

SECOND THOUGHTS ON SECONDARY SANCTIONS

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ABSTRACT

This Article explores the legality of so-called “secondary sanctions” under customary principles of international jurisdiction law. Ordinarily, when the United States imposes economic sanctions, it imposes primary sanctions only—to restrict its own companies and citizens (or other people who are in the United States) from doing business with a rogue regime, terrorist group, or other international pariah. Secondary sanctions, such as secondary trade boycotts and foreign company divestment, involve additional economic restrictions designed to inhibit non-U.S. citizens and companies abroad from doing business with a target of primary U.S. sanctions. Secondary sanctions have proven highly controversial, in part because of broad claims that they are illegally “extraterritorial” in purpose and effect. This Article challenges the conventional view. It suggests that a wide range of secondary sanctions measures are permissible if tailored to regulate exclusively on “territorial” grounds—on the combined basis of territorial and nationality jurisdiction. Secondary sanctions may seldom be wise as a matter of policy, but when primary sanctions fail, secondary sanctions may be a last alternative to the use of military force. Because the use of secondary sanctions has been complicated by lack of clarity about their legality, territorial forms of secondary sanctions should be considered as an alternative to other more legally controversial forms of secondary sanctions.

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1. INTRODUCTION

The United States commonly deploys unilateral economic sanctions against evil dictatorial regimes, fanatical terrorists, nuclear weapons proliferators, and international narcotraffickers. But if ordinary sanctions do not work and other countries do business as usual with a sanctions target, is it legal under customary international law for the United States to broaden its sanctions to deter third countries and their citizens and companies from doing or continuing business with the sanctions target?

For example, while the United States prohibits its own citizens and companies from engaging in most forms of business dealings with the genocidal government of Sudan, China has become Sudan's largest investor and trading partner.¹ Would it be legal for the United States to stop its companies from doing business with Chinese companies that do business in Sudan? Could the United States permissibly order its citizens to divest ownership in any foreign companies that do business in Sudan? Or—as many commentators suggest—are such U.S. efforts to disrupt trade and investment between foreign countries improper acts of “extraterritorial jurisdiction” in violation of customary international law?

These kinds of measures include all forms of “secondary sanctions”—economic restrictions designed to deter third-country actors from supporting a primary target of unilateral sanctions. They respond to an obvious weakness of conventional unilateral sanctions that preclude U.S. companies from doing business with a target regime while implicitly inviting foreign companies to take their place. Secondary sanctions tighten the noose of conventional unilateral sanctions by inhibiting *non*-U.S. citizens and companies from transacting with or supporting a target regime.

Secondary sanctions have proved cringingly controversial and often politically counterproductive. By impeding the business interests of major U.S. trading partners that have not joined a U.S. sanctions effort, secondary sanctions can antagonize major trading partners of the United States and undermine U.S. efforts to rally consensus for more effective multilateral sanctions. Yet, the ultimate goal of complete isolation of a target regime by means of

¹ See *infra* notes 42–44 and accompanying text (describing how the Chinese-Sudanese economic relationship hampers efforts to bring about broad multilateral sanctions).

comprehensive multilateral sanctions is increasingly difficult to achieve, often because of resistance from Russia and China in the United Nations Security Council.²

When unilateral sanctions prove ineffective and multilateral sanctions unachievable, secondary sanctions remain a tempting policy alternative for U.S. policymakers. Perhaps this attraction explains the Janus-like approach of U.S. policy toward secondary sanctions. On the one hand, the United States has long condemned secondary boycott laws, such as the Arab League's secondary boycott of Israel, which would require as a condition of sale of oil to U.S. companies that they agree not to do business with Israel. On the other hand, the United States itself periodically enacts secondary sanctions measures, such as the Helms-Burton Act and the Iran Sanctions Act to deter foreigners from doing business with Cuba and Iran. More recently, as frustration grows with the ineffectiveness of existing sanctions measures to prompt human rights improvements in places such as Sudan and Myanmar, the United States has imposed modest secondary sanctions measures to discourage foreign companies from doing business there.³

The academic commentary has been less than kind to secondary sanctions. Most commentators lambast specific measures such as the Arab League boycott or the Helms-Burton Act. Many commentators assume that secondary sanctions are illegally "extraterritorial," exceeding the proper bounds of U.S. jurisdictional authority under customary international law.⁴

The commentary to date has yet to undertake a comprehensive assessment of the international jurisdictional validity of secondary sanctions measures. This Article starts down that path, advancing two principal points. First, it contends that secondary sanctions cannot be categorically dismissed as improperly "extraterritorial." Secondary sanctions surely aim to affect foreign actors' conduct, but this quality makes them no more impermissibly "extraterritorial" than conventional primary sanctions that are not subject to legitimate jurisdictional question. Whether the United States is barring its companies from doing business with Sudan

² See *infra* notes 40–49 and accompanying text (describing the obstruction of efforts to impose such sanctions due to unilateral veto power at the Security Council).

³ See *infra* notes 83–87 and accompanying text (describing sanctions statutes).

⁴ See *infra* notes 88–92 and accompanying text (surveying commentators' views).

(primary sanctions) or barring its companies from doing business with Chinese companies that do business in Sudan (secondary sanctions), it seeks “extraterritorially” to alter human rights conduct abroad.

This leads to the second and major point of this Article. If secondary sanctions are not categorically invalidated merely by their purpose to change extraterritorial conduct, then it may be that at least some forms of secondary sanctions measures can be justified if grounded in and consistent with traditional principles of prescriptive jurisdiction. Without attempting a taxonomy of all kinds of secondary sanctions measures that could be justified under international customary jurisdictional principles, this Article contends that secondary sanctions should be viewed as presumptively permissible and reasonable if based exclusively on a *combination* of territoriality and nationality jurisdiction (as distinct from jurisdiction based on only one of these grounds or any other grounds such as protective, effects, or universal jurisdiction). For simplicity of reference, I will coin the term “terrinnational sanctions” to refer to these combined jurisdictional grounds.⁵

Terrinnational secondary sanctions regulate only the conduct within the prescribing nation-state’s territory of its own nationals (individual or corporate). Terrinnational sanctions can be primary (if directed against a country or entity that is the primary target of sanctions) or secondary (if directed against a person or entity from a third country that does business with the primary sanctions target). One example of a terrinnational secondary sanctions measure would be a U.S. law prohibiting any U.S. national while in the United States from doing business with any Chinese company that has business operations in Sudan. A *non*-terrinnational secondary sanctions law would lack either or both of these territorial and nationality links—for example, a U.S. law prohibiting Chinese companies from doing business with Sudan or

⁵ Territorial jurisdiction is sometimes defined to include not only conduct within a nation-state’s territory but also extraterritorial acts that cause or are intended to cause a substantial effect within a nation’s territory. *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1), (1987) (enumerating the bases upon which a state has territorial jurisdiction). This Article limits use of the term “territorial” jurisdiction to refer to the core concept of the regulation of conduct that takes place within a nation-state’s territory and not acts that take place abroad with substantial effects in a state’s territory, a concept that might more properly be viewed as a variant of protective jurisdiction.

even a U.S. law prohibiting U.S. citizens in China from working for Chinese companies that do business in Sudan.

Why should a territorial limitation legally justify a secondary sanctions measure? Because territoriality and nationality are the two strongest grounds that legitimate a nation-state's exercise of prescriptive jurisdiction. When these two grounds exist simultaneously as the basis for regulation, a nation-state's exercise of jurisdiction should be viewed as *per se* reasonable. Put differently, it is reasonable for the United States – rather than other countries – to make rules of conduct for its own citizens in its own territory. It would be unreasonable for a foreign state to prescribe rules of conduct for U.S. nationals within U.S. territory (at least in the absence of conduct by U.S. nationals in U.S. territory that puts the United States in violation of a treaty or that otherwise violates a substantive rule of international law).

What is the benefit of recognizing the jurisdictional validity of territorial secondary sanctions? The debate about secondary sanctions is clouded by a misconception that secondary sanctions are generally illegal or that particular sanctions measures exceed permissible limits solely because of their purpose or effect to alter conduct occurring beyond the sanctioning state's borders.⁶ The United States itself is prone to exaggerated claims that secondary sanctions measures can be justified by the protective or effects jurisdictional principles, even when these measures aim to redress non-military human rights abuses or other anti-democratic conduct that occurs in distant lands and that has no real prospect of jeopardizing the safety of or causing any substantial effect in the United States. Although territorial sanctions apply to a smaller range of actors than conventional sanctions that are not restricted to the in-country conduct of a country's own nationals, territorial secondary sanctions still extend the effect of primary sanctions and can do so without engendering crippling debate and countermeasures contesting their legal validity.

Territorial limits on secondary sanctions sensibly reconcile competing interests of the United States to control what its own citizens do in its own territory while not exposing foreign actors to liability for failure to comply with U.S. law. Allowing the use of territorial secondary sanctions means that the United States may disassociate itself more fully from lending the benefits of the U.S.

⁶ See *infra* notes 88–92 and accompanying text (surveying commentators' views regarding extraterritorial illegality of secondary sanctions).

economy in support of abhorrent conduct. The United States is not forced for lack of prescriptive jurisdiction to allow its citizens and companies in U.S. territory to do business with parties that support—even indirectly—odious regimes, groups, or individuals that are the subject of primary U.S. sanctions. On the other hand, the territorial limits of secondary sanctions ensure that only U.S. nationals are subject to penalty for failure to comply with a territorial secondary sanctions measure.

Section 2 of this Article briefly surveys the legal landscape for today's major sanctions regimes. It discusses unilateral sanctions imposed by the United States as well as multilateral sanctions imposed by the United Nations Security Council. It suggests that secondary sanctions may occasionally prove necessary when unilateral primary sanctions have failed and when consensus on multilateral sanctions is unlikely. Section 3 defines the term "secondary sanctions" and discusses several controversially prominent secondary sanctions measures, including the Arab League boycott, the Helms-Burton law, and the Iran Sanctions Act. Section 4—the core of this Article—turns to evaluating the jurisdictional validity of secondary sanctions. It dispels the argument that secondary sanctions are jurisdictionally impermissible merely because of their intent to affect conduct abroad. It then outlines the case for the fashioning of territorially limited secondary sanctions in cases where secondary sanctions may be warranted.

Before turning to these issues, it is important to note what this Article does *not* address. First, it does not address potential objections under trade law to secondary sanctions. Several commentators have addressed the validity of sanctions measures generally under international trade laws, with emphasis on recognized exceptions under the General Agreement on Tariffs and Trade ("GATT") for measures that are necessary to protect morals, public health, and national security. Although this Article does not add to the substantial literature on this topic,⁷ this Article is

⁷ See, e.g., Carlos Manuel Vázquez, *Trade Sanctions and Human Rights – Past, Present, and Future*, 6 J. INT'L ECON. L. 797, 809–30 (2003) (discussing compatibility of human rights sanctions with trade law); Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133, 149–89 (2002) [hereinafter Cleveland, *Human Rights Sanctions*] (same); see also Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 41–48, 65–69 (2001) [hereinafter Cleveland, *Norm Internalization*] (discussing efforts to rely of unilateral economic sanctions to enforce international

significant to the trade law debate because, as commentators have realized, the interpretation of trade law may depend critically on assumptions about the scope of what measures are allowed under the customary law of international jurisdiction.⁸

Nor does this Article focus on other forms of secondary sanctions that have provoked much controversy. For example, some U.S. sanctions laws extend their reach to foreign-incorporated subsidiaries of U.S. parent corporations, and some U.S. export laws forbid foreign companies from re-exporting goods originating from the United States to certain regimes.⁹ Although these measures pose interesting jurisdictional questions, their effectiveness is compromised by the discord they engender among U.S. trading partners that insist on their authority to govern the conduct of companies that are incorporated under their own laws. The point of this Article's focus on territorial secondary sanctions is to articulate a class of secondary sanctions that can better withstand legal jurisdictional challenge, thus allowing the debate about whether to deploy secondary sanctions to focus on their policy soundness rather than their legal validity. As politically contentious as secondary sanctions may often prove to be, they are surely valuable to retain as an alternative in the worst cases to the devastation of using military force.

2. MULTILATERAL AND UNILATERAL SANCTIONS: AN OVERVIEW

Since Pericles led Athens, political states have deployed economic sanctions against other states as weapons of international diplomacy.¹⁰ Modern economic sanctions span a broad range of measures such as arms embargoes, general trade embargoes, asset freezes, and travel restrictions, all designed to punish, influence, or

norms); Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 691 (1988) (considering practical applications of the morals exception in GATT and other WTO agreements).

⁸ See Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction*, 36 J. WORLD TRADE 353, 365-66 (2002) (suggesting that GATT art. XX be read in terms of customary international law governing the exercise of legislative jurisdiction, rather than substantive law); Joel P. Trachtman, *Regulatory Jurisdiction and the WTO*, 10 J. INT'L ECON. L. 631, 633-34 (2007) (examining the allocation of regulatory authority in recent WTO cases).

⁹ See *infra* notes 62, 68-69 and accompanying text.

¹⁰ See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1168 n.18 (1987) (describing the economic sanction Pericles imposed on Megara in 432 BC).

otherwise isolate and contain adversary nations as well as specific individuals and non-state entities engaged in harmful or threatening activity.¹¹

The United States today has unilateral sanctions programs relating to many countries and regions, including the Balkans, Belarus, Cuba, the Congo, Iran, Iraq, Cote d'Ivoire, Myanmar, North Korea, the Sudan, Syria, and Zimbabwe.¹² The broadest of its programs involve general embargos on trade and financial transactions with longstanding hostile regimes such as Cuba, North Korea, Iran, and Syria.¹³ Other sanctions measures focus more narrowly on penalizing the leadership and close associates of enemy regimes, as well as hundreds of designated terrorist, drug trafficking, and weapons-proliferating persons and entities.¹⁴

¹¹ See GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 3 (3d ed. 2007) (1985) (defining "economic sanctions" to mean "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations"); Carter, *supra* note 10, at 1166 (defining "economic sanctions" to mean "coercive economic measures taken against one or more countries to attempt to force a change in policies, or at least to demonstrate the sanctioning country's opinion of another's policies," and suggesting that U.S. economic sanctions measures "can roughly be grouped into five categories, as limits on: (1) U.S. government programs, such as foreign assistance and landing rights; (2) exports from the United States; (3) imports; (4) private financial transactions; and (5) international financial institutions").

¹² The Office of Foreign Assets Control (OFAC) of the United States Department of Treasury administers most of the U.S. international economic sanctions programs; its website lists the countries, regions, and other specially designated persons subject to sanctions. See U.S. Dept. of the Treasury, Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac> (last visited Feb. 21, 2009) (describing the mission of the OFAC). United States sanctions laws are also administered in part by the Commerce Department's Bureau of Industry and Security and also by the State Department's Directorate of Defense Trade Controls. See generally John R. Liebman & Kevin J. Lombardo, *A Guide to Export Controls for the Non-Specialist*, 28 LOY. L.A. INT'L & COMP. L. REV. 497 (2006) (providing an overview of U.S. export control laws).

¹³ See U.S. Dep't of the Treasury, Office of Foreign Assets Control Country Sanctions Program, <http://www.treas.gov/offices/enforcement/ofac/programs/> (last visited Feb. 21, 2009) (providing state by state overview of current OFAC sanctions).

¹⁴ OFAC administers sanctions against three principal classes of non-state entities: (1) terrorists, (2) narcotics traffickers, and (3) proliferators of weapons of mass destruction. See *id.*; see also U.S. Dep't of the Treasury Office of Foreign Assets Control, *Nonproliferation—What You Need to Know About Treasury Restrictions* (Jan. 19, 2008), available at <http://www.treas.gov/offices/enforcementm/ofac/programs/wmd/wmd.pdf> (listing persons and entities subject to weapons proliferation sanctions); U.S. Dep't of the Treasury Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons* (Feb. 26, 2009), <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>

Recent years have marked a significant expansion in U.S. unilateral sanctions measures:

The Balkans. In June 2001, President Bush signed an executive order requiring U.S. persons to block the assets within their possession or control of designated persons involved with destabilizing the peace process in the Balkans.¹⁵

Terrorists. In late September 2001, the President blocked the assets of all foreign persons “determined . . . to have committed, or to pose a significant risk of committing, acts of terrorism” threatening U.S. interests and also the assets of any persons assisting designated terrorists or “otherwise associated” with them.¹⁶ Hundreds of persons and entities have since been placed on the terrorism blacklist subject to blocking sanctions.¹⁷

Zimbabwe. In March 2003, and again in 2005 and 2008, the President ordered the blocking of assets and barred U.S. persons from transacting with designated persons who are “undermining democratic institutions and processes” in Zimbabwe.¹⁸

(providing a 416-page list of “Specially Designated Nationals” subject to U.S. anti-terrorism sanctions); U.S. Dep’t of the Treasury Office of Foreign Assets Control, *What You Need to Know About U.S. Sanctions Against Drug Traffickers* (Feb. 17, 2009), <http://www.treas.gov/offices/enforcement/ofac/programs/narco/drugs.pdf> (listing several hundred individuals and entities subject to blocking of assets and property in accordance with the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-08, and Executive Order 12978).

¹⁵ Exec. Order No. 13,219, 66 Fed. Reg. 3477 (June 26, 2001). *See also* Exec. Order No. 13,304, 68 Fed. Reg. 32,315 (May 28, 2003) (revising Balkans sanctions); U.S. Dep’t of Treasury, Office of Foreign Assets Control, *Balkans – What You Need to Know About U.S. Sanctions* (May 29, 2003), <http://www.treas.gov/offices/enforcement/ofac/programs/balkans/balkans.pdf> (summarizing U.S. efforts to block property of persons who threaten international stabilization efforts in the Western Balkans).

¹⁶ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001), *as amended by* Exec. Order No. 13,268, 67 Fed. Reg. 44,751 (July 2, 2002) and Exec. Order No. 13,372, 70 Fed. Reg. 8499 (Feb. 16, 2005); *see also* U.S. Dep’t of Treasury, Office of Foreign Assets Control, *Terrorism – What You Need to Know About U.S. Sanctions* (Feb. 11, 2009), <http://www.treas.gov/offices/enforcement/ofac/programs/terror/terror.pdf>.

¹⁷ *See Terrorism – What You Need to Know About U.S. Sanctions*, *supra* note 16 (listing names and aliases more than 100 pages long).

¹⁸ *See* Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005) (superseding prior executive order of March 6, 2003) (establishing sanctions including blocking of assets and prohibition of financial transactions); 31 C.F.R. § 541 (2008) (Zimbabwe sanctions regulations); Office of Foreign Assets Control, U.S. Department of Treasury, *Zimbabwe – What You Need to Know About U.S. Sanctions* (Nov. 23, 2005), <http://www.treas.gov/offices/enforcement/ofac/programs/zimbabwe/zimb.pdf> (explaining the Executive Order imposing Zimbabwe sanctions). *See also* Sheryl Gay Stolberg & Celia W. Dugger, *Zimbabwe*

Former Liberian Regime of Charles Taylor. In July 2004, the President ordered U.S. persons to block the assets of designated persons associated with the former regime of Charles Taylor in Liberia.¹⁹

Cote d'Ivoire. In February 2006, the President barred U.S. persons from engaging in most forms of financial transactions with designated persons threatening the peace in Cote d'Ivoire (the Ivory Coast).²⁰

Belarus. In June 2006, the President ordered U.S. persons to block the assets of designated persons "undermin[ing] Belarus' democratic processes or institutions," including persons undermining democracy through human rights abuses and corruption.²¹

Democratic Republic of Congo. In October 2006, the President ordered U.S. persons to block the assets of designated persons contributing to instability and violence in the Democratic Republic of Congo, including military leaders impeding the disarmament

Faces Wider Sanctions Under Bush Plan, N.Y. TIMES, June 29, 2008, available at <http://www.nytimes.com/2008/06/29/world/africa/29diplo.html?hp>

(noting plans to call for international arms embargo and to broaden U.S. unilateral sanctions to "take aim at the entire government of President Robert Mugabe," but noting that Security Council not likely to support sanctions because of opposition from Russia, China, and South Africa); Steven Lee Myers, *U.S. Strengthens Zimbabwe Sanctions*, N.Y. TIMES, July 26, 2008, available at <http://www.nytimes.com/2008/07/26/world/africa/26prexy.html> (describing expansion of U.S. sanctions to include additional mining and banking companies because they provide the most foreign currency to Zimbabwe).

¹⁹ See Exec. Order No. 13,348, 69 Fed. Reg. 44,885 (July 22, 2004) (establishing sanctions against the former Liberian regime); see also 31 C.F.R. § 593 (2008) (Former Liberian regime of Charles Taylor sanctions regulations); Office of Foreign Assets Control, U.S. Department of Treasury, *Former Liberian Regime of Charles Taylor—What You Need to Know About U.S. Sanctions* (May 23, 2007), <http://www.treas.gov/offices/enforcement/ofac/programs/liberia/liberia.pdf> (explaining the Executive Order on Liberian sanctions).

²⁰ See Exec. Order No. 13,396, 71 Fed. Reg. 7389 (Feb. 7, 2006) (establishing sanctions against certain participants in conflict in Cote d'Ivoire); Office of Foreign Assets Control, U.S. Department of Treasury, *Cote d'Ivoire—What You Need to Know About U.S. Sanctions* (Feb. 8, 2006), <http://www.treas.gov/offices/enforcement/ofac/programs/coted/coted.pdf> (explaining the Executive Order imposing Cote d'Ivoire sanctions).

²¹ See Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 16, 2006) (establishing sanctions against certain citizens of Belarus); see also Office of Foreign Assets Control, U.S. Department of Treasury, *Belarus—What You Need to Know About U.S. Sanctions* (June 19, 2006), <http://www.treas.gov/offices/enforcement/ofac/programs/belarus/belarus.pdf> (explaining the Executive Order imposing Belarus sanctions).

and resettlement of combatants and using child soldiers in armed conflicts.²²

President Woodrow Wilson famously endorsed the effectiveness of economic sanctions and the advantage of their use as an alternative to war:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.²³

Yet many decades of experience have failed to resolve doubts about the efficacy of sanctions to alter bad behavior.²⁴ Sometimes sanctions seem to “work” in whole or in part—perhaps by inducing change in a rogue regime’s policies or, indirectly, by inhibiting the wealth and ability of a rogue regime to engage in aggressive or repressive activity.²⁵ Yet too often sanctions glance

²² See Exec. Order No. 13,413, 71 Fed. Reg. 64,105 (Oct. 27, 2006) (establishing sanctions against rebels in the Democratic Republic of Congo); Office of Foreign Assets Control, U.S. Department of Treasury, *Democratic Republic of the Congo – What You Need to Know About U.S. Sanctions* (Oct. 30, 2006), <http://www.treas.gov/offices/enforcement/ofac/programs/drc/drcongo.pdf> (explaining the Executive Order imposing Congo sanctions).

²³ Carter, *supra* note 10, at 1169 n.20 (quoting WILSON’S IDEALS 108 (S. Padover ed., 1942)).

²⁴ Sanctions, of course, may be but one instrument used to alter foreign state behavior. See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401–08 (1999) (discussing the role of coercive sanctions in combination with non-coercive measures to encourage “internalization” of values by norm-violating foreign regimes). Although this Article focuses on the potential utility and legality of secondary sanctions measures, sanctions may also serve normative purposes other than changing or containing a specific regime or individual’s bad behavior. See Cleveland, *Norm Internalization*, *supra* note 7, at 6 (“[E]conomic sanctions have an importance beyond their classical role in seeking to punish and alter a foreign state’s behavior—that of assisting in the international definition, promulgation, recognition, and domestic internalization of human rights norms.”).

²⁵ See, e.g., HUFBAUER ET AL., *supra* note 11, at 78–82 (assessing efficacy of sanctions on basis of review of 174 sanctions measures from World War I to 2000); Cleveland, *Norm Internalization*, *supra* note 7, at 5–6 (citing historical examples of apparent success of sanctions in Brazil, Burma, Chile, Colombia, Nicaragua, South Africa, and Uganda); Carter, *supra* note 10, at 1163 (“Despite significant failures, however, detailed studies suggest that [U.S. economic] sanctions have been successful in some situations,” including “help[ing] to topple Haiti’s Duvalier in

off the target regime with little apparent effect; even worse, they may provoke sympathy and galvanize internal political support for an embattled regime and its leaders.²⁶

Recent experiences with sanctions against North Korea and Iran—the world’s two most feared nuclear rogue regimes—present a muddled picture of the success of sanctions in combination with positive incentives and intense diplomacy efforts. North Korea has re-engaged in talks concerning its nuclear weapons program, in part due to pressure from financial banking sanctions.²⁷ Meanwhile, Iran denounces the mounting sanctions against it but feels their effect, and continues to cooperate in part with international nuclear arms inspectors.²⁸

1986, Uganda’s Idi Amin in 1979, Chile’s Allende in 1973, and the Dominican Republic’s Trujillo in 1961.”).

²⁶ See HUFBAUER ET AL., *supra* note 11, at 8 (“[E]conomic sanctions may unify the target country both in support of its government and in search of commercial alternatives . . . [and] may prompt powerful or wealthy allies of the target country to assume the role of ‘black knight,’ largely offset[ing] whatever deprivation results from the sanctions themselves.”).

²⁷ See, e.g., Helene Cooper, *Bush Rebuffs Hard-Liners to Ease North Korean Curbs*, N.Y. TIMES, June 27, 2008, available at <http://www.nytimes.com/2008/06/27/world/asia/27nuke.html> (noting easing of U.S. sanctions against North Korea in response to recent nuclear-related disclosures and actions); Steven R. Weisman, *How U.S. Turned North Korean Funds Into a Bargaining Chip*, N.Y. TIMES, Apr. 12, 2007, available at <http://www.nytimes.com/2007/04/12/world/asia/12bank.html> (discussing how unfreezing of North Korean funds in a Macao bank assisted U.S. efforts to reopen nuclear talks with North Korea); Warren Hoge, *Security Council Supports Sanctions on North Korea*, N.Y. TIMES, Oct. 15, 2006, available at <http://www.nytimes.com/2006/10/15/world/asia/15nations.html> (noting enactment of Security Council sanctions in response to North Korean missile test and apparent effect on North Korean regime of U.S. pressure on an offshore bank holding North Korean funds); Joel Brinkley, *U.S. Squeezes North Korea’s Money Flow*, N.Y. TIMES, Mar. 10, 2006, available at <http://www.nytimes.com/2006/03/10/politics/10korea.html> (“Six months after the Bush administration blacklisted a bank in Macao accused of laundering money for the North Korean government, senior administration officials say the action has proved to be far more effective than anyone had dreamed.”).

²⁸ See, e.g., Farnaz Fassihi and Chip Cummins, *Cat and Mouse: Iranians Scheme to Elude Sanctions*, WALL ST. J., Feb. 13, 2008, at A1 (suggesting that combination of U.S. and U.N. sanctions “haven’t brought Iran to its knees,” but that “Iranian businesses are starting to feel the pain” in terms of an inflationary impact on the Iranian economy and “how they finance operations, pay bills and export everything from pistachio nuts to Persian carpets”); Zahra Hosseinian & Alistair Lyon, *Iran Tests Missiles, Heightening Tensions with the West*, REUTERS, July 9, 2008, available at <http://www.reuters.com/article/topNews/idUSL0925390620080709> (noting State Department testimony “that Iran had made only ‘modest’ progress in its nuclear program because of U.N. sanctions . . .”).

This broader efficacy debate aside, little doubt remains that multilateral sanctions imposed by the United Nations are preferable to unilateral sanctions by one country alone.²⁹ The United Nations Charter authorizes the Security Council to impose economic sanctions in the event of a threat to peace and security.³⁰ When the Security Council imposes sanctions, all member countries are bound by its mandate.³¹

By contrast, when one country such as the United States imposes unilateral sanctions, no other countries are legally bound. A target of U.S. unilateral sanctions is free to replace any loss of U.S.-related business with new business from third countries that have not imposed sanctions.³² Indeed, non-target countries and companies may tacitly welcome U.S. unilateral sanctions because of the new opportunities that may emerge to do business with the targets of U.S. sanctions.³³

²⁹ See, e.g., EDWARD C. LUCK, UN SECURITY COUNCIL—PRACTICE AND PROMISE 67 (2007) (“[I]n most cases the chances of being persuasive with sanctions are much higher with multilateral than unilateral ones, since the broader the international cooperation the less likely that they will be circumvented or undermined by others.”); MEGHAN L. O’SULLIVAN, SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM 300 (2003) (“The cases in this book not only confirm the much-heralded conclusion that multilateral sanctions are the most effective form of economic pressure, but also suggest that even targeted or limited multilateral measures are preferable to comprehensive, unilateral ones.”).

³⁰ See U.N. Charter art. 39 (Security Council may decide upon “measures . . . to maintain or restore international peace and security” in the event it “determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression.”); *id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”). See generally LUCK, *supra* note 29, at 58–67 (surveying history of Security Council sanctions measures).

³¹ U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

³² O’SULLIVAN, *supra* note 29, at 303 (noting that the “initial shock of U.S. trade sanctions fades quickly, as countries diversify their trade partners,” especially in cases “[w]here the target country sells a fungible commodity in high global demand, [for which] the realignment of trade patters can be almost seamless”).

³³ See Fassihi & Cummins, *supra* note 28, at A1 (noting that U.S. sanctions on Iran “are providing China and other Asian giants with an opening to win big oil projects in Iran”); Jeffrey Gettleman, *War in Sudan? Not Where the Oil Wealth Flows*, N.Y. TIMES, Oct. 24, 2006, available at <http://www.nytimes.com/2006/10/24/world/africa/24sudan.html> (noting that “American sanctions have kept many

Multilateral sanctions are estimated to be effective at least one-third of the time.³⁴ As a recent United Nations report notes, “[i]f effectiveness is defined as the creation of impacts that lead to at least partial compliance [with the conditions for lifting of sanctions], Security Council sanctions have achieved results in at least one-third to one-half of all cases, depending on how generously one defines partial compliance.”³⁵ By contrast, unilateral sanctions imposed by the United States are estimated to work less than twenty percent of the time in recent years.³⁶ “The most obvious and important explanation for the decline in the effectiveness of U.S. sanctions is the relative decline of the U.S. position in the world economy.”³⁷

Although unilateral sanctions are easily evaded, the Security Council has great difficulty agreeing on strong sanctions measures. This is in part because of the threshold requirement in the United Nations Charter that the Security Council determine there to be a threat to peace or security. As Andreas Lowenfeld wryly notes, “the content of that determination is a political questions, and a

companies from Europe and the United States out of Sudan, but firms from China, Malaysia, India, Kuwait and the United Arab Emirates are racing in” and that “[d]irect foreign investment has shot up to \$2.3 billion this year, from \$128 million in 2000, all while the American government has tried to tighten the screws”); *see also* Joanmarie M. Dowling & Mark P. Popiel, *War by Sanctions: Are We Targeting Ourselves*, 11 CURRENTS: INT’L TRADE L.J. 8, 9-12 (2002) (describing harm to U.S. economy and business interests from imposition of unilateral sanctions).

³⁴ Gary C. Hufbauer & Barbara Oegg, *Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT’L L. 305, 307 (2003); *see also* HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED*, *supra* note 11, at 80 tbl.5.1, 125-27 (charting the success and failure rates of sanctions from 1970 to 2000).

³⁵ Symposium on Enhancing the Implementation of United Nations Security Council Sanctions, N.Y., U.S., Apr. 30, 2007, *Report*, p. 4, U.N. Doc S/2007/34, available at http://www.watsoninstitute.org/pub/UNSC-Enhancing_Implementation_Sanctions.pdf (suggesting that sanctions achieved at least partial success in Yugoslavia, Iraq, Libya, Haiti, Angola, Liberia, Sudan (in 1996), Cote d’Ivoire, and “perhaps” North Korea); *see also* David Cortright & George A. Lopez, *Reforming Sanctions*, in *THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 167, 169 (David Malone ed., 2004) (noting examples of Security Council sanctions after 1990 and concluding that “[s]anctions did not produce immediate and full compliance in any of the cases examined, but in a number of cases they resulted in partial compliance or generated effective diplomatic bargaining pressure” and “[i]n about half the cases examined, Security Council sanctions had at least some impact”).

³⁶ Hufbauer & Oegg, *supra* note 34, at 308 (noting that “[b]etween 1945 and 1969, U.S. unilateral sanctions achieved their goal in more than seventy percent of the cases” but that “after 1970 the success rate dropped below twenty percent”).

³⁷ HUFBAUER ET AL., *supra* note 11, at 128.

threat to the peace under Article 39 is whatever the Security Council determines to be a threat to the peace.”³⁸ For example, in contrast to the United States’ general ban against trade and financial transactions with Iran, United Nations sanctions against Iran are far weaker, principally including trade restrictions that extend only to certain military and dual-use items, as well as travel and asset restrictions against just eighteen people and twelve companies believed to be involved with Iranian uranium enrichment activities.³⁹ Russia and China have used their veto-wielding clout as permanent members of the Security Council to stifle proposals for more aggressive sanctions measures.⁴⁰ Despite

³⁸ ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 858 (2d ed. 2008).

³⁹ U.S. Department of Treasury, Office of Foreign Assets Control, *Iran – What You Need To Know About U.S. Sanctions* (Jan. 22, 2009), available at www.treas.gov/offices/enforcement/ofac/programs/iran/iran.pdf (describing scope of U.S. unilateral sanctions measures); Warren Hoge & Elaine Sciolino, *Security Council Adds Sanctions Against Iran*, N.Y. TIMES, Mar. 4, 2008, available at <http://www.nytimes.com/2008/03/04/world/middleeast/04nations.html?ref=todayspaper> (describing the UN sanctions of Iran which impose cargo inspections and the monitoring of Iranian financial institutions); S.C. Res. 1803, ¶ 16, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (noting that the European Union has imposed its own limited sanctions against Iran); see also Steven Lee Myers, *Brown Says Europe Will Tighten Iran Sanctions*, N.Y. TIMES, June 17, 2008, available at <http://www.nytimes.com/2008/06/17/world/17prexy.html?fta=y> (noting European Union decision to freeze overseas assets of Iran’s largest commercial bank).

⁴⁰ See, e.g., Helene Cooper & Warren Hoge, *Europeans Plan Incentives, as Iran Says Sanctions Won’t Halt Nuclear Program*, N.Y. TIMES, Feb. 26, 2008, available at <http://www.nytimes.com/2008/02/26/world/europe/26diplo.html> (noting that “Russia and China, which have deep commercial ties to Iran, have dragged their feet over a new sanctions resolution and agreed only recently to a watered-down set of sanctions to be brought before the Council,” but that “many diplomats, and even some administration officials, say privately that they do not expect much to come from the next sanctions resolution, even if it is passed, because the resolution is so weak”); Warren Hoge, *Draft of New Iran Sanctions Restricts Cargo and Travel*, N.Y. TIMES, Jan. 26, 2008, available at <http://www.nytimes.com/2008/01/26/world/26nations.html> (noting agreement to enhanced Security Council sanctions resolution against Iran in light of non-compliance with past resolutions, but that draft was weakened because of opposition of Russia and China to proposals to prohibit financial transactions with Iranian government-linked banks); *Iran’s Nuclear Dossier: Spinning on Regardless*, THE ECONOMIST, Nov. 24, 2007, at 51 (noting that as “Iran forges ahead in defiance of the United Nations with uranium enrichment at its plant at Natanz,” still “Russia and China are blocking efforts at the U.N. Security Council to slap new sanctions on Iran”); Nazilah Fathi, *Russian Envoy Derides Iran Sanctions*, N.Y. TIMES, Oct. 31, 2007, available at <http://www.nytimes.com/2007/10/31/world/middleeast/31iran.html> (describing Russian Foreign Minister objection to additional sanctions and noting that “after two rounds of sanctions, Russia and China have balked at escalation to another round”); Helene Cooper, *Split in Group Delays Vote on*

Iran's refusal to suspend its nuclear enrichment program in violation of U.N. resolutions, Russia went forward in December 2007 with a delivery of nuclear fuel to an Iranian nuclear power plant.⁴¹

Similar obstacles have impeded the enactment of comprehensive sanctions against the Sudan in response to massacres in Darfur. The United States has imposed stringent unilateral sanctions against Sudan,⁴² but Russia and China have resisted proposals to strengthen U.N. multilateral sanctions measures.⁴³ While U.S. companies are barred from the petroleum and petrochemical sector in Sudan, China—among other countries—has capitalized on Sudan's oil wealth as its primary foreign investor; Sudan furnishes up to ten percent of China's oil

Sanctions Against Iran, N.Y. TIMES, Sept. 29, 2007 available at <http://www.nytimes.com/2007/09/29/world/middleeast/29iran.html> (describing conflicts between United States and Russia over Security Council sanctions against Iran); Elissa Gootman, *Security Council Approves Sanctions Against Iran Over Nuclear Program*, N.Y. TIMES, Dec. 24, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0DE5D61131F937A15751C1A9609C8B63> (noting passage of Security Council sanctions resolution against Iran but that "[i]t is weaker than proposals in earlier drafts, which started circulating in October, after repeated changes intended to placate Russia, which has strong economic ties with Iran" and that "[t]hroughout the process, Russia's objections were often seconded by China").

⁴¹ Helene Cooper, *Iran Receives Nuclear Fuel in Blow to U.S.*, N.Y. TIMES, Dec. 18, 2007, available at <http://www.nytimes.com/2007/12/18/world/middleeast/18diplo.html> ("The United States lost a long battle when Russia . . . delivered nuclear fuel to an Iranian power plant that is at the center of an international dispute over its nuclear program.").

⁴² 31 C.F.R. § 538 (2008) (Sudanese Sanctions Regulations); see also U.S. Dep't of Treasury, Office of Foreign Assets Control, *Sudan—What You Need to Know About U.S. Sanctions* (July 25, 2008), <http://www.treas.gov/offices/enforcement/ofac/programs/sudan/sudan.pdf> (outlining the materials which have been prohibited from trade between the U.S. and Sudan); U.S. Dep't of State, *U.S. Sanctions on Sudan* (Fact Sheet) (Apr. 23, 2008), <http://merln.ndu.edu/archivepdf/AF/state/103970.pdf> (explaining the American rationale for imposing sanctions in Sudan, which include the Sudanese President's failure to end violence in Darfur).

⁴³ Jad Mouawad, *Oil May Allow Sudan to Escape Sanctions' Pain*, N.Y. TIMES, May 30, 2007, available at <http://www.nytimes.com/2007/05/30/business/worldbusiness/30oil.html> (noting new round of U.S. unilateral sanctions against Sudanese-government-controlled companies and that "[t]he European Union has signaled its willingness to consider new sanctions against Sudan, but China and Russia have been opposed").

imports, and Sudan's largest oil company is a joint venture that is operated by a Chinese state-owned oil company.⁴⁴

China has also forestalled U.N. sanctions against the repressive military junta that rules Myanmar. Since 1997 the United States has imposed extensive unilateral sanctions against Myanmar that now include a general ban on import of Myanmar products into the United States, a ban on export from the United States of financial services to Myanmar and blocking of assets of senior Myanmar government leaders.⁴⁵ By contrast, even after Myanmar's violent suppression of pro-democracy demonstrations in the fall of 2007, China signaled its "resolute opposition" to sanctions and continues as Myanmar's most important trading partner.⁴⁶

⁴⁴ *Id.* (noting that more than half of Sudan's oil pumped by the Greater Nile Petroleum Operating Company, "a joint venture of the Sudanese government and state oil companies from China, India and Malaysia, and [that] is operated by the China National Petroleum Corporation"); *No Strings: Why Developing Countries Like Doing Business with China*, *ECONOMIST*, Mar. 15, 2008, at 15-16 (noting China's investment of \$15 billion in the Sudan since 1996 and reliance on Sudanese oil for 10 percent of its oil imports, which "has given China an incentive to reject sanctions on Sudan whenever they have been proposed in the U.N. Security Council"); see also Chin-Hao Huang, *U.S.-China Relations and Darfur*, 31 *FORDHAM INT'L L.J.* 827, 828-30 (2008) (describing extent of Chinese investment and trade with Sudan).

⁴⁵ 31 C.F.R. § 537 (2008) (Burmese Sanctions Regulations); U.S. Dep't of Treasury, Office of Foreign Assets Control, *Burma - What You Need to Know About U.S. Sanctions Against Burma (Myanmar)* (Aug. 16, 2005), <http://www.treas.gov/offices/enforcement/ofac/programs/burma/burma.pdf> (explaining that in response to the Burmese governments large scale repression of the democratic opposition, the U.S. was prohibiting new investment in Burma by any American citizen); see also *United States Imposes More Sanctions to Press Myanmar's Rulers*, *N.Y. TIMES*, Feb. 6, 2008, available at <http://www.nytimes.com/2008/02/06/world/asia/06myanmar.html> (noting recent steps taken by the U.S. to expand assets-blocking sanctions to more persons and entities associated with the Myanmar government); Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 *Nw. U.J. INT'L HUM. RTS.* 153, 156-61 (2007) (describing history of U.S. and EU sanctions against Myanmar).

⁴⁶ Howard W. French, *China Opposes Sanctions on Myanmar*, *N.Y. TIMES*, Oct. 10, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0DE4DB173CF933A25753C1A9619C8B63>; Warren Hoge & Seth Mydans, *U.N. Chief Calls Crackdown in Myanmar 'Abhorrent'*, *N.Y. TIMES*, Oct. 6, 2007, available at <http://www.nytimes.com/2007/10/06/world/06nations.html> (noting that China has argued that sanctions are not warranted as the "crisis does not constitute the kind of threat to international peace and security that calls for the involvement of the Council"); David Lague, *China Braces for Prospect of Changes in Myanmar*, *N.Y. TIMES*, Sept. 27, 2007, available at <http://www.nytimes.com/2007/09/27/world/asia/27china.html> (explaining China's stake in preventing the downfall of the Myanmar government).

More recently, Russia and China jointly vetoed a U.S. proposal in July 2008 for sanctions against Zimbabwe's President Robert Mugabe and his senior leadership stemming from recent violence and electoral abuses.⁴⁷ Calling the proposal an unwarranted interference in Zimbabwe's internal affairs, Russia's ambassador stated that the proposal exceeded the Security Council's mandate to act only in the event of a threat to international peace and security.⁴⁸ One commentator aptly notes that "the recent dual veto [by Russia and China] showed that getting the U.N. to speak in one voice against dictatorships, no matter how heinous, has almost always been nearly impossible."⁴⁹

Not only do Russia and China often impede U.S. efforts to enact U.N. sanctions, but the Security Council has also more generally retreated from the use of comprehensive trade embargos of the kind levied against Iraq, Haiti, and Yugoslavia in the early 1990s toward so-called "smart" sanctions that target particular individuals and entities deemed most responsible for the misconduct of rogue regimes.⁵⁰ According to the U.N. Office for the Coordination of Humanitarian Affairs, "comprehensive economic sanctions or broad trade embargoes are coercive measures of the past and . . . in today's sanctions policies, strategies for mitigating adverse humanitarian impacts on vulnerable

⁴⁷ Neil MacFarquhar, *2 Vetoes Quash U.N. Sanctions on Zimbabwe*, N.Y. TIMES, July 12, 2008, available at <http://www.nytimes.com/2008/07/12/world/africa/12zimbabwe.html> (relating America's failed efforts to impose sanctions against Zimbabwe due to China and Russia's decision to veto a proposed sanctions resolution, causing the American ambassador to question the Russian reliability on human rights matters).

⁴⁸ U.N. Sec. Council Dep't of Pub. Info., *Security Council Fails to Adopt Sanctions Against Leadership as Two Permanent Members Cast Negative Votes*, U.N. Doc. SC/9396, (July 11, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9396.doc.htm> (noting that the Russian representative to the U.N. Security Council suggested that "lately [there] had been some attempts to take the Council beyond its Charter prerogatives of maintaining international peace and security. Such illegitimate and dangerous attempts could 'unbalance' the whole United Nations system").

⁴⁹ Joshua Hammer, *Scandal in Africa*, 55 N.Y. REV. BOOKS 13, Aug. 14, 2008, available at <http://www.nybooks.com/articles/21691>.

⁵⁰ LUCK, *supra* note 29, at 61-67 (describing transition from comprehensive to smart sanctions); Cortright & Lopez, *supra* note 36, at 169-72 (noting that in response to controversy about the humanitarian impact of sanctions, "[g]eneral trade embargoes were abandoned in favor of more targeted sanctions," and describing targeted sanctions reform measures).

populations have imperatively to be incorporated from the very beginning.”⁵¹

Yet while smart sanctions laudably diminish the impact on a civilian population of a target state, they lack the economic clout that more comprehensive sanctions impose and can be circumvented easily through individual targets’ use of aliases and nominees to engage in otherwise prohibited transactions.⁵² As Gary Hufbauer notes, “smart sanctions work better as a signaling device than as a coercive measure” to prompt a target regime’s change of policy.⁵³

Even when the Security Council reaches consensus on sanctions, it is another matter whether the sanctions will be rigorously enforced. More than a decade of U.N. sanctions against Iraq exposed the extent to which enforcement of U.N. sanctions may be scandalously lacking. From 1990 to early 2003, comprehensive U.N. trade sanctions forbid the former Iraqi regime of Saddam Hussein from exporting oil.⁵⁴ But the Iraqi regime still managed to smuggle about \$11 billion of oil through neighboring countries.⁵⁵ The most notoriously verifiable smuggling activity involved Iraq’s construction and operation of an oil pipeline from its northern oil fields near Kirkuk to a port in Syria through which

⁵¹ U.N. Office for the Coordination of Humanitarian Affairs, *Impact of Sanctions*, <http://ochaonline.un.org/HumanitarianIssues/ImpactofSanctions/tabid/1201/Default.aspx> (last visited Feb. 8, 2009).

⁵² See, e.g., HUFBAUER ET AL., *supra* note 11, at 139 (noting that smart sanctions may be more attractive in theory than in practice); Gary C. Hufbauer & Jeffrey J. Schott, *Can Sanctions Stop the Iranian Bomb?*, PETERSON INST. FOR INT’L ECON. Mar. 2006, <http://www.iie.com/publications/papers/print.cfm?doc=pub&ResearchID=606> (noting that “broad economic sanctions, comparable to the isolation of Iraq in the 1990s, are simply not feasible” against Iran because of higher oil prices and because “Russia will continue to cultivate Tehran as its best foothold in the Middle East”).

⁵³ HUFBAUER ET AL., *supra* note 11, at 139.

⁵⁴ S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990) (initial comprehensive sanctions resolution following Iraqi invasion of Kuwait); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (imposing additional sanctions on Iraq conditioned on its compliance with weapons inspections).

⁵⁵ See JEFFREY A. MEYER & MARK G. CALIFANO, *GOOD INTENTIONS CORRUPTED: THE OIL-FOR-FOOD SCANDAL AND THE THREAT TO THE U.N.* 150–51 (2006) (detailing the findings of the official investigation of the Independent Inquiry Committee investigation led by Paul A. Volcker); see also Independent Inquiry Committee into The United Nations Oil-for-Food Programme, <http://www.iic-offp.org> (last visited Feb. 8, 2009) (providing the official reports of the Independent Inquiry Committee).

more than \$2 billion in oil was smuggled from 2000 to 2003.⁵⁶ Russia—with the support of China and sometimes France—blocked efforts within the Security Council to investigate widespread reports of the smuggling activity.⁵⁷ Apart from oil smuggling, the Iraqi regime extracted about \$1.8 billion in secret kickbacks from vendors for commercial oil and humanitarian-goods transactions that were authorized under the U.N.'s Oil-for-Food Program.⁵⁸ Iraq sold more oil to companies from Russia and China than to companies from any other country; these Russian and Chinese companies—including many state-owned companies—accounted for a large share of the illegal kickbacks paid by contractors under the Oil-for-Food Program.⁵⁹ Not surprisingly in light of the commercial advantages to be reaped, Russia and China obstructed proposals in the Security Council to investigate and redress allegations of kickbacks paid for the Iraqi sale of oil.⁶⁰

In short, effective U.N. sanctions are increasingly difficult to achieve and enforce, while unilateral sanctions are of diminishing effectiveness because of the capacity and willingness of third countries to do business with those that the United States shuns. This problem suggests considering how the United States can make unilateral sanctions more effective, specifically whether the United States can leverage primary unilateral sanctions with

⁵⁶ MEYER & CALIFANO, *supra* note 55, at 164-171 (describing the Syrian oil pipeline and the Security Council committee's failure to investigate pipeline smuggling allegations).

⁵⁷ *Id.* at 168-71 (detailing Russia's efforts).

⁵⁸ *Id.* at 86, 115, 118 (illustrating kickback payments of \$229 million in connection with Iraqi oil sales and \$1.5 billion in connection with humanitarian-goods contracts under the Oil-for-Food Program).

⁵⁹ *Id.* at 72 (noting that Russian and Chinese companies received more than \$19.3 billion and \$4.9 billion of oil sales, respectively, amounting to more than one-third of the total of \$64.2 billion of oil that Iraq was allowed to sell under the Oil-for-Food Program); *id.* at 86-87 (describing large "oil surcharge" cash payments from Russian companies—including the Russian state-owned oil company that was the largest single purchaser of oil under the Program—that were funneled through the Iraqi embassy in Moscow); *id.* at 106 (noting prominence of Russian, Chinese, and French companies for humanitarian contracts under the Program); *id.* at 114, 122-24 (describing extent of kickbacks paid for humanitarian contracts under program, and the significant payments by specific Russian and Chinese companies).

⁶⁰ *Id.* at 143-49 (describing the pattern of objections raised by Russia with support of China and sometimes France to investigate allegations of illegal oil surcharge payments).

secondary sanctions to induce foreign companies and individuals to decline to do business with targets of U.S. sanctions.

3. A PLACE FOR SECONDARY SANCTIONS

Most U.S. unilateral sanctions measures are not designed to deter foreigners from doing business with sanction targets. Instead, they restrict only the activities of “United States persons” in their dealings with the sanction target. A “United States person” is defined to include “any United States citizen, permanent resident alien, entity organized under the law of the United States (including foreign branches), or any person in the United States.”⁶¹ This definition principally includes U.S. citizens and U.S.-incorporated companies, while excluding all foreign citizens, except those who happen to be located in the United States. With notable exceptions for Cuba and North Korea, U.S. sanctions measures do not usually apply to foreign-incorporated companies, even foreign subsidiaries of U.S. companies.⁶²

⁶¹ See, e.g., Exec. Order No. 13,224, § 3(c), 66 Fed. Reg. 49,079 (Sept. 23, 2001) (defining the term “United States person” for purposes of sanctions against terrorists 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”); Exec. Order No. 13,338, § 6(c), 69 Fed. Reg. 26,751 (May 11, 2004) (providing the same definition for sanctions against Syria); Exec. Order No. 13,413, § 3(c), 71 Fed. Reg. 64,105, 64,106 (Oct. 27, 2006) (establishing the same definition of “United States person” for sanctions against the Democratic Republic of Congo); 66 Fed. Reg. at 47,081 (defining “person” to include “an individual or entity”); 31 C.F.R. § 537.321 (2008) (providing the same definition for sanctions against Burma/Myanmar); 31 C.F.R. § 538.315 (2008) (providing the same definition for sanctions against Sudan); 31 C.F.R. § 541.312 (2008) (providing the same definition for sanctions against Zimbabwe); 31 C.F.R. § 560.314 (2008) (providing the same definition of “United States person” for purpose of sanctions against Iran).

⁶² Sanctions against Cuba and North Korea apply to any “person subject to the jurisdiction of the United States,” a term that is defined more broadly than “United States person” to include in part any foreign-incorporated company or organization that is “owned or controlled” by a U.S. citizen, resident, or company organized under U.S. law. 31 C.F.R. § 500.329(d) (2008) (North Korea); 31 C.F.R. § 515.329(d) (2008) (Cuba); see also Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25 U. PA. J. INT’L ECON. L. 455, 459–61 (2004) (describing the “extraordinary scope” of the U.S. embargo on trade with Cuba and North Korea). In addition, sometimes sanctions take the form of export controls, and U.S. export control laws restrict non-U.S. persons who have received certain U.S.-origin goods from re-exporting these goods to Cuba and North Korea and also from re-exporting certain licensed goods to a few other sanctioned countries including Iran and Sudan. *Id.* at 462–65.

The term “secondary sanctions” is used in this Article to mean any form of economic restriction imposed by a sanctioning or sending state (e.g., the United States) that is intended to deter a third-party country or its citizens and companies (e.g., France, the French people and French companies) from transacting with a sanctions target (e.g., a rogue regime, its high government officials, or a non-state terrorist entity). One form of a secondary sanction is a secondary trade boycott. As Andreas Lowenfeld explains, “[i]n a *secondary boycott*, state A says that if X, a national of state C, trades with state B [the primary sanctions target], X may not trade with or invest in A.”⁶³ The effect, as Lowenfeld notes, is that “X is required to make a choice between doing business with or in A, the boycotting state, and doing business with or in B, the target state, although under the law of C where X is established, trade with both A and C is permitted.”⁶⁴ Another form of a secondary sanction is state-mandated divestment. For example, State A could require its nationals to divest from or not to commit future investment in X, a national of state C, so long as X trades with state B.

As its name implies, secondary sanctions are supplemental to primary sanctions that restrict economic relations directly between a sending state (and its own individuals and companies) and a target of the sanctions. The imposition of secondary sanctions presupposes that the affected third-party country is a neutral or an ally of the target state—that the third-party country has not itself instituted comparable sanctions to prohibit its own citizens and companies from doing business with the target regime. “Secondary sanctions and secondary incentives differ from other sanctions or incentives in that they are not directed toward the primary target, but rather are directed against third parties in an attempt to [change] their behavior or their policies regarding the primary target.”⁶⁵

Secondary sanctions have proved highly controversial. The Arab League, for example, has long promoted a secondary sanctions policy among its members to condition the sale of oil on

⁶³ Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L LAW 419, 429 (1996) (emphasis in original).

⁶⁴ *Id.* at 429–30.

⁶⁵ GEORGE E. SHAMBAUGH, STATES, FIRMS, AND POWER: SUCCESSFUL SANCTIONS IN UNITED STATES FOREIGN POLICY 4 (1999).

the agreement of buyers that they not do business with Israel.⁶⁶ The United States prohibits its citizens and companies from complying with the Arab League policy or any other nation's boycott policies.⁶⁷

Still, despite the controversial Arab League example, the United States itself occasionally resorts to secondary sanction measures. In 1982, for example, the United States sought to impede the construction of a pipeline from the former Communist Soviet Union to Western Europe. It not only prohibited U.S. companies from providing parts and services, but also most controversially extended this prohibition to foreign subsidiaries of U.S. companies.⁶⁸ Amid a storm of protest from the United States' Western European trading partners decrying the regulations as improperly "extraterritorial" and a Dutch court decision declining to allow its enforcement against a Dutch subsidiary of a U.S. company, the United States retracted its extension of the export control regulations within several months of their issuance.⁶⁹

⁶⁶ See Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 286-88 (2003) (reviewing the history of the Arab League boycott). See generally Martin A. Weiss, *Arab League Boycott of Israel*, CRS REPORT FOR CONGRESS, Apr. 19, 2006, <http://fpc.state.gov/documents/organization/65777.pdf> (providing an overview of the Arab League boycott and U.S. efforts to end it).

⁶⁷ See 15 C.F.R. pt. 760 (2008) (codifying U.S. anti-boycott regulations); see also Edward O. Weant III, *The U.S. Antiboycott Law and Regulation of the Export Administration Acts*, in COPING WITH U.S. EXPORT CONTROLS 207 221, 224 (Evan R. Berlack & Christopher R. Wall eds., 2007) (noting that the U.S. anti-boycott regulations are applicable not only to U.S. companies but any "controlled in fact" foreign subsidiaries); 15 C.F.R. § 760.1 (2008) (defining a person to include any controlled in fact foreign subsidiaries). See generally Clif Burns, *Boeing Subsidiary Fined for Anti-Boycott Violations*, EXPORT LAW BLOG, June 4, 2008, <http://www.exportlawblog.com/archives/344> (reporting that recently, for example, a U.S.-based Boeing subsidiary was fined \$3,600 because its Singapore-based subsidiary failed to report and repudiate a contractual provision requiring it to refrain from doing business with Israel).

⁶⁸ See LOWENFELD, *supra* note 38, at 913 (describing new regulations that extended to foreign subsidiaries); see also Carter, *supra* note 10, at 1194-95 (describing pipeline controls against the Soviet Union); William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713, 721-22 (1997) (discussing the nature and extent of the Soviet Union pipeline sanctions).

⁶⁹ See LOWENFELD, *supra* note 38, at 914-15 (explaining that the United States eventually retracted its extension of export control regulations); see also *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891, 893 (1982) ("The U.S. measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct

Equally controversial was the U.S. effort in 1996 to use secondary sanctions measures to broaden the impact of existing primary sanctions against Cuba. With the passage of the Helms-Burton Act in 1996, Congress sought to deter foreign citizens and companies from economic relations with Cuba involving any property that Cuba had previously expropriated from U.S. citizens.⁷⁰ Deeming these economic relationships to constitute wrongful "trafficking" in expropriated property, Congress denied "traffickers" the right to enter the United States and authorized U.S. victims of expropriation to file suit in U.S. courts for treble damages against foreign "traffickers" of expropriated property.⁷¹ Wrongful "trafficking" activity included not only participation in the purchase, sale, or transfer of expropriated property, but also managing, leasing, possessing, using, or "enter[ing] into a commercial arrangement using or otherwise benefiting from confiscated property."⁷² Thus, as Andreas Lowenfeld notes:

[T]he Act contemplated that if, say, an English company purchased sugar from a Cuban state enterprise and it also . . . was amenable to judicial jurisdiction in the United States, it would be liable to a U.S. national who could show that some of the English company's purchases consisted of sugar grown on the plantation that the plaintiff once

outside the United States and particularly the handling of property and technical data of these companies not within the United States. . . . [They] run counter to the two generally accepted bases of jurisdiction in international law; the territoriality and the nationality principles."); *Compagnie Européenne des Pétroles S.A./Sensor Nederland B.V.* [Rb. Den Haag] [District Court], 17 september 1982 (Neth.), translated in 22 I.L.M. 66, 72-73 (1983) (concluding that export control regulations as applied to Dutch subsidiary of a U.S. company are not justifiable on grounds of territoriality, nationality, or protective jurisdictional principles).

⁷⁰ See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-91 (2006) (codifying laws that discouraged foreigners and organizations from partaking in transactions involving property Cuba had confiscated from U.S. nationals); see also Clark, *supra* note 63, at 466-71 (describing major provisions of the Helms-Burton Act).

⁷¹ See 22 U.S.C. § 6082 (1996) (enumerating a civil liability provision for trafficking in confiscated property claimed by U.S. nationals); 22 U.S.C. § 6091(a) (1996) (providing a denial of entry provision extending not only to persons directly involved in "trafficking" but also, for any "trafficking" transaction conducted in the name of a foreign corporation, denying entry to any "corporate officer, principal, or shareholder with a controlling interest" in the corporation, as well as to the "spouse, minor child or agent" of such individual).

⁷² 22 U.S.C. § 6091(b)(2) (1996).

owned.⁷³

Also in 1996, Congress enacted the Iran and Libya Sanctions Act (now known as the Iran Sanctions Act) that aimed to deter investment by non-U.S. companies in the oil production sectors of Iran and Libya.⁷⁴ As amended to date, the Act provides that for any non-U.S. company that invests within one year more than \$40 million in the Iranian oil sector, the President is required to select at least two sanctions from the following menu of retaliatory measures:

- denial of any export licenses and approvals for products to be shipped to any sanctioned person;
- denial of Export-Import Bank assistance in connection with any products to be exported to any sanctioned person;
- prohibiting U.S. banks from loaning more than \$10 million in one year to any sanctioned person (subject to certain exceptions);
- procurement debarment of sanctioned persons from U.S. government contracts;
- import restrictions against the sanctioned person; and
- denial of certain U.S.-government-linked banking privileges (in the case of sanctioned entities that are financial institutions).⁷⁵

Both the Cuba and Iran/Libya laws were vehemently condemned as “extraterritorially” illegal by the U.S.’s major trading partners, some of whom enacted their own retaliatory laws to block or offset any damage to their companies’ business interests.⁷⁶ The United States ultimately relented by means of

⁷³ LOWENFELD, *supra* note 38, at 923; *see also* Lowenfeld, *supra* note 64, at 426 (providing the same example).

⁷⁴ Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified at 50 U.S.C. § 1701 (1996)) (imposing sanctions on persons making investments contributing to Iran or Libya’s abilities to develop its petroleum sector); *see generally* Kenneth Katzmman, *The Iran Sanctions Act (ISA)*, CRS REPORT FOR CONGRESS, Oct. 12, 2007, <http://www.fas.org/sgp/crs/row/RS20871.pdf> (describing the history and scope of the statute); Ian Talley, *U.S. Senate Panel OKs Stronger Financial Sanctions Against Iran*, WALL ST. J., June 19, 2008 (noting the pending bill in the U.S. Senate to penalize U.S. parent companies of foreign subsidiaries that invest in Iranian oil sector).

⁷⁵ Iran Sanctions Act, 50 U.S.C. § 1701 (1996).

⁷⁶ *See, e.g.*, Steven Lee Myers, *Clinton Troubleshooter Discovers Big Troubles from Allies on Cuba*, N.Y. TIMES, Oct. 23, 1996, at A1 (noting, of the Helms-Burton Act, that “its critics in Mexico, Canada and Europe have called it an ‘extraterritorial’

presidential waiver of application of the disputed secondary sanctions provisions.⁷⁷

As these examples show, secondary sanctions often prove politically problematic. The resentment of third-party countries may divert attention from the wrongful conduct of the target regime and undermine U.S. efforts to rally multilateral consensus for United Nations trade sanctions.⁷⁸ Still, as George Shambaugh notes, “[w]hat critics misunderstand is that secondary sanctions tend to cause intergovernmental conflict precisely because they can provide an effective means for states to influence the activities of foreign firms and individuals operating abroad.”⁷⁹

Many state and local governments in the United States have pursued their own secondary sanctions measures by means of

effort by the United States to impose its foreign policy on others” and that “President Ernesto Zedillo [of Mexico] said it was ‘simply a violation of international law’”); Organization of American States, Opinion of the Inter-American Juridical Committee on Resolution, *Freedom of Trade and Investment in the Hemisphere*, AG/DOC.3375/96, Aug. 23, 1996, reprinted in 35 I.L.M. 1326, 1334 (“[T]he exercise of jurisdiction by a State over acts of ‘trafficking’ by aliens abroad, under circumstances whereby neither the alien nor the conduct in question has any connection with its territory and there is no apparent connection between such acts and the protection of its essential sovereign interests, does not conform with international law.”); Council Regulation 2271/96, Protecting Against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country, 1996 O.J. (L 309) 1 (EC) (providing a European Union regulation prohibiting compliance with Helms-Burton and Iran/Libya statutes); Cleveland, *Norm Internalization*, *supra* note 7, at 60–61 (describing blocking and retaliatory measures by Canada, Mexico, and the European Union); Dodge, *supra* note 68, at 718–19 (“[T]he foreign response to Helms-Burton has been swift and vehement.”).

⁷⁷ See, e.g., Cleveland, *Norm Internalization*, *supra* note 7, at 60–61 (discussing President Clinton’s waiver of sanctions due to international outrage); Stefaan Smis & Kim Van der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D’Amato Acts*, 93 AM. J. INT’L L. 227, 231–35 (1999) (describing the United States’ willingness to grant waivers to EU member states).

⁷⁸ See, e.g., Cleveland, *Norm Internalization*, *supra* note 7, at 64 (noting “general consensus of the international community . . . that Helms-Burton—and particularly the Title III provision for suits against third parties—in fact abuses and distorts international law norms to serve peculiarly U.S. interests” and that such “secondary boycott provisions undermine the moral and normative persuasive power of U.S. unilateral sanctions measures and divert attention from the human rights message being promoted to the legitimacy of the selected messenger”); O’SULLIVAN, *supra* note 29, at 216–17, 302 (contending that the Iran and Libya Sanctions Act “did not help catalyze international support for measures against Libya, but rather impeded them” and “threatened to instigate a trade war and jeopardize U.S.-European cooperation on other issues”; further contending that “[p]olicymakers should not delude themselves by thinking that secondary sanctions offer a potential vehicle to multilateral cooperation”).

⁷⁹ SHAMBAUGH, *supra* note 65, at 161.

procurement-barring measures and divestment from third-country companies that do business with odious regimes.⁸⁰ More than 25 states have adopted legislation to divest from companies that do business in Sudan and 11 states have adopted legislation to divest public pension fund assets from companies that do business in Iran.⁸¹ In view that U.S. companies are already mostly barred from doing business with Sudan or Iran,⁸² the effect of these debarment and divestment measures falls heavily on foreign companies.

Although state procurement bars and divestment measures have been challenged as an infringement on the federal government's foreign affairs power,⁸³ Congress and the President have recently approved the Sudan Accountability and Divestment Act to authorize states and local government to divest from and prohibit investment of their assets in companies with business operations in the oil, mineral extraction, power production, and military sectors of the Sudan.⁸⁴ The new law also adds a federal

⁸⁰ See Sudan Divestment Taskforce, *Divestment Statistics: Figures for States, Universities, Cities, International & Religious Organizations and Countries*, Oct. 15, 2008, <http://www.sudandivestment.org/statistics.asp> (compiling a list of twenty-seven states and twenty-three cities that have adopted Sudanese divestment policies).

⁸¹ See Brian Radzinsky, *U.S. States Continue to Divest from Businesses Tied to Iran*, *WORLD POLITICS REVIEW*, July 2, 2008, <http://www.worldpoliticsreview.com/Article.aspx?id=2371> (citing specific states that have enacted divestment legislation); see also Jesse McKinley, *California Seeks to Ban Investment in Iran*, *N.Y. TIMES*, Apr. 2, 2007, at A14 (reporting specifically about California's divestment legislation).

⁸² See *supra* notes 12–13, 42 and accompanying text.

⁸³ See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating under the Supremacy Clause a Massachusetts law restricting the ability of state government to do business with companies doing business with Burma); *Nat'l Foreign Trade Council v. Giannoulas*, 523 F. Supp. 2d 731 (N.D. Ill. 2007) (invalidating under the Supremacy Clause an Illinois law imposing restrictions on investment of public pension funds in Sudan-connected entities and restrictions on the deposit of state funds in financial institutions with customers that have certain types of connections with Sudan).

⁸⁴ See Sheryl Gay Stolberg, *Bush Signs Bill Allowing Sudan Divestment*, *N.Y. TIMES*, Jan. 1, 2008, at A7 (reporting that President Bush signed into law the Sudan Accountability and Divestment Act after both houses of Congress passed the bill that would allow local and state governments to stop investing in companies that do business in Sudan); Sudan Accountability and Divestment Act of 2007 (SADA), Pub. L. No. 110-174, 121 Stat. 2516 (2007) ("An Act to authorize State and local governments to divest assets in companies that conduct business operations in Sudan, to prohibit United States Government contracts with such companies, and for other purposes."); see also Exec. Order No. 13,412, 71 Fed. Reg. 61,369, §§ 1–2 (Oct. 17, 2006) (revealing that although SADA applies to all companies, its practical effect is to encourage divestment from foreign companies, because U.S.

procurement sanction, requiring all contractors with federal executive agencies to certify that they do not conduct the specified business operations in the Sudan.⁸⁵

Similarly, U.S. sanctions against Myanmar not only prohibit U.S. persons from investing directly there but—in secondary-sanctions fashion—prohibit them from buying shares in a third-country company if the company's profits are predominantly derived from its economic development of resources located in Myanmar.⁸⁶ In addition, U.S. persons are prohibited from approving, financing, facilitating, or guaranteeing a transaction in Myanmar by a person who is a foreign person if the transaction would be prohibited if performed by a U.S. person or within the United States.⁸⁷

These developments suggest that secondary sanctions are here to stay, at least so long as the United States realizes that it cannot achieve its foreign policy goals through unilateral sanctions alone and, as increasingly common, where multilateral sanctions from the U.N. are not possible to achieve. As politically contentious as secondary sanctions may prove to be, they surely remain preferable to using military force.

4. THE JURISDICTIONAL VALIDITY OF SECONDARY SANCTIONS

The political controversy about secondary sanctions is complicated by questions about their legality under international law. The conventional wisdom holds that secondary sanctions are an impermissible "extraterritorial" extension of U.S. jurisdiction that impinges on the rights of neutral states to regulate their own

companies are already prohibited from doing business relating to the petroleum and petro-chemical industries in Sudan).

⁸⁵ See SADA § 6 (enumerating a certification requirement that the contractor does not conduct business in Sudan).

⁸⁶ See 31 C.F.R. § 537.204 (2008) (prohibiting "new investment" in Burma by U.S. persons); 31 C.F.R. § 537.311 (2008) (defining "new investment" to include control of or investment in third-party entities that invest in Burma); *see generally*, United States Department of the Treasury, Office of Foreign Assets Control, *Burma—What You Need To Know About U.S. Sanctions Against Burma (Myanmar)* (Dec. 5, 2008) 3, <http://www.treas.gov/offices/enforcement/ofac/programs/burma/burma.pdf> (stating that the regulations also prohibit U.S. companies from contracting to supervise or guarantee the performance of any foreign person in the performance of a contract that includes the economic development of resources located in Burma).

⁸⁷ See 31 C.F.R. § 537.305 (2008) (prohibiting the exportation or re-exportation of financial services).

citizens and companies. For example, Sarah Cleveland notes the criticism by others of “[e]xtraterritorial’ sanctions, or secondary boycotts . . . since they purport to exercise authority over foreign states and entities for engaging in conduct (business with third countries) that has no jurisdictional nexus with the sanctioning state.”⁸⁸ Similarly, Peter Fitzgerald claims:

[A]n international consensus does appear to be building that the unilateral extraterritorial application of these controls [sanctions] to third parties is impermissible . . . [T]he international community is coming to regard the blacklisting of third parties, or secondary boycotts, as “unreasonable,” and therefore an unjustifiable intrusion upon the sovereignty of the neutral state.⁸⁹

To the same effect, Andreas Lowenfeld argues that “secondary boycott” measures such as the Helms-Burton Act and the Arab League boycott are “contrary to international law, because [they] seek[] unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe.”⁹⁰ He further suggests that “[w]hile no precise rules have been formulated, it seems that in the areas of sanctions . . . customary international law places limits on unilateral extraterritorial measures.”⁹¹ Other commentators have joined the chorus casting doubt on the legality of secondary sanctions measures.⁹²

⁸⁸ Cleveland, *Norm Internalization*, *supra* note 7, at 56–57. Although noting the criticism by others of secondary sanctions, Cleveland does not resolve their legality and suggests that they could be warranted in cases of third-country actors that aid-and-abet human rights abuses of a target regime. *Id.* at 63–64; *see also* Cleveland, *Human Rights Sanctions*, *supra* note 7, at 158 (noting that “[w]hile the validity of secondary boycott measures is beyond the scope of this article, the WTO’s approach to extraterritoriality generally has broad implications for human rights sanctions”).

⁸⁹ Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT’L L. 1, 91 (1998).

⁹⁰ Lowenfeld, *supra* note 63, at 430.

⁹¹ LOWENFELD, *supra* note 38, at 926.

⁹² *See, e.g.*, Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT’L L. 625, 626, 655 (2008) (stating that “[i]t is no surprise that secondary boycotts raise serious public international law concerns” and that “[i]n view of foreign nations’ repeated and unisonous rejections of extraterritorial jurisdiction used as a (the United States) foreign policy tool boosting the efficiency of U.S. economic boycotts, it might be argued that secondary boycotts are illegal under international law”); *see also* J. Brett Busby, *Jurisdiction to Limit Third-Country*

As an initial issue, it is fair to question whether the jurisdictional legality of secondary sanctions matters. After all, under the last-in-time rule the United States is free to supplant customary rules of international jurisdiction without fear that any U.S. court will decide international law to be controlling.⁹³ Nor is it likely that any international tribunal's invalidation of a U.S. secondary sanctions measure would be given effect under U.S. law.⁹⁴

Interaction with Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts, 36 COLUM. J. TRANSNAT'L L. 621, 624 (1998) (contending that Helms-Burton and Iran/Libya statutes "go well beyond previous assertions of extraterritorial jurisdiction by the United States" and that "they have no firm international jurisdictional basis"); Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 WASH. & LEE L. REV. 1601, 1633-34 (1997) (arguing that the Iran and Libya Sanctions Act is illegal under international law). *But see* Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 435-36 (1996) (contending that Helms-Burton Act is justified by effects doctrine).

⁹³ See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (noting that "an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null") (internal quotations and citation omitted); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 331 (2001) ("Congress is free to override the limitations of international law, including the international law of prescriptive jurisdiction, when enacting a criminal statute."). This is not to say that the international customary law of jurisdiction has no effect in U.S. courts because, as the Supreme Court has recently noted, when declining to apply ambiguous antitrust law to foreign company conduct causing foreign economic harm, it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," and "[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow." *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This interpretive rule does not apply to the statutes considered in this Article because they are not asserted to be ambiguous in scope.

⁹⁴ See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (declining to enforce judgment of the International Court of Justice to remedy violation of the consular notification requirement of the Vienna Convention for Consular Relations). In any event, the United States would not bear the burden *ab initio* to establish the jurisdictional validity of its sanctions measure; under the well-established "*Lotus* principle," the burden would remain on other country complainants to show that the United States exceeded its jurisdictional authority. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Although this Article does not address whether secondary sanctions may violate the obligations of the United States under trade law treaties, it is notable that complaints filed in the WTO against the United States arising from the Helms-Burton Act did not result in a final decision on the statute's legal validity. See Cleveland, *Human Rights Sanctions*, *supra* note 7, at 136 n.17 (describing WTO complaints by the EC against the United States arising from the Helms-Burton Act).

Still, despite the likely lack of enforceable limits, the legal validity of secondary sanctions retains important symbolic value that impacts the political calculation about whether to use them.⁹⁵ The reasons why nations may try to comply with the international customary law of jurisdiction—even in the absence of an international compliance mechanism—are beyond the scope of this Article. As Andrew Guzman suggests, even in the absence of a formal enforcement mechanism for a violation of customary international law (CIL), “[t]he sanctions for a violation of CIL may take the form of an unwillingness on the part of other states to rely on compliance with CIL by the violating state (reputation), a reluctance on the part of other parties to comply with that same norm (a form of reciprocity), or the imposition of a direct sanction (a form of retaliation).”⁹⁶ In short, if secondary sanctions are viewed not merely as politically problematic but outright illegal, they are less likely to be considered as a policy option, much less are they likely to be accepted by other countries without retaliation measures of the kind that ensued after passage of the Helms-Burton and Iran Libya Sanctions Acts.

The common condemnation of secondary sanctions as “extraterritorial” overlooks the fact that *all* sanctions measures—primary *or* secondary—seek to effect an extraterritorial change in conduct. Even when the United States imposes unilateral sanctions directly against a rogue regime (without any secondary component against actors from neutral third countries), it acts “extraterritorially” in the sense of striving to change conduct occurring beyond U.S. borders. This point has been

⁹⁵ See Cleveland, *Norm Internalization*, *supra* note 7, at 86 (suggesting that secondary sanctions measures “simply focus the attention of the international community on the legality of the extraterritorial sanctions rather than on the substantive violations of the target state”). Cf. Charnovitz, *supra* note 7, at 691 (“[I]f a morally-motivated trade measure violates international trade rules, then employing it anyway undermines the rule of law and subverts values that may be dear to the country contemplating a trade measure.”).

⁹⁶ ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS 2008-09* (2008); see also *id.* at 7, 33–37 (describing schools of theory about why nations obey international law and focusing on the “‘Three R’s of Compliance’—reputation, reciprocity, and retaliation” as primary rational-choice motivations for nations to comply with international law); Jack Goldsmith & Eric Posner, *THE LIMITS OF INTERNATIONAL LAW* (2006) (emphasizing self-interest of nations in deciding to “comply” with international law); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *YALE L. J.* 2599 (1997) (discussing role of transnational legal process and norm internalization as reasons why nations “obey” international law).

misunderstood by commentators who assert that a state's primary sanctions are regulation of a state's own nationals, while a state's secondary sanctions are not.⁹⁷ Consider, for example, a sanctions law prohibiting U.S. citizens from trading with Myanmar (primary sanctions) or with any third-country that does business with Myanmar (secondary sanctions); both aspects of this sanctions law equally regulate the conduct of U.S. nationals. Unless the critics of secondary sanctions are prepared to denounce all forms of sanctions as prohibitively "extraterritorial,"⁹⁸ the legality of secondary sanctions cannot rise or fall on the basis of their purpose or intent to affect extraterritorial conduct alone.

The jurisdictional validity of secondary sanctions should be measured in light of well-established principles governing the authority of each nation-state as against other nation-states to regulate the conduct of individuals, companies, and other sub-national actors. As briefly discussed below, these customary international jurisdictional guidelines encompass the traditional tripartite authority of every nation-state to *prescribe* rules of conduct, to *enforce* the prescribed rules of conduct, and to *adjudicate* specific cases for the purpose either of prescribing or enforcing rules of conduct.⁹⁹ Together, these guidelines form the basis for

⁹⁷ Lowenfeld, *supra* note 63, at 429 ("a primary boycott does not usually raise issues of international law, because the boycotting state is exercising its jurisdiction in its own territory or over its own nationals"); Bartels, *supra* note 8, at 385 (noting that "something must be said of the fact that in the case of expressly coercive trade restrictions, it is only boycotts affecting nationals of third states (secondary boycotts) that are seen to raise extraterritoriality issues, while boycotts directed at the target state (primary boycotts) are usually not considered in this light" and concluding that the "true reason" for this is because primary boycotts "are indeed extraterritorial, but they are legitimately extraterritorial to the extent that they apply to the nationals of the regulating state").

⁹⁸ See LOWENFELD, INTERNATIONAL ECONOMIC LAW, *supra* note 38, at 891 (noting that despite a provision in the Charter of the Organization of American States prohibiting "'coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind,'" that "the frequent use of sanctions by the United States and many other countries constitutes persuasive evidence that no clear norm exists in customary law against the use of economic sanctions") (citing Charter of the Organization of American States, art. 19, 21 U.S.T. 607, T.I.A.S. 6847).

⁹⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV, introductory note, § 401 (1987) (reaffirming the traditional tripartite authority of every nation); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (Scalia, J., dissenting) (noting that "[t]here is, however, a type of 'jurisdiction' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction,' or 'jurisdiction to prescribe.' This refers to 'the authority of a state to make its law

what William Dodge calls “the ‘structural rules of transnational law’: rules concerning prescriptive jurisdiction, judicial jurisdiction, and the enforcement of judgments that together determine the effectiveness of transnational regulation.”¹⁰⁰

The primary authority to make rules of conduct—prescriptive jurisdiction—turns principally on consideration of four sometimes overlapping factors relevant to a state’s interest in regulating conduct:

territorial and effects jurisdiction—the regulating state’s interest in governing conduct occurring in its own territory (territorial jurisdiction) or conduct outside its territory that has or is intended to have a substantial effect inside its territory (effects jurisdiction);¹⁰¹

nationality jurisdiction—the regulating state’s interest in governing conduct of its own nationals wherever they may be located;¹⁰²

applicable to persons or activities,’ and is quite a separate matter from ‘jurisdiction to adjudicate’”) (internal citations omitted).

¹⁰⁰ William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L. J. 161, 162 (2002).

¹⁰¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1) (1987) (noting that “a state has jurisdiction to prescribe law with respect to . . . (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory”); see also Bradley, *supra* note 93, at 323 (“Under the territorial category, a nation may regulate conduct within its territory as well as foreign conduct that has substantial effects or intended effects in its territory.”); *Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 165 (2004) (“[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.”) (emphasis added). Cf. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (stating that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”).

¹⁰² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987) (noting that “a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory”); see also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) (noting that “[t]he citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons,” and that “a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state.”); see also *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (concluding that a federal

passive personality jurisdiction—the regulating state's interest in governing conduct taken against or harming its nationals;¹⁰³ and *protective jurisdiction*—the regulating state's interest in governing conduct that threatens its security or essential government functions.¹⁰⁴

In addition to the traditional grounds for prescriptive jurisdiction identified above, customary law affords each state the option to assert *universal jurisdiction*—that is, “to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”¹⁰⁵ In short, as Curtis Bradley has noted, “[u]nless a nation's extraterritorial law falls within one of five categories—territoriality, nationality, protective principle, passive personality, or universality—it is said, the nation violates international law rules governing ‘prescriptive jurisdiction.’”¹⁰⁶

More than one state may lay claim to one or more of these jurisdictional connections. Accordingly, as the Restatement of

statute criminalizing U.S. citizens' involvement in illicit commercial sexual conduct in Cambodia is consistent with the “nationality” principle of international jurisdiction).

¹⁰³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987); see also *id.* § 402 cmt. g (noting that the “passive personality principle” is not “generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nations by reason or their nationality”); Bradley, *supra* note 93, at 323 n.4 (noting “substantial debate and uncertainty concerning the legitimacy of the passive personality category” but that “this category has become increasingly accepted in recent years for certain kinds of conduct, such as terrorism.”).

¹⁰⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (1987) (noting that “a state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”); *id.* §402(3) cmt. f (noting application of “protective principle” not only to “offenses directed against the security of the state” but also “other offenses threatening the integrity of governmental functions . . . e.g., espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.”). The protective principle “refers to the safety and integrity of the state apparatus itself . . . not its overall physical and moral well-being.” Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes* 31 (Nw. U. Sch. of Law Pub. Law & Legal Theory Working Paper Group, Series No. 08-12) (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120892.

¹⁰⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

¹⁰⁶ Bradley, *supra* note 93, at 323.

Foreign Relations Law suggests, a state should refrain from asserting prescriptive jurisdiction if to do so would be “unreasonable” in light of the competing ties and interests of other states in regulating the actor or conduct at issue.¹⁰⁷ The Restatement lists a broad range of “reasonableness” factors, such as the nature of the activity; the extent to which it takes place in the territory of the regulating state; the strength of ties such as nationality, residence, and business activity between the regulating state and the person subject to regulation; the “importance” of regulation to the regulating state; and the existence of, interest in, and conflict with regulation of the activity by other states.¹⁰⁸ Many of these factors are redundant of the initial jurisdictional factors, and the Restatement does not furnish further guidance how to reconcile competing jurisdictional claims.¹⁰⁹

Apart from the power to prescribe is the power to enforce prescriptive rules. Enforcement and prescriptive jurisdiction are linked; a nation may enforce a rule of conduct only if, among other factors, it has underlying jurisdiction to prescribe the rule to be

¹⁰⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (describing “reasonableness” limitations on prescriptive jurisdiction); see also *Hartford Fire v. California*, 509 U.S. 815, 818 (Scalia, J., dissenting) (noting that “[u]nder the Restatement, a nation having some ‘basis’ for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction ‘with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable’” and listing “reasonableness” factors) (quoting RESTATEMENT OF FOREIGN RELATIONS LAW § 403). But see Bradley, *supra* note 93, at 324 n.5 (noting that “[t]here has been some debate over whether international law in fact imposes a reasonableness limitation”). Although the Restatement’s “reasonableness” factors of § 403 are said to apply only to the first four grounds for prescriptive jurisdiction of § 402, it is not clear why the same reasonableness concerns would not come into play in cases of competing claims to redress a violation of international law warranting the exercise of universal jurisdiction.

¹⁰⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987); see also *Hartford Fire*, 509 U.S. at 818–19 (Scalia, J., dissenting) (listing several factors).

¹⁰⁹ Perhaps in part for this reason debate persists about whether section 403 sets forth a rule of international “law” or more in the nature of a courtesy principle of comity. See, e.g., Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 47 (1991) (“The Restatement’s intent to move beyond the classical doctrine to an unconditional, legally-mandated rule reveals a discomfort with comity as a mediating principle. The Restatement’s multifactor-balancing approach may seem appealing because it purports to do justice and to re-focus the vagueness that characterizes comity. Yet this balancing approach, like the classical doctrine, is difficult to justify in law or policy.”); David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT’L L. 419 (1997) (contending that section 403 does not state customary international law).

enforced.¹¹⁰ Relatedly, each nation-state has the power to adjudicate in addition to the power to prescribe rules and enforce them (often through the adjudication process). Although a nation's authority to adjudicate does not necessarily require a nation-state to have underlying prescriptive jurisdiction, its exercise of adjudicative jurisdiction must be "reasonable" in light of the affected person's presence, residence, nationality, or pursuit of activities within or affecting the state that seeks to adjudicate.¹¹¹

How then do these jurisdictional rules apply to secondary sanctions? Consider an easy example first. The United States has broad trade sanctions against Iran because of the threat posed by Iran's nuclear weapons program.¹¹² These primary sanctions are plainly justified on a theory of protective or effects jurisdiction—the necessity to protect against Iran's potential use of nuclear weapons against the United States. If the United States learned that third-country individuals and companies were supplying nuclear weapons materials to Iran, it could impose secondary trade sanctions against these third-country actors.¹¹³ As with the primary sanctions directly against Iran, secondary sanctions by the United States against other actors that aid-and-abet Iran's nuclear activities would be equally supportable on a theory of protective and effects jurisdiction.¹¹⁴

¹¹⁰ See LOWENFELD, *INTERNATIONAL ECONOMIC LAW*, *supra* note 38, at 901 ("It is clear that a state does not have jurisdiction to enforce a law or regulation that it did not have jurisdiction to prescribe."); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 431(2) (1987) (requiring in part that the enforcement measures—administrative or judicial—(1) be reasonably related to the rule, (2) any penalty for non-compliance be preceded by an appropriate determination of a violation (usually involving notice and an opportunity for the alleged violator to be heard), and (3) any penalty be proportional to the seriousness of the violation).

¹¹¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 cmt. a (1987).

¹¹² See *supra* notes 39–41 and accompanying text.

¹¹³ See Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (July 1, 2005) (blocking property of persons engaged in activity involving proliferation of weapons of mass destruction and their support network); see also 22 U.S.C. § 2798 (2006) (requiring the President to impose sanctions against any foreign person that knowingly and materially contributes "through the export from any other country of any goods or technology that would be, if they were United States goods or technology, subject to the jurisdiction of the United States" to the efforts of certain foreign countries "to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons").

¹¹⁴ See Cleveland, *Norm Internalization*, *supra* note 7, at 63–64 (noting that secondary sanctions are permissible against third-country actors that aid-and-abet a target regime's human rights violations). For example, U.S. law imposes sanctions against foreign governments that sell MANPADs (portable surface-to-

But apart from these clear cases of a third party's aiding-and-abetting of hostile activity, a more difficult question is posed by the use of secondary sanctions against third-country actors that do no more than engage in ordinary civilian business dealings with an evil regime or other sanctions target. Suppose, for example, that Iran buys chocolate for civilian use from one of the world's largest food product companies—Nestlé in Switzerland. The case for protective or effects jurisdiction to sanction Nestlé is far more debatable, because the threat to the United States occasioned by Nestlé's sales of chocolate to Iran is highly attenuated and because secondary sanctions against third parties are at best an indirect means to change the conduct of the primary target of sanctions.¹¹⁵

This contestability of the grounds for jurisdiction makes the U.S. decision to impose secondary sanctions legally tenuous and hence even more politically problematic. The exercise of jurisdiction quickly becomes vulnerable to claims that the harm or effects to the United States is not real or has been exaggerated in a manner incommensurate with the costs imposed on third country actors. Switzerland, for example, may contend that the U.S. invocation of protective or effects jurisdiction is not reasonable given Switzerland's established grounds of territoriality and nationality to regulate the business conduct of Nestlé.

This kind of debate has parallels to the Commerce Clause debate under U.S. domestic law about the prescriptive jurisdictional power of Congress to regulate activity affecting the

air missile systems) to terrorist organizations or terrorism-supporting countries. See 22 U.S.C. § 2751 (2006) (describing Congress's intentions for arms export control in light of foreign policy ideals); see also 21 U.S.C. §§ 1901-08 (2006) (blocking property and interests in property subject to U.S. jurisdiction of persons materially assisting the international narcotics trafficking activities of persons designated as significant foreign narcotics traffickers).

¹¹⁵ Even dictators likely spend some funds legitimately. For example, although the investigation of the U.N.'s Oil-for-Food Program in Iraq established that more than 2,000 foreign companies paid approximately \$1.8 billion in kickbacks to Saddam Hussein's government from 2000 to 2003, it did not ascertain what the regime did with the kickback money it received; some evidence suggested that the kickbacks were used by government ministries for legitimate costs. The Program did not permit Iraq to recover the costs of internal transport of goods shipped to Iraq, such as the substantial costs of trucking hundreds of tons of imported Australian wheat to the main population center in Baghdad from Iraq's Persian Gulf port of Umm Qasr. After the Security Council did not act on Iraq's request for internal transport cost reimbursement, Iraq began covertly charging its sellers for "transport costs" which were not authorized under the Security Council sanctions rules. MEYER & CALIFANO, *supra* note 55, at 109-130.

fifty states of the United States. In Commerce Clause cases, the validity of federal law ordinarily turns on Congress's authority under the U.S. Constitution's Commerce Clause to regulate commerce between the states.¹¹⁶ Similar to the grounds for invoking international effects jurisdiction, the Commerce Clause debate often turns on whether an activity subject to federal regulation is deemed to have a "substantial effect" on commerce between the U.S. states.¹¹⁷ With few exceptions, U.S. courts have validated Congress's regulatory authority, often on the basis of highly attenuated claims of a "substantial effect" on commerce in cases involving no apparent connection to interstate commercial activity. For some cases that involve purely intrastate conduct (e.g., growing wheat or marijuana for one's own consumption at home), the courts have reasoned that if the activity is "economic" in nature, its intrastate regulation may be derivatively necessary to a broader scheme of interstate market regulation.¹¹⁸

In harder cases where a court cannot plausibly label the activity as economic or commercial in nature, the inquiry shifts to whether any other related objects or events have ties to interstate commerce. For example, Congress prohibits a felon from possessing a gun if the gun has ever previously crossed a state line, even if it did so without the felon's involvement and by lawful shipment by someone else that occurred many years before the felon's later

¹¹⁶ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁷ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (setting forth the "substantial effect" test for interstate commerce).

¹¹⁸ *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (rejecting as-applied challenge to federal law prohibiting manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medicinal purposes; "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class.") (internal quotations omitted); *Wickard v. Filburn*, 317 U.S. 111 (1942) (rejecting farmer's as-applied challenge to federal law prohibiting growing of wheat on farm for subsistence consumption); *see also* Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 16-18 (2007) (summarizing evolution of case law and extension of Commerce Clause authority to regulate any part of a "class" of economic activity that in turn has an effect on interstate commerce); *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257-58 (2005) (suggesting that in dealing with the Commerce Clause, the Supreme Court has relied on "some concept of 'commercial activity' to define the boundary" between federal and state authority and that "[t]he national government may regulate commercial activity, but has much less ability to regulate noncommercial activity," even though "the distinction between commercial and noncommercial activity is difficult to define and employ").

possession of the gun.¹¹⁹ Similarly, Congress prohibits purely intrastate possession or production of child pornography, not because of any link between this inside-the-home activity and interstate commerce but because generic precursor materials, like a digital camera or blank photo paper, have previously crossed a state line.¹²⁰

And if it is not possible to tie any aspect of the regulated activity to interstate commerce, then in bootstrap fashion courts are prone to shift the inquiry again to whether the regulation itself (*not* the regulated activity) somehow affects interstate commerce. So,

¹¹⁹ 18 U.S.C. § 922 (2006); *see Scarborough v. United States*, 431 U.S. 563, 568–70 (1977) (affirming felon-in-possession conviction on basis of interstate travel of firearm at some point in time possibly several years or more before the defendant’s possession and despite lack of any connection between the felon’s possession and the firearm’s crossing of a state line); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006) (acknowledging the continued validity of *Scarborough* in light of *Lopez* and more recent Commerce Clause cases and affirming conviction for intrastate possession by felon of bulletproof vest on the basis of evidence that the vest a felon bought in Kansas had been manufactured in California).

¹²⁰ 18 U.S.C. § 2251(a) (2006) (describing federal criminal prohibition of the use of minors for the production of visual depiction of sexually explicit conduct “if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer”); 18 U.S.C. § 2252A(a)(5)(B) (2006) (describing the federal criminal prohibition of possession of “any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography . . . that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer”); *see, e.g., United States v. Betcher*, 534 F.3d 820, 823–24 (8th Cir. 2008) (finding a “substantial effect” on interstate commerce from intrastate production of child pornography where shown that an Olympus camera manufactured in Indonesia was used by the defendant to take pornographic photos); *United States v. Smith*, 459 F.3d 1276, 1282 (11th Cir. 2006) (holding that although “the Government did not attempt to demonstrate that the images either traveled in interstate commerce themselves or were produced with the intent that they would travel in interstate commerce,” proof of interstate commerce was sufficient on basis of “evidence that some of the photographs were printed on Kodak paper that the developer in Florida received from New York and that some of the pictures were processed using equipment received from California and manufactured in Japan”); *see also United States v. Evans*, 476 F.3d 1176, 1178–79 (11th Cir. 2007) (finding that the defendant’s purely intrastate acts of promoting prostitution had “substantial effect” on interstate commerce; “even though his actions occurred solely in Florida, [they] had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress’s broader regulation of interstate and foreign economic activity,” and his “use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that [his] conduct substantially affected interstate commerce”).

for example, federal appeals courts have upheld application of the Endangered Species Act to protect small pockets of rare, non-migratory animals from real estate development, not on the theory that destruction of the animals' habitat possibly affects interstate commerce but that the federal regulation of real estate development affects interstate commerce.¹²¹ On the other hand, the Supreme Court has occasionally declined in recent years to find a basis in the Commerce Clause for some federal laws, as in *United States v. Lopez* in 1995 when it concluded that a federal law regulating the possession of firearms near schools did not have a substantial effect on interstate commerce.¹²²

The differences in these cases are not explained by factual divergence, but, as Robert Schapiro and William Buzbee have noted, by the analytic lens through which courts choose to scrutinize the "substantial effect" requirement in these cases.¹²³ Courts sometimes look broadly at the "commercial effects of legislation, the commercial implications of an underlying problem," or the "commercial nature of the regulatory target."¹²⁴ Other times courts take a narrower, "unidimensional" view to

¹²¹ *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1069, 1078 (D.C. Cir. 2003) (rejecting as-applied Commerce Clause challenge to application of Endangered Species Act to real estate development affecting "arroyo southwestern toad," a species that lives only in California and does not have commercial use or value, and noting that "the regulation of commercial land development, quite 'apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce'"); *id.*, *reh'g en banc denied*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (contending that "[t]he panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the activity being regulated does so. Thus, the panel sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce"); see also *Nat'l Assn. of Home Builders v. Babbitt*, 130 F.3d 1041, 1045-46 (D.C. Cir. 1997) (rejecting as-applied Commerce Clause challenge to application of Endangered Species Act to block real estate development affecting the "Delhi Sands Flower-Loving Fly," an insect that was found only in California and of no economic use or value).

¹²² *United States v. Lopez*, 514 U.S. at 549; see also *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil remedy provision of Violence Against Women Act authorizing federal lawsuits to recover for acts of gender-motivated violence).

¹²³ Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1202 (2003).

¹²⁴ *Id.* at 1203, 1267.

consider only “the economic nature of the regulated activity.”¹²⁵ In *Lopez*, for example, the Court chose to restrictively focus on the economic nature of the regulated activity (possession of guns near schools), and thereby concluded that the regulation was not authorized under the Commerce Clause. The Court could just as well “have focused on the business aspects of education, the business of guns or even illegal guns, defendant Lopez’s plan to sell a gun in the school, or the many ripple effects of school quality and safety on economic vitality.”¹²⁶

The point of this Commerce Clause discussion is not to prefer one approach or interpretation over another, but to illustrate the constant contestability of a standard such as the “substantial effects” test and similar jurisdictional concepts that depend on some cross-jurisdictional showing of harm. Yet because the Commerce Clause debate occurs within the framework of U.S. domestic law, it is susceptible to definitive—even if unprincipled—resolution by U.S. courts. By contrast, any debate under international law about the prescriptive jurisdictional basis for a U.S. sanction measure is not ordinarily amenable to definitive judicial resolution. No court or arbiter stands ready to pass judgment on the legal validity of U.S. sanction measures, at least so far as such measures are claimed to exceed the bounds of the U.S. sovereign jurisdictional authority. When the United States justifies secondary sanctions on the basis of claimed effects on the interests of the United States, opposing parties can easily raise legality objections that will remain unresolved and that will add to the weight of other political and economic objections resulting from these parties’ loss of business or other economic activity with the United States. For U.S. policymakers, this places a premium on relying—if feasible—on jurisdictional grounds for secondary sanctions that are not as vulnerable to claims of illegality.

Consider the implication of concluding that the United States may not enact any form of secondary sanctions that adversely affects the business interests of a foreign company such as Nestlé. This would mean that the United States would not only be foreclosed from penalizing Nestlé but also legally compelled—for lack of prescriptive jurisdiction—to permit its own citizens and companies to carry on business with Nestlé as if Nestlé had no

¹²⁵ *Id.* at 1223.

¹²⁶ *Id.* at 1259 (internal footnote omitted).

involvement at all with a nuclear rogue regime. Some would approve of this result, concluding that no proper grounds for prescriptive jurisdiction apply. The sale of chocolate from Nestlé to Iran does not take place in the United States. It does not involve U.S. nationals. It does not threaten the security of the United States or cause any substantial effect inside the United States. Universal jurisdiction does not prohibit even the possession of nuclear weapons,¹²⁷ much less the sale by third parties of chocolate to nuclear-armed regimes.

Fair enough—let us assume here that a lack of prescriptive jurisdiction would bar the United States from “regulating” Nestlé. The United States could not forbid Nestlé from selling chocolate to Iran, much less exact a penalty directly against Nestlé for doing so (such as jailing Nestlé executives or forfeiting Nestlé’s assets). The more difficult question, however, is whether the lack of jurisdiction to regulate Nestlé means the United States also loses power to regulate its own citizens and companies in a manner that adversely affects Nestlé.

Suppose, for example, that the United States were to prohibit any U.S. company from promoting or facilitating a financial or trade transaction with Nestlé within U.S. territory. This regulation would be territoriality-based exclusively on both territoriality and nationality grounds. In contrast to protective or effects jurisdiction, territoriality and nationality are generally acknowledged, individually, as the two strongest predicates for the exercise of prescriptive jurisdiction, based as they are on a sovereign’s prerogative to control its own territory and its nationals wherever they may be located worldwide.¹²⁸ Here, in referring to “territoriality,” I use the term solely in its core sense to refer to the control of conduct within a state’s territory, as distinct from the “effects” branch of territoriality—the control of conduct that takes place outside a state’s territory and that is intended to cause or causes a substantial effect within a state’s territory. When both core territoriality and nationality grounds for jurisdiction

¹²⁷ Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 266 (July 8, 1996) (declining to find use or threat of use of nuclear weapons categorically in violation of international law).

¹²⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW ch. 1, subch. A, intro. (1987) (noting the historical acceptance that “a state had jurisdiction to exercise its authority within its territory and with respect to its nationals abroad” and that “[t]erritoriality and nationality remain the principal bases of jurisdiction to prescribe. . .”).

exist simultaneously, it is difficult to conceive of any circumstances in which a nation-state's assertion of prescriptive jurisdiction over an actor would be unreasonable.¹²⁹

Critics might object to territoriality as a defining principle on the ground that there is no reason to require *both* territoriality and nationality jurisdiction. But when one state's jurisdiction rests on only one of these grounds (e.g., territoriality), yet another state is likely to have jurisdiction on the other ground (e.g., nationality). A given measure becomes more vulnerable to challenge as unreasonable when another nation has a competing regulatory interest based either on territoriality or nationality. (A prime example is the dispute engendered when the United States extends its sanctions regulations to foreign-incorporated subsidiaries of U.S. companies.) The dual predication of territorial sanctions can allow the United States to leverage the impact of primary sanctions while minimizing claims that they are jurisdictionally illegal.

The conventional view rejects the notion that a sanction measure aimed at extraterritorial conduct can be legitimized by being couched in terms of a sanctioning state's exercise of its territorial or nationality jurisdiction.¹³⁰ This jurisdictional issue

¹²⁹ The Restatement notes that "[i]nternational law recognizes links of territoriality... and nationality... as generally justifying the exercise of jurisdiction to prescribe," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. a. (1987). It further notes that "[i]n some situations the existence of both links may be important to make the exercise of jurisdiction reasonable." *Id.*, cmt. b. Although this statement stops short of declaring a combined basis of territoriality and nationality as *per se* reasonable, this could be because the Restatement considers "territorial" jurisdiction in its broadest sense to include not just jurisdiction over acts or status in a state's territory but also jurisdiction over extraterritorial acts that have a substantial effect on a state. The Restatement elsewhere suggests that the "effects" prong of territorial jurisdiction is a weaker basis for the exercise of jurisdiction than a nation's interest in controlling in-territory conduct. *Id.* § 403 note 3 ("Where regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place.").

¹³⁰ See, e.g., Busby, *supra* note 92, at 649 (rejecting "bootstrapping" arguments that Helms-Burton Act's penalties could be based on territorial jurisdiction, because they "confuse the triggering conduct that causes the United States to exercise jurisdiction within its territory with the actual exercise of that jurisdiction").

lurked in the well-known Tuna/Dolphin cases¹³¹ and later Shrimp/Turtle litigation before international trade dispute panels.¹³² These cases involved successive challenges to U.S. import bans against tuna and shrimp that were caught abroad without foreign fishermen's use of procedures to minimize the incidental killing of dolphins and turtles. The litigation gave rise to a prominent debate about "product" versus "process" – whether trade law permits a country to restrict imports not only on the basis of concerns about physical defects or unsafe qualities of the "product," but also on the basis of objections to the "process" that was used to generate the product, even if the process has no discernible effect on the safety or physical characteristics of the product.¹³³

¹³¹ Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21/R-39S/155 (circulated Sept. 3, 1991), reprinted in 30 I.L.M. 1594 (1991); Panel Report, *United States—Restrictions on Imports of Tuna*, 6-1, WT/DS29/R (June 16, 1994), reprinted in 33 I.L.M. 839 (1994); see also World Trade Organization, *Mexico etc versus US: 'tuna-dolphin,'* http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (summarizing tuna-dolphin dispute and unadopted decisions of two GATT panels in response to challenges by Mexico and the European Union) (last visited Feb. 21, 2009). At the time of the panel decisions, the U.S. Marine Mammal Protection Act prohibited the importation of yellow fin tuna harvested by purse seine methods unless the exporting nation provided evidence that it had adopted a regulatory program governing the incidental taking of marine mammals comparable to that of the United States and that, among other requirements, the average rate of taking of marine mammals was not more than 1.25 times the rate of taking of marine mammals by U.S. vessels. See 16 U.S.C. § 1361 (1988) historical and statutory note (citing Pub. L. No. 100-711, § 4(a) and Pub. L. No. 105-42, § 4(b)(1)). The Act was amended in 1997 to remove the statutory numerical limits and to require proof instead of compliance with safeguards of the International Dolphin Conservation Program. 16 U.S.C. § 1361(a)(2) (2006); see also *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 761 (9th Cir. 2007) (summarizing dolphin-safe legislation); *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1339-41 (Ct. Int'l Trade 2001) (summarizing disposition of GATT challenges and changes to statutory scheme).

¹³² Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001); see also World Trade Organization, *India etc versus US: 'shrimp-turtle,'* http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (last visited Jan. 26, 2009) (summarizing shrimp-turtle dispute in India and Mexico); World Trade Organization, *Mexico etc versus US: 'tuna-dolphin,'* http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (last visited Jan. 26, 2009).

¹³³ Douglas A. Kysar, *Preferences for Processes*, 118 HARV. L. REV. 525, 540-48 (2004) (noting that "the process/product distinction . . . has become a subject of intense debate among member nations of the WTO" and reviewing tuna/dolphin and shrimp/turtle decisions).

Although the Tuna/Dolphin and Shrimp/Turtle cases principally involved complex interpretations of specific provisions of the GATT,¹³⁴ these issues were analyzed, in part, in light of notions about whether it was jurisdictionally permissible for the United States to condition the entry of imports on the extraterritorial conduct of foreign countries with United States-dictated environmental protections.¹³⁵ Indeed, as Joel Trachtman suggests, “it can be argued that all WTO cases are concerned with allocation of regulatory authority” and, for example, that “[a]t the core of the *Shrimp* case is the jurisdictional question: can the United States regulate the way in which Indian, Malaysian, Pakistani, and Thai fishermen fish for shrimp, as a condition for access to U.S. markets?”¹³⁶

The academic commentary is divided about the jurisdictional justification for a trade ban of the type at issue in the Tuna/Dolphin and Shrimp/Turtle cases. On the one hand, Sarah Cleveland contends that a trade ban is justified as an exercise of territorial jurisdiction. She notes that “under classical jurisdictional analysis, a measure conditioning bilateral trade on conduct occurring in the other state, such as that in *Shrimp/Turtle I*, is not truly ‘extraterritorial,’” because “[t]rade with a foreign state by definition has a territorial nexus with the sanctioning state, and can be regulated by it.”¹³⁷ She adds that “[n]othing in customary international law bars a state from conditioning access to its own

¹³⁴ General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. The GATT imposes obligations of most-favored-nation treatment (Article I), national treatment (Article III), and elimination of quantitative restrictions (Article XI). *Id.* art. XI. In addition, Article XX of the GATT lists numerous exceptions to these usual rules of free trade, such as for unilateral restrictive measures “necessary to protect public morals,” (Art. XX(a)), or “necessary to protect human, animal or plant life or health” (Art. XX(b)), or “relating to the products of prison labour” (Art. XX(e)), or “relating to the conservation of exhaustible natural resources” (Art. XX(g)). *Id.* at art. XX. Article XXI of the GATT also justifies measures taken for national security reasons. *Id.* art. XXI. For a general description of these GATT provisions as they may apply to trade-related sanctions measures, see Charnovitz, *supra* note 7, at 694, and Vázquez, *supra* note 7, at 809–10.

¹³⁵ See, e.g., Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155, *supra* note 131, ¶ 5.28. (noting that “even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, [it] would not meet the requirement of necessity set out in that provision”).

¹³⁶ Trachtman, *supra* note 8, at 633–34.

¹³⁷ Cleveland, *Human Rights Sanctions*, *supra* note 7, at 160.

markets in this manner.”¹³⁸ This argument, however, assumes the presence of a territorial link to be conclusive of a state’s right to assert jurisdiction without accounting for the further—although disputable—requirement that an exercise of territorial jurisdiction be “reasonable” to be sustained as valid under international jurisdictional law.¹³⁹

On the other hand, Carlos Manuel Vázquez has suggested that the import ban at issue in the Tuna/Dolphin case was an improper exercise of extraterritorial jurisdiction that could not be justified on grounds that it technically regulated only conduct within the United States: “Given that the whole point of the import ban is to induce a change in the production process [occurring abroad], it makes considerable sense to view the U.S. law as an attempt to regulate conduct taking place in another country, and the denial of access to the U.S. market as the enforcement mechanism.”¹⁴⁰ Vázquez reasons that if an import ban could be justified on the basis of territoriality (because it nominally controls conduct only within U.S. territory), then “no law would violate limits on prescriptive jurisdiction,” because “every law could simply be recharacterize[d] as a regulation of access to the regulating state’s territory.”¹⁴¹ He adds that “[t]he very existence of international law limits on prescriptive jurisdiction separate and apart from international law limits on adjudicatory and enforcement jurisdiction shows that concerns about extraterritoriality cannot be made to disappear through such a sleight of hand.”¹⁴²

A difficulty with Vázquez’s argument is that it does not account for an essential distinction between territorial jurisdiction and other grounds of prescriptive jurisdiction. When jurisdiction rests on grounds other than territoriality or nationality (such as protective, effects, or universal jurisdiction), then its validity turns on some external, substantive aspect of the *reason* for regulation. For example, if the United States criminalizes the counterfeiting of its currency anywhere in the world (which the

¹³⁸ *Id.*

¹³⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (establishing the framework of “reasonableness” under international law). Application of the “reasonableness” requirement in the context of territorial sanctions is discussed in greater detail below.

¹⁴⁰ Vázquez, *supra* note 7, at 813.

¹⁴¹ *Id.* at 814.

¹⁴² *Id.*

Restatement suggests it could do as a permissible exercise of protective jurisdiction), then the jurisdictional legitimacy of this regulation when applied, for example, to a currency printing press in North Korea depends on the existence of a link between the counterfeiting conduct and some adverse effect or threat to the security of the United States.¹⁴³

By contrast, both territorial and nationality grounds for jurisdiction are status-based (location and citizenship) and substance-neutral. They need not be justified by reference to any purpose, content, or effect of the conduct sought to be regulated. They rest solely on recognition of a nation-state's sovereign authority to control *for any purpose* what its own nationals do within its own territory. Indeed, a "nation-state" as a concept is defined principally by reference to a governmental entity's control over territory and a permanent population of people.¹⁴⁴ Sovereignty presupposes at the least each nation-state's power to control what its own citizens do on its own lands and without a burden to justify the fact of its exercise of this power to other sovereigns.

This is not to say that the United States need never justify to other countries how it regulates its own nationals on its own territory. It is to claim only that the United States need not justify its jurisdictional authority to do so. Its jurisdictional authority to promulgate a rule is distinct from whether the rule puts the United States in violation of a substantive obligation to other nation-states under treaty or customary international law. Suppose, for example, that the United States ordered its citizens to burn chemical waste along the Canadian border, knowing full well that toxic pollutants would rain on Canada. The argument against this law would be that it violates substantive international law

¹⁴³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987) (noting application of "protective principle" to counterfeiting conduct).

¹⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."). *See also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) (noting that "[t]he prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty," that "[e]very country has a right to dictate laws governing the conduct of its inhabitants," and that "the territoriality base of jurisdiction is universally recognized" and "is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power").

agreements against transboundary pollution,¹⁴⁵ not that the United States lacks jurisdiction in the first instance to decide what U.S. citizens may do on U.S. land.

To be sure, it could be asserted that an exercise of territorial or nationality jurisdiction must be reasonable.¹⁴⁶ But the reasonableness-of-jurisdiction inquiry cannot be a substitute for the substantive merits or demerits of a particular regulation. Its focus should be the strength of competing states' interest in the authority to decide the prescriptive rule for a given category of activity, apart from whether specific conduct implicates a substantive international law commitment. If it were otherwise, then international jurisdictional principles would be no more than a backdoor means for a nation to challenge innumerable regulations of other nation-states as "unreasonable," even in the absence of any violation of a substantive treaty commitment or other substantive conduct principle of customary international law.

As noted above, Vázquez suggests that an extraterritorially-aimed sanction that is restricted to the control of in-territory conduct (such as a U.S. ban on imports of non-dolphin-safe tuna) should be viewed as an "enforcement mechanism" for an extraterritorial prescriptive rule. True enough, the labeling of a sanctions measure as "enforcement" rather than "prescriptive" may be of great significance to deciding its jurisdictional validity. Suppose, for example, that terrorists bomb Spain and that in response the U.S. President issues an executive order requiring U.S. banks to freeze any U.S. assets of persons and entities who may later be deemed responsible for the bombing. If the President's bank-freeze order is characterized as an exercise of enforcement jurisdiction, then its validity would turn in part on whether the United States has prescriptive jurisdiction to regulate the underlying conduct (a bombing) that occurred in Spain. The answer might not be obvious. If the bombing did not involve U.S. nationals as perpetrators or victims, then the basis for prescriptive

¹⁴⁵ See, e.g., Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1442 (entered into force Mar. 16, 1983) (demanding that the parties minimize discharge of air pollutants across domestic borders); Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676 (entered into force Mar. 13, 1991).

¹⁴⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (reasonableness requirement applicable to grounds for jurisdiction identified in section 402). *But see supra* note 110 (authorities disputing validity of "reasonableness" requirement).

jurisdiction could depend on protective or effects jurisdiction to look at whether the bombing threatened or caused a substantial effect in the United States. This may depend in part on whether the bombers belong to a global organization such as Al Qaeda, rather than local Basque separatists who have no apparent designs to attack the United States. Or there may possibly be universal jurisdiction because of the tie to terrorism (although as Curtis Bradley notes “the degree to which universal jurisdiction applies to acts of terrorism is still contested and uncertain”).¹⁴⁷

By contrast, if the President’s bank-freeze order is viewed as an exercise of prescriptive jurisdiction to govern the conduct of U.S. banks, then the analysis and basis for jurisdiction is clear. The President’s asset-freeze order regulates the conduct of U.S. national entities (banks) concerning property in the United States (money). It is a proper exercise of prescriptive jurisdiction on territoriality grounds.

In short, if a U.S. sanctions law is viewed as an exercise of enforcement jurisdiction, then its validity depends on whether the United States has prescriptive jurisdiction over the underlying conduct that has prompted the responsive “enforcement” measure. On the other hand, if a sanctions law is deemed in the first instance to be of a prescriptive jurisdictional stature, then its validity turns on traditional prescriptive criteria, such as whether it regulates the conduct of U.S. nationals or others within U.S. territory. The more a sanctions law is “prescriptive” rather than “enforcement,” the stronger its claim to jurisdictional validity if conditioned on the occurrence of acts occurring abroad.

Although the Restatement does not resolve the issue, its commentary casually references sanctions as if they were no more than an exercise of enforcement jurisdiction. In the course of discussing the scope of enforcement jurisdiction, the Restatement cites examples of economic sanctions such as denial of import licenses, debarment from bidding on government contracts, and blocking of assets.¹⁴⁸ Moreover, the Restatement’s commentary

¹⁴⁷ Bradley, *supra* note 93, at 329.

¹⁴⁸ The Restatement’s commentary provides that:

enforcement measure[s] comprise . . . [options] such as the following, when used to induce compliance with or as sanctions for violation of laws or regulations of the enforcing state:

- denial of the right to engage in export or import transactions;
- removal from a list of persons eligible to bid on government

also goes as far to suggest that a secondary sanctions measure prohibiting a U.S. company from trading with a third-country company that does business with a target of U.S. sanctions would be invalid for lack of U.S. prescriptive jurisdiction over trade between the third-country and country X.¹⁴⁹ This example implicitly assumes a secondary sanctions measure to be an exercise of enforcement jurisdiction and dependent on the existence of prescriptive jurisdiction for the United States to regulate trade between the neutral and target countries.

Most sanctions laws, however, are not properly characterized as mere enforcement measures. When the United States authorizes sanctions, it regulates conduct in the same manner as it does for other acts within its prescriptive jurisdiction. Just as a criminal law—which is a quintessential prescriptive measure—may outlaw terrorism and authorize imprisonment for terrorists, so too a sanctions law may prescriptively require banks to freeze terrorist bank accounts and authorize penalties against banks that fail to comply. Both measures not only prescribe conduct but also specify consequences for failure to comply. Neither law involves actual enforcement against any particular entity or individual. Of course, when either a criminal law or sanctions measure is subsequently applied to a particular individual or entity (such as by jailing an individual or denying an export license), this is an exercise of enforcement pursuant to the prescriptive norm. But the fact of enforcement in the particular does not dispel the prescriptive

contracts;

— suspension, revocation, or denial of a permit to engage in particular business activity;

— prohibition of the transfer of assets; and

— comparable denial of opportunities normally open to the person against whom enforcement is directed.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 431 cmt. c (1987).

¹⁴⁹ “For example, it might be reasonable for the United States to deny to a foreign company export privileges, i.e., the right to participate in transactions involving export of United States goods, because the company had knowingly reexported a strategic product of United States origin to country X in violation of United States law. . . . It normally would be unreasonable for the United States to deny such export privileges to the same firm simply because it traded with country X in goods not of United States origin, since ordinarily the United States would not have jurisdiction to prescribe with respect to such trade.” *Id.* § 431 cmt. d.

character of either the underlying criminal or sanctions-authorizing law.¹⁵⁰

As these examples suggest, a criminal law might “regulate” terrorists, just as a sanctions law such as an asset freeze may “regulate” the conduct of banks, albeit the sanctions law may be intended also to impose adverse effects on foreign terrorists whose funds will be frozen. A bank that chooses to flout the sanctions law is subject to penalty, just as a person who breaks the criminal law against terrorism. But a question remains: does the fact that the sanctions law is laden with an ulterior intent to impose a cost on foreign terrorists or other foreign actors mean that it should be viewed as an invalid regulation of extraterritorial conduct, rather than a valid territorial regulation of U.S. banks? The answer is “no” for several reasons.

First, consider whether solely the fact of an adverse economic effect on foreign actors is enough to raise a question about a sanctions law’s jurisdictional validity (apart from any intent or purpose of the measure to cause this effect). An adverse effect alone is not enough to invalidate a secondary sanctions measure, because economic harm to extraterritorial parties is a likely consequence even of primary sanctions measures. For example, whenever the United States imposes primary unilateral sanctions to prohibit U.S. companies from trading directly with a target regime, it foreseeably disadvantages non-U.S. companies who assisted U.S. companies to furnish goods or services to the sanctions target.

Suppose, for example, that U.S. law bars General Electric from selling aircraft engines to the Sudan and that General Electric builds its engines using many parts supplied from China.¹⁵¹ A U.S.

¹⁵⁰ This distinction between application to a particular case and general promulgation of a sanctions rule may well explain why the Restatement’s commentary discusses sanctions measures as if they were matters of enforcement jurisdiction. *See id.* § 431 cmt. c.

¹⁵¹ Headquartered in the United States, the General Electric Company is the world’s leading producer of large and small jet engines for commercial and military aircraft. General Electric, About GE—Aviation, <http://www.geaviation.com/aboutgeae/index.html> (last visited Feb. 21, 2009); General Electric website, Investor Contacts, http://www.ge.com/investors/investor_contacts.html (last visited Feb. 21, 2009); *see also* Masumi Suga & Stephen Engle, *GE to Double Purchases of Jet-Engine Parts from India, China*, BLOOMBERG.COM NEWS, July 6, 2007, available at <http://www.bloomberg.com/pps/news?pid=20601091&sid=aaLumJ7463Fg&refer=india> (last visited Feb. 28, 2009) (noting that GE “last year decided to target \$10 billion of purchases from

sanctions measure restricting GE will surely mean a loss of business for Chinese component parts suppliers. Still, this economic disadvantage does not mean that the United States has exceeded its prescriptive jurisdictional bounds and “regulated” Chinese companies. When a nation-state confines its power to regulate territorially, it cannot be said that such measures are impermissibly extraterritorial simply because of their adverse effect on persons abroad.

Nor does it matter that a territorial sanctions law is triggered by or premised on conduct occurring abroad.¹⁵² Consider, for example, a secondary sanctions law prohibiting U.S. companies from trading with Chinese companies that in turn do business with the government of Sudan. This measure would be no different from other kinds of “nested” or contingent prescriptive conduct prohibitions that impose a penalty on a domestic actor for participating in a transaction relating to activity occurring outside the territory of the regulating authority. For example, federal law and many states of the United States criminalize knowing receipt or trafficking in stolen property.¹⁵³ It does not matter if the property may have been stolen abroad or outside the state (and presumably beyond the ability of the United States or an individual state to prescribe conduct).¹⁵⁴ Similarly, federal money

China” and that “[m]any low-technology structural engine components are produced in Asia”).

¹⁵² *But see* Busby, *supra* note 92, at 649 (rejecting territoriality as potential jurisdictional basis for Helms-Burton Act because this “confuse[s] the triggering conduct that causes the United States to exercise jurisdiction within its territory with the actual exercise of that jurisdiction”).

¹⁵³ *See, e.g.*, 18 U.S.C. § 2315 (2006) (prohibiting receipt of property of more than \$5,000 value that has crossed a state or U.S. boundary after being stolen); CAL. PENAL CODE § 496(a) (2004) (criminalizing receipt of stolen goods); N.J. STAT. ANN. 2C:20-7(a) (West 2006) (same); OH. REV. CODE § 2913.51 (2004) (West same); VA. CODE. § 18.2-108 (West 2004) (same).

¹⁵⁴ *See, e.g.*, *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (receipt in the United States of property stolen in Egypt); *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962) (receipt in New York of bonds stolen in Canada); *State v. Freitag*, 247 P.2d 502 (Kan. 1990) (holding that a Kansas court had jurisdiction to try the theft charge, even though the theft occurred in Missouri because the property was recovered in Kansas); *Brown v. State*, 281 So. 2d 924, 925 (Miss. 1973) (holding that the fact that goods were stolen out of state does not defeat criminal liability for receipt of stolen property); *Commonwealth v. White*, 265 N.E.2d 473, 474 (Mass. 1970) (allowing criminal liability in Massachusetts after a car stolen in Canada was brought into Massachusetts); *Cockrell v. Page*, 431 P.2d 668, 669 (Okla. Crim. App. 1967) (finding that an Oklahoma court had jurisdiction over a defendant who brought chattel stolen from Texas to Oklahoma).

laundering law prohibits knowingly transacting in money or property that the defendant knows to be proceeds of unlawful activity, even from unlawful activity occurring abroad.¹⁵⁵ It does not matter that the antecedent unlawful activity occurred abroad because the relevant conduct subject to regulation is the subsequent laundering transaction in the United States.¹⁵⁶

In neither type of case involving receipt of extraterritorially stolen property or laundering of foreign crime proceeds is there a sustainable claim that the United States has impermissibly legislated on the basis of events occurring abroad. For the same reason, the fact that the United States may lack a proper prescriptive jurisdictional basis to regulate business deals between China and Sudan does not dispel U.S. authority to regulate the conduct of U.S. companies in U.S. territory to prohibit them from doing business with Sudan's Chinese business partners.

This discussion suggests that a key issue is *whom* a sanctions law actually "regulates." If a U.S. sanctions law subjects a French arms merchant to imprisonment or payment of a civil fine because of the merchant's shipment of arms from France to Iran, then the U.S. sanctions law "regulates" the French arms merchant because of his exposure at the hands of U.S. government officials with penalties for failure to comply. If, on the other hand, a U.S. sanctions law prohibits U.S. companies in the United States from doing business with a French arms merchant that trades with Iran, then it cannot be said that the U.S. law regulates the French merchant at all. The U.S. law may disadvantage the merchant, perhaps severely so in hopes of effectuating a change by the French company in its business conduct. But the law still does not regulate the French merchant, as he faces no consequences at the hands of the U.S. government for failure to conform. The French merchant faces consequences incident only to the U.S. regulation of

¹⁵⁵ 18 U.S.C. §§ 1956(a)(1)(B)(i), (C)(1) (2006) (noting the illegality of conducting a financial transaction with knowledge that it involves "proceeds of some form of unlawful activity" if the transaction "is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" and defining "some form of unlawful activity" to include "a felony under State, Federal, or foreign law").

¹⁵⁶ *Id.*

the conduct of its own citizens that takes place in its own territory.¹⁵⁷

It follows that a territorial sanctions law is not rendered invalid simply because it has an adverse effect on foreign actors or because its operation is triggered by acts that occur abroad. But these conclusions do not reckon with still perhaps the most potent objection: that such adverse consequences happen on purpose and not by accident. Does the fact that a territorial secondary sanctions law is *intended* to burden and deter certain extraterritorial conduct—such as Europe's or China's business dealings with Sudan—render the measure unreasonable or otherwise invalid under customary international jurisdiction law?

The answer must be “no” for two reasons. First, as discussed above, even primary sanctions are intended to deter certain extraterritorial conduct. There is no reason to suppose that secondary sanctions are categorically and presumptively less valid because they share the same extraterritorial intent. Second, the jurisdictional validity of a state's regulation of its own nationals in its own territory does not rest on the state's purpose, intent, or reason for regulation. Territorial and nationality regulation rest solely on the situs of conduct and identity of the actors subject to regulation. The question, then, is not whether a territorial regulation is intended to affect conduct abroad (as it surely is), but whether it can be viewed in the first instance as having a legitimate domestic purpose to regulate one's own citizens at home.

But what qualifies as a legitimate regulable domestic “interest” of a state's citizens? When can it be said that a regulation permissibly regulates the in-country activities of one's own citizens rather than serving as no more than a pretext for control of extraterritorial conduct? One common theory stemming from cases such as the Tuna/Dolphin and Shrimp/Turtle disputes relies on the so-called “product” versus “process” distinction. As noted above, under this theory a country may permissibly bar imports based on unsafe or immoral characteristics inherent to the imported product itself (such as poisons or pornography), but it may not bar imports merely because of non-quality/non-safety

¹⁵⁷ Cedric Ryngaert overlooks this point in contending that “secondary boycotts raise serious public international law concerns,” because “[t]hey subject corporations that are not incorporated in the boycotting State to the latter's regulations in the absence of a direct and clearly discernable effect on that State.” Ryngaert, *supra* note 92, at 626.

objections about the extraterritorial process employed to make the product or to get it to the U.S. market (such as the use of child labor or non-dolphin-safe fishing methods).¹⁵⁸

Although many commentators endorse the product/process distinction, it increasingly has come under attack because it undervalues the interests of domestic consumers in declining to participate in a tainted production-and-consumption chain.¹⁵⁹ As Douglas Kysar notes, consumers often care about more than just the physical characteristics of the products they consume. They also have “preferences for processes,” that is, “consumer preferences may be heavily influenced by information regarding the manner in which goods are produced.”¹⁶⁰ These concerns “can include the labor conditions of workers who produce a consumer good, the environmental effects of a good’s production, the use of controversial engineering techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product, but that do not necessarily manifest themselves in the product itself.”¹⁶¹

In short, as Kysar suggests, “consumers may view consumption choices, at least in part, as moral acts that have personal significance *irrespective of their instrumental effects*.”¹⁶² Similarly, as Steve Charnovitz has observed, trade-related restrictions may have more than one purpose—they may not only be “outwardly-directed” to change conduct abroad but also simultaneously “inwardly-directed” in order to “protect morals of persons in one’s own country” from association with conduct that the governing state abhors.¹⁶³ Thus, for example, when Congress

¹⁵⁸ See, e.g., Steve Charnovitz, *The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 64-70 (2002) (describing the range of potential trade restrictions based on “process and production methods” for imported products). Although Charnovitz contends that some kinds of PPMs are permissible under trade law, he notes that “[m]any commentators contend that WTO rules do not permit importing governments to make distinctions based on the production process.” *Id.* at 76.

¹⁵⁹ *Id.*

¹⁶⁰ Kysar, *supra* note 133, at 529.

¹⁶¹ *Id.*

¹⁶² *Id.* at 532 (emphasis added).

¹⁶³ Cf. Charnovitz, *supra* note 7, at 695. *But see* Kysar, *supra* note 133, at 532 (noting that the distinction between “outwardly directed” and “inwardly directed” may be “somewhat arbitrary because there are two sides to a transaction” allowing dual characterization).

enacted consumer “dolphin-safe” labeling requirements, it declared a purpose not only “to support a worldwide ban on high seas driftnet fishing” but also to vindicate the interests of “consumers [who] would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.”¹⁶⁴

These “inward” concerns for consumer preference justify territorial sanctions restrictions that effectuate one country’s citizens’ interest in not taking part in the chain of production, distribution, and consumption that ultimately supports reprehensible actors or their conduct. The concerns hold equally true for secondary sanctions as primary sanctions. Citizens may legitimately wish that they and their countrymen not transact directly with a genocidal regime or transact with companies that choose to do business with a genocidal regime. Territorial sanctions laws that give collective effect to these preferences are a legitimate regulation of a country’s own citizenry regardless of their additional intent to discourage harmful or odious conduct abroad. The conventional view of secondary sanctions—with its focus on condemning extraterritorial effect and intent—too broadly incapacitates a sanctioning state from regulating and protecting the interests of its own companies and citizens at home.

Still, as noted above, even sanctions resting upon territorial and nationality grounds may be subject to the general requirement of reasonableness.¹⁶⁵ With territorially-limited sanctions should come two principal restrictions that underscore their reasonableness and enhance the likelihood that they will be viewed by other countries as a legitimate exercise of prescriptive jurisdiction. First, in recognition that territorial sanctions do not “regulate” foreign actors abroad, there should be no penalty or threat of enforcement against any *non*-U.S. person who chooses to trade or transact with a U.S. person in violation of the secondary sanctions restriction. U.S. sanctions laws commonly impose liability against those who aid-or-abet a sanctions violation.¹⁶⁶ For

¹⁶⁴ 16 U.S.C. §§ 1385(b)(2), (b)(3) (2006).

¹⁶⁵ See *supra* notes 107–09 and accompanying text.

¹⁶⁶ See International Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96, § 206, 121 Stat. 1011 (2007) (codified at 50 U.S.C. § 1705 (2006)) (authorizing both civil and criminal penalties against those who violate the act—which encompasses aiding-and-abetting). In cases where secondary sanctions are not based on territoriality but on protective or effects jurisdiction as in the case

territorial sanctions regulation, the United States should refrain from imposing co-conspirator, accessory, or aiding-and-abetting liability on foreign individuals or firms, even if they are allegedly complicit in a violation by a U.S. individual or company of a territorial-based sanction. If GE trades with a Chinese company in violation of the sanctions law, only GE should face liability, consistent with respect for ensuring that the regulation remains domestic in scope.

Second and more significantly, territoriality should not tautologically extend to the regulatory or enforcement conduct of government officials (*e.g.*, police, prosecutors, and prison guards), as opposed to the regulation of *non-governmental* persons in their personal and business dealings. The customary law of international jurisdiction principally concerns the authority of government *through its officials* to regulate individuals and other sub-national actors, not of governmental officials to regulate themselves. Indeed, if either territorial or nationality principles were extended to include the conduct of governmental officials and employees, then virtually any form of extraterritorial regulation could be justified. The United States, for example, could criminalize prostitution among Peruvians in Peru. A Peruvian pimp on vacation in the United States could be arrested and jailed, assertedly on the contention that the U.S. law was not an improper regulation of conduct in Peru but of the conduct of arresting and prosecuting U.S. officials in U.S. territory. Indeed, FBI agents could raid brothels in Lima, assertedly on the ground of U.S. authority to direct and control the actions of its own law enforcement nationals.¹⁶⁷

In this vein, Vázquez has good reason to worry about the overextension of territorial jurisdiction, such as he fears that “State A might enact a law making it a crime for anyone anywhere to spit on a sidewalk,” and then State A might invoke territorial jurisdiction to subject any foreign sidewalk spitter to arrest upon entry into the United States.¹⁶⁸ But the limitation that this Article

of third parties who aid-and-abet specific hostile activity of the target regime, then accessorial liability would continue to be appropriate.

¹⁶⁷ Of course, the FBI’s raid in Peru would be independently objectionable as an in-territory enforcement measure without the consent of Peru. See RESTATEMENT OF FOREIGN RELATIONS § 432(2) (1987) (prohibiting exercise of enforcement jurisdiction in foreign country without consent of foreign country).

¹⁶⁸ Vázquez, *supra* note 7, at 814.

suggests—to require a sanctions regulation be directed to *non-governmental* officials—would bar territorial regulation from being applied in this manner. Neither territoriality nor nationality jurisdiction would justify State A's arrest of foreign sidewalk spitters upon their entry to State A, because both these grounds for jurisdiction as asserted would rest solely on the in-country conduct and citizenship of governmental officials, rather than the in-country conduct of private citizens who are the appropriate subjects of regulation.

This is not to suggest that neither territorial nor nationality jurisdiction can extend to a government's own officials. Rather, the claim is that these grounds for jurisdiction remain subject to an overarching reasonableness requirement and that reasonableness is established where it is clear that the regulation and its burdens apply to and burden the conduct of one's own citizens, not just one's own governmental officials. The fact that a law burdens the primary conduct of citizens—not just governmental officials—to prevent them from engaging in transactions or dealings they might otherwise choose is indicative of a regulation's status as a genuine restriction on domestic conduct (regardless of the restriction's additional foreign effects).

Nor does the sidewalk spitting example suggest that State A—if genuinely abhorred by the global prevalence of sidewalk spitters—would be powerless to act at all. Rather than subjecting to arrest those foreign sidewalk spitters that happened to enter State A's territory, State A could regulate its own private citizenry to prohibit them from doing business in State A with foreign sidewalk spitters. Despite the apparent absurdity of State A's concern about sidewalk spitting in other countries, the point remains that State A could respond in a territorially limited manner that would not exceed the jurisdiction of a state to regulate its own citizens within its own territory.

From this distinction between the regulation of governmental and non-governmental actors, it follows that Vázquez's concern about the U.S. tuna/dolphin import ban is well-founded. But it is not for the reason Vázquez posits—that the ban was tainted by an improper purpose of the United States to influence foreign fishing practices. Instead, it is because the tuna/dolphin import ban did not “regulate” anyone in the United States except for governmental customs officials charged with denying entry to non-conforming tuna. Because the only “regulation” was of governmental officials, the import ban was unreasonable and amounted—as Vázquez

asserts—to an invalid “enforcement mechanism” for an extraterritorial prescriptive rule.

So, then, if the United States cannot enact an import ban on non-dolphin-safe tuna, is it jurisdictionally powerless to regulate domestically its citizenry in a way that affects countries’ tuna fishing methods? No—rather than an import ban, territoriality would allow the United States to regulate the in-territory business conduct of U.S. citizens, even in a manner intended to alter foreign fishing practices. For example, the United States could prohibit its companies and citizens in the United States from engaging in contracts to buy, sell, finance, or transport tuna that were not caught using dolphin-safe methods. This restriction would doubtless have a similar effect as an outright trade ban on Mexico and other tuna-exporting countries, but it would be independently justifiable as a regulation of the conduct of U.S. nationals in U.S. territory.

The distinction is not merely formal. Regardless of whether foreign countries might ever adopt dolphin-safe methods, the United States has an independent interest to stop its citizens and companies from supporting the killing of dolphins by participating in a non-dolphin-safe distribution chain. Indeed, apart from the import ban, the United States has long had labeling legislation to inhibit its citizens from purchasing non-dolphin-safe tuna (whatever its domestic or foreign source). Since 1990, U.S. law has prohibited the sale in the United States of tuna with a “Dolphin Safe” label if the tuna in fact was caught using non-dolphin-safe methods.¹⁶⁹

Different nations draw different lines between what conduct is “governmental” and what conduct is “non-governmental,” and this may pose a challenge in some cases in determining if a territorial sanctions measure should be viewed as a government’s regulation of private citizen conduct rather than a more questionable regulation of a government’s own officials. This problem, however, is far from novel as U.S. courts have often grappled with a similar issue in the context of judging the immunity of foreign sovereigns from civil suit in the courts of the United States. By statute, foreign sovereigns are immune from

¹⁶⁹ Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, § 901, 104 Stat. 4436 (1990) (codified at 16 U.S.C. § 1385 (2006)); *see also* *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 761 (9th Cir. 2007) (describing the U.S. statutory dolphin protection scheme).

liability in U.S. courts except to the extent they engage in non-governmental "commercial" activities.¹⁷⁰ The Supreme Court has noted that, regardless of a government's public purpose for regulation, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial'" in nature.¹⁷¹ The "commercial activity" exception is now widely acknowledged worldwide.¹⁷² A similar and now generally well-accepted inquiry into the nature rather than purpose of activity subject to governmental regulation could distinguish between regulation of private and governmental actors.

This distinction between the regulation of "commercial" versus "governmental" conduct explains why secondary sanctions are less jurisdictionally controvertible when, as with the recent secondary sanctions law enacted against Sudan, they take the form of procurement debarment or divestment. Consider, for example, the provision of the recent law that prevents U.S. government agencies from awarding contracts to companies that do certain kinds of business with the government of Sudan.¹⁷³ This measure restricts U.S. nationals within U.S. territory; although its restriction involves U.S. governmental actors (rather than private citizens), it regulates them in their capacity as *de facto* private market participants in the purchase of goods and services.¹⁷⁴ Similarly, the new law's

¹⁷⁰ Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602-11 (2006)).

¹⁷¹ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *see also* 28 U.S.C. § 1603(d) (2006) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

¹⁷² United Nations Convention on Jurisdictional Immunity of States and Their Property, Dec. 2, 2004, 44 I.L.M. 803 (not yet entered into force). The U.N. Convention provides that the nature (not purpose) of a transaction should be the primary factor governing whether an act is commercial, but suggests that purpose may be considered if the parties to the transaction have agreed or if purpose is relevant in the practice of the forum state. *Id.* art. 2(2); *see also* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 194 (2005) (noting that the U.N. convention "embraces the so-called restrictive theory of sovereign immunity, under which governments are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions").

¹⁷³ *See supra* notes 84-85 and accompanying text.

¹⁷⁴ *See Weltover*, 504 U.S. at 614-15 (noting that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial'

authorization of state and local governments to divest their assets from companies that do certain kinds of business in Sudan involves the regulation of the private market activities of governmental actors. Although these debarment and divestment measures may not be clearly justifiable as an exercise of protective or universal jurisdiction, they are plainly appropriate exercises of territorial jurisdiction.

By contrast, the Helms-Burton Act's civil liability provision cannot be squared with territoriality, even though it regulates on its face the conduct of private market actors who wish to bring treble-damages suits against "traffickers" in Cuban-expropriated property. In reality, the law conscripts and empowers U.S. governmental judicial officials to award and enforce damages against foreign persons and companies. This is no different than authorizing government officials at a private person's behest to seize and forfeit assets of foreign companies that have done business involving Cuban-expropriated property. Although nominally predicable on territorial and nationality grounds, the Helms-Burton civil liability provision does not meet the test for territorial sanctions because it does not constitute legitimate regulation of private conduct on territorial grounds.

But this conclusion does not mean that the United States is jurisdictionally powerless to deter foreign companies from "trafficking" in Cuban-expropriated property. Territoriality would allow a law forbidding U.S. citizens in U.S. territory from doing business with "blacklisted" foreign companies that are known to profit from Cuban-expropriated property. Territoriality would also allow a law requiring U.S. banks to cease all business with traffickers, including the immediate freezing of traffickers' assets within the United States. A bank account freeze order would validly regulate U.S. citizenry to prevent them from aiding in any way the activities of those who support the sanctions target, including support by means of the return of assets invested in the United States and subject to U.S. citizens' control. These measures might prove politically controversial but would not exceed the jurisdictional authority of the United States to regulate the conduct of its citizenry in U.S. territory.

activity, because private companies can similarly use sales contracts to acquire goods").

The Iran Sanctions Act fares better than the Helms Burton Act as a reasonable exercise of territorial jurisdiction. Most of its sanctions options involve restrictions on the business activity of U.S. nationals (e.g., prohibiting U.S. banks from loaning more than \$10 million per year to a foreign sanctioned person or barring U.S. companies from receiving export licenses for goods to be shipped to foreign sanctioned persons). Alternatively, the Act regulates U.S. government actors but only in their capacity as private market participants (e.g., federal government procurement debarment against foreign sanctioned persons or denial of Export-Import Bank assistance in connection with products to be exported from the United States to a foreign sanctioned person or procurement). The most jurisdictionally questionable provision of the Iran Sanctions Act is its bar on the import of goods into the United States from foreign sanctioned persons, as this involves the restriction of governmental actors with respect to inherently governmental functions of import control.

More problematic still are recent proposals to broaden U.S. sanctions measures by means of holding a parent U.S. company strictly liable for extraterritorial acts of its foreign-incorporated subsidiary as if the U.S. parent company had engaged in those acts itself.¹⁷⁵ This approach exceeds the bounds of territorial jurisdiction as it conditions liability exclusively on acts occurring abroad and without the participation of the parent company. By contrast, another proposal to bar U.S. parent companies from taking steps to set up a foreign subsidiary for the purpose of circumventing sanctions against Iran permissibly regulates conduct occurring within the United States by U.S. companies.¹⁷⁶

To be sure, territorial secondary sanctions may be less comprehensive than other forms of secondary sanctions because they abjure control of the conduct of foreign actors or even the

¹⁷⁵ See Clif Burns, *Extraterritorial Jurisdiction: It's What's for Dinner*, EXPORT LAW BLOG, June 27, 2008, <http://www.exportlawblog.com/archives/date/2008/06> (describing how the provisions of "Stop Business with Terrorists Act of 2008" bills introduced in the Senate and House of Representatives would hold U.S. parent corporations liable for business dealings of foreign subsidiaries with Iran, specifically for any acts outside the United States of foreign subsidiaries that, if committed inside the United States or by a U.S. person, would constitute a violation of existing sanctions against Iran).

¹⁷⁶ See Comprehensive Iran Sanctions, Accountability and Divestment Act of 2008, S. 3445, 110th Cong. § 104 (2008), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s110-3445>: (last visited Feb. 22, 2009) (describing the liability of parent companies for violations of sanctions by foreign subsidiaries).

conduct of U.S. actors when they are abroad. But other more legally contentious forms of secondary sanctions are themselves far from comprehensive. For example, when secondary sanctions are extended to the conduct of foreign incorporated subsidiaries of U.S. parent companies, this leaves unregulated the vast range of foreign companies that are not owned or controlled by a U.S. parent. Of course, there is a risk with territorial sanctions that U.S. citizens and companies will seek to avoid their application by incorporating or doing business abroad. But this possibility of evasion is already present for any sanctions measures, not just territorially limited secondary sanctions that stop short of seeking to regulate all forms of extraterritorial conduct. Moreover, as the law already does in the case of primary sanctions, it may prohibit U.S. citizens while in U.S. territory from engaging in corporate shell games or other activity for the purpose of evading or avoiding existing sanctions measures.¹⁷⁷

5. CONCLUSION

Secondary sanctions have a limited but continuing role to play in circumstances where unilateral primary sanctions alone are ineffective and consensus on multilateral sanctions is not possible. Their use to date, however, has been clouded by confusion about their legality and, in particular, because of a misconception that any purpose or intent to affect conduct abroad taints them with the brand of extraterritorial illegality. The relevant inquiry for adjudging the legality of secondary sanctions measures should be whom they regulate and where the conduct subject to regulation takes place. When secondary sanctions are territorially restricted to the regulation of U.S. nationals with respect to their non-governmental acts within the United States, then these sanctions should be viewed as presumptively permissible as a matter of customary jurisdictional law. As the United States considers secondary sanctions measures in the future, it should consider territorially tailored sanctions as an alternative to other more legally vulnerable measures.

¹⁷⁷ See, e.g., 31 C.F.R. § 541.204 (2006) (Zimbabwe sanctions regulations providing in part that “[a]ny transaction by a U.S. person or within the United States on or after the effective date that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this part is prohibited”).

