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Do Economic Sanctions Work?

Lessons from ILSA & Other U.S. Sanctions Regimes

Stuart E. Eizenstat

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Foreword

Economic sanctions have been a frequently used tool of U.S. foreign policy in recent years. One of the most controversial applications of sanctions has been through the Iran-Libya Sanctions Act (ILSA), which was originally passed into law in 1996 and renewed in 2001. Events since the Act's passage have, however, raised questions about the effectiveness of ILSA in particular, and sanctions in general, as foreign policy tools.

U.S. relations with both Iran and Libya are poised at a critical stage, albeit in very different ways. Thus it is timely to review the recent experience and impact of the sanctions weapon. To contribute to this debate, the Atlantic Council asked Ambassador Stuart Eizenstat to write about his personal experiences with ILSA and other U.S. sanctions. Over the course of nearly two decades, Stu Eizenstat was at the center of implementing U.S. sanctions, and therefore has considerable first-hand experience with which to judge how well these have advanced U.S. policy or served U.S. interests. The Council is most grateful that he agreed to take on this project and thanks him for bringing his unique perspective to bear on it.

Additionally, I would like to thank Dick Nelson for his far-sighted management of the Council's work on Iran and Libya. I also wish to acknowledge Jason Purcell and Lauren Weeth, respectively the Assistant Director and Intern of the Council's Program on International Security, for their skillful editorial work on this report.

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Christopher J. Makins
President
Atlantic Council of the United States

Executive Summary

The 1990s saw a cascade of contentious sanctions legislation. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, including an amendment to the Sovereign Immunities Act, which permits lawsuits against governments on the terrorism list – a major step in denying foreign governments normal immunity from suit in U.S. courts. The Iran-Libya Sanctions Act (ILSA) was also passed in 1996, with the goal of discouraging third-country companies from investing in Iran or Libya. This sparked outrage from European countries, which objected to the act's "extra-territorial" reach, and from the European Union (EU) institutionally, which responded with a law barring any European company from complying with the legislation (and with similar provisions regarding Cuban trade under the controversial Helms-Burton Act).

This problematic legal tangle was compounded by a series of state and local laws that provided for sanctions on domestic companies and local governments conducting business with entities in certain foreign countries. One notable example was a 1996 Massachusetts law – eventually overturned by the Supreme Court – which penalized companies doing business with Myanmar, formerly known as Burma. Indeed, across the gamut of bad sanctions laws, the most counterproductive are those imposed by states and localities, which use their procurement authority to attempt to make foreign policy. Including these, more than 100 economic sanctions laws had been enacted in the United States by the end of the 1990s, almost all of which denied U.S. companies export and investment opportunities around the world.

This is not to say that sanctions are an inherently "bad" tool for the pursuit of U.S. interests. Rather, it serves as a reminder that sanctions offer a decidedly mixed bag of beneficial and damaging results to policymakers. It therefore stands to reason that little is gained and much is risked by viewing sanctions as a policy of first resort in dealing with difficult regimes.

An alternative to the quick imposition of unilateral sanctions would be a multi-tiered approach. To begin with, the United States ought to exhaust a series of diplomatic efforts – ranging from friendly dialogue to relatively more coercive action – before it considers the imposition of sanctions. If these preliminary measures fail, the United States should seek, in a second phase, to coordinate the imposition of sanctions with its allies and others, preferably in the United Nations framework. Multilateral sanctions supported by the United Nations have proven the most likely to be effective, as evidenced by changes in Libya, South Africa and elsewhere. Most recently, the broad-based multilateral sanctions regime imposed for years on Iraq was found to have made Saddam Hussein's pursuit of weapons of mass destruction (WMD) even more difficult and costly than the Bush administration had imagined before the war.

However, U.S. policy cannot be held hostage to the recurrent unwillingness of the international community to impose sanctions. In cases where the United States fails to rally support for an international sanctions regime, officials should move into a third phase of policymaking, in which they develop a strategy and plan for the imposition of unilateral

sanctions. This phase would include careful cost-benefit analysis as well as U.S. efforts to educate world leaders and rally international public opinion in support of its initiatives.

Unilateral sanctions can take many forms. Those like ILSA and Helms-Burton have proved to be the least effective. By sanctioning companies from allied countries, they have offended our friends, thrown bilateral relations into turmoil, put U.S. companies at a competitive disadvantage and done remarkably little to change the conduct of the country or countries being targeted.

A more effective approach imposes unilateral sanctions under the broad authority of the International Emergency Economic Powers Act (IEEPA), which may be initiated after a Presidential finding of an "unusual or extraordinary threat" against the United States. This is the authority most frequently used by presidents to freeze assets and it has proven useful in several cases. For example, it provided much of the leverage needed to win the release of U.S. hostages in Iran. Otherwise, unilateral U.S. sanctions are more effective to the extent that they are carefully directed against specific foreign companies involved in objectionable activities (e.g. those imposed against Chinese companies engaged in dangerous proliferation activities).

However, if there is one overriding lesson from 25 years of experience with sanctions, it is the crucial need for presidential waiver authority – specifically a "national interest waiver" – in any congressionally-mandated economic sanctions legislation. National interest waivers, which are invoked by acts of the president, give U.S. officials the flexibility needed to negotiate successfully with the many parties and interests that are inevitably affected by any unilateral sanctions regime.

This multi-tiered approach for the use of sanctions as an instrument of U.S. policy reflects first-hand experience with what works well and what is more problematic. Such experience, in turn, provides an historical context within which to gauge the impact and effectiveness of U.S. economic sanctions in general and the Iran-Libya Sanctions Act in particular. Among the more immediate reasons for an in-depth review of ILSA is that Congress has mandated a presidential report on the effectiveness of the law by June, 2004, which includes an invitation for the President to provide recommendations on whether the act should be terminated or modified. In the author's view, ILSA has outlived whatever usefulness it may once have had. It is a toothless tiger and attempting to add "teeth" will in any event not give the United States needed leverage because the world has changed considerably since ILSA was enacted in the mid-1990s. A more globalized world economy now makes it more difficult and more costly for the United States to act independently, as ILSA would have it do.

The sanctions provided for by ILSA have neither affected Iranian behavior nor deterred European and Japanese investment in Iran's energy sector, thereby harming U.S. business interests exclusively. Meanwhile, entirely apart from ILSA, the Bush administration has successfully encouraged the European Union to take a tougher stance on Iran's apparent attempts to acquire nuclear weapons. These efforts may have a strong positive effect now that Iran has signed the International Atomic Energy Agency's additional protocol, which allows for more intrusive inspections. In this light, the notion of using ILSA to sanction

European companies investing in Iran borders on the ludicrous, as it constitutes little more than a symbolic irritant to recent successful U.S.-EU cooperation to press Iran further on proliferation and other issues.

In marked contrast to U.S. unilateral sanctions on Iran and Libya, United Nations (UN) sanctions on Libya – combined with U.S. unilateral measures – seem to have had their desired effect. Libya met all of the UN's demands, which included a commitment to cease all forms of terrorist action and all assistance to terrorist groups. Indeed, by all accounts, Libya has proven its renunciation of terrorism through "concrete actions," as called for in UN Security Council Resolution 748. Furthermore, Libyan leader Mu'ammar Qadhafi decided, in December 2003, to abandon his country's nuclear, chemical and biological weapons programs, to halt attempts to extend the range of Libyan missiles and to allow UN inspections under the auspices of the International Atomic Energy Agency.[1]

As a result, ILSA's restrictions appear to be a cumbersome relic that stands in the way of opening a new chapter in U.S.-Libyan relations. Now that UN sanctions have been permanently lifted and with Libya apparently following through on its promise to end its WMD programs, ILSA's continuation in regard to Libya will likely do far more to isolate the United States and U.S. businesses than it will to isolate Qadhafi's regime. This suggests that even if the U.S. administration remains reluctant to move too quickly towards reopening formal relations with the Libyan government, it would be in the best interests of the United States for the president to recommend that Congress terminate ILSA with respect to Libya. Later, after Qadhafi has unmistakably demonstrated his commitment to fulfill his recent pledges, the full range of unilateral U.S. sanctions on Libya might be lifted. They will have served their purpose.

In the final analysis, sanctions must not be misunderstood as an end in themselves. They are a means to an end. ILSA has not achieved the ends for which it was designed. And neither ILSA itself, nor sanctions in general, can act as stand-alone policy. To treat them as such is a major strategic mistake.

[1] In this case, the 2003 military action against nearby Iraq – the ultimate sanction – also seems to have had an impact. Ultimately, however, it was the isolation of Libya, caused by both UN and U.S. sanctions, that prevented Qadhafi from modernizing the Libyan economy and so compelled him to forswear his difficult behavior. A similar combination of UN and U.S. sanctions helped to end the South African apartheid regime two decades earlier.

Do Economic Sanctions Work?

Lessons from ILSA & Other U.S. Sanctions Regimes

I. Recent Unilateral U.S. Sanctions: What Worked, What Did Not

In order to assess the effectiveness of the Iran-Libya Sanctions Act (ILSA) specifically, and, more generally, to elaborate the ways in which the United States can most successfully employ sanctions as an instrument of foreign policy, it is necessary to review the recent history of U.S. sanctions to determine which worked, which did not and which may have actually harmed U.S. interests. The United States has imposed sanctions for a variety of reasons and in a variety of ways over the past 25 years – with decidedly mixed results.

The Iran Hostage Crisis: Freezing Assets

In the 1960s and early 1970s, under its pro-western leader, Shah Muhammad Reza Pahlavi, Iran had become a valued ally of the United States. However, bilateral relations rapidly deteriorated during Iran's radical Islamic revolution (led by Ayatollah Khomeini), which culminated in the taking of hostages from the U.S. Embassy compound in early November, 1979.[2] The United States subsequently severed diplomatic relations with Iran and turned to economic sanctions as a way to pressure Iran's new clerical regime to release the hostages.

In Executive Order 12170, President Jimmy Carter made first use of the sweeping sanctions powers the U.S. Congress had granted to the president in its International Emergency Economic Powers Act (IEEPA)[3]. With this Executive Order, the president froze $12 billion dollars of Iranian assets in the United States and imposed a ban on U.S. imports of Iranian goods, effectively ending all commerce with, and travel to, Iran.

The assets frozen under Executive Order 12170 became critical leverage in the negotiation of the 1981 Algiers Accords and the subsequent freeing of the U.S. hostages. While many other factors, including international condemnation, doubtless helped to convince Iran's new Islamic revolutionary regime to release the 52 Americans after 444 days in captivity, it was

[2] At the time, I was President Carter's chief domestic advisor at the White House.

[3] 50 U.S.C. §1701-1706

indeed the leverage provided by the frozen assets that solidified the final deal. The fledgling Iranian regime was in desperate need of cash.

As part of the Algiers Accords, which unblocked Iranian assets and lifted the trade embargo, the United States established a U.S.-Iran Claims Tribunal at The Hague to help negotiate claims by both governments and to distribute the unfrozen Iranian assets. This body has worked well over the past 22 years, providing one of the few venues in which the United States and Iran can meet officially and resolve disputes without the harmful political rhetoric that has characterized much of their public relationship. The Algiers Accords culminated a successful use of unilateral sanctions by the U.S. government, even if some disputes remain over the return of specific assets under the Claims Tribunal.

The Soviet Invasion of Afghanistan: Punitive Sanctions

In response to the Soviet Union's invasion of Afghanistan in December 1979, President Carter imposed several major sanctions, including a ban on U.S. grain sales to the USSR and a boycott of the 1980 Summer Olympics in Moscow. Neither of these sanctions succeeded in meeting their objective of pressuring the Soviets to leave Afghanistan, and both had considerable counterproductive impacts.

Ban on Grain Sales

The grain embargo was a disaster. Its direct impact was minimal, and because it was not part of a multilateral effort, the Soviets were able to avoid any ill effect almost entirely. As the United States failed both to evaluate adequately the global grain market and to line up support for its initiative in advance, countries like Argentina substituted their grain for U.S. grain, mitigating the overall impact on the Soviet Union and harming U.S. agricultural interests. U.S. farmers were manifestly upset and an administration attempt to allay their anger by allowing the sale of the minimum amount of grain required under an agreement negotiated during the détente era did little more than to trigger a dock strike. Not surprisingly, shortly after the 1980 election, Ronald Reagan terminated the ban on grain sales, confirming that the sanctions had been ineffective and undermining other, on-going efforts to send a message of resolve to the Soviet Union.

Boycott of the 1980 Olympics

The Olympic boycott also proved fruitless, if not counterproductive. The United States was virtually alone in the boycott, denying U.S. athletes the opportunity to compete in events for which they had trained for years. This meant that, domestically, the boycott was a highly unpopular decision. President Carter did, however, take other, more popular and effective steps that eventually helped drive the Soviets out of Afghanistan. The United States substantially increased Soviet military losses by supplying arms, including Stinger missiles, to the anti-Soviet *Mujahedeen* fighters.[4] This series of events suggests, at the very least, that economic sanctions imposed by the United States alone are no panacea.

[4] Some of these Mujahedeen later became supporters of the radical Islamic Taliban. Then, in 2001, when the United States moved to oust the Taliban from Afghanistan, remnants of the Mujahedeen and others turned their U.S.-supplied Stinger missiles on U.S. aircraft.

Clinton and the Birth of ILSA: Sanctioning Foreign Companies

If the example of frozen Iranian assets demonstrates the potential for the successful use of unilateral sanctions – and that of the Soviet grain embargo the limits of such sanctions – then the case of the Iran-Libya Sanctions Act points out the potential for unilateral sanctions to have decidedly mixed results, if not a net negative impact on U.S. interests.

Congress passed ILSA in 1996 because of concerns over Iran's efforts to acquire weapons of mass destruction (WMD) and over its support for violent Palestinian groups, such as *Hezbollah*, which oppose the Middle East peace process. Late in legislative negotiations and without committee consideration, Senator Edward Kennedy (D-MA) added Libya to the bill, advocating for the interests of the 1988 Pan Am flight 103 bombing victims' families.

Legislators wanted to express a strong condemnation of Iranian and Libyan behavior, though they could not do so by banning U.S. trade, aid or investment in Iran and Libya as earlier Executive Orders and federal regulations had already done so. Therefore, Congress targeted foreign firms, hoping to discourage these from investing in the oil and gas sectors of Iran and Libya by imposing sanctions on those that do.[5]

About a year after ILSA's passage, Total, Gazprom, and Petronas – respectively French, Russian and Malaysian companies – announced their agreement with the Government of Iran to develop Iran's South Pars gas field. This triggered an investigation by the State Department, which soon revealed that the investment would likely come within the parameters of ILSA. Accordingly, the U.S. Congress pressured the Clinton administration to impose sanctions.

The prospect of the full application of ILSA provoked outrage from the European Union (EU) (especially Sir Leon Brittan, the European Commission's Trade Commissioner, and the governments of France and Germany). Sir Leon called ILSA "extra-territorial" – essentially an effort by the United States to control the international conduct of friendly foreign countries. At his initiative, the European Union soon passed a law barring European companies from complying with any investigation arising from ILSA or other "extra-territorial" legislation, including the Helms-Burton Act.

As a consequence of this burgeoning dispute, I was dispatched to Europe to negotiate with Sir Leon. At a private meeting with ILSA's chief sponsor in Congress, Senator Al D'Amato (R-NY), we reached an understanding that I was to play the role of "good cop" – holding out the carrot of a presidential waiver – while D'Amato and his colleagues would keep to their "tough cop" role by refusing to modify or to scrap the legislation itself.

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[5] The "menu" of sanctions options includes: denial of Export-Import Bank loans, credits or credit guarantees for U.S. exports to the sanctioned firm; denial of licenses for the U.S. export of military or militarily-useful technology to the sanctioned firm; denial of U.S. bank loans exceeding $10 million in one year to the sanctioned firm; if the sanctioned firm is a financial institution, a prohibition on that firm's service as a primary dealer in U.S. government bonds, and/or a prohibition on that firm's service as a repository for U.S. government funds; prohibition on U.S. government procurement from the sanctioned firm; and a restriction on imports from the sanctioned firm, in accordance with the International Emergency Economic Powers Act.

This "good cop/tough cop" routine worked. Using the waiver authority provided by Congress as leverage, I was able to further ILSA's goals while avoiding confrontation with our European allies over sanctions on their investors. We reached an agreement at the EU-U.S. Summit in London (May 1998), which was announced by Prime Minister Tony Blair and President Bill Clinton at the same time that the second Helms-Burton agreement was achieved with the European Union.[6]

Under the terms negotiated, the European Union agreed to tighten its export controls and dual use restrictions to make it more difficult for Iran to obtain products that might facilitate its weapons of mass destruction programs, and to cooperate closely with the United States on non-proliferation and counter-terrorism objectives. Russia put in place its first comprehensive export control program. The U.S. administration then waived sanctions against the Total, Gazprom and Petronas companies for their South Pars project.

There are, in fact, two waivers allowed under the law: a Section 4(c) waiver, which would immunize from the reach of ILSA all future investments by companies from any country that receives the waiver; and a Section 9(c) waiver, which could be granted on a project-by-project basis, if the Secretary of State were to determine that doing so would be in the national interest. The Clinton administration opted for the second, more limited waiver, which seemed to be both appropriate in light of the law and all the political traffic would bear at the time. We considered it essential to continue to monitor Iranian conduct, and we wanted to ensure that the European Union would faithfully follow its part of the agreement before we relaxed our regulatory controls.

Our choice of the limited waiver angered the European Union representatives, who believed that for each investment by a European company in Iranian oil and gas reserves, they would need to go through a separate set of difficult, time-consuming negotiations with the U.S. government. The U.S. response to this reaction – in the form of an announcement by Secretary of State Madeleine Albright, explaining the waiver in the South Pars case – constituted modest reassurance. Secretary Albright declared that if the European Union maintained a strengthened level of cooperation in the key areas of non-proliferation and counter-terrorism, "[we] would expect that a review of our national interests in future ILSA cases involving Iran similar to South Pars, involving exploration and production of Iranian oil and gas, would result in like decisions with regard to waivers for EU companies."[7] We subsequently made it clear to the Europeans that an "expectation" was neither a promise nor a guarantee of a future waiver and that each case would have to be reviewed in light of the statutory standard of national interest. Still, the message was clear. As such, the European Union representatives accepted the deal, grousing all the while that this "expectation" would apply only during the Clinton administration and thus would prove to be too short term. However, early in the term of the new Bush administration, officials publicly indicated that they would continue the Clinton administration's policy on this issue, which, to this day, they have done.

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[6] See below. Because of congressional inaction, the second Helms-Burton agreement never came into force.

[7] Toby Gati, Wynn Segall and J. Robert Joyce, "Russia and U.S. Sanctions Policy", *Russia Business Watch*, Winter, 1999. On the internet at: http://www.cdi.org/russia/johnson/3031.html

At around the same time as the United States was negotiating a waiver deal with the Europeans, a combination of U.S. pressure and the impact of the Asian financial crisis seem to have been enough to impel the Indonesian firm Bakrie not to proceed with the development of Iran's Balal oil field. Bakrie's actions delayed the investment plans of its Canadian partner, Bow Valley Energy, which then had to seek new partners to replace Bakrie and to provide the financial resources necessary to carry out the project. Thus, the early tests of ILSA yielded both failure and success with respect to its overall goal of deterring foreign investment in Iran's energy sector.

The 1996 Helms-Burton Act

Like ILSA, the Helms-Burton Act[8] seemed likely to produce mixed results at best, or at worst, to yield anger and subversion on the part of U.S. allies and trading partners. In the end, only the leverage provided by the Act's presidential waiver provision allowed me and my team of U.S. negotiators to accomplish the broad purpose of the act – consolidating international support for the United States' tough line on the government of Fidel Castro.

The Helms-Burton Act[9] came into being following the shoot-down of a "Brothers to the Rescue" plane by a Cuban MIG fighter over international waters between Miami and Havana. Despite initial strong objections from the Clinton administration, Congress passed Helms-Burton in 1996. This Act, like ILSA, was a secondary sanctions measure, or as the Europeans prefer to call it, a "unilateral, extra-territorial" U.S. action. Just as ILSA sought to punish foreign companies investing in the oil and gas sectors of Iran and Libya, the Helms-Burton Act provides for sanctions against foreign companies investing in illegally expropriated U.S. property in Cuba, allows lawsuits by the original owners of expropriated property and denies U.S. visas to the senior officials of companies that make such investments (and their families). This mainly affected companies building hotels and resort-related facilities. The Sharrett Corporation of Canada was sanctioned early on, when the son of the chairman, who wanted to study in the United States, was denied a visa, as were the senior officials of the company.

Similar sanctions loomed over the heads of European investors. The Clinton administration therefore found itself caught between domestic pressures from Congress (including, notably, members with large Cuban-American constituencies) to impose sanctions, and EU pressures meant to deter sanctions. I was personally ordered to find a way out of the bind. During several trips to Europe, Canada and Mexico, I explained that the Helms-Burton Act dealt only with investments in illegally expropriated property, which should be viewed as off limits in any event. This reasoning fell on deaf ears, however, and opposition reached a fever pitch. My colleagues and I confronted demonstrations in Canada, a raft of tomatoes thrown at us in Mexico City and a stone wall of resistance in Europe.

Fortunately, we had a springboard from which to jump. Congress had provided us with a bargaining chip in the form of presidential waiver authority to the lawsuit sections of the Act. The possibility of such a waiver allowed U.S. negotiators to bring a substantial "carrot"

[8] Sponsored by Senator Jesse Helms (R-NC) and Congressman Dan Burton (R-IN)

[9] Formally, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996; 22 U.S.C. §6021-6091.

to the table during complex negotiations in 1996, the result of which was agreement on a parallel set of actions. The European Union agreed to adopt a new Common Position on Cuba, taking a more public position opposing Fidel Castro's anti-democratic, anti-human rights activities. EU embassies in Havana duly increased their support of dissidents and began to condemn more vocally the arrests of opposition figures. In return, President Clinton agreed to waive, every six months, the Title III provision allowing lawsuits against firms violating the act, so long as the European Union would maintain its Common Position throughout each period. This arrangement garnered little opposition in the United States because we had succeeded in advancing the broad purposes of the Act. Indeed, Congress and the Cuban-American community lent their support (albeit grudgingly), while the European Union seemed satisfied as sanctions were not to be imposed.

Thanks to this diplomatic foundation, the U.S. administration was able to broaden its negotiations in 1998 to deal with, among other issues, the visa section of Helms-Burton, where Congress had not originally provided waiver authority. The European Union agreed to recognize officially the Castro regime's seizure of U.S. property as illegal, and further agreed not to extend governmental assistance to any European company investing in illegally confiscated property in Cuba, provided that the administration could persuade Congress to give the president waiver authority for the visa denial section of the act, as it had done for the section dealing with lawsuits. Predictably, Fidel Castro blasted the agreement and sharply criticized the European Union for kowtowing to the United States. But Castro's discord proved irrelevant as, in the end, the agreement was stillborn. Neither I nor my colleagues were ever able to persuade Senator Helms to provide the waiver authority needed to bring the second Helms-Burton agreement to life.[10]

Expanding the Scope of Sanctions

Though both ILSA and Helms-Burton continue to be visible and highly controversial, they make up only two pieces of the complicated sanctions puzzle during the Clinton years. Indeed, there was a cascade of sanctions legislation in the 1990s, of which ILSA was only a part. A list of countries that actively supported terrorism was created, and it included Iran, Iraq, North Korea, Sudan, Libya, Syria and Cuba. This led to economic sanctions being imposed on the designated countries, as well as to restrictions on U.S. imports, investment and travel. In 1996, Congress passed an amendment to the Sovereign Immunities Act, which permits lawsuits against governments on the terrorist list by victims of state-sponsored terrorism. This constituted a major step in denying foreign governments normal immunity from suit in U.S. courts for their non-commercial activities.

Sanctions legislation even cropped up on the state level. One example was the attempt by Massachusetts lawmakers to sanction Burma's repressive military regime by denying state procurement opportunities to companies investing in Burma. This law drew opposition from the Clinton administration and it was eventually struck down by the Supreme Court because it both impinged on the president's authority to make and direct foreign policy and clashed with the Commerce Clause of the Constitution.

[10] The Elian Gonzalez affair closed the door for good on any amendment to the Helms-Burton Act during the Clinton administration.

Similarly, the administration sought to avert various and sundry state and local sanctions against Swiss, German, Austrian and French companies during the sensitive negotiations on Holocaust restitution. These took the form of threats by state and local officials to withdraw billions of dollars of pension funds invested in Swiss banks and German companies which had employed slave labor during World War II; to deny Swiss banks lucrative underwriting business; to block the merger of Deutsche Bank with Bankers Trust; and to block the merger of two Swiss banks, UBS and SBC.[11]

To contain the potential damage from other sanctions initiatives, I worked with Congress both to provide presidential waiver authority for the Religious Persecution Act and to modify what became the Mack-Lautenberg amendment in 2000. Mack-Lautenberg sought to obtain recoveries for victims of Iranian and Cuban oppression – victims who had won judgments against Iran and Cuba in U.S. courts – while minimizing the use of the two countries' frozen assets.

All of these sanctions schemes catalyzed the U.S. business community to press the administration and Congress – led by Senator Richard Lugar (R-IN) – to consider, for the first time, the enormous costs (in lost opportunities) of the more than 100 economic sanctions laws on the books. Almost all of these denied U.S. companies export and investment opportunities around the world.

II. Dealing with Difficult Regimes: Iran and Libya

Iran Today

Iran presents an especially difficult challenge in the current sanctions debate. For while the United States has many legitimate concerns about the nature and behavior of Iran's clerical regime, there have been no United Nations (UN) sanctions on Iran, which would represent a broad international consensus and provide the United States with additional leverage. Existing unilateral U.S. sanctions, particularly the ILSA sanctions, have proven ineffectual.

In addition, today's Iran is arguably a more ambiguous adversary than the Iran that emerged from the 1979 Islamic revolution. Iran's first two national elections after 1996 produced both a president committed to domestic reform and a parliament (*Majlis*) widely viewed as "moderate." Under President Khatami, Iran made a conscious effort to establish better relations with European governments, particularly after the Mykonos trial found Iranian officials responsible for assassinations in Germany and led to a temporary recall of EU ambassadors from the country. The Iranian government has reached out to more moderate Gulf States and has mended fences with Saudi Arabia, its long-time rival. There has also been some curtailment of its terrorist activities in Europe and the Arab states. On the Iranian street, demonstrations showed that large segments of the population, particularly the country's young people, yearn for more freedom and openness, and for a more tolerant form of Islam than is currently afforded them under the rule of the radical Mullahs.

[11] I staunchly opposed these efforts as interfering with the president's ability to conduct foreign policy. However, I cannot deny that they helped to facilitate the multi-billion-dollar settlements we achieved.

But the Islamic fundamentalists, who continue to control the courts, the intelligence service and the military (and who remain committed to a profoundly anti-U.S. policy) have thwarted attempts at genuine reform. In January 2004, they took the step of precluding a large number of reform-minded members of Parliament – along with hundreds of other reform-minded candidates – from running in the February election. And thereafter the elections returned a new *Majlis* with a clear conservative majority. The radicals have therefore continued effectively to direct both Iran's domestic and foreign policies.

President Bush named Iran as part of the "Axis of Evil" in his 2002 State of the Union address and the State Department's most recent report on terrorist states cites Iran as the leading state sponsor of terrorism. Indeed, Iran's support for terrorists continues – for *Hezbollah* in Lebanon and for radical groups in the Palestinian territories bent, literally, on blowing up the fragile United States-EU-UN-Russia "Roadmap to Peace". The Bush administration has likewise accused Iran of harboring *al Qa'eda* terrorists and of fomenting violence against the U.S. presence in Iraq.

Iran also continues its problematic behavior with regard to nuclear weapons proliferation. Although the government has now signed – under pressure from the United States, the United Nations and the European Union – the necessary additional protocol to the Nuclear Non-Proliferation Treaty (NPT) which allows full-blown inspection of Iranian nuclear facilities by the International Atomic Energy Agency (IAEA), it remains uncertain whether this will lead to a permanent freezing or dismantlement of its fuel cycle programs satisfactory to the international community.

A Changed International Context for U.S.-Iranian Relations

Any assessment of how the United States might best pursue its goals vis-à-vis today's Iran needs to take into account both Iran's evolving domestic environment and the recent changes that have occurred in the international context. The Iraq war increased the threat Iran perceives from the United States, while improved U.S.-Russian ties constitute potential new leverage in the international struggle to prevent Iran from acquiring nuclear weapons.

Another potential source of leverage is the coincidence of interests between the United States and Europe in regard to many of these problems. The Bush administration is to be commended for successfully encouraging the European Union to take a tougher stance toward Iran's efforts to acquire WMD. Chris Patten, the External Relations Commissioner of the European Union, has taken the unusual and important position that the EU will not go forward with its trade and cooperation agreement (TCA) with Iran unless Iran fully cooperates with IAEA inspections. In this light, the notion of using ILSA or other extra-territorial legislation to sanction European companies investing in Iran appears to border on the ludicrous, as it would surely discourage the EU from cooperating with the United States to press Iran to come clean on (and ultimately to halt) its WMD programs.

Jeopardizing International Cooperation

EU cooperation in combating Iranian proliferation is just one obvious potential casualty of rigorous ILSA enforcement. For while the 1998 agreement with the EU on the South Pars waiver and the "expectation" of similar treatment in the future avoided an immediate crisis,

it also created new problems. For one, it left U.S. energy companies in the anomalous position of being more constrained than their European and Asian competitors. While they were barred by Executive Orders from investing in Iran, European energy companies could invest with impunity, knowing that a waiver would be likely if the EU should continue its cooperation on non-proliferation and counter-terrorism.

Indeed, the nature of ILSA is such that even though it (and the Helms-Burton Act) were passed with great fanfare, many in Congress have simply lost all desire to see them implemented because of the collateral damage that would be done to U.S. relations with allies in Europe and elsewhere, many of which are already raw on a range of other issues. Secondary sanctions such as ILSA breed a counter-productive culture of non-compliance, because the costs of implementation are perceived as higher than the benefits of enforcement. This phenomenon has effectively undermined the Act's *raison d'être*. There are, for example, outstanding cases of European investments undergoing State Department "investigation" for years, with no action. The same situation exists with the Helms-Burton Act, where European investments in Cuba have been on a sort of "no action" track over several years.

Libya's Terrorist Past and Potentially Peaceful Future

The History of Libyan Terrorism

The regime of Mu'ammar Qadhafi has had a long history of involvement with terrorism and terrorist organizations. Just after Qadhafi's "1 September Revolution", Libya may have been involved in the 1972 murder of Israeli athletes at the Munich Olympics and the 1973 assassination of the U.S. Ambassador to Sudan. Among the atrocities for which Libya has been proven directly or indirectly responsible are the 1986 LaBelle Discotheque bombing in Berlin; the 1986 terrorist attacks on the Rome and Vienna airports; the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland; and the 1989 downing of a UTA jet over Niger. Qadhafi's regime has also supported violent Palestinian rejectionist groups and the Irish Republican Army. These and others benefited from Libya-based training camps that reared terrorists for a generation.

Initial U.S. Responses

In response to Mu'ammar Qadhafi's incitement of (and support for) "anti-imperialist" terrorist violence, Libya was designated a state sponsor of terrorism in 1979. As a result, it was automatically subjected to a number of punitive sanctions, which have endured over the last two-and-a-half decades. These include controls on the sale of military and dual-use products, prohibition on bilateral U.S. assistance and mandatory U.S. opposition to the granting of loans or aid to Libya by international financial institutions.

In January 1986, following the December 1985 Libyan-supported terrorist attacks on the Rome and Vienna airports, President Reagan invoked the sweeping sanctions provided for under the International Emergency Economic Powers Act. These sanctions virtually ended U.S.-Libyan economic contacts by freezing Libyan assets in the United States and proscribing almost all U.S. exports to, and imports from, Libya. Furthermore, President

Reagan added a military component to the sanctions: the 1986 air strikes against Tripoli and around Benghazi, which included strikes on Qadhafi's own home.

International Action and Strengthened U.S. Resolve

Notwithstanding the litany of Libyan terrorist attacks in the mid-1980s, the countries of the European Union refused to follow the United States by imposing their own economic sanctions on Libya before Lockerbie. Only the linking of Libya to the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland and the 1989 downing of UTA flight 772 over Niger were able to catalyze international action. In early 1992 the UN Security Council passed a number of resolutions, including Resolution 748, which called upon Libya to turn over the Lockerbie bombing suspects and to forswear terrorism while threatening UN-mandated sanctions if Qadhafi's government were to fail to cooperate. By April 1992, the UN had sanctioned Libya with a ban on all air links and an end to arms sales, though it expressly indicated that sanctions would be lifted once Libya surrendered the Lockerbie suspects and ended its support for terrorism. Qadhafi's refusal to do so prompted the Security Council to pass Resolution 883 in November 1993, which tightened air restrictions, froze Libyan government assets abroad and banned certain oil technology and equipment exports to Libya.

In December 1995, the United States Congress went even further to attempt to coerce Libyan compliance with international demands. Senator Al D'Amato, then chairman of the Senate Banking Committee, introduced a bill to impose secondary sanctions on foreign companies investing in Iran's energy sector. Seizing the opportunity, Senator Edward Kennedy, working on behalf of the Pan Am 103 victims' families, added Libya to the legislation as a last-minute floor amendment, without any committee debate or input from the Clinton administration. ILSA was born.

In August 1996, Congress made another important move by passing the Antiterrorism and Effective Death Penalty Act. This bill not only prohibited all financial transactions with Libya and other state sponsors of terrorism, but it also revoked the sovereign immunity of these countries from lawsuits in U.S. courts. What followed was a wave of suits by victims of terrorism originating from Cuba, Iran, Iraq and Libya. It also led to a lengthy negotiation in 1999-2000 between Senators Connie Mack (R-FL) and Frank Lautenberg (D-NJ) and me, on behalf of the Clinton administration, which culminated in the 2000 Mack-Lautenberg legislation. This legislation allowed the partial use of frozen Cuban assets to satisfy large U.S. court judgments obtained by the families of the Brothers to the Rescue airmen, whose plane was shot down over international waters near Cuba in 1996. Mack-Lautenberg also permitted the use of U.S. Treasury funds to satisfy a spate of suits against Iran, subrogating the U.S. government to the rights of the victims to any restitution in possible future claims against Iran.[12]

[12] Following the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996, a raft of suits were brought against countries on the Terrorism List, many of which led to massive damage awards in U.S. courts. As Congress had created a right of action against countries on the Terrorism List without specifying how awards should be satisfied, lawyers for successful plaintiffs have sought the payment of judgments from the frozen assets of the terrorist attack's state-sponsor. In several of the cases involving Iran, this approach constitutes a direct violation of the 1981 Algiers Accord. But in all cases using the frozen assets of a state sponsor of terrorism to satisfy judgments in U.S. courts is bad policy, since the president needs full flexibility

Sanctions and Changing Libyan Behavior

The seven years since the enactment of ILSA have brought important changes in Libyan policy. Most recently, in December 2003, Libyan leader Mu'ammar Qadhafi startled the world by announcing the culmination of months of secret discussions with the British and U.S. governments. Libya would abandon its nuclear, chemical and biological weapons programs, halt attempts to extend the range of Libyan missiles and permit inspectors from the United States and the International Atomic Energy Agency access to all relevant facilities. Also in 2003, Qadhafi set up a $2.7 billion compensation fund for the families of the victims of the Pan Am 103 bombing. These and other recent developments suggest that the UN sanctions regime – combined with unilateral U.S. sanctions first imposed on Libya by the Reagan administration – did indeed have its desired effect.

Among the many factors that seem to have influenced Qadhafi's *volte-face* were the collapse of the Soviet Union and the ascendancy of the United States as the sole remaining superpower; the 1986 U.S. bombing raid on his home, which killed a member of his family; the world-wide shock of September 11th, to which he responded by being the first Arab leader to offer condolences to the United States; and perhaps even the U.S. military success in Iraq. However, the most significant factor seems to have been the leverage provided by UN-imposed, multilateral economic sanctions (including a debilitating international air travel ban), which followed the Pan Am 103 bombing. Libya was thus left an isolated, pariah state.

But to put the effect of sanctions in context, it should be noted that, as early as the late 1980s – years before the passage of ILSA and just before the imposition of UN sanctions – a significant change in the tone of Qadhafi's behavior had begun to emerge.[13] Libya called for private sector investment, mended relations with Egypt, withdrew troops from Chad and participated in the 1989 formation of the Maghreb Union. Qadhafi also indicated that he would end any sponsorship of radical groups.

By the late 1990s and early 2000s, Qadhafi had gone further toward restoring Libya's international credibility by closing the terrorist training camps, severing Libyan support for radical groups in the greater Middle East and making efforts to resolve regional conflicts in Africa. While he has provided support to such infamous tyrants as Robert Mugabe of Zimbabwe and Charles Taylor of Liberia, Qadhafi does seem genuinely to have abandoned the terrorism business. In its latest "Patterns of Global Terrorism" report, the State Department confirms as much.

In September of 2000, in a speech commemorating the anniversary of the 1969 Libyan revolution, Qadhafi indicated that he was ready to change his stripes entirely and integrate Libya into the West. As he put it, "Now is the era of economy, consumption, markets and investments. This is what unites people irrespective of language, religion and national

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in regard to such assets for broader foreign policy purposes. As alluded to above, the partial release of frozen funds led to the 1981 breakthrough with Iran that eventually secured the release of the U.S. hostages. Similarly, freeing up frozen Vietnamese funds helped encourage Vietnam's cooperation in providing information on U.S. soldiers missing in action.

[13] The range of changes in Qadhafi's behavior is documented in the excellent new book by Meghan L. O'Sullivan, *Shrewd Sanctions: Statecraft and State Sponsors of Terrorism.*

identities." His agreement to meet UN terms on the Lockerbie bombing and his December 2003 commitment to abandon Libya's WMD programs certainly seem to testify to the impact of Libya's isolation from the main stream of global economic development – isolation which has contributed to the parlous condition of the country's economy.

As Aristotle once argued, "one swallow does not make spring", and certainly no single speech or set of pledges, however dramatic, necessarily indicates a change of policy. But the evidence cited above, along with other discernible and significant actions, indicate that Qadhafi does indeed intend to pursue the changes he has announced with such fanfare.

Next Moves: Iran

Lessons from Libya, North Korea

While sanctions have their place – whether those of ILSA, the several Clinton-era Executive Orders or the 2000 Iran Non-Proliferation Act, which tightened controls on Iran's ability to acquire a WMD capability – there will be no movement in Iranian policy without a dialogue aimed at showcasing the benefits that would ensue from such movement. In this connection, Iranian leaders will certainly look to see if the United States makes good on its pledge to respond to Libya's abandonment of its WMD programs with improved relations and the removal of sanctions. U.S. moves recognizing positive changes in Libyan behavior could help counteract some of the damage done by President Bush's "Axis of Evil" reference in his January 2002 State of the Union Address, which, by lumping together three very different countries, gave raw meat to the Iranian mullahs who argue that any effort toward rapprochement with the United States is hopeless.

We might also take a page from the approach the Bush administration is using with North Korea, which features a multilateral umbrella erected by China, Japan and others that should eventually pave the way toward bilateral discussions between the United States and North Korea. In the case of Iran, the EU could facilitate movement by pursuing a dialogue on Iran's WMD intentions (which would include the United States) and by involving other countries with an important stake in the future direction of Iranian policy.[14] These could include regional powers such as Saudi Arabia or extra-regional actors, such as Japan, which is currently negotiating a major energy agreement with Iran. Over time, an expanded dialogue could address all of our mutual concerns and provide the United States the opportunity to lay out a program that carefully balances a phase-out of sanctions with concrete steps by Iran to respond to world concerns about its nuclear ambitions and support for terrorism.

For despite its problems, Iran is simply too important a country in the region to isolate, and U.S. sanctions efforts such as ILSA (unilateral in nature and with no international backing) have been ineffective. It is therefore time for a new set of coordinated initiatives.

[14] The EU has maintained normal diplomatic relations with, and economic ties to, Iran. Through its External Affairs Commissioner, Chris Patten and its High Representative, Javier Solana, the EU is aggressively testing the waters to determine Iran's sincerity, by threatening to suspend negotiations for a trade agreement unless Iran does indeed allow full scope IAEA inspections.

A New Policy Framework for New Times

Historically, U.S. bilateral relations with Iran have been fraught with prohibitive difficulties. However, the war against Iraq in the spring of 2003 provided an opportunity for subtle progress. Iran indicated that it was ready to work toward a thaw in the relationship by offering to assist any U.S. or Coalition military personnel whose aircraft should be downed in Iran. But this did not seem to produce any further positive action. Indeed, the U.S. government accused Iran (rightly, as soon became clear) of seeking to conceal illicit WMD programs and expressed suspicions that Iran was supporting anti-Coalition activities in Iraq.

Against this backdrop, and given that the unilateral U.S. sanctions on Iran have failed to achieve meaningful shifts in Iranian policy (unlike the multilateral sanctions regime imposed on Libya), the United States might consider a more flexible, two-pronged policy in Iran, aimed at: (1) isolating radicals and taking a tough stance on the issues of WMD and terrorist support, while (2) encouraging the positive democratic changes demanded by Iranian moderates, students and young people. In heretofore emphasizing only the first half of this formula, the United States has been portrayed as the main threat to Iran by its ruling radical clerics, and has given them a further argument to justify both their repressive domestic measures and their unwillingness to open an official dialogue with the U.S. government.

Regarding the first prong, the Bush administration has done a commendable job rallying European support for a firmer position against Iranian nuclear proliferation, as part of a generally more robust EU approach to WMD. But more needs to be done to stress to Russia that continued support for Iran's budding nuclear industry – which is decreasingly civilian in nature – is unacceptable.

Regarding the second prong, there has been no incentive visible to Iran's moderates (and moderate conservatives), which they might use to justify supporting a new Iranian approach toward the United States. Iran has neither been offered, nor have other U.S. adversaries yet received, carrots to go along with the sticks of U.S. sanctions. Especially in light of the renewed efforts of the European Union, it is time for the United States to offer a clear indication of the benefits that an end to Iranian support for terrorism and WMD proliferation would provide. We must face up to the fact that while our 1998 agreement with the European Union helped restrain potentially dangerous dual-use products from reaching Iran, it has not deterred European investment in Iran's oil and gas fields.

It is likewise counterproductive to address only those in Iran who publicly demonstrate against the clerical regime. This is both an undesirable and unsustainable policy, as it undercuts the moderates' standing within Iran. Under the leadership of President Clinton and Secretary of State Albright, there was an initial effort to respond to President Khatami's call for a "dialogue of civilizations" through cultural and sports exchanges. As the result of President Clinton's April 1999 Executive Order, some Iranian exports – like pistachios – were again permitted into the United States, and food and medicine were allowed to be exported to Iran (as well as to Libya and Sudan). And Secretary Albright called for developing a roadmap to normalization, though the Iranian leadership did not respond in kind.

Next Moves: Libya

Keeping Our Word, Keeping Qadhafi to His

The mid-2003 lifting of UN sanctions on Libya puts the United States back in the unilateralist position it was in before the early 1990s passage of Security Council Resolutions 731, 748 and 883. Together with the increasingly meaningless ILSA threat, there seems little to gain from continuing to impose unilateral sanctions, especially given the recent changes in Libyan behavior. Should Libya quickly and in good faith fulfill its promises to compensate the Pan Am 103 bombing victims' families, to abandon its WMD programs and to allow unrestricted UN inspection of all relevant facilities, it will be up to the U.S. government to respond in kind so as to demonstrate the benefits that can accrue to difficult regimes that forswear their difficult behavior.

Qadhafi is certainly saying all the right things and is just beginning to match words with actions. Libya negotiated the Pan Am 103 bombing settlement, conditioned on the lifting of both UN and U.S. sanctions (with families receiving $4 million each after the lifting of UN sanctions, and the balance of $6 million after U.S. sanctions are lifted *and* Libya is removed from the list of state sponsors of terrorism). Qadhafi has stated publicly that he wants a better relationship with the United States. Following Qadhafi's December 2003 announcement that Libya is prepared to abandon its WMD development programs and to open these to international inspection, President Bush stated that, should Libya follow through on its pledge, it "…will find an open path to better relations with the U.S. and other nations."

This series of events suggests the desirability of action with both clear objectives and reliable verification mechanisms in regard to Libya. Such action should include:

- Continuing to verify that Qadhafi is out of the terrorism business for good;
- Supporting the new inspection regime under the International Atomic Energy Agency and other appropriate agencies so that it might credibly verify – in view of the U.S. and other governments – that Libya is no longer in possession or pursuit of a WMD capability;
- Dissuading Libya from acting as a destructive force in the Middle East peace process or in African regional politics; and
- Reintegrating Libya into the world economy, as a constructive player.

In so doing, the United States should adopt a cautious – but clear – step-by-step approach to the lifting of its unilateral sanctions. It might, for example, lift travel restrictions and reopen diplomatic offices in Tripoli[15], in recognition of explicit actions by Libya toward fulfilling its terrorism and WMD-related promises. As soon as possible, the Bush administration should set out a clear vision of what it is prepared to do if and when Qadhafi meets specific goals. This will entail a thorough understanding on the part of the administration of what ultimately must be done at each step to fully remove each set of sanctions, including either

[15] These steps were taken in late February 2004.

permanent waivers or the termination of ILSA, so long as it remains on the books and in force vis-à-vis Libya.[16]

III. To Sanction or Not to Sanction?

A Multi-Tiered Approach to the Consideration of Sanctions

U.S. policymaking in regard to Iran and Libya is in many ways constrained by both the sanctions and regulations that are already on the books and the political processes that would be needed to remove them. To free future policymaking from similar constraints – and to maximize the effectiveness of the policy option or options eventually chosen – a newly institutionalized, multi-tiered approach to considering sanctions on difficult regimes is needed.

Gradually Toughening Diplomacy

To garner international cooperation and to minimize the potential for negative economic or political side-effects, U.S. policymakers ought always to exhaust the full range of traditional diplomatic steps before contemplating sanctions in order to achieve desired ends.

In July 1999, in testimony on sanctions before the Senate Foreign Relations Committee, I introduced a chart with an illustrative matrix of pre-sanctions options, ranging from "friendly" to "persuasive", "hostile" and ultimately, "coercive". At the initial end of the spectrum, the matrix offered friendly steps such as expanding an embassy or liberalizing visas and landing rights in order to gain foreign support for a particular U.S. policy or goal. Failing these, U.S. policymakers could consider persuasive steps – such as supporting senior officials' exchanges – in order to make our case more energetically and directly. The next set of steps would be more hostile and could include increasing aggressive broadcasts, restricting academic exchanges or canceling arms sales. And, as a last resort before contemplating sanctions (which some difficult regimes, including that of North Korea, view as tantamount to physical warfare) the United States might take coercive measures such as closing an embassy; withdrawing the U.S. ambassador; suspending visas, landing rights and/or trade agreements; entering into security arrangements with neighboring countries; or opposing loans to the country in question by international financial institutions.

Multilateral Sanctions Regimes

If and when economic sanctions are deemed necessary, multilateral sanctions supported by the United Nations are likely to be the most effective in producing desired outcomes. Multilateral sanctions send a stronger message to the target government, are more difficult to circumvent by shifting trade and procurement to third countries and impose fewer costs on U.S. agricultural and business interests, which are at least able to compete on a still-level playing field.

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[16] The most authoritative document dealing with this subject is Dr. Kenneth Katzman's *U.S.-Libyan Relations: An Analytic Compendium of U.S. Policies, Laws & Regulations*, which was published by the Atlantic Council in August 2003.

Multilateral sanctions also have a track record of success, from helping to end apartheid in South Africa to convincing Serbia to come to the bargaining table in Dayton. UN sanctions, including a worldwide aviation ban, did far more than ILSA or other U.S. unilateral sanctions alone to induce Libya to accept responsibility for the Pan Am 103 bombing, end its support for international terrorism and accept international inspection of its WMD programs. Furthermore, the case of Iraq demonstrates the effectiveness of a broad-based multinational sanctions regime. The combination of export controls, intrusive inspections and sanctions evidently made Saddam Hussein's pursuit of WMD even more difficult and costly for Iraq than the Bush administration had imagined before the war.

In any event, the alternative to multilateral sanctions – U.S. unilateral sanctions – have become less and less effective as the world economy has become more integrated and globalized. For while the United States is the largest single market in the world, it has a monopoly neither on purchasing power nor on the supply of vital technology, services and industrial products. Smaller countries can shift relatively unimportant exports and imports elsewhere without experiencing immediate negative impacts on their economies while countries not supporting U.S. sanctions happily fill the vacuum left by the cutoff of U.S. goods.

Soliciting Support for Unilateral Sanctions

Despite the theoretically compelling logic of multilateral sanctions, there will be many instances in which the United States cannot practically obtain UN or other multinational support for its policies. Many European governments – along with those of Japan, Canada and other major economic powers – have an aversion to economic sanctions. Whether these governments are sincerely convinced that engagement is a more effective means of changing negative behavior than are sanctions or whether they are unduly blinded by potential economic gain, U.S. policy cannot be held hostage to their recurrent unwillingness to impose economic sanctions.

In cases where the United States fails to rally support for an international sanctions regime, officials should move into a third phase of policymaking, in which they develop a strategy and plan for the imposition of unilateral sanctions. This phase would include careful cost-benefit analysis as well as U.S. efforts to educate world leaders and rally international public opinion in support of its initiatives.

Anytime Congress or the Executive Branch is considering unilateral sanctions, a formal cost-benefit analysis should be used to assess the burdens that these could impose on the United States itself. The absence of such analysis when President Carter invoked the Export Administration Act of 1979 to place a grain embargo on the Soviet Union led to these sanctions inflicting more economic damage on the United States than on the intended target. As a result the embargo was unsustainable.

Once cost-benefit analysis has revealed that unilateral sanctions will likely accomplish their goals with minimal negative impact on U.S. interests, the United States must work to cultivate international public opinion. If third countries believe the United States holds the "moral high ground" in sanctioning a specific regime – and if the chosen U.S. approach

avoids, to the greatest extent possible, causing harm to third country interests – these will have less incentive to try to undermine unilateral U.S. efforts by offering opportunistic political or economic lifelines to the targeted entity. Eventually, others might even decide to follow the U.S. lead, as the European Union has done with respect to Burma.

Tips for Going it Alone

Use Presidential Authority to Impose Sanctions and Grant Waivers

Unilateral sanctions can take many forms. With proper planning, and in the right circumstances, some forms of unilateral sanctions can indeed be effective. Those like ILSA and Helms-Burton have proved to be the least effective. By sanctioning companies from allied countries, they have offended our friends, thrown our bilateral relations into turmoil, put U.S. companies at a competitive disadvantage (especially when sanctions have been waived) and done remarkably little to change the conduct of the country or countries being targeted. A more effective approach imposes unilateral sanctions under the broad authority of the International Emergency Economic Powers Act, which may be initiated after a Presidential finding of an "unusual or extraordinary threat" against the United States. This is the authority most frequently used by presidents to freeze assets and it has proven useful in several cases.

As mentioned earlier, President Carter used it first as part of Executive Order 12170, freezing all Iranian assets in the United States following the taking of hostages from the U.S. Embassy. The asset freeze was pivotal in providing leverage for winning the hostages' eventual release. Since Jimmy Carter, several presidents have used the authority of IEEPA to issue Executive Orders to freeze assets and block economic transactions with countries that present an "unusual or extraordinary threat" under the terms of the Act.

President Reagan invoked IEEPA to further tighten the screws on economic activity with Libya. President Clinton invoked IEEPA to freeze over $250 million in Taliban assets. As part of the fight against terrorism, the George W. Bush administration's Patriot Act contains several provisions authorizing the freezing and forfeiture of the assets of terrorist organizations or of assets derived from, or intended to be used in, terrorist acts. Moreover, the Patriot Act amended IEEPA to provide the president with authority to confiscate property or block assets in aid of an investigation.

Specifically, President Bush has used IEEPA and the Patriot Act both to freeze the funds of terrorist organizations like *al-Qa'eda*, and to freeze Iraqi funds, which will now be used to help reconstruct the country. In 2003, the president also blocked the property of President Robert Mugabe of Zimbabwe, accusing him of, "…reducing a once promising nation with a bright future to a state of ruin, desolation and isolation."

Indeed, the genius of IEEPA is the broad discretion it grants to the president of the United States. And if there is one overriding lesson from my recent experience with sanctions, it is the crucial need for presidential discretion in the form of waiver authority – specifically "national interest" waivers – in any congressionally-initiated economic sanctions legislation.

It was this authority under Helms-Burton and ILSA that allowed us to advance the goals of the bills without harming our relations with our European allies.

Most recently (in June 2003) President Bush was able to demonstrate U.S. support for the then new Palestinian Prime Minister Mahmoud Abbas by using a national interest waiver to provide $20 million of U.S. economic assistance directly to the Palestinian Authority. This was a total break with the traditional U.S. approach of funneling all aid into the Palestinian territories through independent relief organizations. Without waiver authority, the president would have been unable to adjust to the new realities of the Middle East peace process and would have been stymied in his attempt to use U.S. aid to bolster the Road Map for Peace (though it is now in tatters just the same).

Looking into the future, presidential waiver authority could well prove to be the most useful tool for advancing U.S. interests vis-à-vis Iran, given the fact that ILSA has been reauthorized for five years by Congress. Faced with international insistence that it accept unfettered IAEA inspections, the Iranian government – through its Foreign Minister – has publicly called for a dialogue on this subject with the United States. We should grant this, especially if we can put all issues on the table. As part of this overall initiative, and to end the 25-year impasse with Iran, the U.S. administration could immediately indicate that, in regard to ILSA, it would move from the narrow, project-specific Section 9(c) waivers it used in the Total/Gazprom/Petronas deal in 1998 to broader, country-specific Section 4(c) waivers. This would both remove a bone of contention with the EU and send a signal to Iran of U.S. intentions to develop a more normal relationship. Some of the other U.S. unilateral sanctions on Iran would likely remain in place until the Iranian regime measurably drops its support for terrorism and verifiably abandons its nuclear weapons programs.

At the opposite end of the utility spectrum are congressionally-initiated sanctions measures that provide no flexibility to the president. I confronted this directly in 1998, when the government of India unexpectedly tested a nuclear weapon and Pakistan followed suit shortly thereafter. These tests were a significant set-back to the Clinton administration's anti-proliferation policy, and to its efforts to build a new and closer relationship with both countries – but particularly India, which, in the Cold War era, had maintained an icy posture towards the United States. In fact, President Clinton was planning a visit to India, which was put on hold.

Under the Glenn Amendment (after Senator John Glenn, D-OH) to the Arms Export Control Act[17], automatic economic sanctions applied a broad range of punishments to India and Pakistan for having tested nuclear devices. The Clinton administration had no flexibility and very little room to bargain, resulting in significant damage to U.S. business and diplomatic interests. In the end, Congress had to amend the law to provide the president with more negotiating room, though the genie was already out of the bottle with regard to the nuclear tests. The elbowroom was nevertheless indispensable in allowing us to put our relationships with both countries back on an even keel and to ensure that the two historic enemies, India and Pakistan, would not employ their nuclear weapons against each other. Even to this day, though many of the problems stemming from the 1998 nuclear tests

[17] Section 102(b)(2) of the Arms Export Control Act, 22 U.S.C. §2751 et seq.

continue to occupy U.S. policy, the capacity of the U.S. government to convince each side to place its nuclear devices in a holster would have been seriously impaired had the strictures of the Glenn Amendment not been modified.

This experience with India and Pakistan, as well as the creative use of presidential waiver authority in regard to ILSA and Helms-Burton, (which advanced the purposes of those laws while limiting the collateral damage to our relations with Europe), should serve as clear indications to Congress that any additional unilateral legislation – being in and of itself problematic in a globalized economy – must include broad presidential waiver authority. Only the president can nimbly balance all the factors that must be taken into account when applying economic sanctions.

Target Sanctions at Specific Companies, for Specific Activities

In their initial application, unilateral U.S. sanctions are most often effective to the extent that they are directed against particular companies involved in objectionable activities (rather than against a broad range of companies doing a broad range of commerce in the targeted country, as part of a secondary boycott). For example, there are various laws that empower a president to sanction companies or entities that contribute to the proliferation of WMD, including the Iran-Iraq Arms Non-Proliferation Act of 1992[18], the Nuclear Proliferation Prevention Act of 1994[19] and the Iran Non-Proliferation Act of 2002[20].

Recently, President Bush imposed economic sanctions against China North Industries Corporation, a Chinese state-owned enterprise, which exported sensitive missile technology to Iran. The sanctions have deprived China North Industries of the ability to export its products, which would have likely been worth more than $200 million over the next two years, to the United States. Furthermore, these sanctions have neither diminished U.S. private sector engagement with China, nor unduly harmed the interests of innocent Chinese citizens, nor, perhaps most significantly, caused the collateral economic and political damage that direct sanctions against the government of China would have caused. This is especially noteworthy at a time when the United States is seeking Chinese assistance on other important agenda items, such as the North Korean nuclear crisis.

Consider the Value of Symbolism

It is also important to consider those times when the presidential invocation of sanctions has more symbolic than practical impact. In August 2003, President Bush ordered the freezing of the assets of six top leaders of *Hamas*, a radical Palestinian group, and of five charities linked to the group that are based outside the United States. Although the actual economic effect of this sanction has been nil (because few, if any, of the applicable assets are located within the United States), it sent an important signal that the U.S. government does not distinguish between the military and civilian arms of *Hamas*. In turn, this signal put pressure on the European Union to eliminate its own distinction – which it recently did.

[18] Public Law 102-484, §1601-1608
[19] 22 U.S.C. §3201 et seq.
[20] Public Law 106-178

Similarly, Congress passed a law in July 2003 that bars all Burmese exports to the United States (worth about $356 million in 2002), freezes all Burmese government assets in the United States and codifies a policy of opposing new international loans and technical assistance to the country, in order to punish the ruling military junta that detained Nobel Peace Laureate Aung San Suu Kyi. Without international backing, these sanctions will have little direct negative impact on Burma, but neither will they harm U.S. interests to any appreciable degree – and they send a clear statement of displeasure with Burma's policies.

Centralize the Authority to Impose Sanctions

In marked contrast to innocuous, symbolic sanctions, the Massachusetts law mentioned earlier, which penalized companies doing business with Burma, is an example of the most counterproductive brand of bad sanctions laws – those imposed by states and localities using their procurement authority to attempt to make foreign policy.

In the case of Burma, there was already federal policy in place to deal with this brutal military dictatorship. I tried in vain to convince the lead sponsor of the Massachusetts law to hold off and give the federal policy a chance to work. I even jokingly referred to him in our internal discussions as the foreign minister of Massachusetts. But the law passed, and, after much debate and division within the Clinton administration – some at the White House approved of the Massachusetts law as a human rights measure and did not want to be seen as opposing it – we asked the U.S. Supreme Court to strike down the law. The Supreme Court did so. Similarly, in 2003, in American Insurance Association v. Garamendi, the U.S. Supreme Court struck down a California law threatening sanctions against foreign insurance companies that failed to publish lists of World War II era policyholders. However well intended the law might have been in regard to victims of the Holocaust, it was found to violate the foreign policy prerogatives of the president.

On the flipside, it can certainly be argued that state and local sanctions against companies investing in apartheid-era South Africa helped birth important U.S. national legislation on the subject. But, as a general, practical matter, state and local sanctions laws interfere with the authority of the president of the United States to shape foreign policy, and can also interfere with interstate commerce. They are bad policy.

IV. Conclusions for ILSA and Other Unilateral Sanctions

With the State Department's first report due out soon on several aspects of the effectiveness of ILSA and a congressionally-mandated presidential report on the overall effectiveness of the law to be submitted by June 2004, it is appropriate to take a hard look at how, and indeed whether, this legislation works. More broadly, one ought to examine the utility of U.S. economic sanctions as a foreign policy tool in a globalized world economy – one in which the United States no longer has a monopoly over any given product.

ILSA: Ineffective at Best, Counterproductive at Worst

The international context has changed considerably since ILSA was enacted in 1996. UN sanctions against Libya – in place since the 1988 bombing of Pam Am flight 103 over

Lockerbie, Scotland – were lifted permanently in mid-September 2003, after Libya met the Security Council's remaining requirements: finally accepting responsibility for the actions of Libyan agents in perpetrating the bombing and making a commitment to pay $2.7 billion in compensation to victims' families. Furthermore, Libya has announced a decision to terminate and dismantle its weapons of mass destruction programs. As for Iran, the country's nuclear and missile programs have advanced more rapidly than anticipated and its relationship with the United States and its allies has become further complicated by the war in Iraq and by charges that Iran may be harboring *al Qa'eda* terrorists. Other developments in the Middle East have likewise introduced new or exacerbated tensions into the U.S.-Iranian relationship.

As such, now more than ever, ILSA looks like an exhausted and toothless tiger. Despite President Clinton's issuance of Executive Order 12957 in March 1995 to bar any U.S. company from developing Iran's petrochemical industry – and a second Order in May of that year, which barred virtually all economic dealings with Iran – the litany of U.S. unilateral sanctions on Iran has neither affected Iranian behavior nor deterred European and Japanese investment in Iran's energy sector. Instead, our unilateral sanctions have prevented U.S. companies from pursuing lucrative business opportunities, thereby isolating only the United States. Attempting to add more teeth is not likely to yield additional leverage or to produce desired outcomes.

One must therefore conclude that this legislation has outlived whatever usefulness it may once have had and that its continuation is more likely than not to have a net negative effect on U.S. interests and policy goals. Entirely apart from ILSA, the Bush administration has successfully encouraged the European Union to take a tougher stance on Iran's apparent attempts to acquire nuclear weapons. These efforts have had a strong positive effect with Iran's signature of the International Atomic Energy Agency's additional protocol, which allows for more intrusive inspections. In this light, the notion of using ILSA to sanction European companies investing in Iran borders on the ludicrous, as it constitutes little more than a symbolic irritant to recent successful U.S.-EU cooperation to press Iran further on proliferation and other issues. ILSA has also outlived its usefulness in regard to Libya, as the recent breakthrough on WMD inspections demonstrates. Ideally, ILSA should go. There seems to be a growing consensus that the termination of ILSA with respect to Libya should follow international recognition that Qadhafi has indeed fulfilled his commitments to abandon the pursuit of WMD and to open all of the country's WMD-related facilities to inspection. With respect to Iran, however, ILSA's termination seems unlikely in the near-term. Therefore, at a minimum, the Bush administration should move from project-specific to country-specific waivers and legislators should plan to allow ILSA to die a natural death upon its expiration in 2006.[21]

Unilateral Sanctions: Potentially Useful, but Tough to Get Right

Generally speaking, economic sanctions have a major role in our foreign policy arsenal. If employed thoughtfully and combined with other foreign policy tools, sanctions can be

[21] ILSA will expire in 2006 unless it is specifically extended by Congress. ILSA was originally set to expire in 2001, but was extended for a further five years.

effective. And they must be, for we cannot (nor indeed should we) resort to military force whenever we wish to change the behavior of a regime or, in extreme cases, to change the regime itself.

Too often, however, sanctions are imposed to deal with problems of the moment – only to remain frozen in place long after they have demonstrated any usefulness. They are repeatedly used as a crutch to avoid taking harder (or less obvious) steps to achieve U.S. goals. They can also cause tension with our allies and diminish our standing in the world. Their costs at home and abroad are rarely considered comprehensively, and too often they have unintended negative consequences for innocent third parties.

Because the United States no longer commands a monopoly in any one product, because of the sensitivity of even our allies as to how sanctions are employed, because they impose real costs to the U.S. business community and because of their diminishing returns over time, unilateral sanctions can often be downright counterproductive. So, wherever possible, the United States should go through the painstaking work of trying to build a multinational coalition of countries to impose, or at least to back, economic sanctions.

This is not to say that economic sanctions can never constitute an effective complement to other methods of achieving specific U.S. foreign policy goals. Rather, it suggests that, to be given the best chance for success, sanctions must be part of an overall policy framework targeting a specific country, whether the policy goal is regime change or simply behavior modification. All too often, sanctions become an unproductive end in themselves, acting as an unsatisfactory substitute for broader policy decisions and initiatives. The Helms-Burton Act of 1996, for example, was another in a string of economic sanctions against Cuba following the initial economic boycott imposed by President Kennedy in 1961, 35 years earlier. Yet Castro remains in power, as brutal a dictator as ever, confronting his 9th U.S. president. Castro hangs on even with his Soviet lifeline long-since cut and U.S. sanctions in place for over four decades.

In essence, the lesson of ILSA and Helms-Burton (among others) is that sanctions must not be understood as an end in themselves, but rather as a means to help change conduct or, ultimately, an imminently threatening regime. To be effective they must, at the very least, be joined with other policy measures and provide for presidential discretion authority. They are not stand-alone policy and to treat them as such is a major strategic mistake.

About the Author

Stuart E. Eizenstat was sworn into office as Deputy Secretary of the Treasury on July 19, 1999. As Deputy Secretary, Mr. Eizenstat was the second-highest ranking official at the Treasury Department. While serving as Deputy Secretary of the Treasury, Mr. Eizenstat continued his work as Special Envoy for Property Claims in Central and Eastern Europe, a position he had held since 1995. He likewise retained his role of Special Representative of the President for Holocaust-era issues.

On June 6, 1997, Stuart E. Eizenstat was sworn in as Under Secretary of State for Economic, Business and Agricultural Affairs and served until July 16, 1999. The Under Secretary serves as the senior economic official at the Department of State. He advises the Secretary on international economic policy and leads the work of the Department on issues ranging from trade and aviation negotiations to bilateral relations with major partners such as Japan and the European Union.

From April 5, 1996 to June 6, 1997, Ambassador Eizenstat was Under Secretary of Commerce for International Trade. At Commerce, Under Secretary, Mr. Eizenstat led the U.S. Department of Commerce's International Trade Administration, which has responsibility for promoting U.S. exports, assisting U.S. business efforts abroad, enforcing laws against unfair trade practices and developing trade policy.

Mr. Eizenstat served as the U.S. Ambassador to the European Union. At the time of his nomination, he was Partner and Vice Chairman of the law firm, and Chairman of the Washington office of, Powell, Goldstein, Frazer & Murphy, where he had been since 1981. He concurrently served as Adjunct Lecturer at the John F. Kennedy School of Government at Harvard University, Cambridge, Massachusetts, and was a Guest Scholar at the Brookings Institution in Washington.

Mr. Eizenstat has recently been appointed co-chairman of the European-American Business Council. He is a partner at the law firm Covington & Burling, heading the firm's international practice. His work at Covington focuses on international business transactions and regulations and on resolving international trade problems.

Stuart Eizenstat was born in Chicago in 1943. He is an honors graduate in political science of the University of North Carolina at Chapel Hill and received his law degree from Harvard University in 1967. His distinguished career in government began during his university years, when he spent three summers (1963, 1964 and 1966) working as an intern for both the legislative and the executive branches of the Federal Government. In 1967-1968, he served as a staff aide in the Johnson White House and in 1968 as Research Director for Vice President Hubert Humphrey's Presidential Campaign. From 1977 to 1981 he was President Carter's chief domestic policy advisor and Executive Director of the White House domestic policy staff.

He has received numerous awards and honorary degrees throughout his years in public service. In 2003 he was selected as the Great Negotiator of the Year by the Harvard Program on Negotiation. In 2001 he received both the Treasury Department's highest award, the Alexander Hamilton Award, and the Knight Commander's Cross (Badge and Star) of the Order of Merit of the Federal Republic of Germany. From the French government, he received the Legion of Honor for his Holocaust restitution negotiations.[22] In 1999 he received from Secretary of State Madeline Albright the Department's Distinguished Service Award along with an award from the Israeli government. In 1996, at the conclusion of his service as U.S. Ambassador to the European Union, Ambassador Eizenstat received from Secretary of State Warren Christopher the highest award which can be given to a non-career Ambassador, the Foreign Affairs Award for Public Service. Some of the other awards he has received include: the Export Enhancement Award, U.S. Coalition for Employment Through Exports, 1993; Israel Bond Award, 1992; Jewish Leadership Award, the Academy of Jewish Religion, 1989; Man of the Year Award from the National Capital Association of B'nai B'rith Lodges, 1982; U.S. Department of Labor Award for Special Contributions to Youth Employment, 1980; Award from the Washington International Business Council, 1978; and Young Man of the Year Award for Leadership, American Association for Jewish Education, 1973-74.

Ambassador Eizenstat is married to Frances Carol Eizenstat and is the father of two sons – Jay and Brian – and the grandfather of four grandchildren.

Stuart Eizenstat is a Director of the Atlantic Council of the United States

[22] Ambassador Eizenstat provides a thorough account of these negotiations in *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, which was published by PublicAffairs in January 2003.

Notes

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