REACHING MULTINATIONAL CORPORATIONS: A NEW MODEL FOR DRAFTING EFFECTIVE ECONOMIC SANCTIONS

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"Sanctions have been successful—by our definition—in 34 percent of the cases overall."[1]

INTRODUCTION

At a fundamental level, an economic sanction represents compromise between competing political concerns.[2] Trade restrictions between the United States and an adversarial state send a stronger message than an envoy could deliver through diplomatic channels.[3] Also, depending on the sanction in play, the costs of imposing economic sanctions are less in terms

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1. 1 GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 93 (2d ed. 1990).

2. *See generally id.* 1–3 (noting the policy goals of imposing economic sanctions). While one may view economic sanctions as a policy compromise, debate over the scope and purpose of trade restrictions can be quite heated. Consider former Senator, then vice presidential candidate, John Edwards's rebuttal to an answer given by Vice President Cheney during the 2004 vice presidential debate:

> [Vice President Cheney] talks about Iran. The reality about Iran is that Iran has moved forward with their nuclear weapons program on their watch. They ceded responsibility to dealing with it to the Europeans.
>
> Now, the [V]ice [P]resident, as you pointed out, spoke out loudly for lifting the sanctions on Iraq. John Kerry and I believe we need to strengthen the sanctions on Iraq, including closing the loophole that allows companies to use a subsidiary, offshore subsidiaries to do business with Iran.
>
> I mentioned Halliburton a few minute[s] ago in connection with the $87 billion, and you raised it in this question. This is relevant, because [Vice President Cheney] was pushing for lifting sanctions when he was CEO of Halliburton. Here's why we didn't think Halliburton should have a no-bid contract.
>
> While [Vice President Cheney] was CEO of Halliburton, they paid millions of dollars in fines for providing false information on their company, just like Enron and Ken Lay.
>
> They did business with Libya and Iran, two sworn enemies of the United States.

Senator John Edwards, Cheney-Edwards Vice Presidential Debate (Oct. 5, 2004), *available at* http://www.debates.org/pages/trans2004b.html.

3. *See generally* HUFBAUER, *supra* note 1, at 4–13 (tracing the use and effectiveness of the numerous uses of economic sanctions throughout history).

of capital and human life than military intervention.[4] Because of these benefits, it is not surprising that the United States has used economic sanctions throughout the twentieth century in order to achieve various foreign policy objectives.[5] For example, Congress gave broad, trade-restriction power to the President to use against Germany and its allies in World War I and World War II as an economic supplement to military action.[6] The Truman Administration exercised its statutory authority under the First War Powers Act by imposing economic sanctions against communist China in 1950, which remained in effect until the Nixon Administration's rapprochement two decades later.[7] Also, the Reagan Administration, invoking authority delegated by Congress, widely restricted trade with the Soviet Union in 1982.[8] More recently, the President and Congress have passed far-reaching economic sanctions against terrorists, terrorist organizations, and those countries that support them.[9] While the policy objectives behind any one economic sanction could be numerous, the United States's decision to impose trade restrictions always reflects, in a broad categorical sense, national security, foreign policy, or economic

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4. *See id.* at 9 (discussing President Woodrow Wilson's assessment that imposing a sanction "does not cost a life outside the nation boycotted" (quoting WILSON'S IDEALS 108 (Saul K. Padover ed., 1942))).

5. *See generally* KENNETH A. RODMAN, SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT 1–3 (2001) (examining the United States's increasing use of economic sanctions in the post-Cold War era due to its diminishing hegemony and due to economic globalization).

6. Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 411, 415 (1917), *amended by* First War Powers Act, 1941, ch. 593, § 301(1), 55 Stat. 838, 839–40 (codified at 50 U.S.C. app. § 5(b) (2000)).

7. PHILLIP I. BLUMBERG & KURT A. STRASSER, THE LAW OF CORPORATE GROUPS: STATUTORY LAW—SPECIFIC §§ 20.06.1, .6 (1992).

8. *See, e.g.*, Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (Nov. 18, 1982) (ordering the end of the pipeline embargo and rescinding the controls imposed on the U.S.S.R. by 47 Fed. Reg. 141, 47 Fed. Reg. 144, and 47 Fed. Reg. 27,250); Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (June 24, 1982) (rescinded Nov. 18, 1982) (updating the original pipeline embargo order); Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., 47 Fed. Reg. 141 (Jan. 5, 1982) (rescinded Nov. 18, 1982) (restricting oil and gas exportation to the U.S.S.R.—which became known as the pipeline embargo—in reaction to the heavy repression in Poland); *see also* RODMAN, *supra* note 5, at 71–98 (discussing the pipeline embargo).

9. *See, e.g.*, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001) (prohibiting transactions between U.S. persons and persons supporting or committing terrorism); Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594 (2005) (defining what constitutes "blocked property" and prohibiting financial, technological, and material transactions of blocked property); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (2005) (regulating financial transactions between U.S. persons and listed persons and countries); Terrorism List Governments Sanctions Regulations, 31 C.F.R. pt. 596 (2005) (listing the countries); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597 (2005) (regulating transactions with terrorist-related organizations).

interests.[10] Sometimes these objectives are embodied in the language of the legislation itself;[11] on other occasions objectives must be inferred from legislative history and historical context.[12]

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10. *See* International Emergency Economic Powers Act § 202(a), 50 U.S.C. § 1701(a) (2000) (noting that authority under the act may be exercised when there is a threat to national security, foreign policy, and the national economy); Export Administration Act of 1979 § 3, 50 U.S.C. app. § 2402 (2000) (explaining the importance of exports to the economic, security, and foreign policy goals of the United States); *see also* BLUMBERG & STRASSER, *supra* note 7, § 21.03 ("The 1977 Amendments [to the Export Control Act of 1969] authorized the President to regulate the export of goods . . . to the extent necessary to further significantly the foreign policy or national security . . . of the United States." (footnotes omitted)).

11. *See, e.g.*, 50 U.S.C. § 1701(a) (authorizing the President to take action against any unusual or extraordinary threat "to the national security, foreign policy, or economy of the United States").

12. This article will not involve an in-depth analysis of the particular episodes in which the United States (or any other country) has attempted to enforce economic sanctions beyond that necessary to flesh out the scope of the sanction legislation. Many such episodes exist, however. *See, e.g.*, Hamburg-Am. Line Terminal & Navigation Co. v. United States, 277 U.S. 138, 141 (1928) (noting that a New Jersey subsidiary of a German parent corporation was not an "enemy" under the Trading with the Enemy Act); Behn, Meyer & Co. v. Miller *ex rel.* United States, 266 U.S. 457, 462, 473 (1925) (holding that subsidiaries in which Germans held stock were not considered "enemies" within the meaning of the Trading with the Enemy Act); Fruehauf-France, S.A. v. Massardy, Cour d'appel [CA] [regional court of appeal] Paris, May 22, 1965, J.C.P. 1965 II, 14274, concl. Nepveu (Fr.), *summarized in* 5 I.L.M. 476 (1966) (appointing an administrator to operate Fruehauf-France—which was owned in majority by a U.S. parent company—and to carry out a contract in violation of the U.S. embargo against China and North Korea); Compagnie Européenne des Pétroles, S.A./Sensor Nederland B.V., Arrondissementsrechtbank [Rb.] [District Court], The Hague, Sept. 17, 1982, RvdW 167 (Neth.), *reprinted in* 22 I.L.M. 66, 67–69 (1982) (holding that a contract was governed by Dutch law and that under Dutch law, a Dutch subsidiary (with a U.S. parent) had Dutch nationality, despite the defendants claim that their behavior was governed by U.S. Export Administration Regulations); Libyan Arab Foreign Bank v. Bankers Trust Co., [1989] Q.B. 728, 731–33, 774 (Eng.) (holding that the freezing of Libyan assets in foreign branches of U.S. banks was ineffective to prevent a Libyan bank from recovering deposits held in the London branch of a U.S. bank); Daimler Co. v. Continental Tyre & Rubber Co., [1916] 2 A.C. 307, 336–37 (H.L.) (appeal taken from Eng.) (holding that a British subsidiary of a German corporation with a Board of Directors comprised solely of German nationals was an "enemy" corporation for the purposes of British law); BLUMBERG & STRASSER, *supra* note 7, § 20.06 (discussing the United States's trade embargo on North Korea and China, which later resulted in "celebrated confrontations over continued application of the China Embargo with the closest allies of the United States: the United Kingdom, France, and Canada" (citing 3 ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS § 20.01 (2d ed. 1983))); HUFBAUER, *supra* note 1, at 13 (discussing Europe's refusal to comply with U.S. attempts to extraterritorially enforce an embargo against the Soviet Union in the early 1980s and the ensuing "Soviet-European pipeline case"); RODMAN, *supra* note 5, at 2–3 (examining the United States's increasing use of economic sanctions in the post–Cold War era due to its diminishing hegemony and to economic globalization); Kenneth A. Rodman, *Sanctions at Bay? Hegemonic Decline, Multinational Corporations, and U.S. Economic Sanctions Since the Pipeline Case*, 49 INT'L ORG. 105 (1995) (using President Reagan's attempt to place sanctions on the gas pipeline between the U.S.S.R. and Europe to explain how decreasing U.S. hegemony has led to U.S. economic sanctions being less effective). *See generally* MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE (2001) (providing in-depth discussions on legislation, sanctions, specific political events, and other relevant topics).

Once in place, the mechanics of an economic sanction are rather complex in operation. A typical economic-sanction regime involves a country (the sender state) that imposes an economic sanction over another country (the target state).[13] The economic sanction prohibits specified commercial entities within the sender from trading with the target unless that entity can obtain a license.[14]

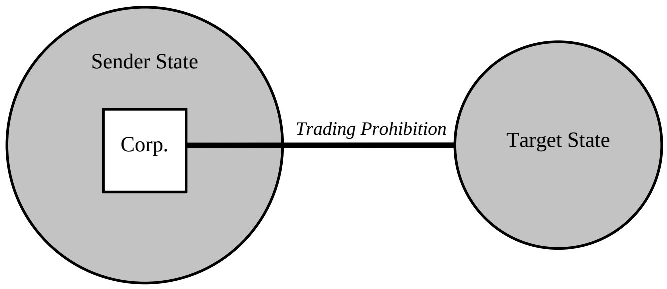

Fig. 1. A typical economic-sanction regime

The ability to obtain a license depends completely upon the seriousness of the economic sanction in effect at the time and can range from a mere formality to outright prohibition.[15] For example, the ability of a U.S. business concern to obtain a license to trade with Cuba today is nearly impossible.[16] Before the early 1990s, however, the same entity could request, and most likely receive, a license with only moderate bureaucratic wrangling.[17]

If an economic sanction embodies important enough policy objectives, a sender may also limit (or attempt to limit) the ability of commercial entities located within another foreign country (the third state) to trade with

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13. HOSSEIN ASKARI ET AL., USING UNILATERAL ECONOMIC SANCTIONS EFFECTIVELY: A GROUNDED THEORY 1 (George Wash. Ctr. for the Study of Globalization, Occasional Paper Series No. 03-11, 2003), http://digbig.com/4hfhd. *See generally* HUFBAUER, *supra* note 1, at 4–9 (discussing the history of economic sanctions).

14. Richard Pettler, *How to Keep Your Clients from Violating Export Rules*, INT'L L. NEWS, Fall 2004, at 13, 13–15. *See generally* ERIC L. HIRSCHHORN, THE EXPORT CONTROL AND EMBARGO HANDBOOK (2000) (providing a detailed discussion of export controls).

15. Pettler, *supra* note 14, at 14.

16. *See* MALLOY, *supra* note 12, at 504–10 (discussing the difficulty of trade with Cuba and the effect of the regulations). *See generally* Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2005) (providing the regulations for the embargo of Cuba, which is still in effect).

17. *See* BLUMBERG & STRASSER, *supra* note 7, § 20.07.2 (discussing the United States's concession that foreign subsidiaries of U.S. corporations could, in certain circumstances, obtain a license to trade with Cuba).

a target.[18] The sender usually confines the restrictions placed on foreign businesses to entities owned or controlled by businesses located within the sender.[19] The paradigmatic example involves a domestic parent corporation that wholly owns a foreign subsidiary.

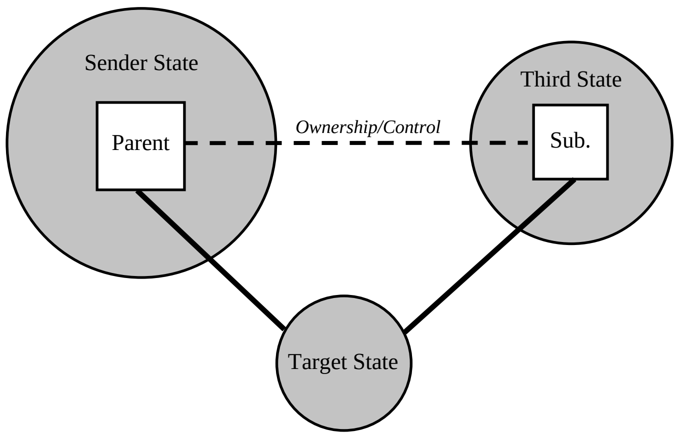

Fig. 2. The controlled foreign subsidiary

Despite the fact that the foreign subsidiary may be a distinct legal entity incorporated in the third state, the parent's control over the foreign subsidiary places it under the sender's regulatory ambit.[20] As such, the relationship between the parent and the subsidiary in a multinational enterprise can trigger trade restrictions upon the subsidiary.[21]

Depending on the definition of ownership/control, which this Article will explore at length, the sender state is able to regulate trade in two ways: (1) a sender can prohibit a corporation located within its territorial

18. *See* Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] Q.B. 728, 731–33, 774 (Eng.) (describing the United States's unsuccessful attempt to freeze Libyan assets in foreign branches of U.S. banks); Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (2005) (defining persons subject to the Foreign Assets Control Regulations as individuals, corporations, or partnerships as organized or doing business in the United States, as well as those entities owned or controlled by such U.S. entities).

19. *See, e.g.*, 31 C.F.R. § 500.329 (regulating entities owned or controlled by U.S. entities); U.S. Department of the Treasury Public Circular No. 18, 7 Fed. Reg. 2503, 2504 (Apr. 1, 1942) (putting forth the first definition of "person subject to the jurisdiction of the United States," and including foreign subsidiaries of domestic parent corporations within that definition through the medium of control).

20. *See* 31 C.F.R. § 500.329(c)–(d) (noting that "[a]ny corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by" any U.S. person or corporation is subject to the jurisdiction of the United States).

21. *See id.* (subjecting foreign subsidiaries controlled by U.S. corporations to the jurisdiction of the United States).

boundaries from trading with a target,[22] as seen in figure 1; and (2) the sender can restrict the trade of any subsidiary which that corporation owns or controls,[23] as figure 2 depicts. However, if our hypothetical corporation is a U.S.–based subsidiary owned or controlled by a foreign parent located in a foreign state (for our purposes, a fourth state), the economic sanction also operates to restrict trade between the foreign parent and the target state, as seen in figure 3.[24]

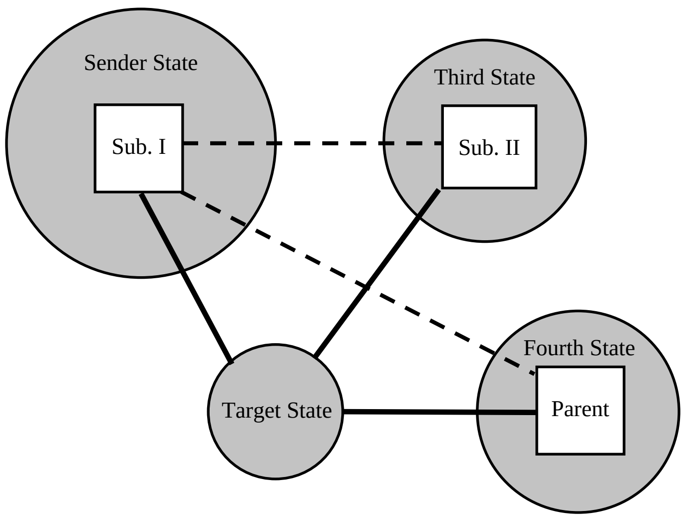

Fig. 3. The tiered multinational corporation

Here, the ownership/control function travels both up and down the tiered multinational corporation to capture all facets of the enterprise. An economic sanction, however, does not restrict the trading capability of subsidiaries partially but not sufficiently owned or controlled by a multinational corporation.

The legal mechanisms by which a sender determines the reach of trade restrictions over domestic and foreign businesses take the form of jurisdictional standards drafted into economic-sanction legislation.[25]

22. *Id.* §§ 500.201(b), .329(c).
23. *Id.* §§ 500.201(b), .329(c)–(d).
24. *Id.* §§ 500.201(b), .329(b).
25. *See, e.g.*, Trading with the Enemy Act, ch. 106, § 2(a), 40 Stat. 411, 411 (1917) (codified as amended at 50 U.S.C. app. § 2(a) (2000)) (defining any corporation "doing business" or "incorporated within such territory of any nation with which the United States is at war" as an enemy); 31 C.F.R. § 500.329 (noting that "[a]ny corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by" a U.S. person or corporation is subject to the jurisdiction of the

Congress has utilized a number of standards, each reflecting varying policy considerations.[26] The precise language Congress uses in drafting a jurisdictional standard is extremely important, as that language determines the extent of the sanction's application. Two paradigms immediately present themselves. First, Congress has restricted specific actors from trading with target states through the ownership/control function described above.[27] Through these actor-focused proscriptions, Congress directly regulates each entity by requiring licensing in order to trade with a target. Part I of this Article addresses actor-focused proscriptions. Second, Congress has at times prohibited anyone, regardless of the actor, from trading with a target in goods that originated in the United States.[28] An actor who trades in U.S.-origin goods with a target, whether or not a domestic corporation owns or controls that actor, would violate trade restrictions simply because the goods originated in the United States.[29] Part II explores the nature of this stream-of-commerce-type regime. Despite the operational differences between the actor-focused and U.S.-origin paradigms, both share certain fundamental characteristics. Some U.S.-origin statutes utilize jurisdictional standards similar, if not identical, to those found in actor-focused statutes.[30] Congress's prerogative to recycle language among economic-sanction statutes makes categorization difficult. However, categorization remains entirely necessary for organizational simplicity and to flesh out the effect that language has on the enforcement of economic sanctions.

As this Article will show, both actor-focused and U.S.-origin sanction regimes are costly.[31] An economic sanction diminishes, if not stops, trade between certain entities or in designated areas, to the disadvantage of sender and target alike.[32] Yet a sanction regime touches more than just the sender and target states. The jurisdictional standards embedded in a statute may

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United States).

26. *Compare* Trading with the Enemy Act § 5(b) (giving the President the power to regulate any transaction between a U.S. person or institution and an "enemy" during war), *and* 31 C.F.R. § 500.329 (allowing the regulation to reach any entity "owned or controlled" by a U.S. entity), *with* Export Administration Act of 1979 §§ 4–5, 50 U.S.C. app. §§ 2403(b), 2404(a)(1) (2000) (limiting the jurisdiction of the act to those transactions involving only a specific set of countries), *and* Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.315 (2005) (defining "U.S. person" to include foreign branches of "entit[ies] organized under the laws of the United States" without using the words "owned or controlled" in relation to business entities).

27. *See infra* Part I.

28. *See infra* Part II.

29. *See infra* Part II.A.

30. *See infra* notes 161–69.

31. *See infra* Part III.

32. HUFBAUER, *supra* note 1, at 2, 12–13 (noting the economic and political backlash that a sanction may have on both sender and target countries).

implicate corporations in a third, fourth, or number of states.[33] As depicted in figure 3, the reach of an economic sanction over foreign corporations is limited by the degree of ownership/control that a particular entity possesses over other entities within a multinational enterprise. Although policy congruence with regard to an economic sanction may exist between the sender and some states that host corporations subject to trade restrictions, that similarity of interests may not exist in a number of other host states neutral towards or hostile to the policy objectives of the sender.[34] A third state would likely take issue with the sender's attempt to prohibit a corporation—incorporated in, and therefore considered a national of, the third state[35]—from trading with a target in a potentially profitable venture.[36] In such situations, a host state would find the jurisdictional claim of the sender to be an affront to the host state's sovereignty.[37] The jurisdictional challenge is costly to the sender state because it may preclude the sender from obtaining foreign policy objectives on other potentially more important fronts.[38]

This Article proposes a third model—one which eschews the need for the policy congruence frequently lacking between countries in many economic-sanction regimes.[39] Consider an economic sanction that

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33. *See* ASKARI, *supra* note 13, at 1 ("Since sanctions represent barriers to trade and investment flows, they reduce overall levels of global welfare. Thus, there is a global cost to sanctions that persists independent of the net impact on any given nation—sender, target, or third country.").

34. For a discussion on policy congruence as it relates to economic sanctions, see generally BLUMBERG & STRASSER, *supra* note 7, § 20.01; Monroe Leigh, *The Long Arm of Uncle Sam—US Controls as Applied to Foreign Persons and Transactions*, *in* EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 47 (Cecil J. Olmstead ed., 1984).

35. *See, e.g.*, Fruehauf-France, S.A. v. Massardy, Cour d'appel [CA] [regional court of appeal] Paris, May 22, 1965, J.C.P. 1965 II, 14274, concl. Nepveu (Fr.), *summarized in* 5 I.L.M. 476 (1966) (appointing an administrator to operate Fruehauf-France—which was owned in majority by a U.S. parent company—and to carry out a contract in violation of the United States embargo against China and North Korea); Compagnie Européenne des Pétroles, S.A./Sensor Nederland B.V., Arrondissementsrechtbank [Rb.] [District Court], The Hague, Sept. 17, 1982, RvdW 167 (Neth.), *reprinted in* 22 I.L.M. 66, 67–69 (1982) (holding that a contract was governed by Dutch law and that under Dutch law, a Dutch subsidiary (with a U.S. parent) had Dutch nationality, despite the defendants claim that their behavior was governed by U.S. Export Administration Regulations); Libyan Arab Foreign Bank v. Bankers Trust Co., [1989] Q.B. 728, 731–33, 774 (Eng.) (holding that the freezing of Libyan assets in foreign branches of U.S. banks was ineffective to prevent a Libyan bank from recovering deposits held in the London branch of a U.S. bank).

36. *See* DANIEL W. DREZNER, THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS 317 (Cambridge Stud. in Int'l Rel. No. 65, 1999) (looking to specific examples involving the United States to explain that host countries turn sanctions into interstate disputes because they consider them a violation of their sovereignty); *see also infra* Part III.B.

37. DREZNER, *supra* note 36, at 317; *see also infra* Part III.B.

38. DREZNER, *supra* note 36, at 317; *see also infra* Part III.B.

39. For a discussion and in-depth analysis of the lack of policy congruence between countries in various economic-sanction regimes, see generally HUFBAUER, *supra* note 1.

explicitly prohibits U.S. parent companies from engaging in trade with a target country and references foreign subsidiaries only implicitly by stating that parents would be held liable for a trading violation of the subsidiary.[40] In other words, Congress allocates the burden of enforcement to the foreign subsidiary's domestic parent, making enforcement a matter of business judgment rather than state action. Indeed, a statute whose jurisdictional standard does not purport to regulate the actions of foreign subsidiaries will preclude the United States from directly enforcing economic sanctions against foreign corporations in uncooperative countries.

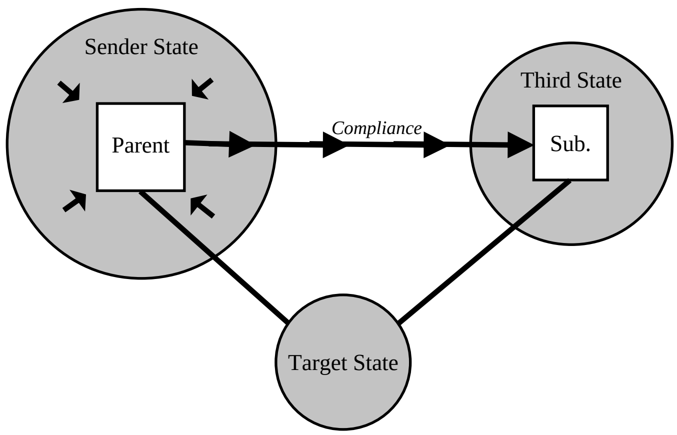

Fig. 4. Indirect extraterritoriality

This model minimizes or eliminates the foreign policy costs associated with international controversy because a host state is less likely to view the business decisions of a multinational enterprise as an affront to its sovereignty. At the same time, the alternative enforcement mechanism will likely result in the compliance of the foreign subsidiary with the sender's trading prohibition.

I. CONTROLLING FOREIGN SUBSIDIARIES: ACTOR-FOCUSED PROSCRIPTIONS

This Part introduces the development of the broadest assertion of extraterritorial jurisdiction over multinational corporations, found in the language "*person subject to the jurisdiction of the United States*."[41] By

40. *See infra* Part III.
41. Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (2005).

using this language, the United States seeks to ensure the broadest possible inclusion of foreign actors, including foreign subsidiaries of domestic parent corporations.[42] Part II explores the more subtle standard applied to the term "United States person."[43] Statutory definitions and subsequent regulations have given the latter term a more narrow control test that excludes foreign subsidiaries, thus reducing international confrontation.[44]

A. The Outer Boundaries of Legislation

The entry of the United States into World War I effected not only an influx of military resources into the European fray but also legislation that attempted to use economic sanctions to strangle the economic resources of Germany and its allies.[45] The primary example of this wartime legislation was the Trading with the Enemy Act of 1917 (TWEA).[46] The TWEA "delegate[s] broad powers to the President to issue regulations and enforce the [A]ct" by imposing economic sanctions on countries against whom the United States declares war.[47] The prohibitive language of the statute provides "[i]t shall be unlawful . . . [f]or any person in the United States . . . to trade . . . with . . . an enemy or ally of [an] enemy."[48] The jurisdictional reach of the statute—which "persons" and "enemies" Congress encompassed within the meaning of the provision[49]—was a matter of definitional drafting that did not possess the jurisdictional reach found in subsequent legislation. For example, section 2 of the TWEA defines "person" as "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."[50] Moreover, Congress defined "enemy" as:

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42. *See* U.S. Department of the Treasury Publication Circular No. 18, 7 Fed. Reg. 2503, 2504 (Apr. 1, 1942) (putting forth the first definition of "person subject to the jurisdiction of the United States," and including foreign subsidiaries of domestic parent corporations within that definition through the medium of control).

43. 50 U.S.C. app. § 2407(a)(1) (2000).

44. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001) (including foreign branches but making no mention of subsidiaries).

45. BLUMBERG & STRASSER, *supra* note 7, § 20.02.

46. Trading with the Enemy Act, ch. 106, 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44 (2000)); BLUMBERG & STRASSER, *supra* note 7, § 20.02. Although Congress has significantly amended the Act, portions of the TWEA remain in effect today. 50 U.S.C. app. §§ 1–44.

47. James Irvine Whitcomb Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174, 175 (1968).

48. Trading with the Enemy Act § 3.

49. *Id.* § 2.

50. *Id.*

> Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.[51]

A literal reading of these definitions limits the application of the TWEA to corporations incorporated in an enemy country or corporations incorporated in another country and doing business with an enemy country.[52]

The Supreme Court construed the limited reach of the TWEA in two post–World War I cases. In 1925, the Court held that, despite that fact that German nationals owned a majority of a corporation's shares, the corporation was not an enemy pursuant to the TWEA.[53] Again, in 1928, the Court construed the TWEA so as not to apply in the case of a New Jersey subsidiary owned by a German parent corporation.[54] The restrictive interpretation of the Supreme Court in the aftermath of World War I is directly related to Congress's emergent draftsmanship of the TWEA.[55] Congress's reliance on entity principles in drafting the definitions of "enemy" and "person" severely limited the application, and thus effectiveness, of the TWEA during World War I.[56] The success of future legislation depended on Congress's ability to flesh out the economic realities of the twentieth century.[57]

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51. *Id.*

52. BLUMBERG & STRASSER, *supra* note 7, § 20.02.

53. Behn, Meyer & Co. v. Miller, 266 U.S. 457, 462, 473 (1925).

54. Hamburg-Am. Line Terminal & Navigation Co. v. United States, 277 U.S. 138, 140 (1928).

55. BLUMBERG & STRASSER, *supra* note 7, § 20.02.

56. *See id.* § 20.03 (concluding that later amendments employed broader language "[i]n the light of the unfortunate lesson of the restricted coverage of the TWEA").

57. Would the Court have decided these cases differently had the cases been litigated during the war years? Consider *Daimler Co. v. Continental Tyre & Rubber Co.*, which held during wartime that a British subsidiary of a German corporation with a Board of Directors comprised solely of German nationals was an "enemy" corporation for the purposes of British law, as well as Justice Jackson's caveat in his dissent in *Korematsu v. United States*, issued during World War II where he noted the dangers of the majority's holding, which "validated the principle of racial discrimination" during times of war. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); Daimler Co. v. Continental Tyre & Rubber Co., [1916] 2 A.C. 307, 336–37 (H.L.) (appeal taken from Eng.); *see also* CHARLES FAIRMAN, GOVERNMENT UNDER LAW IN TIME OF CRISIS 117–22 (1955) (unpublished paper, Harvard University) (on file with author) (analyzing Supreme Court jurisprudence during times of war).

The hostilities of World War II gave Congress the opportunity to reevaluate the effectiveness of the President's economic-sanction power in the TWEA.[58] Recognizing the shortcomings of the jurisdictional scope in both the "person[s] in the United States" standard and the definition of "enemy,"[59] Congress devised a new standard that would encompass those entities previously outside the scope of the TWEA in the First War Powers Act of 1941 (FWPA), which substantially amended the jurisdictional scope of the TWEA.[60] The pertinent part of the FWPA reads: "During the time of war or during any other period of national emergency declared by the President, the President may, [among other things, impose sanctions upon] any person . . . subject to the jurisdiction of the United States."[61] Although

58. BLUMBERG & STRASSER, *supra* note 7, § 20.03.

59. Trading with the Enemy Act, ch. 106, §§ 2–3, 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. app. §§ 2–3 (2000)).

60. First War Powers Act, 1941, ch. 593, § 301, 55 Stat. 838, 839–40 (codified as amended at 50 U.S.C. app. § 5 (2000)).

61. *Id.* Along with extending the jurisdictional scope of the TWEA, the FWPA also delegated to the President the authority to apply the Act during periods of national emergency. *Id.* § 301(1). Although this specific topic is beyond the scope of this Article, the addition of a new medium through which to apply economic sanctions merits a brief note. The triggering mechanism for the President's sanctioning power in the TWEA rested with an Article I declaration of war. *See* Trading with Enemy Act §§ 2–3, 5 (basing almost every definition of "enemy" on the words "any nation with which the United States is at war" and prohibiting trade with such enemies except as the President authorizes). The President could then administer economic sanctions as he saw fit until the ratification of a treaty of peace. *See id.* § 2 ("The words 'end of the war' . . . shall be deemed to mean the date . . . of exchange of ratifications of the treaty of peace . . . ."). The triggering mechanism for the FWPA, on the other hand, rests either with an Article I declaration of war or a period of national emergency "declared by the President." First War Powers Act § 301(1); *see also* 12 U.S.C. § 95(a) (prohibiting banks from allowing any designated financial transfers "during such emergency period as the President of the United States by proclamation may prescribe"). The degree of separation of powers Congress provided in the TWEA simply is not present in the TWEA as amended by the FWPA. Accordingly, the FWPA provided the Executive with the initial authority to impose economic sanctions of potentially limitless duration determined solely by the discretion of the President when the President believes a situation rises to the occasion of a "national emergency." First War Powers Act § 301(1).

In 1976, Congress attempted to limit the President's authority to arbitrarily invoke national emergencies when it passed the National Emergencies Act of 1976 (NEA), Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601–1651 (2000)). In 1973, the United States was subject to "four extant states of declared national emergency," the earliest of which had been declared by President Franklin Roosevelt forty years earlier. MALLOY, *supra* note 12, at 172. The enactment of the National Emergencies Act cancelled all extant national emergencies and provided more stringent procedures for future issuances of presidential declarations of national emergency. National Emergencies Act § 101–201; BLUMBERG & STRASSER, *supra* note 7, § 20.08 n.2; MALLOY, *supra* note 12, at 172–73. Many of those procedures are encompassed in the International Emergency Economic Powers Act (IEEPA), which limits the use of the TWEA to times of war but gives the President, in peacetime, virtually the same powers as granted in the TWEA. International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 101, 202–203, 91 Stat. 1625 (codified as amended at 50 U.S.C. §§ 1701–1702 (2000)); *see also* MALLOY, *supra* note 12, at 171 (describing the change that the IEEPA effected on TWEA). Congress attempted to limit the unilateral sanction power of the President in the NEA and the IEEPA. *See* Michael P. Malloy, *Embargo Programs of the United States Treasury Department*, 20 COLUM. J.

the FWPA did not expressly provide a definition for this new standard, a subsequent Treasury Circular published in the Federal Register spelled out the jurisdictional reach of the FWPA, which defined "person subject to the jurisdiction of the United States" as:

> (1) Any citizen of the United States whether within the United States or within any foreign country;
> (2) Any person within the United States;
> (3) Any partnership, association, corporation, or other organization
> (i) Which is organized under the laws of the United States; or
> (ii) Which has its principal place of business within the United States; or
> (iii) Which is owned or controlled by, directly or indirectly, one or more persons subject to the jurisdiction of the United States as

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TRANSNAT'L L. 485, 495–96 (1982) (describing the numerous procedures that necessarily precede the President's use of sanctions under the IEEPA and referencing similar procedures under the NEA). The procedural restrictions, however, do not seem to have affected the President's ability to address emergency situations through significant measures. *See* MALLOY, *supra* note 12, at 171 ("Since its enactment in 1977, the IEEPA has served as the statutory authority for the most significant U.S. sanctions programs, in absolute dollar terms, since the World War II controls. . . . [I]n slightly more than twenty years, the IEEPA has been invoked more often than the TWEA had been in the period of almost eighty years since its enactment."). Thus, aspects of the economic-sanction legislation of the twentieth century provide examples of the powerful migratory effect delegations upon the President have in relation to the aggregate war powers—or in the case of economic sanctions, war-like powers—of the Executive Branch. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) (O'Connor, J., plurality opinion) (acknowledging "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle . . . . [T]he law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities"); Dames & Moore v. Regan, 453 U.S. 654, 663–67, 686 (1981) (holding that the President has the authority to suspend pending court claims); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (noting the dangers of rash majority holdings in response to crises during or in close proximity to times of war, manifested in this case by "validat[ing] the principle of racial discrimination" during World War II); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2072–83 (2005) (discussing, in a well-researched article, the extent to which Congress has delegated President Bush the authority to pursue terrorists in the wake of September 11, 2001, along with a history of congressional authorization for executive actions during crises since the Early Republic); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386 (1989) ("[T]he undermining of liberal constitutional restraints on executive emergency power during the twentieth century has been caused less by legislative failure or by executive arrogance, than by the transformation of the eighteenth century world and the rise of American power in global affairs."); Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397 (2004) (discussing Supreme Court decisions addressing declarations of martial law and states of emergency at both state and federal levels).

> herein defined; and
>
> (4) Any agent, subsidiary, affiliate or other person *owned or controlled*, directly or indirectly, by any person subject to the jurisdiction of the United States as herein defined.[62]

Seen through the lens of the Treasury Circular's subsection (4), the FWPA expanded the scope of the TWEA beyond that of citizens, residents, and corporations located within the United States to include foreign subsidiaries of domestic parent corporations.[63]

The President's new authority allowed the Executive branch the flexibility required to operate effectively and with sophistication in a complicated economy.[64] As amended, the TWEA reflected the economic realities of the twentieth century by recognizing the complex management and capital movements of corporate groups.[65] The new test determining the minimum threshold for connectivity of one entity within a corporate group to another turned on the concept of *control*.[66] This concept grew out of the complex regulations characteristic of much New Deal legislation.[67] The litmus test became whether a domestic parent corporation "owned or controlled" a foreign subsidiary corporation—an interpretation of the FWPA that the Supreme Court blessed in subsequent case law.[68]

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62. U.S. Department of the Treasury Public Circular No. 18, 7 Fed. Reg. 2503, 2504 (Apr. 1, 1942) (emphasis added).

63. *Id.*; BLUMBERG & STRASSER, *supra* note 7, § 20.03.

64. BLUMBERG & STRASSER, *supra* note 7, § 20.03.

65. *Id.* For a discussion on the way in which multinational corporations operate in the world economy, see generally Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 6–13 (2003).

66. *See* U.S. Department of the Treasury Public Circular No. 18, 7 Fed. Reg. at 2504 (subjecting to U.S. jurisdiction entities "owned or controlled" by any person of the United States).

67. *E.g.*, The Securities Act of 1933, ch. 38, § 2(11), 48 Stat. 74, 75 (codified as amended at 15 U.S.C. § 77b(11) (2000)) (including in the definition of "issuer" any person the issuer controls); The Securities Exchange Act of 1934, ch. 404, § 20(a), 48 Stat. 881, 899 (codified as amended at 15 U.S.C. § 78t(a) (2000)) (holding liable any person that controls another liable person); The Emergency Railroad Transportation Act, 1933, ch. 91, § 1(e), 48 Stat. 211, 211 (expired 1936) (using control as part of the definition for "subsidiary").

68. Übersee Finanz-Korporation, A.G. v. McGrath, 343 U.S. 205, 211–12 (1952); *see also* Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, S.A., 343 U.S. 156, 157–59 (1952) (noting that a corporation controlled by enemy nationals does not escape regulation under the TWEA simply because it is organized in a friendly nation); Clark v. Übersee Finanz-Korporation, A.G., 332 U.S. 480, 486 (1947) (rejecting an argument that would disregard whether an entity was owned or controlled by a foreign corporation). While neither the FWPA nor the Treasury Circular precisely defines the degree of control required to trigger application of the TWEA, the legal vagueness does not appear to affect the Court's determination of who is in control of a corporation. At the corporate level, there is usually very little question as to who is on the board of a subsidiary and how that director obtained his or her post.

Beyond authorizing the Executive to impose sanctions during times of declared war or national emergency, the TWEA as amended by the FWPA delegated broad powers to the President to make regulations necessary to enforce the Act.[69] Since the enforcement of the TWEA often involves "transactions . . .related to currency controls and the freezing of foreign assets . . . , the President has delegated the administration of the [TWEA] to the Secretary of the Treasury."[70] The resultant body of regulations was called the Foreign Assets Control Regulations (FACR),[71] which were issued by a sub-department within the Treasury, descriptively named the Office of Foreign Assets Control.[72] The FACR are regulations of general application,[73] often serving as a foundation for more specific regulations targeting certain countries.[74] Like the Treasury Circular, the FACR include foreign subsidiaries of domestic parent corporations within their jurisdictional ambit by incorporating the expansive standard used under the FWPA.[75] Section 500.329 of the FACR states:

> The term, *person subject to the jurisdiction of the United States*, includes:
> (a) Any individual, wherever located, who is a citizen or resident of the United States;
> (b) Any person within the United States as defined in § 500.330;
> (c) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; and

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69. 50 U.S.C. app. § 5(a)–(b) (2000). Specifically, section 5(a) of the TWEA permitted the President to "make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct." Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 411, 415 (1917). The amendment to the TWEA in the FWPA reinforced this authority: "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe." First War Powers Act, 1941, ch. 593, § 301(1), 55 Stat. 838, 839 (1941).

70. Corcoran, *supra* note 47, at 176 (citing Exec. Order No. 9193, 7 Fed. Reg. 5205, 5206 (July 9, 1942)).

71. Foreign Assets Control Regulations, 15 Fed. Reg. 9040, 9041 (Dec. 17, 1950) (codified as amended at 31 C.F.R. pt. 500 (2005)).

72. *Id.*; BLUMBERG & STRASSER, *supra* note 7, § 20.05. The Office of Foreign Assets Control was created in 1962 by Treasury Department Order No. 128. Sardino v. Fed. Reserve Bank of N.Y., 361 F.2d 106, 109 n.2 (2d Cir. 1966).

73. BLUMBERG & STRASSER, *supra* note 7, § 20.05.

74. *See, e.g.*, *id.* § 20.07.2 (discussing how the specific Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2005), supplement the FACR).

75. 31 C.F.R. § 500.329.

> (d) Any corporation, partnership, or association, wherever organized or doing business, that is *owned or controlled* by persons specified in paragraph (a) or (c) of this section.[76]

While the FACR do not explicitly define control, they appear to apply an arithmetical control test:[77] ownership of greater than fifty percent of the voting block of shares in a corporate entity would be sufficient.[78] But it is likely that fifty percent or less would also satisfy the statute where there are no other larger voting blocks.[79]

The first post–World War II application of the FACR, as promulgated pursuant to the TWEA as amended by the FWPA, came in 1950 during the Korean conflict.[80] In response to the threat posed by communist aggression in Korea, President Truman proclaimed the existence of a national emergency on December 16, 1950.[81] The regulations issued by the

76. *Id.* (second emphasis added). While the definition in the FACR uses slightly different language than the Treasury Circular, subsection (d) nevertheless extends to foreign subsidiaries of American parents. BLUMBERG & STRASSER, *supra* note 7, § 20.05. *Compare* U.S. Department of the Treasury Public Circular No. 18, 7 Fed. Reg. 2503, 2504 (Apr. 1, 1942) (defining the standard as "[a]ny agent, subsidiary, affiliate or other person owned or controlled, directly or indirectly, by any person subject to the jurisdiction of the United States"), *with* 31 C.F.R. § 500.329 (defining the standard as "[a]ny corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by persons specified in paragraph (a) or (c) of this section").

77. Corcoran, *supra* note 47, at 178.

78. BLUMBERG & STRASSER, *supra* note 7, § 20.03 (citing Stanley L. Sommerfield, Office of Foreign Assets Control, U.S. Dep't of the Treasury, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 BUS. LAW. 861, 866 (1964)).

79. *Id.* Control may also exist through joint ventures and management agreements and other strategic alliances lacking the level of equity contained in traditional ownership contexts. *See* Terence J. Lau, *Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation*, 41 AM. BUS. L.J. 413, 425 (2004) (discussing control in the context of the Cuban Asset Control Regulations (CACR), which contain nearly identical jurisdictional language to the FACR).

80. BLUMBERG & STRASSER, *supra* note 7, § 20.06.1. The legal mechanism that triggered the use of force in Korea in 1950 was an Article II proclamation of the existence of a national emergency, rather than an Article I declaration of war. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950); BLUMBERG & STRASSER, *supra* note 7, § 20.06.1. Some commentators insist that conflicts lacking an opposing sovereign do not qualify as "real" wars and instead should be considered as wars only in a metaphorical sense. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032–33 (2004) (explaining how the "war on terrorism" differs from wars between sovereign states); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002) (comparing the differences between the "war on terrorism" or the "war on drugs" and declared wars between nations). Others argue that the distinction is immaterial to the constitutional analysis of the legitimacy of those conflicts, provided that appropriate congressional authorization exists in one form or another. *See, e.g.*, Bradley & Goldsmith, *supra* note 61, at 2062 ("Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war."). For the sake of convenience, this Article will use the term "war" irrespective of whether the conflict at issue was predicated upon an Article I declaration of war or an Article II proclamation of the existence of a national emergency.

81. Proclamation No. 2914, 15 Fed. Reg. at 9029. The proclamation provided, in full:

Treasury Department "imposed an embargo on unlicensed financial and commercial transactions between the United States" and both North Korea and China.[82] In addition, the Treasury Department froze all North Korean and Chinese assets in the United States.[83] Since the specific regulations

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> WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and
>
> WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and
>
> WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and
>
> WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:
>
> NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do *proclaim the existence of a national emergency*, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.
>
> I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.
>
> I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interest to the common good.
>
> I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.
>
> I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.
>
> I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.
>
> I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby "secure the Blessings of Liberty to ourselves and our Posterity."

Id. (emphasis added).

82. Foreign Assets Control Regulations, 15 Fed. Reg. 9040, 9041 (Dec. 17, 1950) (codified as amended at 31 C.F.R. pt. 500 (2005)); BLUMBERG & STRASSER, *supra* note 7, § 20.06.1.

83. Foreign Assets Control Regulations, 15 Fed. Reg. at 9041–43; BLUMBERG & STRASSER, *supra* note 7, § 20.06.1.

targeting China and North Korea were promulgated under the FACR,[84] the broad "person subject to the jurisdiction of the United States" standard applied.[85] As such, the regulations prohibited all foreign subsidiaries of U.S. parent corporations that failed to obtain a license from engaging in any financial or commercial transactions with those two countries.[86]

B. Drafting with Discretion

Yet the broad jurisdictional standard Congress employed in the TWEA as amended by the FWPA, and the body of regulations flowing out of that legislation, has not been applied in all economic-sanction legislation. Congress drafted more sophisticated sanction regimes in the face of international controversies where U.S. interests are at stake. Economic-sanction legislation regulations addressing complex issues in the Middle East, such as section 8—The Anti-Boycott Controls (Controls)—of the Export Administration Act of 1979 (EAA 1979)[87] and the various counter-terrorism regulations imposed by the Bush Administration after September 11, 2001,[88] for example, displayed a degree of tailoring not present in the legislation of the first half of the twentieth century.

Congress issued the Controls in reaction to the League of Arab States's boycott of Israel.[89] The Controls addressed the League's *secondary* boycott of Israel, not its *primary* boycott.[90] A primary boycott occurs when the boycotting countries refuse to buy the products of the boycotted country.[91] This is distinguishable from a secondary boycott, which occurs when the boycotting countries "refuse to buy the products of third parties failing to comply with a primary boycott."[92] Congress enacted the EAA 1979

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84. Foreign Assets Control Regulations, 15 Fed. Reg. at 9040–41.

85. 31 C.F.R. § 500.329.

86. Foreign Assets Control Regulations, 15 Fed. Reg. at 9041.

87. Export Administration Act of 1979 § 8, 50 U.S.C. app. § 2407 (2000).

88. *See, e.g.*, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001) (ordering the adoption of economic sanctions against terrorist persons, organizations, and countries who support terrorism and who are engaged in or threatening to engage in terrorism against the United States); Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594 (2005) (defining what constitutes "blocked property" and prohibiting financial, technological, and material transactions of blocked property); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (2005) (regulating financial transactions between U.S. persons and listed persons and countries); Terrorism List Governments Sanctions Regulations, 31 C.F.R. pt. 596 (2005) (listing the countries); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597 (2005) (regulating transactions with terrorist-related organizations).

89. BLUMBERG & STRASSER, *supra* note 7, § 22.01.

90. *Id.* § 22.02.

91. *Id.* § 22.01 n.2.

92. *Id.* Scholars have also recognized a *tertiary* boycott, in which the boycotting countries

because of the reach of the League's boycott into the trade practices of U.S. concerns doing business with Israel.[93]

Congress drafted the Controls to be a compromise between the need to penalize those Arab nations participating in the boycott and the desire to continue uninterrupted trade between those nations and U.S. corporations.[94]

> [T]he President shall issue regulations prohibiting any *United States person*, with respect to his activities in the interstate or foreign *commerce of the United States*, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States . . . .[95]

Unlike the TWEA as amended by the FWPA, the Controls provide a statutory definition of the novel "United States person" standard.[96] The EAA 1979 defines "United States person" to mean "any United States resident . . . , any domestic concern . . . and any foreign subsidiary or affiliate . . . of any domestic concern which is *controlled in fact* by such domestic concern."[97] The Controls do not define what Congress meant by "commerce of the United States" or how "controlled in fact" differed from *control* as provided in the regulations.[98]

The heightened level of sophistication reflected in the Controls is more apparent in the regulations promulgated under the EAA 1979. Under the regulations, "*United States person* means any person who is a United States

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pressure third parties to reject trade with parties who fail to comply with the primary boycott. *Id.* Even more discriminatory, a *personal* boycott occurs when boycotting countries use the religion and national origin of a particular individual as a reason for the boycott. *Id.* (citing Christopher C. Joyner, *The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice*, 17 VAND. J. TRANSNAT'L L. 205, 218 (1984)). Interestingly, the League's boycott against Israel contained all four types of boycotts within its prohibitory language. Joyner, *supra*, at 217–18.

93. *See id*. §§ 22.01–.02 (discussing how Congress issued the Controls to protect trade with Israel). The Controls were originally contained in the Export Administration Act of 1969 (EAA 1969), which provided a system of general peacetime export controls during the Cold War. *Id.* § 21.02. The EAA 1969 was later amended in 1977 by Act of Dec. 28, 1977, Pub. L. No. 95-223, § 301, 91 Stat. 1625, 1629 (1977), and eventually replaced by the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2000)). For a full discussion on the Export Administration Act of 1979, see discussion *infra* Part II.A.

94. BLUMBERG & STRASSER, *supra* note 7, § 22.03.

95. 50 U.S.C. app. § 2407 (2000) (emphasis added). While the language of the Controls appears to be "couched in general terms," the real purpose behind the provisions was a direct reaction to the League's boycott of Israel. BLUMBERG & STRASSER, *supra* note 7, § 22.02.

96. Export Administration Act of 1979 § 16, 50 U.S.C. app. § 2415(2) (2000).

97. *Id.* (emphasis added).

98. BLUMBERG & STRASSER, *supra* note 7, § 22.02.

resident or national, including individuals, domestic concerns, and 'controlled in fact' foreign subsidiaries, affiliates, or other permanent foreign establishments of domestic concerns."[99] Like the "person subject to the jurisdiction of the United States" standard,[100] the new standard within the Controls, set forth in the regulations, also includes foreign subsidiaries of domestic parent corporations.[101] Yet the reach of "United States person" is not as expansive as its predecessor. The difference lies in the regulations' definition of control.[102] "*Control in fact* consists of the authority or ability of a domestic concern to establish the general policies or to control [the] day-to-day operations of its foreign subsidiary . . . ."[103] This *operational control* requirement precludes the application of the Controls over multinational corporations functioning through decentralized subsidiaries.[104]

The regulations promulgated pursuant to the Controls also require that the trade of the controlled-in-fact foreign subsidiary flow through the medium of "United States commerce."[105] The regulations extend to foreign transactions involving goods or services acquired from a person in the United States, including those United States goods and services obtained indirectly from a third person.[106] Thus, the definitions of "United States commerce" and "United States person," along with the heightened controlled-in-fact standard, severely limit the reach of the Controls into transactions involving foreign subsidiaries of domestic parent corporations.[107] As such, the Controls do not reach, and do not attempt to reach, the numerous transactions proscribed by the FACR.

The economic-sanction regulations issued in the aftermath of the September 11 attacks provide other interesting examples of more narrowly drafted standards.[108] On September 23, 2001, President Bush declared a

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99. 15 C.F.R. § 760.1(b) (2006).

100. *See* discussion *supra* Part I.A.

101. 15 C.F.R. § 760.1(b).

102. *Compare id.* § 760.1(c) (defining *control* in relation to general policies or day-to-day operations), *with* BLUMBERG & STRASSER, *supra* note 7, § 20.03 (noting that the Office of Foreign Assets Control interpreted *control* to mean "any type of effective control, actual or potential" (quoting Sommerfield, *supra* note 78, at 866)).

103. 15 C.F.R. § 760.1(c).

104. *See* BLUMBERG & STRASSER, *supra* note 7, § 22.03.3 (explaining how foreign subsidiaries' activities that are not directly controlled by U.S. parent corporations are untouched by the Controls).

105. 15 C.F.R. § 760.1(d)(6)–(10).

106. *Id.* § 760.1(d)(8); BLUMBERG & STRASSER, *supra* note 7, § 22.03.3.

107. BLUMBERG & STRASSER, *supra* note 7, § 22.03.3.

108. *E.g.*, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001); Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594 (2005); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (2005); Terrorism List Governments Sanctions Regulations, 31 C.F.R. pt. 596 (2005); Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. pt. 597 (2005).

national emergency as a result of the attacks.[109] The purpose of Executive Order 13,224 was to disrupt the financial network by which terrorist persons and organizations raise funds.[110] While the scope of Executive Order 13,224 was more expansive as to certain terrorist targets than those measures put in place by former President Clinton,[111] the Order narrowly defined the persons upon whom and entities upon which it applied.[112] For example, President Clinton limited the applicability of economic sanctions only to those terrorist persons or organizations having a disruptive presence in the Middle East peace process.[113] President Bush's Executive Order 13,224, on the other hand, purported to reach beyond designated terrorist persons and organizations to those front organizations, agents, associates, and other entities that provided assistance to them.[114] And yet the

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109. Exec. Order No. 13,224, 66 Fed. Reg. 49,079. The Order read, in part:

> I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial institutions as an additional tool to enable the United States to combat the financing of terrorism.

Id. In the IEEPA and the NEA, Congress delegated the authority for the Order to the President. *Id.*; *see supra* note 61.

110. Himamauli Das, *The United States Sanctions Response to the Attacks of September 11, 2001: A Synopsis of Remarks at the NESL Rogue Regimes Conference*, 36 NEW ENG. L. REV. 943, 944 (2002) (citing Exec. Order No. 13,224, 66 Fed. Reg. 49,079).

111. *See id.* at 947 (observing that Exec. Order No. 13,224 included "all of the foreign organizations previously designated as Foreign Terrorist Organizations (FTOs)" and added or provided the authority for a number of others). President Clinton enacted various counter-terrorism measures. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995), *reprinted as amended in* 50 U.S.C. § 1701 (2000) (designating certain terrorist persons and organizations); Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998), *reprinted as amended in* 50 U.S.C. § 1701 (2000) (amending Exec. Order No. 12,947 by designating Osama bin Laden, al Qaeda, and two other individuals as terrorist persons or groups); Das, *supra* note 110, at 944–45 (discussing counter-terrorism measures prior to the Bush Administration).

112. *See* Exec. Order No. 13,224, 66 Fed. Reg. at 49,080 (restricting applicability to corporations incorporated within the United States).

113. Das, *supra* note 110, at 945 (citing Exec. Order No. 12,947, 60 Fed. Reg. at 5079).

114. Exec. Order No. 13,224, 66 Fed. Reg. at 49,080 (applying to those "otherwise associated

prohibitory language of Executive Order 13,224 utilized a narrowly defined "United States person" standard.[115] Section three of the Order defines "United States person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States."[116] Foreign subsidiaries or affiliates are thus excluded.[117] As such, despite the more expansive definition of *terrorist* found in Executive Order 13,224, foreign subsidiaries of domestic parent corporations remain untouched. The furthest reach of the definition extends only to "foreign branches," which the Office of Foreign Assets Control has construed to mean the foreign branches of U.S. financial institutions.[118] The subsequent regulations issued by the Treasury Department faithfully follow Executive Order 13,224.[119]

In sum, the Controls and the terrorism regulations display a deliberate decision not to exercise the full reach of United States's extraterritorial jurisdiction utilized in previous economic sanctions. The Controls, along with the regulations interpreting and supplementing them, used a new standard that limited the reach of the statute's extraterritorial jurisdiction.[120] Limiting terms such as "controlled in fact"[121] and "United States commerce"[122] contained within the Controls and corresponding regulations narrowed the applicability of the Controls' prohibitory language over foreign subsidiaries while nevertheless punishing those countries

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with those persons listed in the Annex").

115. Exec. Order No. 13,224, 66 Fed. Reg. at 49,080.

116. *Id.*

117. *See id.* (noting that only entities incorporated under the laws of the United States are subject to the order).

118. *See* 31 C.F.R. § 597.319(a) (2005) (defining "U.S. financial institution" to mean, in part, "[a]ny financial institution organized under the laws of the United States, including such financial institution's foreign branches" (emphasis omitted)).

119. *Id.* § 594.315. Section 594.315 of the Global Terrorism Sanctions Regulations corresponds exactly to the definitional language in Executive Order 13,224. *Compare id.*, *with* Exec. Order No. 13,224, 66 Fed. Reg. at 49,080. The Terrorism Sanctions Regulations offer a slight variation: "The term *United States person* or *U.S. person* means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches); or any person in the United States." 31 C.F.R. § 595.315. The Terrorism List Governments Sanctions Regulations leave out any reference to a "foreign branch." 31 C.F.R. § 596.313 (2005) ("The term *United States person* means any United States citizen or national, permanent resident alien, juridical person organized under the laws of the United States, or any person in the United States."). Interestingly, the Foreign Terrorist Organizations Sanctions Regulations 31 C.F.R. pt. 597, do not even include a definition for "United States person."

120. 50 U.S.C. app. § 2415(2) (2000).

121. 15 C.F.R. § 760.1(c) (2006).

122. *Id.* § 760.1(d)(6)–(10).

participating in certain aspects of the boycott of Israel.[123] The terrorism regulations utilized the same standard as the Controls yet defined "United States person" so as to preclude the application of the antiterrorism sanctions over any foreign subsidiary save foreign branches of U.S. financial institutions.[124] Both examples show how the scope of economic sanctions can differ sharply.[125]

II. SHIFTING THE FOCUS: U.S.–ORIGIN GOODS

The statutes and regulations examined in this Article thus far have focused on the actor: U.S. corporations and in some instances U.S.–owned-and-controlled foreign subsidiaries. Part II.A begins by looking at prophylactic export legislation that targets not only the actors involved in certain proscribed transactions but also the goods being traded. Part II.B then examines the Cuban Embargo from its genesis in the Kennedy Administration to the present day.

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123. *See* BLUMBERG & STRASSER, *supra* note 7, § 22.03 (discussing how Congress drafted the Act to discourage parties from participating in the boycott but also to avoid impeding on the activities of American subsidiaries in foreign countries).

124. Exec. Order No. 13,224, 66 Fed. Reg. at 49,080; 31 C.F.R. §§ 594.315, 595.315, 596.313, 597.319; Andreas F. Lowenfeld, Book Review, 96 AM. J. INT'L L. 745, 745 (2002) (reviewing KENNETH A. RODMAN, SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT (2001)).

125. Not all economic-sanction regulations in force today, however, display the same discretion found in the terrorism-sanctions regulations. For example, both the Iranian Assets Control Regulations and Cuban Assets Control Regulations currently utilize the "person subject to the jurisdiction of the United States" standard. Cuban Assets Control Regulations, 31 C.F.R. § 515.201(a) (2005); Iranian Assets Control Regulations, 31 C.F.R. § 535.201. Both sets of regulations give the same expansive definition to the standard as the FACR: "Any corporation, partnership, or association, wherever organized or doing business, that is *owned or controlled* by [such persons or entities]." Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (emphasis added); *accord* Cuban Assets Control Regulations, 31 C.F.R. § 515.329; Iranian Assets Control Regulations, 31 C.F.R. § 535.329. As such, to simply deem the "United States person" standard as a predecessor to the "person subject to the jurisdiction of the United States" standard could be viewed as inexact, since the former did not completely replace the latter. *See* discussion *supra* Part I.B. For an interesting comparison between two otherwise facially similar regulations, compare Iranian Assets Control Regulations, 31 C.F.R. § 535.329, utilizing the "person subject to the jurisdiction of the United States" standard, with Libyan Sanctions Regulations, 31 C.F.R. § 550.308, utilizing the "United States person" standard. For a further discussion on Cuban Assets Control Regulations and the broader U.S. embargo on Cuba, see discussion *infra* Part II.B.

A. The Stream of Commerce

Congress passed the Export Administration Act of 1969 (EAA 1969)[126] to establish a system of general export controls when the United States was not at war or facing a national emergency.[127] The EAA 1969 was designed to limit or cut off economic support for the Soviet Union and her allies by U.S. companies during the Cold War.[128] To accomplish its goals, Congress tagged jurisdiction on U.S.–origin goods.[129] The EAA 1969 authorized the President to prohibit

> the exportation from the United States, its territories and possessions, of any articles, materials, or supplies, including technical data or any other information . . . . To the extent necessary to achieve effective enforcement of [the EAA 1969], [the President may also regulate] the financing, transporting, and other servicing of exports and the participation therein by *any person*.[130]

Moreover, the EAA 1969 authorized the Secretary of Commerce to issue regulations,[131] and the regulations interpreting the Act sweepingly provided that, "*no person* in a foreign country (including Canada) or in the United States may: (a) Reexport such [exported] commodity . . . from the authorized country(ies) of ultimate destination" unless so authorized.[132] The EAA 1969 broadly defined "person" to mean "any individual, partnership, corporation, or other form of association, including any government or agency thereof."[133] Thus, the EAA 1969 prohibited anyone from reexporting goods that originated in the United States to target countries determined by the President.[134] The EAA 1969 extended jurisdiction to the goods in commerce themselves, rather than solely to the

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126. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841. The EAA 1969 was twice extended and eventually replaced. Export Administration Amendments of 1974, Pub. L. No. 93-500, § 13, 88 Stat. 1552; Export Administration Amendments of 1977, Pub. L. No. 95-52, § 101, 91 Stat. 235; Export Administration Act of 1979 § 19(a), 50 U.S.C. app. § 2418 (2000).

127. BLUMBERG & STRASSER, *supra* note 7, § 21.02.

128. *Id.*

129. Export Administration Act of 1969 § 4(b).

130. *Id.* (emphasis added).

131. *Id.* § 4(a)(1)–(2).

132. Export Administration Regulations, 40 Fed. Reg. 23,990, 23,991 (June 4, 1975) (emphasis added).

133. Export Administration Act of 1969 § 11.

134. *See id.* § 4(b) (authorizing the President to prohibit reexportation of U.S.–origin goods).

actors who traded in such goods.[135] As such, the prohibitory language of the EAA 1969 simply did not discriminate between U.S.–controlled foreign subsidiaries and foreign entities with little to no connection with the United States.[136]

The EAA 1969's focus on U.S.–origin goods is both narrower and broader than the jurisdictional scope of actor-specific prescriptions explored *supra* in Part I.[137] A U.S.–controlled foreign subsidiary would only incur penalties for violating the EAA 1969 if that subsidiary traded in goods originating in the United States.[138] That same subsidiary would be free, under the provisions of the EAA 1969, to trade with target countries as long as the goods involved in the transactions did not originate in the United States.[139] Thus, the EAA 1969 captures only a subset of the U.S. subsidiaries that happen to fall under the umbrella of ownership or control. In this respect, the prohibitions of the EAA 1969 are narrower than those found in the TWEA as amended by the FWPA, the FACR, and the Controls.[140] Yet the prohibitions of the EAA 1969 extend beyond the reaches of actor-focused proscriptions because the prohibitions travel with U.S.–origin goods no matter who trades in them.[141] A foreign corporation with little or no ties to the United States would find itself violating U.S. law should it happen to trade with a target country in goods that happened to originate in the United States.[142] This broad assertion of extraterritorial

135. *See id.* (stating that the President can prohibit or limit the export of goods from the United States without mentioning any prohibitions based on the person exporting the goods).

136. BLUMBERG & STRASSER, *supra* note 7, § 21.02.

137. *Compare* Export Administration Act of 1969 § 4(b) (regulating U.S.–origin goods), *and* Export Administration Regulations, 40 Fed. Reg. at 23,991 (same), *with* discussion *supra* Part I and accompanying notes (discussing economic sanctions focused on actors).

138. *See* Export Administration Act of 1969 § 4(b) (allowing the President to prohibit or limit exports only of goods originating in the United States and its territories).

139. *See id.* (regulating only U.S.–origin goods); Export Administration Regulations, 40 Fed. Reg. at 23,991 (same).

140. *Compare* Export Administration Act of 1969 §§ 3, 4(b) (limiting regulations to exports from the United States to nations threatening national security), *with* First War Powers Act, 1941, ch. 593, § 301(1)(B), 55 Stat. 838, 839–40 (providing the person-subject-to-the-jurisdiction-of-the–United States standard), *and* Foreign Asset Control Regulations, 31 C.F.R. § 500.329 (2005) (including entities that are owned or *controlled* by "person[s] subject to the jurisdiction of the United States" as defined by the First War Powers Act), *and* Export Administration Act of 1979, 50 U.S.C. app. §§ 2407, 2415 (2000) (providing the narrower "United States person" standard). For further discussion, see *supra* Part I.

141. *See* Export Administration Act 1969 § 4(b) (stating that the President may prohibit or limit export of goods from the United States and making no mention of prohibitions based on who is exporting the goods).

142. *See id.* (stating that the regulations reach beyond the physical export of a good and can extend to the "financing, transporting, and other servicing of exports and the participation therein by any person").

jurisdiction extends far beyond the concept of control—which acted almost as a limiting factor for the actor-focused proscriptions—into the open waters of the stream of commerce.

The enforcement of the EAA 1969 on non–U.S.–controlled subsidiaries, however, is more forgiving than it is on those subsidiaries beholden to U.S. influence and pressure.[143] Foreign concerns, unaffiliated with U.S. parent corporations, could simply choose to violate the provisions of the EAA 1969 and incur nominal penalties.[144] The full costs of noncompliance with the EAA 1969 on the part of unaffiliated foreign concerns were rarely enforced, presumably due to the lack of cooperation by foreign courts to impose U.S. law on corporations organized abroad. "By contrast, the American-owned foreign subsidiary and particularly its American parent were directly exposed to American pressures and sanctions."[145] In this respect, the EAA 1969 largely had a prohibitory effect, as compared to a nominal legal one, only against corporations already subject to the jurisdiction of the United States.[146]

Amendments to the EAA 1969 in 1977 (1977 Amendments) extended the jurisdictional reach of the EAA 1969 to regulate the export of goods and technology "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."[147] The 1977 Amendments extend beyond the practical enforcement ramifications of the EAA 1969 to regulate the export of goods of U.S.–controlled foreign concerns *whether or not* those concerns dabble in U.S.–origin goods.[148] As such, the 1977 Amendments jurisdictionally bridged the U.S.–controlled

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143. BLUMBERG & STRASSER, *supra* note 7, § 21.02.

144. *Id.*

145. *Id.*

146. *Id.* A rare example of where the power of American pressure extended to unaffiliated foreign concerns was when the United States imposed effective sanctions against foreign subsidiaries of Toshiba and Kongsberg Vaapenfabrikk "because they had re-exported sensitive computer technology to the Soviets." *Id.* § 21.02 n.11 (citing Jonathan Fuerbringer, *Senate Backs Import Ban in Soviet Trade Deal*, N.Y. TIMES, July 1, 1987, at A1; David E. Sanger, *Japan Protests Trade Sanctions in the Bill*, N.Y. TIMES, Aug. 4, 1988, at D19).

147. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 301, 91 Stat. 1625, 1629 (1977) (codified as amended at 50 U.S.C. app. § 2404(a)(1) (2000)).

148. *Id.* For a look into the legislative history of the 1977 Amendments, along with strong reasons why Congress's use of this expansive standard meant to include foreign subsidiaries of domestic parent corporations, see BLUMBERG & STRASSER, *supra* note 7, § 21.03. The legislative history suggested that the 1977 Amendments would "confer[] nonemergency authority to control non-U.S. exports by foreign subsidiaries of U.S. concerns." *Id.* (quoting S. REP. NO. 95-466, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4545 ("confer nonemergency authority under the act to control non-U.S.-origin exports by foreign subsidiaries of U.S. concerns.")). "[A]n amendment that would have prohibited controls on non-U.S[.] exports by foreign subsidiaries of American corporations was defeated." *Id.* (citing S. REP. NO. 96-169, at 4–5 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1147, 1151–52).

foreign subsidiaries that traded in U.S. goods with those that only traded non–U.S. goods. The only groups that the 1977 Amendments did not include under its expansive jurisdictional umbrella were unaffiliated foreign concerns that did not trade in goods that originated in the United States.[149] All other concerns faced penalties for violating the amended EAA 1969.[150] Thus, the EAA 1969 as amended by the 1977 Amendments included not only the broad elements of a stream-of-commerce sanction regime but also the full jurisdictional arsenal inherent in the person-subject-to-the-jurisdiction-of-the–United States standard.

Many of the provisions of the 1977 Amendments were included in the EAA 1979,[151] and this expansive regime now provides "the current framework for federal export controls."[152] A subtle but far-reaching provision of the EAA 1979 includes foreign licensees within its prohibitory

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149. *See* § 301, 91 Stat. at 1629 (regulating trade by all entities subject to U.S. jurisdiction).

150. Export Administration Act of 1969, Pub. L. No. 91-184, § 6, 83 Stat. 841, 844.

151. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2000)). The EAA 1979 also separated the control of U.S.–origin goods into three categories, depending on the particular purpose behind restricting those goods:

> (2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—
>
> (A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the *national security* of the United States;
>
> (B) to restrict the export of goods and technology where necessary to further significantly the *foreign policy* of the United States or to fulfill its declared international obligations; and
>
> (C) to restrict the export of goods where necessary to protect the *domestic economy* from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

Id. § 3(2)(A)–(C) (emphasis added). Each category provides for the control of those goods that affect the enumerated policy objectives. *See* 50 U.S.C. app. §§ 2404, 2405, 2406 (providing the prohibitory language for national security controls, foreign policy controls, and economic controls, respectively). Such goods covered by the national security controls include military equipment and sensitive computer technology. *See* BLUMBERG & STRASSER, *supra* note 7, § 21.03 (finding that "most controls on high-technology equipment such as computers and electronic instruments were 'national security' controls"). In the past, foreign policy controls have encompassed crime control equipment and nuclear substances. Special Country Policies and Provisions, 43 Fed. Reg. 27,986, 27,986 (June 28, 1978); Exports of Crime Control and Detection Equipment, 39 Fed. Reg. 26,719, 26,719 (July 23, 1974). Economic or "short-supply" controls consist mainly of petroleum products. *See* BLUMBERG & STRASSER, *supra* note 7, § 21.03 (providing petroleum products as the "leading example of items" subject to these controls). "Such a statutory distinction may conceivably make some ultimate difference in judicial decisions in dealing with the validity of governmental action. National security considerations obviously provide a stronger basis for assertion of governmental authority than foreign policy or short-supply considerations." *Id.* § 21.03 n.6 (citing Leigh, *supra* note 34, at 48–50).

152. BLUMBERG & STRASSER, *supra* note 7, § 21.04.1.

provisions.[153] While licensees have some characteristics of subsidiaries and thus some measure of economic integration of a given multinational enterprise, they do not generally fit under current concepts of "control"—at least with the licensor.[154] Regulating licensees is thus another example of the conflicting motivations behind the EAA 1979, lying at the crossroads between a stream-of-commerce regime and an actor-focused regime. Which particular regime Congress chooses to utilize, or which characteristics of both, depends upon politically-driven decision-making. Both regimes provide powerful jurisdictional mechanisms to extend U.S. power over many aspects of a multinational corporation.

B. The Cuban Embargo

Following the failed invasion of Cuba at the Bay of Pigs and the subsequent international confrontation over Soviet-supplied atomic missiles, the Kennedy Administration resorted to economic sanctions over Cuba in 1963.[155] The legal authority cited for the sanction regime rested in the TWEA as amended by the FWPA;[156] particularly, the President's delegated ability to impose sanctions during times of proclaimed national emergency.[157]

President Truman's extant 1950 proclamation set the stage for the 1963 sanctions over Cuba. Although President Truman's proclamation specifically targeted the developing situation in North Korea, his words spoke to the communist threat worldwide.[158] The Kennedy Administration relied on Truman's broad warning against the growing threat of communism as a substantive justification for economic sanctions against Cuba. Also, because Truman's 1950 proclamation remained in effect at the

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153. § 10, 93 Stat. at 525; *see also* Homer E. Moyer Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 100–04 (1983) (listing past suspensions and freezes on export licensing and contemplating whether statutory authority exists for such freezes).

154. BLUMBERG & STRASSER, *supra* note 7, § 21.04.1. Terence Lau notes, in an interesting comparison, the difficulty in applying Treasury regulations to multinational corporations that operate mainly under franchise agreements, like those used by McDonald's—which maintains a high amount of control over its numerous and "independent" franchisees. Lau, *supra* note 79, at 426.

155. Cuban Assets Control Regulations, 28 Fed. Reg. 6974, 6974–85 (July 9, 1963) (codified at 31 C.F.R. pt. 515 (2005)). *See generally* MALLOY, *supra* note 12, at 459–510 (discussing the Cuban embargo controls); Sommerfield, *supra* note 78, at 867–68 (same).

156. Cindy G. Buys, *United States Economic Sanctions: The Fairness of Targeting Persons From Third Countries*, 17 B.U. INT'L L.J. 241, 243 (1999).

157. 50 U.S.C. app. § 5(b) (2000).

158. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950) (providing President Truman's proclamation in full).

time,[159] President Kennedy relied on Truman's already-declared national emergency (under the TWEA) as the legal and procedural authority allowing him to effectuate his plan for Cuba.[160]

To implement President Kennedy's Executive Order, the Secretary of the Treasury issued the Cuban Assets Control Regulations (CACR).[161] The CACR supplemented the general provisions of the FACR by imposing specific and far-reaching prohibitions upon Cuba.[162] Like the EAA 1979, the CACR provide a dichotomous sanction regime, reflecting both actor-specific and stream-of-commerce-type prohibitions.[163] Regarding the former, the CACR state in pertinent part:

> (a) All of the following transactions are prohibited . . . :
> (1) All transfers of credit and all payments . . . with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;
> (2) All transactions in foreign exchange by any person within the United States; and
> (3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.
> (b) All of the following transactions are prohibited . . . :
> (1) All dealings in . . . any property . . . by any person subject to the jurisdiction of the United States; and
> (2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.
> (c) Any transaction for the purpose or which has the effect of evading . . . paragraph (a) or (b) of this section is hereby prohibited.[164]

159. *See* H.R. REP. NO. 95-459, at 5 (1977) (explaining that President Johnson cited the national emergency declared by President Truman in 1950 in order to impose controls on U.S. investors in 1968, and that these controls were put out of existence by legislation in 1974); *supra* text accompanying note 61 (discussing the changes to national emergency legislation in the 1970s).

160. Buys, *supra* note 156, at 243.

161. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (2005).

162. *See* BLUMBERG & STRASSER, *supra* note 7, § 20.07.2 (discussing how the controls were comprehensive and simultaneously applied to specific transactions of military materials).

163. *Compare* 50 U.S.C. app. §§ 2404(a) (2000) (providing both actor-specific and stream-of-commerce-type prohibitions), *and supra* Part II.A (interpreting the EAA 1979), *with* 31 C.F.R. § 515.201 (providing the dichotomous regulations for the Cuban Embargo), *and infra* notes 172–216 and accompanying text (interpreting the CACR).

164. 31 C.F.R. § 515.201(a)–(c).

The key phrase here, not surprisingly, is "person . . . subject to the jurisdiction of the United States."[165] The CACR gives that standard the same expansive scope as the FACR, noted previously,[166] which extends jurisdiction over foreign subsidiaries of domestic parent corporations.[167] Another actor-specific prohibition within the CACR concerns the importation of Cuban merchandise: Section 515.204 prohibits the importation of merchandise by persons subject to the jurisdiction of the United States if that merchandise "(1) [i]s of Cuban origin; or (2) [i]s or has been located in or transported from or through Cuba; or (3) [i]s made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba."[168] These actor-specific prohibitions impose comprehensive controls over economic relations with Cuba far beyond that of the FACR or similar regulations.[169]

Regarding the stream-of-commerce-type regime inherent in the CACR, section 515.533 permits transactions involving U.S.–origin goods *provided that* the Secretary of Commerce authorizes all such transactions through licensing.

> (a) All transactions ordinarily incident to the exportation of

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165. *Id.* § 515.201.

166. *See supra* Part I.A (examining the standard in the context of the Trading with the Enemy Act as amended by the First War Powers Act); *supra* Part II.A (examining the same standard in the context of the EAA 1979).

167. Note the similarity between the definitions of "person subject to the jurisdiction of the United States" in the CACR and the FACR:

> The term *person subject to the jurisdiction of the United States* includes:
>
> (a) Any individual, wherever located, who is a citizen or resident of the United States;
>
> (b) Any person within the United States as defined in § 515.330;
>
> (c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
>
> (d) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section.

Cuban Assets Control Regulations, 31 C.F.R. § 515.329 (emphasis in original); *accord* Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (2005); *see also* Cuban Assets Control Regulations, 31 C.F.R. § 515.313 (defining the phrase "*property subject to the jurisdiction of the United States*").

168. 31 C.F.R. § 515.204.

169. *See* BLUMBERG & STRASSER, *supra* note 7, § 20.07.2 (discussing how the CACR supplemented the FACR).

> items from the United States, or the reexportation of U.S.-origin items from a third country, to any person within Cuba are authorized, provided that:
>
> (1) The exportation or reexportation is licensed or otherwise authorized by the Department of Commerce under the provisions of the Export Administration Act of 1979 . . . .[170]

At first blush, the language of section 515.533 generally appears to allow transactions involving U.S.–origin goods except under a limited number of circumstances where the Secretary of Commerce would be unwilling to grant a license.[171] Yet in reality, the probability that a foreign concern will obtain a license depends almost entirely on whether that concern is subject to the jurisdiction of the United States.

In 1992, Congress passed the Cuban Democracy Act (CDA)[172] "in response to the Castro Regime's refusal to permit free elections" and abide by international human rights standards.[173] The CDA severely limited, if not destroyed, the ability of U.S.–owned or –controlled companies from obtaining licenses to trade with Cuba. Contracts entered into after October 23, 1992, may not be licensed unless the transactions involve either "the exportation of medicine or medical supplies from a third country to Cuba" or "the exportation of telecommunications equipment from a third country, when the equipment is determined to be necessary for efficient and adequate telecommunications service between the United States and Cuba."[174] Transactions that fall under either category—few though they may be—must still meet a series of conjunctive requirements:

> (i) The commodities to be exported are non-strategic;
>
> (ii) United States-origin technical data (other than maintenance, repair and operations data) will not be transferred;
>
> (iii) If any U.S.-origin parts and components are included therein, such inclusion has been authorized by the Department of Commerce;
>
> (iv) If any U.S.-origin spares are to be reexported to Cuba in connection with a license transaction, such reexport has been authorized by the Department of Commerce;

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170. 31 C.F.R. § 515.533.

171. *Id.* § 515.533(a)(1).

172. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2315, 2575 (codified as amended at 22 U.S.C. §§ 6001–6010 (2000)).

173. Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 72 (1999), *reprinted in* 25 U. PA. J. INT'L ECON. L. 455, 466 (2004).

174. *Id.* § 515.559(a)(1)–(3).

> (v) No U.S. dollar accounts are involved; and
> (vi) Any financing or other extension of credit by a U.S.-owned or controlled firm is granted on normal short-term conditions which are appropriate for the commodity to be exported.[175]

Any controlled, foreign subsidiary whose transaction does not meet all of the above requirements would fail to obtain a license and would thus be prohibited from trading with Cuba under the CACR.[176] Since the above categories exclude the majority of possible transactions with Cuba, the CDA effectively cancelled the ability of controlled, foreign subsidiaries to trade with Cuba.[177] Put another way, the limitations placed upon the exception swallowed the exception. Noncontrolled concerns, on the other hand, can obtain licenses in a manner similar to the pre-1992 sanction regime without too much relative difficulty.[178] Thus, while the stream-of-commerce regime in the CACR attempts to regulate the activities of unaffiliated foreign concerns, the thrust of the Cuban Embargo is still geared toward the direct regulation of controlled foreign actors.

An interesting twist to the Cuban Embargo came when Congress passed and President Clinton subsequently signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act),[179] which significantly tightened controls on Cuba.[180] The Helms-Burton Act was passed in response to Cuba's shootdown of two unarmed airplanes flown by anti-Castro activists.[181] The legislation calls for nothing short of "free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers."[182] Moreover, the Helms-Burton Act is to remain in effect, along with the entire Cuban Embargo, until there is a regime change in Cuba that results in a verifiable democratic government.[183]

The Helms-Burton Act simultaneously "strengthens existing sanctions [over Cuba] and expands their extraterritorial effect."[184] First, the Helms-Burton Act reaffirms the provisions of the CDA, which had in part

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175. *Id.* § 515.559(b)(1)(i)–(vi).
176. *Id.* § 515.559(a).
177. BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 288 (Supp. 2002); Clark, *supra* note 173, at 467.
178. *See supra* note 17 and accompanying text.
179. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–6091 (2000)).
180. BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 289 (Supp. 2002).
181. *Id.*; Clark, *supra* note 173, at 467.
182. 22 U.S.C. § 6022(4).
183. *Id.* §§ 6032(h), 6064(a); Clark, *supra* note 173, at 467.
184. BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 289 (Supp. 2002).

encouraged the President to seek the compliance of foreign countries with the Cuban Embargo.[185] Second, the Act instructs the President to require that the Secretary of the Treasury and the Attorney General fully enforce the CACR already in effect.[186]

Third, and perhaps most importantly, the Act creates a private right of action against "trafficking" in order to discourage the indirect financing of Cuba through such trafficking in property confiscated by the Castro Regime.[187] Section 6082(a)(1) states that "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property."[188] The extraterritorial nature of § 6082 needs some unwinding. The Act defines "person" to mean "any person or entity, including any agency or instrumentality of a foreign state."[189] The brevity of the definition of "person" demands the most expansive of readings. Indeed, the language seems to include anybody or anything that traffics in confiscated property, even uncontrolled foreign concerns.[190] The Act defines "traffics" as instances where:

> [A] person knowingly and intentionally—
> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
> (ii) engages in a commercial activity using or *otherwise benefiting from* confiscated property, or
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property.[191]

185. 22 U.S.C. § 6032(a)(1).
186. *Id.* § 6032(c).
187. *Id.* § 6082(a)(1).
188. *Id.*
189. *Id.* § 6023(11).
190. *See* MALLOY, *supra* note 12, at 191–92 (providing a third-party national who buys confiscated crops as an example of a person who can be sued under the Act).
191. 22 U.S.C. § 6023(13)(A)(i)–(iii) (emphasis added). The Act stipulates that the definition of "traffics" does not include:

> (i) the delivery of international telecommunication signals to Cuba;
> (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a

Moreover, the Act defines "knowingly" to mean "with knowledge or having reason to know."[192] Fully defined, § 6082 provides a private right of action for U.S. nationals to sue in U.S. federal court for money damages any person who traffics in said nationals' confiscated property.[193]

The extraterritorial effect in § 6082 could be substantial. The definition of "person" contains no limiting language[194] and appears expansive even when compared to the person-subject-to-the-jurisdiction-of-the–United States standard.[195] Also, the definition of trafficking includes, in one extreme, those persons who merely have "reason to know" that they might "otherwise benefit[] from confiscated property."[196] Economic-sanction expert Michael Malloy has speculated that:

> [A] third-country national who purchased, or financed the purchase or sale of, the crop of a confiscated Cuban plantation formerly owned by a U.S. enterprise, or by a Cuban who is now a U.S. national, might find itself subject to suit in U.S. court for "trafficking" in confiscated property.[197]

Carrying the language of § 6082 to another logical end, a U.S. parent may find itself liable for the acts of a subsidiary that "traffics" in confiscated property if a plaintiff can show that the parent somehow "benefit[ed] from" that property, no matter how tenuous a relationship the parent maintained with its subsidiary.[198]

> specially designated national;
>
> (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or
>
> (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

Id. § 6023(13)(B)(i)–(iv).

192. *Id.* § 6023(9).

193. BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 289 (Supp. 2002) (explaining that § 6082 "permits recovery up to three times the value of the property, plus court costs and legal fees").

194. 22 U.S.C. § 6023(11).

195. *See supra* Part I.A (exploring the jurisdictional extent of the person-subject-to-the-jurisdiction-of-the–United States standard).

196. 22 U.S.C. § 6023(9), (13)(A).

197. MALLOY, *supra* note 12, at 192.

198. When 22 U.S.C. §§ 6023(11), 6023(13)(A), and 6082 are read together, a parent's potential liability becomes clear. Section 6082 creates a right of action against any person who traffics in confiscated property, § 6023(11) includes any entity in its definition of "person"—this would include a parent who traffics—and § 6023(13)(A) states that trafficking includes "engag[ing] in a commercial activity using or *otherwise benefiting from* confiscated property"—a parent usually benefits from the activities of a subsidiary. 22 U.S.C. §§ 6023(11), 6023(13)(A), 6082 (emphasis added); *see also* BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 290 (Supp. 2002) ("The term 'traffic' is broadly

While commentators anticipated that the Helms-Burton Act would be challenged under international law,[199] § 6082 has not yet become effective due to continuous suspension on the part of the Executive.[200] Section 6085 authorizes the President to suspend the effective date of § 6082 for a six-month period, as long as "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba."[201] President Clinton first suspended the ability to bring suit under the Helms-Burton Act and continued suspending every six months for the duration of his administration,[202] and that suspension has been renewed every six months by the subsequent administration.[203] As such, § 6082's

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defined . . . .").

199. *See, e.g.*, Stuart E. Benson, *Dramatic Expansion of US Sanctions Against Cuba: Impact on US and Foreign Companies*, 24 INT'L BUS. LAW. 275, 278 (1996) (noting that Canada has articulated two different possible challenges to the Helms-Burton Act).

200. Clark, *supra* note 173, at 470; Pedro A. Freyre, *Helms Burton: The Dilemma of Hard Wiring Policy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 187, 190 (2004).

201. 22 U.S.C. § 6085(b)(1).

202. Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 1136 (July 16, 1996); Statement on Review of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 1 PUB. PAPERS 1 (Jan. 3, 1997); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 962 (July 16, 1997); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 1 PUB. PAPERS 75 (Jan. 16, 1998); Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 1247 (July 16, 1998); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 1 PUB. PAPERS 44 (Jan. 14, 1999); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 1232 (July 16, 1999); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 1 PUB. PAPERS 63 (Jan. 14, 2000); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 1435 (July 14, 2000); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 3 PUB. PAPERS 2929 (Jan. 16, 2001); Statement on the Cuban Liberty and Democratic Solidarity Act, Title III, 2 PUB. PAPERS 855 (July 16, 2001); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 1 PUB. PAPERS 77 (Jan. 16, 2002); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 PUB. PAPERS 1251 (July 16, 2002).

203. Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 39 WEEKLY COMP. PRES. DOC. 80 (Jan. 16, 2003); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 39 WEEKLY COMP. PRES. DOC. 925 (July 16, 2003); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 40 WEEKLY COMP. PRES. DOC. 92 (Jan. 16, 2004); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 40 WEEKLY COMP. PRES. DOC. 1323 (July 16, 2004); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 41 WEEKLY COMP. PRES. DOC. 53 (Jan. 13, 2005); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratic

novel method of implementing a sanction regime through a private right of action remains untested.

III. A NEW MODEL: LIABILITY ALLOCATION ON PARENT CORPORATIONS

The previous two Parts have dealt with the direct regulation of foreign subsidiaries, either through actor-focused proscriptions[204] or the control of U.S.–origin goods flowing through the stream of commerce.[205] The provisions of both economic-sanction regimes assert extraterritorial jurisdiction over foreign subsidiaries, and neither regime shies away from such assertion.[206] Both regimes are perfectly legal, at least from the standpoint of U.S. law.[207] Yet Congress, and the rest of the world for that matter, also operates in the political realm, in which the tenets of law serve merely as a ceiling. The driving force behind political decisions, on which economic-sanction regimes depend, also is comprised of a myriad of competing normative considerations. Chief among them is the desire to optimize the expenditure of political capital. Congress incurs much cost in passing an economic-sanction regime, so naturally Congress wants that regime to be as effective as possible. This Part recommends a new model to increase the effectiveness of the enforcement of economic sanctions.

A. The Foreign Corrupt Practices Act

The enforcement of a particular economic-sanction regime may pose political problems in application where no legal problems existed during drafting. Indeed, just because a piece of legislation passes legal scrutiny does not necessarily mean that the legislation will be popular, accepted, or even successful. For example, the CDA[208] and Helms-Burton Act[209] have

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Solidarity (LIBERTAD) Act of 1996, 41 WEEKLY COMP. PRES. DOC. 1177 (July 15, 2005); Letter to Congressional Leaders on Review of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 42 WEEKLY COMP. PRES. DOC. 78 (Jan. 17, 2006); Letter to Congressional Leaders on Review of Title III of the Cuban Liberty and Democratice Solidarity (LIBERTAD) Act of 1996, 42 WEEKLY COMP. PRES. DOC. 1354 (July 16, 2006).

204. *See supra* Part I.

205. *See supra* Part II.

206. *See supra* Parts I, II.

207. *See* Andreas F. Lowenfeld, *Unilateral Versus Collective Sanctions: An American's Perception*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 95, 101 (Vera Gowlland-Debbas ed., 2001) (arguing that even though control under these regimes is perfectly legal, it "should be resorted to only in exceptional circumstances and only when essential to implementation of a program to further a major national interest of the state exercising jurisdiction" (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 414 (1986)).

208. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2315, 2575 (codified as amended at 22 U.S.C. §§ 6001–6010 (2000)); *see also supra* Part II.B (addressing the Cuban Embargo,

proven extremely unpopular in the international community,[210] despite the lack of challenges to their legal validity under U.S. law.[211] International unrest, especially in regard to economic sanctions, which depend a great deal upon international compliance, can hamper the effectiveness and even success of the application of a given economic-sanction regime. In response to the Helms-Burton Act, the European Union (EU),[212] Canada,[213] and Mexico[214] each passed laws designed to counter the application of the Act in their respective countries. Also, the United Nations overwhelmingly passed a resolution condemning the United States's embargo of Cuba and demanded an immediate end to all economic restrictions.[215] Despite the political, perhaps even anti–U.S., motivations behind the countermeasures, the actions of the EU, Canada, and Mexico—three of the United States's most important trading partners—betoken serious ramifications for the Cuban Embargo and the United States's ability to conduct foreign policy effectively on other fronts.[216]

An efficient economic-sanction regime depends upon the successful enforcement of its provisions, and promulgated regulations, with the least

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including the CDA).

209. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–6091 (2000)); *see also supra* Part II.B (addressing the Cuban Embargo, including the Helms-Burton Act).

210. *See, e.g.*, BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 291 (Supp. 2002) (noting that few corporations have brought claims under the Helms-Burton Act); Clark, *supra* note 173, at 475–81 (discussing Western countermeasures to the CDA and Helms-Burton Act).

211. *Cf. supra* Part II.B (discussing how § 6082 has been continuously suspended since its inception). The lack of legal challenges may be due to the continual suspension of § 6082, rather than flawless drafting.

212. *See, e.g.*, Council Regulation 2271/96, 1996 O.J. (L 309) 1 (introducing four principal countermeasures designed to counteract the provisions of the CDA and the Helms-Burton Act). A number of EU member states have instituted a series of similar countermeasures, including the United Kingdom, Belgium, Denmark, Finland, France, Germany, the Netherlands, and Sweden. Clark, *supra* note 173, at 481 & n.126.

213. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 5.1–5.2 (1985), (authorizing the Canadian Attorney General to issue orders blocking compliance with foreign judgments adverse to Canadian trade interests), *available at* http://laws.justice.gc.ca/en/F-29/241212.html.

214. *See* Clark, *supra* note 173, 480 (citing Ley de Protección al Comercia y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional [Law of Protection of Commerce and the Investment of Foreign Norms that Contravene the Right International], arts. 1, 4–5, Diario Oficial de la Federación [D.O.], 23 de Octubre de 1996 (Mex.), which Clark describes as "provid[ing] for the non-recognition and non-enforcement of foreign judgments issued under [the Helms-Burton Act]").

215. G.A. Res. 47/19, ¶ 2, U.N. Doc. A/RES/47/19 (Mar. 17, 1993); BLUMBERG & STRASSER, *supra* note 7, § 20.07.2, at 288 (Supp. 2002).

216. Numerous other examples of international controversies surrounding the United States's application of economic sanctions exist, yet further discussion is beyond the scope of this article. For further discussion, see BLUMBERG & STRASSER, *supra* note 7, § 20.06, exploring the ramifications of the China and North Korea Embargo on the United States's trading partners, and § 21.05, discussing the high political costs associated with the Siberian Pipeline experience.

amount of cost to the sender. Assuming, arguendo, that the purposes behind the Cuban Embargo have been or are being achieved, do the costs associated with the embargo—both domestically and abroad, but particularly abroad—justify that relative success?[217] If so, then U.S. policy makers are correct to discount international opinion as well as the costs incurred as a result of that negative reaction by foreign countries. But if those costs outweigh the benefit of imposing harsh economic sanctions on Cuba, then perhaps congressional policy makers should reevaluate, at the very least, the manner in which the United States chooses to impose economic sanctions.

An alternative model for drafting economic-sanction legislation may operate to improve the efficiency concerns facing traditional sanction regimes. One such model exists in the Foreign Corrupt Practices Act of 1977 (FCPA),[218] which made bribes of foreign governmental officials to obtain business unlawful.[219] FCPA achieved this goal by "strengthening [corporate] accounting controls."[220] While the FCPA is not an example of economic-sanction legislation, the novel manner in which the Act purports to enforce its antibribery provisions over multinational corporations offers an analogous model that Congress could apply to economic sanctions.

First, a synopsis of the FCPA's accounting provisions is in order. The FCPA seeks to thwart the bribery of foreign officials by requiring detailed accounting reporting.[221] Section 102 of the FCPA requires reporting companies, which include issuers under section 12 of the Securities Exchange Act of 1934 (Exchange Act)[222] and "companies required to report under § 15(d) of the Exchange Act,"[223] to:

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217. Despite the animosity surrounding the Helms-Burton Act specifically and the Cuban Embargo generally in the court of world opinion, there is little doubt that the embargo is having a negative effect on the Cuban economic climate. *Saying Boo to Helms-Burton*, THE ECONOMIST, Oct. 19, 1996, at 49. Indeed, the Canadian ambassador to Cuba, Mark Entwistle, remarked in 1996 that, "[Helms-Burton] has clearly already had a significant chilling effect on investment decisions." *Id.* Thus, in the context of the Cuban Embargo, the question becomes whether the "chilling effect" outweighs the negative reaction by the international community that may impact the United States's ability to adequately conduct foreign policy in this and other areas. Policy makers must attempt to quantify both factors, however difficult, in order to determine efficiency.

218. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3 (2000)). *See generally* Avi-Yonah, *supra* note 65, at 17–20 (discussing the extraterritorial benefits of the FCPA).

219. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

220. BLUMBERG & STRASSER, *supra* note 7, § 23.02.

221. *See id.* § 23.04.01 (discussing the accounting provisions of the FCPA and how they play an important part in the regulatory scheme).

222. Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78*l*(a) (2000).

223. *Id.* § 78o(d); BLUMBERG & STRASSER, *supra* note 7, § 23.04.1.

> (A) [M]ake and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
>
> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles . . . , and (II) to maintain accountability for assets;
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization.[224]

On its face, this language suggests that only those companies subject to the rigors of the Exchange Act fall under the purview of the FCPA. Thus, foreign subsidiaries that are not subject to the Exchange Act, it would seem, need not comply with the FCPA's accounting controls.

Yet the reporting requirement imposed on parent corporations unavoidably leads to the application of antibribery standards to controlled, foreign subsidiaries, despite the lack of any "express reference" to foreign subsidiaries in the FCPA.[225] The accounting rules of the Securities and Exchange Commission (SEC) require parent corporations to consolidate their own financial statements with those of their majority-owned subsidiaries.[226] The transactions recorded in the financial statements of the subsidiary are subsequently reported by the parent, who consequently becomes bound by any of the subsidiary's misstatements under section 102.[227] Indeed, the SEC has emphasized a parent's liability for a controlled subsidiary's misstatements in an interpretation issued immediately after Congress passed the FCPA.[228] Should a parent violate section 102, section 20(a) of the Exchange Act provides joint and several liability.[229] Moreover, a parent corporation's failure to bring a controlled subsidiary into compliance with section 102 also subjects the parent to

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224. 15 U.S.C. § 78m(b)(2)(A), (B)(i)–(iii).

225. BLUMBERG & STRASSER, *supra* note 7, §§ 23.04.2., 23.06.1.

226. *Id.* § 23.06.1 n.6 (citing 17 C.F.R. §§ 210.3-02, -09, .3A-02(b) to (d) (2005)).

227. *Id.* § 23.06.1.

228. *Id.* (citing Alan Levenson, *The Accounting and Recordkeeping Provisions of the Foreign Corrupt Practices Act*, 10 INST. ON SEC. REG. 84–85 (1978)).

229. Securities Exchange Act of 1934 § 20(a), 15 U.S.C. § 78t(a) (2000); BLUMBERG & STRASSER, *supra* note 7, § 23.06.1.

penalties.[230] As such, the FCPA imposes the costs of a subsidiary's compliance on its controlling parent without directly saying so.

The absence of any direct reference to foreign subsidiaries in the FCPA recognizes a congressional concern with the foreign policy implications of extraterritorial application.[231] Indeed, while the bill that would become the FCPA was in conference, the Senate conferees remarked upon "the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill."[232] Congress solved this problem by omitting any direct reference to foreign subsidiaries with the full knowledge that the practical effect of the FCPA would inexorably lead to the indirect regulation of those foreign subsidiaries. Congress's sophisticated drafting allowed the United States to enforce the antibribery objectives behind the FCPA without opening the country to charges of heavy-handedness associated with the enforcement of an extraterritorial statute.[233]

B. Indirect Extraterritorial Jurisdiction

Incorporating drafting concepts from the FCPA into economic-sanction legislation will operate to minimize international controversies surrounding their application. The most important concept espoused in the FCPA was a reliance on indirect extraterritorial jurisdiction as an enforcement mechanism. Indirect extraterritorial jurisdiction involves the application of legal pressure on domestic parent corporations in order to induce the compliance of a controlled, foreign subsidiary.[234] The concept is actor-

230. *See* SEC v. First Sec. Co. of Chi., 463 F.2d 981, 987 (7th Cir. 1972) ("[F]ailure of the controlling person to maintain and diligently enforce a proper system of internal supervision and control constitutes participation in the misconduct and the violation will be deemed to have been committed . . . by the controlling person who did not perform the duty to prevent it." (quoting Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 438 (N.D. Cal. 1968)).

231. BLUMBERG & STRASSER, *supra* note 7, § 23.05.1.

232. *Id.* (quoting H. REP. NO. 95-831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126) (further citations omitted).

233. Several sources discuss the success of the FCPA in inducing worldwide antibribery initiatives. *See, e.g.*, Tom Delare, *A Sea Change in Anti-corruption Efforts*, *in* NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 93, 94 (2000) ("[T]he [FPCA] . . . establish[ed] substantial and dissuasive penalties for persons and corporations making payments to foreign government officials, political parties and candidates in order to retain or obtain business."); Matt T. Morley, *Combating Bribery*, NAT. L.J., Mar. 27, 2000, at B-7 (examining the Organisation for Economic Co-operation and Development (OECD) agreement outlawing bribery that was influenced by the FCPA and suggesting how companies should respond to it); David E. Sanger, *Business Bribes to Foreigners to Be Banned by End of 1998*, N.Y. TIMES, May 24, 1997, at 33 (describing OECD Bribery Convention, noting that it was influenced by the FCPA, and assessing that the agreement "leaves open the possibility that some nations may treat bribery as a far more serious offense than others").

234. *See* BLUMBERG & STRASSER, *supra* note 7, § 20.15 ("The United States may instead look

focused insomuch as the parent is concerned, yet does not attempt to *directly* regulate the actions of that parent's controlled subsidiary through any jurisdictional standard in the language of the provisions.[235] Instead, the proposed legislation, like the FCPA accounting provisions, allocates the liability for a subsidiary's noncompliance to the controlling parent.[236]

There are a number of nonjurisdictional standards Congress could utilize to trigger the application of parent liability. For example, Congress could incorporate indirect extraterritorial jurisdiction through an objective-knowledge standard. Under that standard, a parent corporation would be liable for the trading violations of a subsidiary if the parent knew or *should have known* about the trading violations.[237] In lieu of or in addition to a knowledge standard, Congress could impose a benefit requirement—that a parent would incur liability if that parent engaged in or *otherwise benefited from* the trade violation.[238] Under this hypothetical sanction regime, a parent "knowledgeable" of its subsidiary's trade violations (and who perhaps "benefited" from those violations) would be subject to suit in the United States and face a variety of civil or even criminal penalties.[239]

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to pressure upon American parents as a less intrusive method of obtaining compliance by their foreign subsidiaries. Although this indirect technique . . . may be less effective, it avoids bruising confrontation with close allies and the embarrassment of possible ultimate failure of the effort.").

235. *Compare supra* Part I (discussing actor-focused economic sanctions), *with supra* Part III.A (explaining how the FCPA regulates subsidiaries indirectly through the actions of the parent).

236. *See supra* Part III.A.

237. *Cf.* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act) § 4, 22 U.S.C. § 6023(9) (2000) (defining "knowingly" as "with knowledge or having reason to know").

238. *Cf. id.* § 6023(13)(A)(ii) (providing a definition of "traffics," which includes the "otherwise benefiting from" language).

239. A limited number of regulations out of the Office of Foreign Asset Controls, promulgated under the IEEPA, already contain aspects of indirect extraterritorial jurisdiction. Regulations directed at Burma, 31 C.F.R. § 537.202 (2005), Sudan, 31 C.F.R. § 538.206 (2005), and Iran, 31 C.F.R. § 560.208 (2005), prohibit U.S. persons (a domestic parent, for example) from approving, facilitating, brokering, financing, or guaranteeing transactions of a foreign person (a foreign subsidiary, for example) into which the U.S. person would be prohibited from entering. Lau, *supra* note 79, at 434–37. While this Article has not directly addressed economic sanctions promulgated under the IEEPA, there is significant room for the President and Congress to expand liability allocation on parent corporations under both the TWEA and the IEEPA. As this Article suggests, triggering parent liability through securities laws will, for reporting companies at least, provide a discrete vehicle for enforcing trading prohibitions. *See supra* Part III.A (discussing the manner in which the FCPA allocates liability for bribery by a foreign subsidiary on a domestic parent); *cf.* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 91–92 (2003) (arguing that the extraterritorial application of U.S. domestic antifraud provisions to foreign companies or conduct has created an "inconsistent and expansive" scope of federal jurisdiction, "result[ing] in conflicts with other countries and the potential for redundant and unnecessarily costly systems of overlapping regulations"); Minodora D. Vancea, Note, *Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?*, 53 DUKE L.J. 833, 874 (2003) (arguing that cooperation is superior to the "unilateral

Control is the medium through which indirect extraterritorial jurisdiction operates, though control is not a quantifiable requirement as in traditional economic-sanction standards.[240] Allocating the liability for a controlled subsidiary to the parent corporation imposes costs on the parent. Because a rational parent would wish to avoid incurring unnecessary liability, the parent will direct its subsidiary to comply with the tenets of the economic sanction in place.[241] This liability allocation also inadvertently functions as a control test. If a parent is unable to reign in its subsidiary from violating trade restrictions, the parent lacks requisite control. In those circumstances, even traditional regimes would ultimately fail to directly regulate the subsidiary.[242] If a parent is able to direct the actions of a subsidiary into compliance, then a sufficient amount of control exists. Compliance is thus a symptom of a parent's control over its subsidiary.

One potential problem occurs when a parent that lacks the requisite amount of control nevertheless incurs liabilities from an unrestrained subsidiary. Imagine a parent who had reason to know of a subsidiary's violation of an economic sanction (and perhaps subsequently benefited

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exportation of American norms," that concerns over comity and sovereignty "counsel against unilateral assertion of extraterritorial jurisdiction in corporate governance issues," and that the imposition of corporate-governance codes on foreign parties could be found "unacceptably intrusive and would thus attract retaliation"). Similarly, although beyond the scope of this Article, federal income tax laws applicable to controlled, foreign corporations may also provide a novel mechanism for veiling the direct enforcement of economic-sanction regimes. *See, e.g.*, Avi-Yonah, *supra* note 65, at 23–24 (discussing the benefits of an enterprise approach in the taxation context).

One advantage of imposing liability on domestic parent corporations is the ability to demonstrate personal jurisdiction more easily. The United States would have little trouble in asserting personal jurisdiction over the parent corporations it seeks to penalize because many are already incorporated or headquartered within the United States. Furthermore, the enforcement of judgments would not rely on any foreign judiciary because adjudication would occur within the United States.

240. *See, e.g.*, Restrictive Trade Practices or Boycotts, 15 C.F.R. § 760.1(c) (2006) (requiring "[c]ontrol in fact"); Foreign Assets Control Regulations, 31 C.F.R. § 500.329 (2005) (requiring "owne[rship] or control[]" to trigger application of the regulations); Cuban Assets Control Regulations, 31 C.F.R. § 515.329(d) (2005) (requiring "owne[rship] or control[]"); Iranian Asset Control Regulations 31 C.F.R. § 535.329(d) (2005) (requiring "owne[rship] or control[]").

241. The United States was partially successful in applying metalegal pressure upon domestic parent corporations of Canadian subsidiaries in order to compel compliance in the embargoes involving China, North Korea, and Cuba. *E.g.*, Corcoran, *supra* note 47, at 180–81 ("[T]he United States Treasury has been singularly successful in obtaining compliance by casting a wide net . . . . Informal pressure on United States parent companies, including the threat of adverse publicity, and possible problems in securing government contracts are available to secure silent compliance and to deny the Canadian corporation a day in court. It is clear too that this sort of informal pressure can be effective even in the absence of control by a United States parent company."); *see* BLUMBERG & STRASSER, *supra* note 7, §§ 20.07.2, 20.06.4 ("[T]he United States continued 'indirect controls' over foreign subsidiaries through pressure on their United States parent corporations to cause the subsidiaries to comply with the [Cuban] Embargo."). Note, however, the distinction between applying metalegal pressure through enforcement and drafting indirect extraterritorial jurisdiction into the economic-sanction legislation itself.

242. *See supra* Parts I, II.

from it) yet did not possess the requisite amount of control to influence the subsidiary's actions one way or another. In those circumstances, penalizing the parent would seem unfair. Yet any rational parent could prevent the absorption of liability in this hypothetical by altering the relationship with its subsidiary *ex ante*. A corporate lawyer should be able to tailor the parent–subsidiary relationship in a manner that would result in the parent incurring the least amount of liability.[243] A parent that maintained a good deal of control over a subsidiary would have incentive to obtain near-complete operational control in order to ensure compliance with the economic-sanction regime.[244] Accordingly, a parent with little control would be induced to distance itself completely from the daily operations and business decisions of a subsidiary.[245] This would allow a parent to avail itself of a lack-of-knowledge defense, since the independent status of the foreign subsidiary precluded knowledge on behalf of the parent. Parents with a degree of control somewhere between the two extremes could choose either option, depending on the goals the parent wishes to pursue. What results is the stratification of a parent's control over its subsidiaries into easily distinguishable categories for the purpose of imposing penalties.[246]

The most important distinction between an indirect extraterritorial-jurisdiction regime and the traditional regimes is the plain on which enforcement occurs. The traditional regimes directly regulate foreign

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243. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that the social costs of industry are part of the privilege of participating in industry and that the total effect of costs and benefits will greatly affect business decisions).

244. *See* Clark, *supra* note 173, at 487 (recommending parents with some level of operational control "to take steps to exercise that control in a fully informed and thoughtful manner designed to avoid liability under U.S. sanctions and, to the extent possible, minimize difficulties").

245. *See id*. (noting that some parent corporations "have the[ir] foreign subsidiary operate wholly independently and without direction from the parent. This model can be useful in insulating the parent from imputed liability for the actions of the subsidiary under agency, accomplice and conspiracy theories . . . .").

246. Terence Lau suggests that, at least in the context of economic-sanction regimes implemented under the IEEPA, parent companies have difficulty in exercising a proper degree of independence over foreign subsidiaries while maintaining adequate profit levels. *See* Lau, *supra* note 79, at 434, 445–50 (discussing, among other examples, how synergistic activities such as pooled "back office" functions, a common export control compliance division, and even legal advice from in-house counsel may trigger parent liability). These profitable activities, however, which are nearly universal amongst larger multinational corporations, create an incentive to regulate the business decisions of foreign subsidiaries that may otherwise wish to violate trade prohibitions. In such situations, a parent will direct its foreign subsidiary to comply with the provisions of the applicable economic-sanction regime. Otherwise, a parent could isolate or sell a foreign concern that required too high an enforcement cost in the short-term or presented too high a risk of violative activity in the future. Parents will internalize these costs and risks when structuring their global enterprises as added factors in making, amongst other transactions, mergers and acquisitions.

subsidiaries of domestic parent corporations.[247] Because, under international law, those foreign subsidiaries are governed by the laws of their host state,[248] any attempt by the United States to enforce U.S. law over a foreign subsidiary is likely to be considered an assault on the sovereignty of the host state.[249] Such disputes are destined to involve a clash between sovereigns[250] and impose significant costs on the ability to conduct foreign relations on other fronts. Call this, for our purposes, the interstate plain. Indirect extraterritorial jurisdiction essentially alters the plain on which the enforcement of economic sanctions occurs. Under this new regime, the parent corporation is responsible for enforcing a foreign subsidiary's compliance with the provisions of an economic sanction. The parent accomplishes this not through regulation, which is a governmental function, but by policing the business decisions of its subsidiaries. Relying on a parent corporation to enforce economic sanctions removes potential disputes from the skittish interstate plain to the plain of business judgment.[251] A foreign sovereign is less likely to view transactional policing by a subsidiary's parent as an affront to its sovereignty than if the United States itself were to demand compliance with a U.S. regulatory regime. Enforcing economic sanctions on the business-judgment plain thus operates to minimize the costs associated with international disputes because of the decreased probability that those disputes will occur.[252]

247. *See supra* Parts I, II.

248. *E.g.*, Fruehauf-France, S.A. v. Massardy, Cour d'appel [CA] [regional court of appeal] Paris, May 22, 1965, J.C.P. 1965 II, 14274, concl. Nepveu (Fr.), *summarized in* 5 I.L.M. 476 (1966) (appointing an administrator to operate Fruehauf-France—which was owned in majority by a U.S. parent company—and to carry out a contract in violation of the U.S. embargo against China and North Korea); Compagnie Européenne des Pétroles, S.A./Sensor Nederland B.V., Arrondissementsrechtbank [Rb.] [District Court], The Hague, Sept. 17, 1982, RvdW 167 (Neth.), *reprinted in* 22 I.L.M. 66, 67–69 (1982) (holding that a contract was governed by Dutch law and that under Dutch law, a Dutch subsidiary (with a U.S. parent) had Dutch nationality, despite the defendants claim that their behavior was governed by U.S. Export Administration Regulations); Libyan Arab Foreign Bank v. Bankers Trust Co., [1989] Q.B. 728, 731–33, 774 (Eng.) (holding that the freezing of Libyan assets in foreign branches of U.S. banks was ineffective to prevent a Libyan bank from recovering deposits held in the London branch of a U.S. bank and were governed by English law).

249. *See* DREZNER, *supra* note 36, at 317 ("[H]ost countries inevitably see extraterritorial sanctions as a violation of their sovereignty.").

250. *Id.*

251. This will operate to alleviate the concerns raised by Reuven Avi-Yonah, who suggests that economic sanctions "must be applied extraterritorially to achieve [their] effect," and that "[e]xtraterritorial application should . . . be avoided unless agreement with major allies can be achieved first." Avi-Yonah, *supra* note 65, at 28.

252. It must be conceded that not every situation that calls for the application of an economic sanction will necessarily lend itself to the indirect extraterritorial-jurisdiction model. First, the model's effectiveness rests with a domestic corporation's ability to influence the actions of a foreign corporation. That may not be possible in the context of a U.S. subsidiary and a foreign parent, as depicted in figure 3. Traditional jurisdictional standards may be more appropriate in upstream contexts. Second, the model

CONCLUSION

The enforcement mechanism Congress incorporates into an economic-sanction regime determines how effective that regime will be. U.S. law merely sets a ceiling as to how high (or far, depending on your spatial point of reference) a jurisdictional standard within a particular economic sanction may extend. Yet the law speaks little to how the international community, particularly the United States's trading partners, will view that regulatory regime. Direct assertion of U.S. authority over controlled, foreign subsidiaries is unlikely to succeed in all, or perhaps even most, situations that call for the application of an economic sanction. This is not because congressional drafters misinterpret U.S. law, but because, as the United States's history with economic-sanction regimes has shown over the last century, the world does not necessarily and at all times revolve around U.S. interests. Congressional drafters should recognize the limits of U.S. hegemony and adopt a new model for the effective enforcement of economic sanctions. Congress should take advantage of the operational control inherent in multinational enterprises by imposing liability on a controlled subsidiary's parent. Having parent corporations ensure the compliance of their subsidiaries with the provisions of an economic sanction will minimize international controversy surrounding the enforcement of those sanctions. A more measured economic-sanction regime will be a more effective one.

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may not be suitable in situations where vital national-security interests are at stake—the most important and internationally respected rationale for implementing an economic sanction. *See* International Emergency Economic Powers Act § 202, 50 U.S.C. § 1701 (2000)) (granting the President authority under the Act to deal with "an unusual and extraordinary threat"); BLUMBERG & STRASSER, *supra* note 7, § 21.03 n.6 ("National security considerations obviously provide a stronger basis for assertion of governmental authority than foreign policy or short-supply considerations." (citing Leigh, *supra* note 34, at 48–50)). Here, traditional regimes may be better matched for those exigencies, especially when there is a high degree of policy congruence among nations (which may be likely during serious crises). Yet it is difficult to imagine a scenario so serious that would not justify outright military intervention, at least in conjunction with an economic sanction. Even in the body of economic-sanction regulations resulting from the September 11 attacks, for example, President Bush invoked only the "United States person" standard. *See supra* Part I.B. Third, the *method* by which Congress chooses to enforce an economic sanction may be secondary to the *lack of trade* generated by the economic sanction, which will result no matter which method is in play. The focus of this Article, however, has not been on the political considerations behind economic sanctions but on the ramifications of the legal vehicles used to convey the existing aims of policy makers. The politics of economic sanctions deserve attention as an important topic affecting U.S. foreign policy but is nevertheless beyond the scope of this Article.