do in order to resume normal relations. The Helms-Burton Act is quite explicit about expecting the overthrow of Fidel Castro before foreign assistance sanctions can be lifted.<sup>66</sup> Second, the criteria help guide businesses on possible future relations with the target. Consider the ILSA's sunset rule. Does it not encourage American petroleum companies to continue to foster their informal contacts—which by no means are barred by the ILSA—with Iran and Libya in anticipation of the day the sanctions are lifted? In contrast, if the message from termination criteria (or their absence) is "no way, no how," then American businesses have two choices: forget about doing deals with the target, or lobby Congress and the White House to change the law. Third, termination criteria may say something about the political maneuvering necessary to pass the sanctions legislation. A sunset provision may have been required to secure votes, and broad Presidential discretion may have been essential for White House support.

It is rather difficult to formulate hard a priori generalizations about the controversies that termination provisions might cause. The degree of controversy will depend in part on how they are drafted. It would seem a priori that the absence of termination criteria from sanctions legislation is likely to be controversial, but the controversy is not necessarily to occur when the legislation is passed. Indeed, the absence may be deliberate to facilitate passage of the bill. The controversy comes later, after the sanctions have been in place and have proved ineffectual and have hurt poor people in the target country. American sanctions against Pakistan pursuant to the Nuclear Proliferation Act are a case in point.

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65. See 50 U.S.C. § 1701(8)(9); Bhala, *supra* note 6, at 112–13.

66. See 22 U.S.C. § 6033(b)(1)–(2); Bhala, *supra* note 6, at 57.

Only days after they were imposed, Pakistan announced its steadfast determination to maintain a fully operational arsenal of nuclear missiles.<sup>67</sup> A month later, it revealed its foreign exchange reserves had been ravaged to the level of \$600 million, barely enough to finance three weeks of imports,<sup>68</sup> and that it had to obtain \$250 million in balance of payments support from Kuwait to stave off its impending debt crisis.<sup>69</sup> Could it then have been any surprise that President Clinton signed legislation to exempt export credits for farm sales from the American sanctions on both Pakistan and India?<sup>70</sup> Certainly not, especially in view of the additional fact that this move helped ailing American farmers survive during a dramatic fall in wheat prices.<sup>71</sup>

Still, termination criteria as simple as a sunset provision can be controversial. Suppose the sanctions arguably have induced a bit of change in the target's behavior. The debate on removal of the sanctions begins. Why punish the target further when it is trying to change? Then again, why throw away the very stick that seems to have brought about the improvement? The ILSA is a case in point. It has possibly hampered Iran's ability to develop nuclear, biological, or chemical weapons, and impressed on some moderate Iranian leaders the economic benefits of better ties with the United States. Should the sanctions thus be terminated in advance of the five-year sunset date?

#### *Step Seven: U—Whether the Sanction is Unilateral*

*Is the sanction regime imposed unilaterally by the United States?* It is not difficult to discern whether sanctions are unilateral or multilateral in nature. It need only be found out how many countries other than the United States have agreed to punish the target. There is no shortage of contemporary examples of America acting alone: the Helms-Burton Act, ILSA, Nuclear Proliferation Act, and Narcotics Trade Act. Recent instances of unified action are relatively fewer in number. The Gulf War sanctions imposed on Iraq and the air travel ban to Libya, both imposed by the United Nations, are instances. More distant historical illustrations of multilateral action include the apartheid-era sanctions imposed on South Africa and the former Rhodesia.

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67. See Christopher Thomas, *Pakistan Starts Big Build-up of Nuclear Arsenal*, THE TIMES (LONDON), June 1, 1998, at 11.

68. See Farhan Bokhari, *Pakistan Tries to Plug Holes as Foreign Exchange Reserves Drain Away*, FIN. TIMES, July 27, 1998, at 2.

69. See Farhan Bokhari, *Pakistan Set to Receive Kuwaiti Aid*, FIN. TIMES, June 12, 1998, at 6.

70. See Stephen Fidler, *U.S. Clears Way for Wheat Sales*, FIN. TIMES, July 16, 1998, at 5.

71. *Id.*

What is a less obvious, but an important related inquiry, is to discern whether a sanctions regime is as unilateral or as multilateral as it appears. It may be that only the United States has a *de jure* measure against a target, but other countries may shun the target as a *de facto* matter. These third countries may fear that formal legal action by them would cause internal political problems, or trigger retaliation by foreign powers supporting the target. The low profile support received by the United States after the Gulf War from a number of Arab countries is an example. Who can doubt these countries would like to be rid of Saddam, or at least of the threat posed by Iraq acquiring weapons of mass destruction? But who can doubt that these countries cannot possibly align themselves too publicly with American-inspired sanctions against Iraq?

Conversely, it may be that many countries have *de jure* sanctions against a target. But, *de facto*, measures are observed more in the breach. Third countries may want to show public support for a sanctions scheme by outlawing certain transactions and contacts with the target. Perhaps they are rewarded for their ostensible outrage by receiving American aid, or at least not losing this aid. These third countries may nonetheless be unwilling to enforce the bans because of domestic political, economic, ethnic, linguistic, cultural, or religious considerations. The target may enjoy support among the local populace. There may be lucrative or even essential business relations with the target. Sizeable local communities may share an ethnic, linguistic, or cultural heritage, or a religion, with the people of the target country. Even if a third country intends to live up to its commitment to join a multilateral sanctions scheme, it may be unable to do so. It may simply lack the law enforcement resources or expertise. There may be nightmarish geographical problems that work to the advantage of smugglers and others seeking to defy the ban—for example, a thick jungle that becomes nearly impassible for large groups of personnel and vehicles during the monsoon (not uncommon in South East Asia), or hundreds of miles of cold, mountainous terrain with only treacherous footpaths (not uncommon in Asia Minor). The broad point is to be chary of appearances. A *de jure* unilateral sanctions regime may be *de facto* multilateral. A *de jure* multilateral sanctions regime may be *de facto* unilateral.

This point sheds some light on the customary *a priori* expectation that a unilaterally-imposed sanction will be more controversial than a multilaterally-imposed one. That is true, if reality and appearances coincide. When America behaves like a cowboy, and no other country follows, America is surely in for at least a verbal battle with her trade partners. After all, a *de jure* and *de facto* unilateral sanctions scheme

necessarily means that there is no political or moral consensus in favor of penalizing the target, while a de jure and de facto multilateral regime is a manifestation of the opposite circumstances. In the former, but not the latter instance, howls about extra-territoriality, infringement on sovereignty, and bully-like behavior will be heard coming from capital cities around the world.

However, there are at least two important circumstances when the expectation of greater controversy with a unilateral regime can break down. First, it may be that governments fall enthusiastically into line to enact and enforce a multilateral sanctions scheme. But over time, the cruel and inhuman effects of the scheme become known. CNN broadcasts stories of middle-class Iraqis who cannot get medicines to treat simple ailments like fevers that strike all children from time to time. Aid workers call attention to famine conditions in North Korea. Economists publish studies indicating that constructive engagement with South Africa would create job opportunities for, and thus empower, blacks. At this point, the target has become the victim, and the world the torturer, and thus begins a global public debate about the multilateral sanctions scheme. In this regard, the excellent analyses in the recent British book, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions*,<sup>72</sup> ought not to go unmentioned. Only the most intransigent reader can emerge from this collection unscathed in support for multilateral sanctions.

Second, where reality and appearances do not coincide, controversy may take a different turn from what was initially expected. Consider an instance where the United States is the only country to impose sanctions as a matter of law, but there is considerable support for the sanctions. There the United States may cajole her trading partners to be more visible in expressing their displeasure with the target, or the United States may decide that the low-profile approach of her partners is as much as can be expected, and perhaps rather effective to boot. But where there is a de jure multilateral scheme, and in practice some of America's trading partners are sieves through goods and services pass to the target, Washington will undoubtedly decry the hypocrisy, loudly or behind the scenes, but in either event directly to the sieves. Thus, to say that unilateral sanctions are likely to evoke more controversy than multilateral sanctions is at best a very gross generalization that breaks down when diverse interest groups highlight the inhumane effects of multilateral sanctions, and when widely-enacted sanctions legislation is not enforced.

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72. See THOMAS G. WEISS ET AL., *POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS* (1997).

IV. THE VIRTUES OF *MRS. WATU*

*MRS. WATU* is a simple yet potent model for unlocking the complexities of *any* piece of sanctions legislation. While it may not encompass all of the important issues raised by such legislation,<sup>73</sup> certainly it covers the key doctrinal points: the *Method(s)* of sanction(s) threatened; the possible establishment of a private *Right of action*; the call for a *Secondary boycott*; the existence and nature of *Waiver authority*; the *Aim* of the sanction; the criteria for *Terminating* the sanction; and whether the sanction is *Unilateral* in nature. In brief, *MRS. WATU* is a friendly analytical tool for sanctions legislation.

Equally, if not more importantly, *MRS. WATU* may have some insights into the future that cut through the loud and often emotional debate about proposed sanctions legislation. It is a model for *any* practicing or academic lawyer, regardless of political or economic persuasion. Reading a proposal with *MRS. WATU* can provide a priori hints about controversies that the legislation, if enacted, might cause. Simultaneous use of multiple methods of sanctions, private rights of action, secondary boycotts, broad presidential waiver authority, commodity-aimed sanctions, sanctions with no criteria for termination, and unilaterally-imposed sanctions may well prove to be particularly disputatious. In this regard, *MRS. WATU* is an independent, *non-normative*, *non-empirical* model for critically analyzing sanctions. As America's use of sanctions continues, and perhaps accelerates, any device that brings even a modicum of order and dispassion to the debate ought to be welcome.

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73. For instance, another issue that might be pursued is the level of governmental authority that imposes the sanction. This issue is raised by the array of states and municipalities that have enacted measures restricting business dealings with Burma. See David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands its Foreign Policy Expedition from Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021 (1997); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma*, 30 VAND. J. TRANSNAT'L L. 175 (1997). In April 1998, a coalition of American businesses, the National Foreign Trade Council, Inc. (NFTC), working with USAEngage, filed suit in the United States District Court for Massachusetts against Massachusetts' limits on entering into procurement transactions with firms that do business with Burma. The NFTC argues the scheme violates the Commerce and Foreign Relations Clauses of the Constitution, which vest the federal government with the power to regulate interstate and foreign commerce and forbid states from burdening such commerce. See *Trade Association Lawsuit Challenges Massachusetts Burma Sanctions Law*, 15 Int'l Trade Rep. (BNA) 797 (May 6, 1998); *State Sanctions Law to be Subject of Constitutional Challenge*, 15 Int'l Trade Rep. (BNA) (Feb. 25, 1998).