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END RUN ON SANCTIONS (A CASE STUDY ON CONTEMPORARY ENERGY
INVESTMENT IN IRAN)

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* J.D., The University of Texas at Austin School of Law, 1999; B.A., Virginia Military Institute, 1992. For those who have stood watch in the Desert Sands: may clear understanding defeat poor policy.

SUMMARY:

... Though the risk of sanctions enforcement may be difficult to quantify, it must be taken into account in business transactions and contract provisions. ... The agency primarily responsible for sanctions enforcement is the Office of Foreign Assets Control (OFAC). ... They have made consistent sanctions enforcement impossible. ... Termination clauses may be particularly useful in the event of sanctions enforcement. ... A company threatened by sanctions enforcement could simply assign its contractual obligations to a new party. ... Joint Management and Participation Clauses: Not surprisingly, Iran has sought domestic content clauses that benefit development and training in its energy sector. ... These actions reduce the long-term costs of unilateral sanctions while minimizing the chances of sanctions enforcement. ... In light of these factors, unilateral sanctions enforcement will become dependent more on political considerations than legal determinations. ... This Article demonstrates that the risks of sanctions enforcement must be

factored into any Iranian investment decision. ... It is evident that current corporate strategies are already reducing the political risk of unilateral sanctions enforcement and are ultimately undermining sanctions effectiveness. ...

TEXT:

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"This is where you are going to make big bucks." ¹

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I. Introduction

Another Haboob is kicking up dust in Iran though this time it is not the meteorological phenomenon partly responsible for America's rescue debacle of 1980. ² Rather, it is the winds of political change. For almost two decades, global politics have locked U.S. energy investors out of the Iranian market. ³ Now, with the spotlight on Iranian President Khatami's reform movement, U.S. sanctions appear to be the only obstacle. ⁴ Despite conservative crackdowns and political instability, ⁵ Iran has reopened the door to some of the world's most lucrative prospects for big oil [*265] businesses. ⁶ And, they want in.

In 1995 Conoco representatives outbid competitors for the first American-Iranian energy agreement since Washington severed relations with Tehran in 1980. ⁷ This contract, estimated at a value of over \$ 1 billion in U.S. dollars (USD), served as a harbinger of future Iranian multi-million dollar foreign direct investment offers. ⁸ Paradoxically, it shocked the Clinton Administration. ⁹ Given Iran's pariah status as a state-sponsor of terrorism, ¹⁰ the President of the United States quickly declared the Conoco's actions "inconsistent" with American foreign policy. ¹¹ Shortly thereafter, both the executive and legislative branches tightened prohibitions on Iranian business transactions. ¹² These strictures remain the primary hurdle to entry into the Iranian market.

This Article reexamines Iranian sanctions. It takes a pragmatic approach by combining an overview of the Iranian natural resource market with analysis of the structure of sanctions and their legal impact on Western energy investments. Although previous scholarship has touched on

the viability of unilateral sanctions under international law,¹³ few have scrutinized the actual contract developments that have occurred since U.S.-Iranian sanctions were implemented.¹⁴ In contrast, this Article serves to benefit businessmen, lawyers, and policymakers alike by highlighting the [*266] domestic political risk associated with sanctions.¹⁵

Domestic political risk presents a difficult and unpredictable challenge for energy companies seeking to enter uncertain markets. Though the risk of sanctions enforcement may be difficult to quantify, it must be taken into account in business transactions and contract provisions. Indeed, many of today's multi-national corporations (MNC's) are utilizing groundbreaking financial strategies in order to maintain a competitive edge in the Iranian market. These strategies may not be openly discussed in business literature or readily apparent in the news reports, but their careful evaluation ultimately reveals the ineffectiveness of unilateral sanctions as a policy tool.

II. Current U.S. Posture Towards Investment in Iran

"Washington's view of the Middle East is a distorted one . . . "¹⁶

The U.S. government has maintained a declared state-of-emergency with Iran for over twenty years.¹⁷ Since November 4, 1979 when Iranian students overran the U.S. embassy in Tehran, taking 63 American citizens hostage in a crisis that lasted 444 days, America's primary response to a declared emergency has been through economic sanctions.¹⁸ Even when Iranian sanctions relief has appeared possible, further regional tensions have sidetracked the normalization of relations.¹⁹ One crisis has followed [*267] another, and the renewed import embargo established by the Reagan Administration during the Iran-Iraq war has resulted in a regulatory system that continues to have negative consequences for international businesses today.²⁰

The cornerstone of the modern day Iranian sanctions regime rests in President Carter's Executive Order 12,170.²¹ Since its implementation the United States has taken virtually no steps towards reestablishing economic or diplomatic relations with Iran.²² Policymakers proffer a number of reasons for maintaining a hard-line policy.²³ The most frequently cited reasons are Iran's

continued pursuit of weapons of mass destruction (WMD) and its sponsorship of international terrorism.²⁴ On these bases, the Clinton Administration has branded its policy in the region with the term Dual Containment.²⁵

Dual Containment has its roots in policies from the Former Soviet era.²⁶ It is designed to contain potential Iranian and Iraqi aggression in efforts similar to relations with the former U.S.S.R. The intended purpose of this policy is to promote "stability and peaceful change" by handling both Iran and Iraq as hostile states.²⁷ Subsequently, this policy relies on economic sanctions as a primary means of preventing Iran from acquiring [*268] the financial resources necessary to sustain international aggression.²⁸ Although the United States has repeatedly relied on sanctions since Colonial times,²⁹ the effectiveness of today's unilateral sanctions is hotly contested.³⁰

Regardless of their overall effectiveness, sanctions have undoubtedly taken a bite out of international petroleum investments.³¹ They exist as more than just a speed bump in business planning. Though vocal critics and foreign legislation have lessened the sting, few U.S. citizens realize the dramatic changes occurring in the Iranian market.³² Sanctions rhetoric has had a strong impact on public perceptions and has overshadowed the announcement by Iran's Foreign Minister Kamal Kharazi that the Iranian government posits no obstacles to U.S. investments in Iran.³³

III. Emerging Iranian Investment Climate

"There is no obstacle to U.S. oil companies participating in development projects in Iran."³⁴

Iran plays a critical role as a resource base for the growing demand of Middle Eastern energy supplies.³⁵ It is the second largest oil producer among Oil Producing Export Countries (OPEC) and it maintains the second largest natural gas reserves behind Russia.³⁶ Though these factors help contribute to the pressure lobbyists place on Capitol Hill, it is not likely that sanctions will soon be lifted. Much like the past, political [*269] difficulties plague present day Iranian energy investments.³⁷

Iranian religious and cultural differences have posed the primary hurdles to international business investments since Englishman William Knox D'Arcy won his concession from Shah Muzaffar al-Din in 1901.³⁸ With a cultural base uniquely distinct from its Arab neighbors,³⁹ Iran appears a strange and unfamiliar country for most Westerners.⁴⁰ This differing social structure has promulgated Iran's nationalist tendencies.⁴¹ It has also led to political misunderstandings, regional tensions, and a historical suspicion of foreigners.⁴² The general perception in America is that Iran is a hostile and closed market.⁴³

Power struggles over Iran's geo-strategic location and its natural resources further taint Iran's less-than-favorable market reputation.⁴⁴ European imperialism and Cold-War has led to Iranian mistrust for Western governments.⁴⁵ This mistrust sparked two events that isolated Iran from the world community: the Iranian nationalization of foreign oil assets in 1951 and the Iranian Revolution of 1979.⁴⁶ Since then, the Iranian [*270] energy sector has been largely devoid of foreign investors.⁴⁷

The geo-political situation appears different today. Though Iran maintains a certain amount of apprehension regarding Western policies, (particularly over measures such as recent U.S. executive and legislative proposals to overthrow Iranian and Iraqi regimes),⁴⁸ present day Iran reflects strong undercurrents of pluralism.⁴⁹ In May 1997, 20 million of 30 million voters, most under the age of 30, elected a moderate to office-President Mohammad Khatami.⁵⁰ Considered to be an anti-establishment candidate, Khatami is forging new change.⁵¹ He has placed emphasis on promoting peace and stability through economic development and social liberalization.⁵²

Under Khatami's leadership, Iran has expanded foreign investment offers and created newfound political and economic ties with neighboring States.⁵³ Although a bulwark of religious fundamentalism remains, Iran's [*271] social climate is changing dramatically.⁵⁴ The most recent local council elections of February 1999 reaffirm the popularity of Khatami's reforms.⁵⁵ The Iranian youth, removed from the revolution of a previous generation, are seeking both economic and societal freedom.⁵⁶

Like the majority of its Gulf State neighbors, Iran now faces a host of modern economic problems.⁵⁷ Rising population trends, declining oil prices, increasing costs of urbanization, and an aging petroleum production infrastructure are forcing these countries to slowly adopt more moderate economic policies.⁵⁸ At the top of their agenda is cautious privatization and efforts to attract increased foreign direct investment.⁵⁹ These measures are vital to stimulating competition and higher economic growth.⁶⁰

European and Asian governments recognize Iran's economic importance.⁶¹ They have reconciled previous differences and responded with cooperative if not amicable relations.⁶² Internal and external economic forces are now pushing Iran towards increased interdependence in globalized financial markets.⁶³ Its role in recent OPEC cuts highlights this fact.⁶⁴ As the emerging economic interdependence between Asia, [*272] Europe, and the Middle East stokes international energy competition,⁶⁵ businesses have again turned their eyes to Iran's low production costs and its ample petroleum supplies.⁶⁶ Oil majors are currently clambering over each other for unobstructed access into the Persian and Caspian oil environs.⁶⁷ Analysts predict that the Middle East will continue to be the "strategic prize" into the new millenium.⁶⁸

IV. The Persian and Caspian Investment Environs

"Victory will belong to the people who are sitting on waves of oil."⁶⁹

A. Iranian Petroleum Sector

Due to its isolation, Iran's energy market remains largely untapped.⁷⁰ As the second largest producer in OPEC, Iran is documented as having over 90 billion barrels in oil reserves.⁷¹ With an oil production cost among the lowest in the world-approximately \$ 0.60 per barrel-Iran is a prime target for increased production during periods of plummeting oil prices.⁷² Such low production costs, combined with nine percent of the world's oil reserves,⁷³ contributes to Iran's status as a major supplier of crude to the [*273] global market.⁷⁴ Prior to the tightening of U.S. sanctions

in 1995, American companies annually purchased in excess of \$ 4 billion USD of Iranian crude.⁷⁵

Iran's petroleum infrastructure is, however, desperately in need of repair.⁷⁶ At its peak production, prior to the Fall of the Shah, Iran produced an impressive 6 million barrels of oil per day (m/b/d).⁷⁷ By comparison, Iran's current oil infrastructure has an estimated sustainability of only 3.6 m/b/d.⁷⁸ Iran is seeking to raise this production level to 4.5 m/b/d by the year 2000, yet it requires significant development to do so.⁷⁹

With the threat of overproduction and another possible drop in oil prices, Iran has no choice but to improve its production capabilities or suffer further export losses.⁸⁰ Though cheap production outlays put Iran at a significant advantage over higher cost production locales (e.g., the North Sea), a struggling economy and increased domestic consumption prevent it from exploiting this advantage.⁸¹ Experts posit that Iran requires approximately \$ 30 billion in USD to revitalize its oil and gas industries in the coming decade.⁸²

B. Iranian Natural Gas Sector

Due to this century's focus on oil production, Iran's natural gas resources have largely been neglected.⁸³ Although Iran is estimated at having over 735 trillion cubic feet (t/c/f) in natural gas reserves,⁸⁴ these reserves require massive development.⁸⁵ Significant capital expenditures [*274] and technological improvements could help Iran position itself as a primary provider of liquefied petroleum gas (LPG) to countries such as Japan.⁸⁶ But the successful exploration and production of these resources demands foreign expertise. For this reason, it is not surprising that Iran has placed emphasis on natural gas development in its most recent energy offers.⁸⁷

C. Caspian Sea Development

In addition to its territorial petroleum and gas reserves, Iran complements its energy resources

with access to those in the Caspian Sea.⁸⁸ The Caspian region is frequently viewed as the next great oil market after the North Sea.⁸⁹ Though an accurate total is not available, experts have inflated Caspian oil reserve estimates to as high as 100 billion barrels.⁹⁰ Proven oil reserves are more reasonably assessed at 16-32 billion barrels.⁹¹

As a border state to the Caspian Sea, Iran offers a prime route for marketing Caspian oil in the Persian Gulf.⁹² Naturally it is seeking increased participation in Caspian Sea exploration.⁹³ The Caspian Border States- (Turkmenistan, Azerbaijan, Georgia, Russia, and Iran)-are still at odds, however, over how these resources will be shared.⁹⁴

The peaceful development of Caspian resources is considered vital to the stability of Former Soviet States.⁹⁵ It is a subject of worldwide interest [*275] for both governments and multinational corporations.⁹⁶ Two models of development are frequently deliberated.⁹⁷ These include a territorial sea model, where each state would control the reserves in its own sector, and a lake model, where the reserves would be shared by all states on a percentage basis.⁹⁸ American sanctions policies will affect corporate investments differently depending on which contract model is used.⁹⁹

If the border states agree to a lake model for some or all of the exploration and development initiatives, the U.S. government is likely to consider any regional agreement with an Iranian partnership arrangement subject to U.S. sanctions.¹⁰⁰ Comparatively, the sea model will allow corporations to avoid sanctions by negotiating with those separate governmental entities investing in geographical projects that exclude Iranian participation.¹⁰¹ In either case, sanctions will have a critical impact on American business ventures as well as Iranian energy resource development.

D. Geo-Strategic Factors of the Iranian Market

Sitting at the crossroads to Asia, Iran is in the perfect position to market both Caspian Sea and Persian energy resources.¹⁰² Despite the ruggedness of its terrain, Iran provides the shortest and

arguably most advantageous route for transporting oil and gas from the Caspian to a well developed market in the Middle East. ¹⁰³ Improvements in its oil infrastructure could provide countries with increased demands (e.g., India and Pakistan) with direct access to vital energy supplies. ¹⁰⁴

The benefit of developing multiple avenues for marketing energy resources is often cited. ¹⁰⁵ Few are able to accentuate the positive, however, under the shadow cast by U.S. sanctions. ¹⁰⁶ While Western oil consortia currently plan pipeline developments from Turkmenistan to Turkey, parochial governmental interests preclude serious consideration of a pipeline in Iran. ¹⁰⁷ Economic pressures will certainly increase the [*276] probability of such projects. ¹⁰⁸ Moreover, the development of Iranian pipeline technology will also demand large amounts of foreign investment and expertise. ¹⁰⁹

E. Current Investment Outlook

President Khatami and his predecessor President Rafsanjani each recognized Iran's need for foreign direct investment. ¹¹⁰ In an effort to improve Iran's economy, these administrations have sought to wean Iran from dependence on oil exports by exploring new markets. ¹¹¹ In fact, Iran is now considered to have the most ambitious petrochemical expansion program in the Middle East. ¹¹² Its resource development projects are, however, still subject to conservative scrutiny.

Articles 44 and 81 of the Iranian Constitution place all mineral resources under state control and prevent Iran from divesting its natural resources to non-nationals: The granting of concessions to foreigners for the formation of companies or institutions for commercial, industrial, and agricultural purposes, or for the extraction of minerals, is absolutely forbidden. ¹¹³

Due to these constitutional restraints, Iranian energy offers require the support of its religious parliament-the Majlis. ¹¹⁴ The Majlis must pass provisions allowing for limited foreign investments prior to mineral resource contracts. ¹¹⁵ In 1991, the Majlis approved measures to open a limited number of contracts to foreign investors. ¹¹⁶

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With the Majlis approval, Iran initially placed eleven offers up for bid.¹¹⁷ As of March 1999, a total of 43 Iranian offers were on the table.¹¹⁸ These offers indicate Iran's willingness to work closer with foreign companies in resource development.¹¹⁹ Though the most lucrative investment opportunities are not yet for bid,¹²⁰ Iran is having much success in attracting foreign interest.¹²¹ Its recent "advertising campaigns" evince strong desires to have U.S. sanctions lifted.¹²²

V. Overview of U.S.-Iranian Sanctions

"We are probably stuck until 2001" ¹²³

A. Sanctions Authority

The underlying authority for U.S.-Iranian trade sanctions inheres to the executive power to regulate foreign affairs and congressional authority to regulate commerce.¹²⁴ Although critics question the extraterritorial application of this authority,¹²⁵ stateside power to issue sanctions is firmly rooted in U.S. judicial decisions.¹²⁶ The result is a two-tier regulatory regime incorporating executive orders and congressional acts with little [*278] judicial interference.

Over the last few years the President and Congress have contributed to the complexity of the Iranian sanctions regime.¹²⁷ The President, under political pressure from Congress and lobbying groups, tightened Iranian sanctions on U.S. companies by exercising authority granted him under the International Emergency Economic Powers Act (IEEPA), [50 U.S.C. § 1701](#), et. seq., and the National Emergency Act (NEA), [50 U.S.C. § 1601](#), et. seq.¹²⁸ Additionally, Congress, intent on applying sanctions abroad, issued its own statutory prohibitions through Public Law 104-172, the Iran-Libya Sanctions Act (ILSA) of 1996.¹²⁹

B. Executive Orders and Associated Implementing Provisions

Under the IEEPA and NEA, the President can implement trade regulations provided the President makes a declaration of an "unusual and extraordinary threat" and periodically consults with Congress on the issue.¹³⁰ In 1995 and 1996, President Clinton exercised this authority, strengthening and clarifying Iranian sanctions policies with Executive Orders 12,957, 12,959, and 13,059.¹³¹ These orders established regulatory provisions in the Iranian Transactions Regulations (ITR) 31 C.F.R. § 560, supplementing those already outlined in the Iranian Asset Control Regulations (IACR), 31 C.F.R § 535.¹³² Since the Clinton Administration has maintained the declared emergency with Iran,¹³³ these IEEPA prohibitions continue to regulate "foreign trade that involves any person or any property subject to the jurisdiction of the United States."¹³⁴

Violations of IEEPA regulations are subject to congressionally mandated civil and criminal penalties.¹³⁵ For a major multi-national corporation, the \$ 11,000 strict liability civil penalty encapsulated in [50 \[*279\] U.S.C. § 1705\(a\)](#) is peanuts compared to a billion-dollar contract in the Iranian energy sector.¹³⁶ However, the criminal penalty outlined in [50 U.S.C. § 1705\(b\)](#) negates the practicality of a simple cost-benefit investment analysis.¹³⁷ This code section provides a significant deterrent to any "officer, director, or agent of any corporation who knowingly participates in such a violation."¹³⁸ It does so by imposing a fine of up to \$ 50,000 and/or up to ten years imprisonment.¹³⁹ Furthermore, if additional criminal charges are present, the higher of the instituted penalties controls.¹⁴⁰ Few corporate executives are likely to gamble with sanctions when their own careers are at stake. As such, multi-national companies are trading lightly around these prohibitions.

The agency primarily responsible for sanctions enforcement is the Office of Foreign Assets Control (OFAC).¹⁴¹ OFAC is a branch of the Department of Treasury. It publishes numerous supplementary documents illuminating federal interpretations of the sanctions regime.¹⁴² When read in conjunction with 31 C.F.R. §§ 535, 560, OFAC publications provide few exceptions to the prohibition on trade with Iran. A corporation's primary means of avoiding direct prohibitions is to file a request for an export waiver license.¹⁴³ The granting of such a license and the enforcement of sanctions violations is highly political, however, because OFAC receives guidance from both the Executive Branch and the U.S. Department of State.¹⁴⁴

Aside from specific case-by-case OFAC licensing approvals, virtually all U.S. trade in the Iranian petroleum sector is prohibited.¹⁴⁵ Generally, goods, technology, and services can not be exported, re-exported, sold, or supplied directly or indirectly from the United States or by a U.S. citizen to Iran or the Government of Iran.¹⁴⁶ Additionally, U.S. persons, including foreign branches of U.S. banks and trading companies, are prohibited from [*280] engaging in any transactions, including purchase, sale, transportation, swap, financing, or brokering transactions, related to goods or services of Iran.¹⁴⁷

As interpreted, few loopholes exist. The Iranian sanctions regulations place a significant damper on the ability of a U.S. company to invest in the Iranian energy sector.¹⁴⁸ They make even planning for such future prospects difficult.¹⁴⁹ By forcing financial institutions to implement asset-blocking procedures on prohibited transactions, any attempt at completing a business deal with a prohibited party is not likely to receive financing without approval from OFAC.¹⁵⁰

C. Iran-Libya Sanctions Act (ILSA) of 1996

In addition to the standing trade and transaction prohibitions outlined in 31 C.F.R. §§ 535, 560, Congress passed ILSA in 1996 in an attempt to curb foreign trade with Iran, specifically in the petroleum industry.¹⁵¹ Section 5 of ILSA outlines a scienter requirement.¹⁵² It requires the President to impose at least two of six sanctions if a person with actual knowledge made an investment of \$ 20 million, (or a combination of investments within a twelve month period in excess of \$ 20 million), that "directly and significantly" contribute to the enhancement of Iran's ability to develop its petroleum resources.¹⁵³

Although companies subject to U.S. jurisdiction are already restricted from trading with Iran by 31 C.F.R. § 560, ILSA restraints are also used. They apply not only to companies under U.S. jurisdiction but also to their foreign counterparts.¹⁵⁴ Section 6 of ILSA outlines the various possible ramifications. Upon a finding of non-compliance, the President is to impose at least two of the following:¹⁵⁵

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- 1) prevention of export-import banking assistance for exports to a sanctioned person;
- 2) prohibition of export licensing of goods or technology to a sanctioned person;
- 3) bar on loans over \$ 10 million in a twelve month period for a sanctioned person;
- 4) restriction of a sanctioned person from dealing in Federal Reserve funds;
- 5) prevention of U.S. government contract procurements with a sanctioned person;
- 6) moratorium on importation of goods from a sanctioned person.

These provisions have the potential to upset any major international transaction requiring financing or insurance from a U.S. institution. ¹⁵⁶ But even though they appear extreme, the United States has not yet enforced ILSA extraterritorially against companies dealing with Iran. ¹⁵⁷

Contrary to its application, the terms set forth in Section 14 of ILSA show that Congress intended the consequences of this act to be sweeping in nature. Definitions 14(4) and 14(9) ensure that all aspects of the petroleum industry are covered. "Development" includes "exploration, extraction, refining, or transportation by pipeline of petroleum resources," ¹⁵⁸ and "investment" is defined as any contract that includes the "responsibility for development," "purchase of shares or ownership," or any "form of participation that results in royalties or profits." ¹⁵⁹ Supplementary definitions denote even further statutory breadth. Section 14(10) "Iran," 14(14) "Person," and 14(15) "Petroleum Resources" make the act applicable to all corporate-like entities that participate in any gas or petroleum transaction with any Iranian instrumentality. ¹⁶⁰

Indeed Congress has left businesses with little room to maneuver. Its intent is clear-any major energy transaction with Iran is prohibited. Although some legal scholars have tried to split hairs over this issue,¹⁶¹ loose interpretation of the statute really is not persuasive. On its face and [*282] in the courts, ILSA appears remarkably tight.¹⁶²

As tight as they are, ILSA provisions do contain a political escape hatch. They provide the possibility for presidential waivers under sections 4(C) and 9(C).¹⁶³ These waivers exist in situations where the President concludes 1) that nationals conducting the transactions are from countries undertaking substantial measures to curb Iran's threatening activities-(ILSA Section 4(C) Waiver), or 2) upon the determination that a waiver is in the national interest-(ILSA Section 9(C) Waiver).

In May 1998, the President avoided enforcing sanctions and set a waiver precedent by issuing a section 9(C) waiver to Total SA after it replaced Conoco as the primary contracting agent for the development of the Sirri gas fields and entered a new contract for South Pars.¹⁶⁴ Not surprisingly, the President chose the waiver presenting the most breathing room. Under section 9(C) no justification of substantial measures must be outlined; the President must merely make a determination that a waiver is in the nation's best interest.¹⁶⁵ The Executive Branch is currently considering further waivers for contracts signed by Bow Valley and Elf.¹⁶⁶ As of August 1999, it has yet to make an announcement on the issue.

These waivers have bolstered support for a change in sanctions policy. They have made consistent sanctions enforcement impossible.¹⁶⁷ Even though the Executive Branch recently eased some restrictions on Iran,¹⁶⁸ it is unlikely that Congress or the President will lift ILSA prohibitions before their expiration date.¹⁶⁹ The President could terminate ILSA by certifying that Iran has ceased its efforts to acquire WMD technology and declaring that it is no longer a state-sponsor of terrorism, however, it appears more likely that this statute will run its course as nothing more [*283] than a political paperweight.¹⁷⁰

As previously mentioned, ILSA provisions are not indefinite. Section 13 of ILSA provides a "Sunset Clause" terminating the Act five years after its enactment on August 5, 2001.¹⁷¹ Given the intense lobbying pressure against the sanctions, ILSA probably will not be renewed.¹⁷² Still, until the Executive Branch lifts the declared emergency, individuals and businesses under U.S. jurisdiction will remain subject to [31 U.S.C. §§ 535](#), 560 regulations.

D. Supplementary Enforcement: Other Agencies and Other Laws

The lead organization for Iranian sanctions enforcement is OFAC, but there are a number of other regulatory agencies that keep watch on Iranian trade. Other agencies that share export-licensing jurisdiction with OFAC include the State Department's Office of Defense Trade Control (DTC) and the Commerce Department's Bureau of Export Administration (BXA).¹⁷³ Corporations dealing in goods that can be considered "dual use" technology (having both military and industrial applications) or desiring to export approved medicines or foodstuffs may be required to file separate licenses with these agencies. In enforcing trade prohibitions, OFAC, DTC, and BXA can grant each other reciprocal enforcement authority when reviewing licenses and violations.¹⁷⁴

Although OFAC regulations do not mandate that corporations maintain an OFAC awareness representative, the difficulty of sifting through the various regulatory procedures almost makes it a necessity. No standard OFAC licensing form exists, and coordination with multiple governmental agencies is cause for confusion.¹⁷⁵

[*284] [SEE TABLE IN ORIGINAL]

Additionally, Iranian sanctions issues may involve both questions of fraud that are prosecutable under [18 U.S.C. § 1001](#) et. seq., and issues involving anti- terrorism policies, outlined in the Antiterrorism and Effective Death Penalty Act, [8 U.S.C. § 1189](#).¹⁷⁶ A corporation acting [*285] without an OFAC sanctions awareness representative may thus be caught off guard by the complexity of sanctions issues. It may unwittingly enter into transactions through third-party organizations (front companies for sanctioned countries), that are based in countries less affected by U.S. sanctions measures (e.g., London or Japan). Such transactions are prohibitive if any of

the contracting parties are found on an OFAC Specially Designated National (SDN) list.¹⁷⁷ OFAC regularly updates these lists to ensure companies conducting prohibited business with Iran are boycotted.¹⁷⁸ An OFAC awareness representative can therefore provide considerable help in ensuring that sanctions procedures and advisories are readily updated.

OFAC advises corporations to monitor the constant SDN updates.¹⁷⁹ A failure to properly monitor transactions may result in a suspended transaction with assets "blocked" or "frozen" (e.g., money, checks, drafts, debts, obligations, notes, letters, warehouse receipts, bills of sale, evidences of title, contracts goods, chattles, stocks, ships, goods on ships, etc.).¹⁸⁰ Since OFAC relies on major financial institutions to block/freeze assets, a stop-transaction notice may occur suddenly with little warning. Although a company may be able to avoid serious criminal penalties and regain its property in the event its assets are frozen, the suspension or loss of ownership privileges combined with the time value of money may create a substantial loss of interest and monetary gain.¹⁸¹

E. Foreign Response to U.S.-Iranian Sanctions

Foreign States have been extremely critical of U.S. efforts to impose extraterritorial sanctions on non-U.S. companies.¹⁸² Though the intent behind Iranian sanctions was to lead by example,¹⁸³ both the Legislative and Executive Branches instituted their measures without international consensus.¹⁸⁴ Even America's closest trade partners (e.g., Canada), have [*286] responded with enmity towards U.S. sanctions.¹⁸⁵ These governments have issued blocking legislation in order to protect their own multi-national corporations.¹⁸⁶

Among others, Member States of the European Union, Canada, and Mexico have all instituted blocking legislation.¹⁸⁷ Such legislation typically requires companies threatened by sanctions to contact an appropriate national agency and notify them of the dilemma.¹⁸⁸ This presents the possibility for dispute resolution in a venue such as the World Trade Organization (WTO).¹⁸⁹ The fact that no nation has issued a formal WTO complaint exhibits international desires to avoid an acrimonious trade dispute.¹⁹⁰ Yet even with a formal complaint, resolution might be difficult since the United States continues to refuse to submit the issues to international organizations for resolution.¹⁹¹ Blocking legislation therefore places significant pressure on the United States to

abide by its current section 9(C) waiver precedent for foreign companies. ¹⁹² It sets the stage for a potential international legal battle between sovereigns with conflicting policies.

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VI. Legal Impact of U.S.-Iranian Sanctions

A. U.S. Corporate Strategies

"We're going right to the edge, but we're not crossing the line[.]" ¹⁹³

The most interesting development regarding Iranian sanctions has been their impact on international energy investments. As of August 1999, no U.S. company has entered into a major transactional agreement for investment in the Iranian energy sector. ¹⁹⁴ The effect of Executive Order 12,957 and Conoco's backout has been a flight of capital investment opportunities from U.S. companies to foreign firms. ¹⁹⁵ As could be expected, this has caused an outcry over job losses and the inability of America to stimulate Iranian reform through economic means. ¹⁹⁶

U.S. multi-national corporations have stepped up lobbying campaigns against Congress. ¹⁹⁷ They remain "committed to doing business in Iran," ¹⁹⁸ and are positioning themselves for the day sanctions are lifted. ¹⁹⁹ Although federal regulations prohibit companies under U.S. jurisdiction from entering any major Iranian energy contract, corporate tenacity is keeping a foot in the door. U.S. corporate activity demonstrates a threefold strategy for dealing with U.S. sanctions: 1) continuous dialogue, 2) limited investment and planning, and 3) merger and partnership arrangements.

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1. Continuous Dialogue

Continuous dialogue appears to be the most prominent corporate tactic for combating unilateral sanctions.²⁰⁰ Even foreign companies with major U.S. assets and high susceptibility to sanctions measures (e.g., Shell) are now seeking to re-establish association with Iranian counterparts.²⁰¹ These businesses are doing so by attending government-sponsored investment conferences²⁰² and by actively bidding on Iranian investment offers.²⁰³

Corporations are laying the framework for future Iranian investment relationships, by forming cross-border business contacts. Although U.S. regulations prevent performance of Iranian investment contracts, they do not preclude attendance at Iranian conferences and active bidding.²⁰⁴ It is also doubtful that sanctions can repress a contract for performance at a later date. Energy firms are therefore able to establish market positions by evaluating the Iranian reaction to future contract terms. Such continuous dialogue may appear to be of little value, but it actually benefits both parties. Dialogue provides Iranian sponsors with an idea of what a company has to offer, while Western investment companies gather market intelligence on their competitors' tactics. Subsequently, Iran is able to tease the market by holding out its most lucrative deals in order to obtain [*289] more agreeable terms from those bidders hungriest for access to its energy sector.

2. Limited Investment and Planning

Some companies, such as Arco, have stepped beyond dialogue into the realm of limited investment and planning strategies.²⁰⁵ In 1997, the Iranian Majlis passed a resolution allowing corporations to establish branch offices in Iran.²⁰⁶ Arco was one of the first companies to express interest in this opportunity, knowing that half the battle of economic competition is having direct access to the local market.²⁰⁷ Incidentally, British Petroleum (BP) has already taken this action, exhibiting cross-cultural wisdom for developing business relations in the Middle East.²⁰⁸

In addition to seeking a branch office, Arco exercised options available under [31 C.F.R. § 560.523](#) allowing importation of commercial information.²⁰⁹ By utilizing this provision, Arco improved its commercial investment readiness by purchasing updated geographical data on Iran.²¹⁰ Other companies quickly followed suit.²¹¹

Although most major oil companies are involved in some sort of planning for investment in the Iranian energy sector, direct investment is not a realistic option for many corporations. A few companies are, however, seeking to sidestep sanctions effects through limited investment options. These typically include OFAC approved swaps and potential exploration projects under \$ 20 million. ²¹²

A swap arrangement allows companies like Mobil or Chevron to avoid transportation difficulties by delivering to Iran a certain amount of unrefined crude from the Caspian region in exchange for refined Iranian oil in the Gulf region. ²¹³ Mobil has already executed swap transactions [*290] with Iran under OFAC licensing arrangements. ²¹⁴ Though OFAC has denied further swap transactions, approved licenses for such arrangements will remain a possible means of bypassing sanctions. ²¹⁵

For companies like Mobil and Chevron that have significant investments in the Caspian sector, OFAC licenses are vital to developing foreign operations. ²¹⁶ In the absence of alternative means of transportation (e.g., pipelines) swap transactions present one of the few workable methods for marketing Caspian resources to Western States. ²¹⁷ These transactions also promote increased demand for a future Iranian pipeline. ²¹⁸

Swaps are called into question by [31 C.F.R. § 560.206](#) despite their economic importance. ²¹⁹ In the absence of OFAC approval, Section [31 C.F.R. § 560.206](#) prevents the exchange of Iranian goods-including refined oil. ²²⁰ This forces a corporation to provide OFAC with an appropriate justification for a swap transaction. Such a justification may or may not pass muster depending on the political climate at the time submitted. ²²¹

One would expect that a company investing in the Caspian region should be able to provide a valid swap justification given that a primary security interests outlined by U.S.-Middle East policies calling for the economic development of the Former Soviet States in the Caucasus region. ²²² On the other hand, if the transaction is eclipsed by potential Iranian-Caspian partnership dealings, OFAC is likely to consider the justification unconvincing. ²²³ Incidentally, OFAC has denied Mobil's further swap requests.

In addition to licensed swap arrangements and intense planning efforts, companies such as Arco continue to voice their intention to bid for limited exploration contracts in Iran.²²⁴ Such bidding may fall under the \$ 20 million threshold of ILSA provisions,²²⁵ but under the existing IEEPA [*291] \$ 20 million threshold of ILSA provisions,²²⁵ but under the existing IEEPA regulatory scheme, contract performance is likely to violate [31 C.F.R. § 560.206](#).²²⁶ Even a foreign company with a U.S. subsidiary is prohibited from selling American-made goods in the Iranian market.²²⁷ Consequently, companies considering limited Iranian investment offers risk criminal penalties for intentionally violating U.S. sanctions regulations.²²⁸ Smaller U.S. companies may, however, stand a better chance of dodging sanctions through merger or partnership arrangements.

3. Merger and Partnership Arrangements

Over the last two years, consolidation of businesses in the oil industry has occurred at a rapid pace.²²⁹ Numerous motivations exist for mergers and strategic partnerships. These include opportunity for growth, larger capitalization, technical specialization, market development, and leaner operating costs.²³⁰ Although not publicly stated, sanctions in today's market must also be a merger consideration.²³¹

Mergers and strategic partnerships provide U.S. and foreign companies with a potential solution to sanctions' negative market influences. Although research does not indicate that any U.S. company has openly announced its merger just to enter the Iranian market, the market climate and demand for Middle East resources creates a strong stimulus for such consideration.²³² Even for companies not initially seeking investment in Iran, a transnational merger may create opportunities to exploit new markets.

The recent merger of British Petroleum (BP) with Amoco (with further consideration to merge with Arco) provides an example of how an American company might utilize merger to escape U.S. sanctions.²³³ In the [*292] BP merger, a U.S. subsidiary (Amoco or Arco) could actively invest in Iran under the political shelter of a foreign company (BP). Comparatively, Conoco's

recent partnership initiatives provide an example of an alternative business arrangement that could circumvent sanctions.²³⁴ In this example, Conoco, a U.S. corporation, could reap benefits from transactions conducted primarily by its foreign partners (Petronas-Statoil).²³⁵ The key issues appear to be timing and control. Specifically, attention must be given to when the transaction is requested and how much control the U.S. partner or subsidiary has in the investment.²³⁶

Where a merger results in the majority of equity being owned by the foreign firm, the U.S. subsidiary's operations might fall outside the U.S. jurisdictional requirement of 31 C.F.R. § 560. Additionally, the controlling corporation could work a transfer of subsidiary assets or restructure its operations in a manner that brings them under foreign control.²³⁷ In both situations ILSA provisions would still apply, but the merger would create a blanket of protection through foreign political pressures and foreign blocking legislation.²³⁸ The shield of foreign political pressure might allow a foreign corporate leadership to capitalize on a U.S. subsidiary's expertise [*293] to enter the Gulf market.²³⁹

Increased merger activity is heightening the complexity of the market situation and making the political fallout of sanctions more costly for the U.S. government. Smaller companies with less investment capital (e.g., Amoco) might be able to look to a larger corporation for the financial backing necessary to break into a new market.²⁴⁰ In the event the controlling corporation (e.g., British Petroleum (BP)) recharacterizes its subsidiary operations, smaller investment opportunities could be achieved that would otherwise be blocked by sanctions restrictions.²⁴¹

Although foreign investments can not exceed ILSA's annual \$ 20 million provision, smaller exploration contracts can help specialized subsidiaries gain a foothold in the Iranian market.²⁴² Such an advantage is crucial to capturing a particular area of resource development (e.g., exploration or natural gas development).

A closer look at the BP-Amoco merger shows that the equity break-out is BP 60%, Amoco 40%.²⁴³ In this scenario, the U.S. firm, Amoco, possesses excellent expertise in exploration and development in the Middle East,²⁴⁴ while BP has been out of the Iranian market for many years.²⁴⁵ British Petroleum is thereby able to provide the foreign clout necessary to combat sanctions while relying on the U.S. subsidiary's business reputation for possible entry into a closed market.

While the subsidiary would still fall under the jurisdiction of OFAC regulations, the U.S. government would be obligated to reconsider the political ramifications of enforcement. ²⁴⁶

If the political pressure is great enough, a U.S. subsidiary under foreign control can avoid ILSA and IEEPA prohibitions altogether through presidential waivers and/or OFAC licenses. Alternatively, the foreign controlling corporation may take its chances with U.S. government [*294] enforcement by restructuring subsidiary operations and seeking investments under \$ 20 million. One concern, however, remains. Since current U.S. regulations prohibit evasion of the Iranian sanctions, ²⁴⁷ the Federal Trade Commission of the U.S. Department of Commerce ²⁴⁸ might choose not to approve an international merger if it is apparent that it is designed for re-entry into the Iranian market. ²⁴⁹ In such a situation, OFAC interpretations could still upset an U.S. subsidiary's intentions for entry into the Iranian market through a partnership or merger arrangement.

B. Foreign Corporate Strategies

"U.S. Companies are going to be way behind" ²⁵⁰

1. Strategic Partnerships

Foreign firms have been less affected by U.S. sanctions than their American counterparts. They have primarily relied on strategic partnerships to gain control over Iranian business offerings. ²⁵¹ After Conoco backed out of its initial contract, Total SA of France stepped into its place. ²⁵² Riding the anti- sanctions tide, Total SA formed a strategic partnership with Gazprom of Russia, and Petronas of Malaysia to gain a second major natural gas development contract. ²⁵³ This partnership arrangement forced the United States government to reexamine sanctioning an action that might hinder trade relations in three major trading areas of the world: Europe, Russia, and Asia. ²⁵⁴

[*295] [SEE TABLE IN ORIGINAL]

In hindsight, Total SA's move was ingenious.²⁵⁵ Forming a strategic partnership offers a way to spread the capital, economic, and political risks of reentry into an uncertain market. But such a move has drawbacks. Since one of OFAC's primary tools for enforcement is financial asset blocking, mergers create difficulties in acquiring the funding and insurance necessary to complete a large-scale energy agreement.²⁵⁶ American banking-institutions are often the only institutions large enough and strong enough to bear greater risk at better terms.²⁵⁷ These U.S. institutions are subject, however, to [31 C.F.R. § 560.206](#) procedures.²⁵⁸ As OFAC's constructive agent, they can stop a deal cold.²⁵⁹

An example of such difficulty appears in the Canadian company Bow Valley's bid for development of the Balal Oil Field.²⁶⁰ Outbidding competitors for the contract over a year ago, Bow Valley has only recently been able to close its deal after losing its initial partners-Bakrie of Indonesia and British Petroleum of England-to financial and [*296] political pressures.²⁶¹ Despite such difficulties, strategic partnerships are still the preferred method for foreign firms seeking to beat U.S. sanctions.

2. Subsidiary Asset Sales

Strategic partnerships offer additional political cover for foreign corporations seeking entry into the Iranian market, but they do not provide full protection from sanctions. For those companies subject to U.S. jurisdiction and/or those that violate the \$ 20 million investment provision of ILSA, sanctions can prove disruptive to profitable export operations or financial transactions. As such, a foreign company has two choices. It can remain below ILSA's investment limits, or it can opt to sell off those assets and subsidiaries in the United States that could possibly subject it to 31 C.F.R. § 560 prohibitions.²⁶²

This ruse is not farfetched. After Total SA acquired Conoco's lost contract, it moved in on an even larger deal for development of the South Pars Gas Fields estimated at \$ 2 billion USD.²⁶³ In order to shelter itself from political recoil, it sold its assets and subsidiaries in the United States

while bidding for South Pars.²⁶⁴ Certainly this option is available only to those corporations that stand to gain more from a sanctioned market than a stateside market. Arguably for Total SA the gambit paid off.

Taking advantage of the first major Iranian contract opportunity put Total SA out front. It was able to gain valuable experience and knowledge of the current Iranian market. Another major French company, Elf, has already capitalized on French contacts in the region.²⁶⁵ It has acquired a billion-dollar contract for the Daroud oil field in Iran.²⁶⁶ Together these French companies have managed to increase the ante on U.S. sanctions. They have strengthened their commercial stance through the prospects of a merger and gained stronger market control over the Iranian energy sector.²⁶⁷ Their actions have created an incentive for the French government to institute protective blocking legislation.

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3. Reliance on Foreign Blocking Legislation

Strategic partnerships and asset sales provide the shield for foreign firms seeking entry into the Iranian market, but blocking legislation provides the sword. In countries like Canada where blocking legislation exists, smaller companies, such as Bow Valley, are able to strike out for Iranian bids under the cover of government protection.²⁶⁸ Since the United States has already set a waiver precedent, more foreign bidders are likely to go it alone.

Blocking legislation provides a significant deterrent against U.S. sanctions. By challenging U.S. credibility, it allows a foreign corporation to put state sovereignty on the line before its own financial assets are threatened. With the Clinton administration facing a host of criticism over its unilateral trade initiatives, and a presidential "lame-duck" period approaching, the United States is not likely to pressure countries into a situation where political capital could be lost.²⁶⁹

Foreign blocking legislation has thus rung the death knell for the extraterritorial application of unilateral U.S.-Iranian sanctions.²⁷⁰ The U.S. government's 1998 waivers show that on a foreign policy level, the United States is not willing to face a challenge over unilateral sanctions before

an international tribunal. As such, few cases involving foreign firms are ever likely to reach the judiciary. Bottomline: U.S.-Iranian sanctions are unlikely to deter the burgeoning of foreign investment in the Iranian energy field.

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VII. Judicial Review of U.S.-Iranian Sanctions

"The obvious purpose of the order is to isolate Iran from trade with the United States." ²⁷¹

Unlike the Internal Revenue Service (IRS), OFAC does not customarily release public records of its private rulings. ²⁷² Aside from Freedom-of- Information Act requests, litigated cases and OFAC publications are the only means for determining OFAC positions. Since no foreign government has challenged U.S. sanctions at the international level, there are no pertinent transnational cases to evaluate. Federal rulings have, however, established the validity of similar sanctions activity within U.S. jurisdiction. ²⁷³

Even though ILSA provisions remain questionable under international law, challenges to Iranian Assets Control and Transaction Regulations are likely to fall on deaf ears in federal courts. ²⁷⁴ The judiciary is not likely to grant recourse for U.S.-Iranian sanctions, and will respond with rulings similar to those made on complaints over Cuban asset blocking. There is, however a unique difference between Iranian sanctions and other sanctions regulations.

In contrast to earlier sanctions, the United States Congress passed ILSA with the intent to apply its provisions extraterritorially. ²⁷⁵ Unlike the policy implementations towards Cuba and Iraq, there was no visible "triggering event" that motivated the U.S. government's action (e.g., nationalization of assets or invasion of a sovereign country). ²⁷⁶ Moreover, there was no multi-lateral or bilateral support for ILSA. ²⁷⁷ The lack of grounding for such legal measures thus proves to be a shaky foundation for extraterritorial application of ILSA. Courts have shown, however, that it does not provide a sufficient basis for defeating individual sanctions charges within the federal judiciary. For those under U.S. jurisdiction, sanctions present a significant courtroom threat. Any challenge rooted in [*299] claims of ambiguity risks criminal liability.

The only documented case concerning Iranian sanctions appears to be *United States v. Ehsan*,²⁷⁸ a case where the defendant was indicted for shipping equipment in violation of export prohibitions.²⁷⁹ The defendant attempted to ship Transformer Oil Gas Analysis Systems (TOGAS) through a third country, the United Arab Emirates, into Iran.²⁸⁰ Ehsan argued that federal regulations did not cover "reexportation" and that 31 C.F.R. § 560 was ambiguous.²⁸¹

At the time of Ehsan's offense, between May 95 and May 96, IEEPA regulations did not specifically address reexportation.²⁸² It was not until President Clinton issued Executive Order 13,059 clarifying Executive Orders 12,957 and 12,959 that "reexportation" was specifically addressed in 31 C.F.R. § 560.²⁸³ The District Court and the Fourth Circuit Court of Appeals weighted this distinction differently.

The District Court favored Ehsan and took a strict textual approach to interpreting export regulations.²⁸⁴ Taking a different approach, the Fourth Circuit Court of Appeals reversed the District Court.²⁸⁵ The Appellate Court stated that a broad interpretation of Executive Orders and their ensuing regulations was warranted in order to effectuate the President's intent to ban all exports to Iran.²⁸⁶ This ruling is not unusual. The judiciary often gives wide discretion to the actions of the Executive Branch in the area of foreign affairs.²⁸⁷

Although no further cases are on record concerning U.S.-Iranian sanctions, one can look by analogy to outside rulings—specifically those involving U.S.-Iraqi sanctions—to glean a further impression of future judicial outcomes under IEEPA regulations. One need investigate few additional cases, however, to see that the judiciary will give the Executive Branch wide latitude in implementing sanctions provisions.

In *United States v. Arch Trading Co.*,²⁸⁸ the defendant was convicted of conspiring to commit an offense against the United States, violating IEEPA regulations, and lying to the Office of Foreign Assets Control.²⁸⁹ [*300] These charges arose from a prohibited agreement between Arch Trading and an Iraqi government instrumentality.²⁹⁰ Arch Trading ultimately lost, but it posited a

number of clever arguments before the court. ²⁹¹

Arch Trading's argument had three prongs: 1) a violation of an Executive Order could not constitute a conspiracy offense, 2) the President had no authority to define criminal conduct under IEEPA regulations, and 3) the Executive Orders were inconsistent. ²⁹² On each of these arguments the court ruled against Arch Trading, ²⁹³ and deferred to Executive discretion. The judiciary simply refused to encroach on the President's authority to issue sanctions. ²⁹⁴

A cursory analysis of the Ehsan and Arch Trading holdings shows that the Fourth Circuit is willing to yield to the executive and legislative branches when interpreting IEEPA and NEA regulations. Future cases regarding enforcement of asset blocking are likely to have similar results. ²⁹⁵ Corporations considering current investments in Iran must realize that testing the limits of U.S.-Iranian sanctions is hazardous. ²⁹⁶ Although there may be commercial policy reasons to rule in favor of a defendant, ²⁹⁷ the courts are still likely to interpret sanctions prohibitions broadly. This is likely to be the case regardless of what Federal Circuit reviews the issues. Thus legal scholars and corporate practitioners are better off not second-guessing the Executive Branch when it comes to sanctions authority.

Corporate directors and their legal advisors must also realize that OFAC has established a certain "minimum standard" for dealing with sanctions prohibitions. ²⁹⁸ The Office of Foreign Assets Control provides computer software, prohibited party listings, and recommended procedures [*301] for determining what financial transactions might be subject to government regulations. ²⁹⁹ In addition to its products, OFAC recommends that a corporation designate an OFAC representative. ³⁰⁰ In this way, corporations are charged with a certain duty of care. ³⁰¹ A court could arguably apply such a standard under [50 U.S.C.A. § 1703\(b\)](#) and 31 C.F.R. § 560 when evaluating a transaction that benefits an Iranian third party.

VIII. The Iranian Counter-Trade Model

"The more open and transparent investments are, the more chances we have in solving economic

problems."³⁰²

A. Swaps and Buy-Backs

Some companies have been able to lessen the effectiveness of sanctions through direct investment agreements. Additionally, Iran's counter-trade model has caught on and Iraq is already planning to follow Iran's buy-back approach.³⁰³ It is therefore prudent to examine the current energy contracts Iran is placing for bid. Such agreements are primarily counter-trade agreements that include both swaps and buy-backs.³⁰⁴ Since developing countries have historically avoided giving official status to such counter-trade transactions, long-term international counter-trade transactions have typically been rare.³⁰⁵ Iran's systematic approach toward making such public offers appears to be setting a trend.³⁰⁶

Swaps are simply commodity exchange agreements.³⁰⁷ In the Iranian energy sector swaps are similar to that which Mobil arranged for an exchange in unrefined Caspian oil for refined Iranian oil in the Gulf.³⁰⁸ [*302] Another example would be the Conoco partnership arrangement, where the foreign partner Petronas sought to provide refining services in exchange for Iranian crude.³⁰⁹

Buy-backs, in contrast, are often long-term investment agreements providing the exchange of goods or services between parties usually with no monetary exchange.³¹⁰ These arrangements are uniquely tailored to a particular situation.³¹¹ In the Iranian energy sector, buy-back contracts are based on the exchange of investment in resource development services for repayment in oil production at a set percentage rate between fifteen to twenty percent upon contract completion.³¹²

Developing countries have historically offered such counter-trade models in an effort to attract capital investment and needed goods during time periods of financial difficulty.³¹³ Buy-back contracts have been a favorite of China, particularly in efforts to attract high technology investments.³¹⁴ They were also preferred transactions for the governments of the Former U.S.S.R. and Eastern Europe.³¹⁵ Surprisingly buy-backs have fallen from favor as a topic of interest in recent literature.³¹⁶ Still, they are no less important to the policies of today's developing countries

than they were in the past. Western petroleum investors should, therefore, understand the Iranian counter-trade model in order to limit the risks of reentry into the Iranian market.

Iran has utilized modern buy-back contract models since the early 1980s.³¹⁷ Although there is little documentation on the details of these contracts, Iran appears to have frequently relied on counter-trade policies during periods of oil price decline and financial difficulty.³¹⁸ One of the largest of these contracts included a \$ 1.1 billion exchange of oil to Romania for locomotives, tractors, oil equipment, spare parts and consultancy services.³¹⁹ Other publicly-documented transactions included [*303] exchanges of oil for foodstuffs and technology with New Zealand, Uruguay, Thailand, China, and Japan.³²⁰ Iranian counter-trade transactions have typically involved high dollar values, well above \$ 500 million.³²¹ High-dollar Iranian counter-trade offers continue to be today's market trend.³²²

Although the Iranian government abandoned its barter policy in mid- 1982,³²³ it has since reinstated administrative counter-trade regulations.³²⁴ In 1991, the Iranian parliament approved the current buy- back model.³²⁵ This buy-back model permits Western oil companies to enter into state energy development projects.³²⁶ The Iranian Bilateral Transactions Committee of the Ministry of Commerce and the relevant division of the National Iranian Oil Company oversee all Iranian barter deals.³²⁷ These offers allow Iran to negotiate each deal separately.³²⁸ Since buy-back agreements are considered the law between the parties, they are well-suited to Iran's religiously-based legal system. They allow Iran to maintain sovereignty over its resources while making special accommodations for foreign investment.³²⁹

Iran's current focus on counter-trade is likely due to its rising domestic energy demands,³³⁰ declining oil prices,³³¹ poor economic state,³³² government deficit,³³³ and tattered energy production infrastructure.³³⁴ While neighboring Gulf states have much more competitive Gross Domestic Product (GDP) rates, Iran's economy is in need of [*304] revitalization.³³⁵ Buy-backs permit Iran to gain foreign direct investment and technology without losing control over its constitutionally protected natural resources.³³⁶ They also provide Iran with a possible means of avoiding OPEC production quota requirements.³³⁷ Payment in oil arguably does not fall under the category of sales on the open market.

Although OPEC countries have recently cut production,³³⁸ Iranian concerns over a flooded market still provide an impetus for the increase in development offerings.³³⁹ Not only is Iran hoping to take advantage of its low cost of production to increase cash flow under depressed oil prices,³⁴⁰ but it is strategically positioning itself to meet future contingencies.³⁴¹ As pressure builds to bring Iraqi and Libyan oil back on the market,³⁴² there will be tension on countries to undercut OPEC requirements.³⁴³ In order to maintain stable export profits and government revenue, Iran must have the ability to increase production in order to capture market shares in the event oil prices again plummet.

B. Counter-Trade Risks

Some commentators have erroneously described Iran's energy offers as "relatively risk free."³⁴⁴ As advantageous as counter-trade transactions [*305] are for Iran, they still present risk for the Western investor.³⁴⁵ Investing in Iranian energy contracts requires a high degree of capital investment.³⁴⁶ Unlike the advantageous percentage-cut offered under Production Sharing Agreement (PSA), buy-backs are set for a fixed amount of return.³⁴⁷ Oil price changes, and Iranian production difficulties therefore limit the return on Western investments. Even though Iran offers its buy-backs at relatively high rates-fifteen to twenty percent-increased domestic demand or production difficulties could prevent its timely repayment of investment costs.³⁴⁸

In the event a major OPEC player such as Saudi Arabia "opens the taps,"³⁴⁹ Iran will have difficulty maintaining hard currency reserves. It will be forced to use its production to pay the high rates of return on its buy-backs while satisfying domestic demands. A major fluctuation in oil prices could thus place greater pressure on Iran to increase its production to capacity. With its infrastructure in shambles, a flooded market might again lead to the nationalization of foreign assets, or sequestration of investment technology.³⁵⁰ Additionally, the all-too-familiar political and military tensions in the Gulf region could result in embargo penalties, or investment loss.³⁵¹

The possibility of these events occurring presents a significant risk of contract cancellation or non-performance under an Iranian buy-back [*306] agreement. This risk underscores the difficulties major multi-nationals are having in obtaining both insurance and financial backing for major investments in the Iranian energy sector.³⁵² Iranian reliance on arguments of changed

circumstances or Force Majeur, probably would not hold up before an international tribunal, but litigating/resolving the issues would be both time-consuming and costly.³⁵³ Corporations must therefore be vigilant. Although lawyers working on Iranian buy-back deals have room to be creative,³⁵⁴ they must cautiously ensure contract clauses provide a minimum of adequate protection for multi-million dollar investments.

IX. Contemporary Western-Iranian Contract Analysis

"We were very glad to hear the speech of President Khatami in which he mentioned that Iran wants to move towards a free market economy. . . ." ³⁵⁵

A. Current Western-Iranian Energy Contracts

Although business confidentiality rules prevent the review of actual Iranian buy-back contracts,³⁵⁶ Barrows Corporation of New York has produced synopses of the major clauses in Total SA's buy-back deal for the Sirri Gas Fields, and Bow Valley's buy-back agreement for development of the Balal Oil Fields.³⁵⁷ Certain events have forced partnerships to change, but evaluation of these products provides insight into future Iranian business offers.

Analysis of current agreements indicates that corporations are sacrificing contractual protection in an effort to reenter the Iranian market. They also indicate Iran's desire to protect its own market in the face of Western development.

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The major contracts signed with Iran are displayed in Diagram 3:

[SEE TABLE IN ORIGINAL] ^{358 359 360 361 362 363}

These contracts are tailored to individual party desires, but one can expect that the combined

interests of the Iranian government and multi-national corporations will result in some similarities in contractual provisions.

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B. Evaluation of Contemporary Iranian Contract Clauses

Common to both the Total SA and Bow Valley agreements are a number of clauses that warrant review.³⁶⁴ These include choice-of-law, arbitration, termination and Force Majeur, method-of-payment, participation and management, and assignment clauses. Each contract specifies that the terms of agreement are between the Western corporation and the National Iranian Oil Company (NIOC).³⁶⁵

Choice-of-Law Clause: Most visible in these agreements is a choice-of-law clause specifying that Iranian law governs the contracts.³⁶⁶ In the event of a dispute, this clause may prevent Western companies from being able to recover fully for their investment. Although principles of commercialism-Lex Mercatoria-have become more frequent in international tribunal rulings,³⁶⁷ there is no guarantee that they would be applied under an Iranian choice-of-law clause.³⁶⁸ Contract ambiguities might also subject Western investments to Iranian courts and principles of the Shari'a.³⁶⁹ Though Iran's need for Western energy technology should provide a significant deterrent against unfair treatment, a foreign choice-of-law clause will always present uncertainty.³⁷⁰ Under a foreign choice-of-law clause, parties will not be able to determine with certainty the likely outcome of any future legal dispute.

Dispute Resolution Clause: Both the Total SA and Bow Valley contract synopses indicate that Western parties have sought to provide for future dispute resolution through arbitration clauses.³⁷¹ The arbitration clauses in these contracts are lean. Disputes arising from these agreements are to be resolved by a three-person arbitral tribunal to be decided upon by the parties.³⁷² While one can only speculate as to the lack of specific detail, these clauses manifest Iran's partial willingness to accept a method of dispute resolution similar to that used by the U.S.-Iran Claims Tribunal.³⁷³

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The brevity of these arbitration clauses does, however, create a good bit of uncertainty. Important determinations such as situs of arbitration (Lex Arbitri), conflicts issues (Lex Fori), procedural rules, and gap-filling, (e.g., with principles of Lex Mercatoria or UNIDROIT principles) are not included.³⁷⁴ This uncertainty reduces the speed and efficiency in which a contemporary Iranian investment dispute could be resolved.³⁷⁵ It also raises questions of enforcement.³⁷⁶ These problems could be alleviated by designating a particular administering institution (e.g., The International Chamber of Commerce) and/or utilizing a standard institutional clause.³⁷⁷

In all likelihood, it is difficult to convince Iranian negotiators to agree to anything other than a rudimentary arbitral clause. Unlike fellow Gulf States (e.g., Bahrain) Iran's skepticism towards Western arbitral institutions is evident in its failure to ratify major arbitral agreements such as the U.N. Arbitration Convention of 1958, the Convention on the Settlement of Investment Disputes of 1965, or the Convention on Multilateral Investment Guarantee Agency of 1985.³⁷⁸ Iran's failure to ratify these conventions is unfortunate. It undermines Iran's claim of a secure investment environment and precludes opportunities to cut potential dispute resolution costs. Additionally, Iran's reluctance to sign arbitration treaties inhibits the use of even more beneficial clauses (e.g., those requiring mediation and negotiation prior to arbitration or those incorporating a hybrid-approach). Not surprisingly these do not appear under the Total SA and Bow Valley agreements.³⁷⁹ Major Western corporations, therefore, appear to be sacrificing the certainty of model clauses and arbitral institutions in an effort to avoid haggling with Iran over dispute resolution issues.

Force Majeur and Termination Clauses: The Total SA and Bow Valley agreements maintain termination and Force Majeur provisions. The details of non-performance under these provisions are not available in the Barrows Contract Synopses. Both contracts do, however, require advance notice of cancellation.

Termination clauses may be particularly useful in the event of sanctions enforcement. In situations where a party must back out of an [*310] agreement already signed (e.g., Bow Valley's partnership arrangements), Western parties must consider how to incorporate sanctions risks into Force Majeur clauses. Companies evaluating investment in a politically unstable country are wise to monitor U.S. domestic policies when looking towards contract drafting. A corporation such as Telephone Systems International Inc., having recently sought investment in

Afghanistan,³⁸⁰ may find that its newly-signed agreement is unexpectedly subjected to domestic political regulations.³⁸¹ In contracts such as that signed by Total, such unilateral sanctions may prevent adherence to a strict 90-day contractual termination notice if assets or finances are suddenly frozen.³⁸²

Assignment Clauses: In addition to termination clauses, both the Total SA and the Bow Valley clauses have assignment clauses.³⁸³ These clauses allow Western corporations to transfer their agreements to other multi-national corporations upon favorable consent by NIOC to be decided within 30 days.³⁸⁴ As with the termination clauses, assignment clauses should be considered as a possible means of protecting against sanctions risk. A company threatened by sanctions enforcement could simply assign its contractual obligations to a new party. The Total SA contract even provides that a failure of the NIOC to respond to an assignment request within 30 days is to be considered tacit approval.³⁸⁵

Method of Payment Clauses: The Total SA and Bow Valley agreements, though centered on a specified rate of return on investment, are in line with the similar method of compensation found in most modern Production-Sharing Agreements (PSAs).³⁸⁶ These contracts call for payment in specified amounts of natural gas or crude.³⁸⁷ Interestingly, the Total SA agreement utilizes a base market price in crude in order to [*311] determine payment in natural gas.³⁸⁸ Analysis of the payment formula indicates that as the market price of crude declines, so does the compensation price of the natural gas.³⁸⁹ Total SA will, therefore, receive more gas as crude prices drop and less gas as crude prices increase. This appears to be the case regardless of the demand price for natural gas.³⁹⁰

Joint Management and Participation Clauses: Not surprisingly, Iran has sought domestic content clauses that benefit development and training in its energy sector.³⁹¹ It appears, however, to have been more lenient in its less-developed natural gas sector as opposed to the petroleum sector where it has more experience.

The Bow Valley agreement is characterized as a contractor service arrangement.³⁹² Its terms restrain contractor independence by requiring Iranian supervision over Bow Valley operations.³⁹³ Under this agreement Bow Valley is required to give priority to qualified Iranian citizens,

equipment, and services.³⁹⁴ It is also required to contract with Iranian firms for at least thirty percent of the Petroleum costs and must limit foreign personnel to positions that can not be filled by qualified Iranian workers.³⁹⁵ Additionally, a joint management clause establishes a Joint Management Committee (JMC) between Bow Valley and the NIOC that consists of six representatives (three from each party) and requires unanimity in all joint ventures.³⁹⁶

Comparatively, the Total SA agreement is characterized as a buy-sell arrangement,³⁹⁷ with Total SA as the buyer and the NIOC as the seller. As an incentive to development, Iran apparently sacrificed more control over natural gas development in exchange for the buyer's installation of necessary extraction, compression, and transportation facilities.³⁹⁸ The apparent flexibility granted to Total SA in its operations as compared the Bow Valley agreement might be attributed to the fact that the Bow Valley agreement came two years into Iran's experience renegotiating with Western corporations.³⁹⁹ Over the course of its negotiations, Iran appears to have increased its bargaining power, lobbying for more of a role [*312] in foreign investment operations. This increase in Iran's negotiation savvy and stronger bargaining position is also evidenced in the fact that the Bow Valley agreement, unlike the Total SA contract, incorporates even more novel provisions favoring Iran.⁴⁰⁰ These provisions include a requirement that development operations be conducted in accordance with good industry practices and in an environmentally sensitive manner.⁴⁰¹

Contract Summary: Analysis of the Total SA and the Bow Valley contracts indicate that Iran is attempting to maximize its returns and that it is gaining experience dealing with modern Western contractual clauses.⁴⁰² Bow Valley, a smaller corporation and one likely to have less bargaining power than a larger corporation such as Total SA, appears to have ceded more control over its operations.⁴⁰³ Although both companies bargained for clauses that account for the risks of expropriation, neither contract provides optimal protection against foreign and domestic political risk, particularly in the area of dispute resolution. A quantification of these risks is therefore helpful in determining what clauses a corporation should bargain for.

X. Quantification of Political Risk-Foreign and Domestic

"American sanctions are a concern, but Shell will seek a waiver."⁴⁰⁴

Due to the political volatility of unilateral sanctions and their ability to upset multi-million dollar contracts, corporations would benefit from any attempt at quantifying the risks of unilateral sanctions enforcement. Although investors have accounted for foreign political risk since the earliest Iranian investment projects, no apparent methodology exists for examining domestic political risk. ⁴⁰⁵

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Methods for analyzing the potential risk of sanctions enforcement could include analysis made on a percentage of risk-per-factor basis (e.g., chances of OFAC waiver in event of merger), or the incorporation of domestic political risks into the evaluation of costs versus revenue (e.g., potential gains in Iranian market versus losses in U.S. market for sanctions avoidance). ⁴⁰⁶ Other statistical approaches to the issue may be more cumbersome than they are useful, but a basic understanding of the domestic political risks along with foreign political factors is necessary to planning for future entry into a sanctioned market.

Energy companies, such as Shell, are already incorporating domestic political risks indirectly into their strategies even if formal quantification and analysis is not apparent in their business strategy or in scholarly literature. With domestic merger trends on the rise in the energy-industry (e.g., Exxon-Mobil, ⁴⁰⁷ British Petroleum-Amoco-Arco, ⁴⁰⁸ Total-Petrofina-Elf), ⁴⁰⁹ larger corporations ("super-majors") including Shell are negating the risk of sanctions enforcement by playing various legal systems against each other. ⁴¹⁰ Strategic MNC-partnerships have a similar effect. They counter risk of sanctions by increasing opportunities for OFAC waivers or sanctions work-arounds. Additionally, foreign companies have reduced domestic political risks by selling off their stateside assets and avoiding U.S. jurisdictional requirements.

In similar fashion, smaller corporations such as Conoco and Arco, are able to work within the bounds of sanctions to reduce the effects of domestic political risk. These companies are using calculated planning and limited investment initiatives in order to gain exposure to the Iranian market. These actions reduce the long-term costs of unilateral sanctions while minimizing the chances of sanctions enforcement. Smaller companies could calculate the cost versus benefit of these strategies by quantifying the reduction in domestic political risks each option achieves.

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Although OFAC makes quantification of domestic political risks difficult by not publicly releasing its waiver and license information, such analysis is not outside the realm of corporate research. By quantifying the overall risk of unilateral sanctions enforcement and the indirect costs on future investment strategies, both attorneys and entrepreneurs can better ascertain their bargaining position for initial contract negotiations. Such analysis would be beneficial in the design of contractual clauses, specifically those dealing with non-performance or dispute resolution. Legal counsels must be wary, however, that their advice on mergers or sanctions does not promote illegal activity. Quantification of political risks appears proper when it does not advocate violations of trade regulations. Yet, advice urging prohibited conduct would not only be illegal, but also unethical in light of the Model Rules of Professional Conduct. ⁴¹¹

Even if a company has difficulty obtaining accurate and comprehensive statistical risk analysis on sanctions enforcement, it can still utilize a simple review of domestic political conditions in a beneficial manner. Basic analysis of domestic political risk can be used to determine whether or not attempting entry into an unstable market is practical for a business. Such a review can be used to calculate the possibilities of long-term or short-term gains and the potential for contract disruption. Quantification of domestic sanctions risks can ultimately aid in the evaluation of a company's business choices. Since the unique nature of Iran's buy-back contracts precludes formation of production sharing agreements (PSA), larger firms may have less of an incentive to enter into limited investment agreements. ⁴¹² Alternatively, smaller companies, may find that the high [*315] rates of return on limited Iranian capital investments provide a consistent stream of income without the risk of unproven reserves associated with a typical PSA. ⁴¹³ With Iran still holding onto its most lucrative resources for future development, ⁴¹⁴ a formal evaluation of domestic political risks can help determine the overall advantageous of specific market initiatives.

XI. Conclusion

"In this global economy, we will continue to witness the perpetual movement of capital in search of efficient allocation and higher profitability." ⁴¹⁵

In today's globalized energy market, the United States will continue to find itself under intense pressure to lift unilateral sanctions in market areas that are heavily saturated with major multinational corporations. The U.S. government's recent trade embargo against Afghanistan ⁴⁶ indicates, however, that unilateral sanctions are going to be with us for quite some time. As advocates of unilateral sanctions find it increasingly difficult to defend their positions against the same market pressures that tore down the Berlin Wall and dissolved Socialist based economies, Iranian officials will be forced to continue evaluating the advantages of more liberal development offers. ⁴⁷ In light of these factors, unilateral sanctions enforcement will become dependent more on political considerations than legal determinations. This will be particularly true in high visibility cross-border cases.

This Article demonstrates that the risks of sanctions enforcement must be factored into any Iranian investment decision. Formal quantification of these risks may be a beneficial method of analyzing appropriate business choices. It is evident that current corporate strategies are already reducing the political risk of unilateral sanctions enforcement and are ultimately undermining sanctions effectiveness. Although unilateral sanctions may not be the primary reason for mergers or subsidiary sell-offs, they will be a consideration in any long-range corporate business strategy. They [*316] already appear to be a proven tactic for maintaining a competitive edge in the Iranian market.

From a policy standpoint, this Article shows that unilateral prohibitions in today's international market are nothing more than a political hot potato. The United States government will ultimately have to rethink foreign policy initiatives that run contrary to international consensus. ⁴⁸ With no support behind U.S.- Iranian sanctions, economic forces are ultimately undermining the viability of their legal enforcement. Though the judiciary may read sanctions provisions broadly, political pressures decrease the chances of a sanctions case actually reaching the courts. Instead, the U.S. government relies on private financial institutions to execute an executive role in enforcing legal provisions.

In the end corporations will continue to look within legal boundaries for a way to circumvent the effects of unilateral sanctions. Where the U.S. economy does not have complete control over a market, corporate initiatives will render unilateral sanctions politically difficult to enforce. As is seen in the Iranian market, sanctions merely create investment opportunities for foreign

businesses, banks, and insurance institutions as corporations avoid those institutions subject to U.S. jurisdiction. All things considered, Alexis de Tocqueville might look down at the Iran's grassroots reform movement with a smile, but he is more apt to raise a quizzical eyebrow at the inconsistency and intransigence found in American sanctions policies. ⁴¹⁹

FOOTNOTES:

n1 Bhushan Bahree, *Fields of Dreams: Big Oil is Gushing About Big Bucks to be Made in Iran-Total Spearheads a Return Despite U.S. Sanctions; Deals Start Piling Up*, Wall St. J. Europe, Mar. 5, 1999, at 1 [hereinafter Bahree I] (quoting Mr. Patrick de Genevraye, vice-president of the Mideast Operations of Total SA while standing on an oil rig in the Persian Gulf).

n2 A Haboob is the Iranian name for a meteorological condition associated with a desert thunderstorm belt. Downward air pressure from the storm will form a suspended cloud of dust up to a hundred miles from the storm center. This phenomenon is a noted factor in the failure of U.S. forces to rescue American hostages in Iran. See James H. Kyle, *The Guts to Try* 178, 248, 249, 327 (1990).

n3 For background information on the evolution of U.S.- Iranian relations, see generally James A. Bill, *The Eagle and The Lion, The Tragedy of American-Iranian Relations* (1988).

n4 The Iranian reform movement has been referred to as "Iran's Second Revolution." See, e.g., *Protesting in Tehran*, *Economist*, July 17, 1999, at 39.

n5 See *id.*

n6 See generally Bahree I, *supra* note 1.

n7 After three years of private negotiations, Conoco outbid Total SA for development of Sirri gas fields. See Bahree I, *supra* note 1; see also *Conoco Signs Deal with Iran to Build Oilfield, - Deal Made Despite Growing Support in Congress to Forbid all Economic and Financial Transactions with Iran*, *Orlando Sentinel*, Mar. 7, 1995, at A3.

n8 See *id.*

n9 See Robert H. Pelletreau, *The United States, Iran and the Total Deals*, XX Int'l Law. News. 23 (1998) (discussing Secretary of State Warren Christopher's anger at not having prior knowledge of Conoco's deal with Iran).

n10 See Robert S. Greenberger, *Clinton Administration Blasts Dupont's Conoco Unit Over Oil Contract with Iran*, Wall St. J., Mar. 8, 1995, at A.5 (quoting U.S. White House and State Department press releases: "This kind of cooperation with Iran is inconsistent with our policy of bringing pressure on Iran, both politically and economically, to change its unacceptable behavior.").

n11 See *id.*

n12 President Clinton tightened sanctions on Iran almost immediately after Conoco announced its agreement. The U.S. Congress followed up with its own legislation less than a year later. See Exec. Order No. 12,957, [60 Fed. Reg. 14,615 \(1995\)](#) [hereinafter Exec. Order No. 12,957]; see also The Iran Libya Sanctions Act (ILSA) of 1996, Pub. L. No. 104-172, 110 Stat. 541 (1996), reprinted in [50 U.S.C.A. § 1701](#) (West Supp. 1999) [hereinafter ILSA].

n13 See, e.g., Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds its Jurisdiction to Prescribe Law*, [54 Wash. & Lee L. Rev. 1601, 1603 \(1997\)](#).

n14 See generally John Elicott, *Between a Rock and a Hard Place: How Multinational Companies Address Conflicts Between U.S. Sanctions and Foreign Blocking Measures*, [27 Stetson L. Rev. 1365 \(1998\)](#) (failing to take a comprehensive approach to analyzing corporate sanctions strategies).

n15 The local political operating environment has traditionally been the single most important factor in a multi-national corporations foreign petroleum investment initiatives. See Christopher Tugendhat, *Oil the Biggest Business* 176 (1969).

n16 Archie Dunham, *Fulfilling the Promise of Middle East Petroleum: A U.S. Perspective* (1998) (visited 2 Sept. 1999) <<http://www.conoco.com>> (recounting Archie W. Dunham, President of Conoco, statement that "Washington's view of the Middle East is a distorted one[,] an image of a region where instability is the norm and political minefields place global oil supplies and therefore global economic growth in continuous jeopardy.").

n17 In response to the Iran-Hostage crisis, President Carter issued Exec. Order 12,170 on 14 Nov. 1979 blocking Iranian assets within United States jurisdiction. See Exec. Order No. 12,170, 44 Fed Reg. 65,729 (1979), reprinted in [50 U.S.C.A. 1701](#) [hereinafter Exec. Order No. 12,170].

n18 Iranian students initially took 63 Americans hostage. Some were released prior to the negotiated resolution of the crisis. As such, many authorities utilize different totals causing some literary confusion. See Kyle, *supra* note 2, at 27; see also Daniel Yergin, *The Prize - The Epic Quest for Oil, Money and Power* 699-702 (1991) (documenting the crisis).

n19 After conclusion of the Iran-Hostage Crisis, Iranian sanctions were rescinded. President Reagan later reinstated sanctions in response to the Iranian military threats against U.S.-Flagged vessels supporting Operation Earnest Will during the Iran-Iraq War. Compare Exec. Order No. 12,525, (1985), reprinted in [50 U.S.C.A. § 1701](#) (West Supp., 1999) [hereinafter Exec. Order No. 12,525], with Exec. Order No. 12,613, (1987), reprinted in [50 U.S.C.A. § 1701](#) (West Supp. 1999) [hereinafter Exec. Order No. 12,613].

n20 See Exec. Order No. 12,959, [60 Fed. Reg. 24,757 \(1995\)](#) [hereinafter Exec. Order No. 12,959]; see also Exec. Order No. 13,059, [62 Fed Reg 44,531](#), reprinted in [50 U.S.C.A. § 1701](#), (West Supp. 1999) [hereinafter Exec. Order No. 13,059] (outlining U.S.-Iranian sanctions policies, clarifying President Clinton's initial Executive Order, and establishing present day sanctions regime).

n21 See Exec. Order No. 12,170, *supra* note 17.

n22 Cf. *id.*

n23 See Jesse Helms, *What Sanctions Epidemic? U.S. Business' Curious Crusade*, 78 *Foreign Affairs* 2 (Jan./Feb. 1999) [hereinafter Helms].

n24 Frequently cited reasons for a hard-line policy towards Iran include also its postulated involvement in the breakdown of the Israeli-Palestinian Peace Accords, and its regional arms buildup. See, e.g., William J. Clinton, *Message to the Congress on the Continuation of the National Emergency with Respect to Development of Iranian Petroleum Resources*, Mar., 5, 1997, in William J. Clinton, 1 *Pub. Papers* 240 (Jan. 1, 1997) [hereinafter *Public Papers 1997*]. Experts allege, however, that it is only a matter of time before Iran is able to acquire nuclear technology. See Michael Eisenstadt, *Living with a Nuclear Iran?*, 41 *Survival* 124 (1999) (discussing Iran's pursuits for nuclear technology).

n25 See Martin Indyk, *Indyk Remarks at NY Council on Foreign Relations*, Apr. 22, 1999 (visited 27 Apr. 1999) <<http://www.usia.gov/regional/nea/mena/indy0423.htm>> (discussing Dual Containment); see also Office of International Security Affairs, *Dep't of Defense, United States Security Strategy for the Middle East 2* (1995) [hereinafter *Strategy*] (clarifying U.S. strategy in the Middle East); Patrick Clawson, *The Continuing Logic of Dual Containment*, 40 *Survival* 33 (1998) (describing the evolution of Dual Containment and arguing that its use is the

"better alternative.").

n26 See S.J. Deitchman, *Beyond the Thaw: A New National Strategy* 44 (1991).

n27 See *Strategy*, supra note 25, at 2.

n28 See Exec. Order No. 12,613, supra note 19.

n29 See Helms, supra note 23, at 4.

n30 See, e.g., Joseph Marty et al., *Symposium: U.S. Gulf Policy: How Can It Be Fixed?*, VI *Middle East Pol'y* 1 (June 1998) (debating U.S. sanctions policies towards Iran).

n31 Since Conoco backed out of its agreement with Iran, no other U.S. company has entered into a major Iranian energy agreement. See Patrick Crow, *U.S. Petroleum Firms Hit Hard by Washington's Unilateral Sanctions*, 95 *Oil & Gas J.* 37 (1997); see also *Iran-Libya Sanctions Act 1 Year Later*, Hearing before the Committee on International Relations House of Representatives, 105th Cong. 75-79 (1997) [hereinafter *House Hearings*] (testimony of Jeffrey J. Schott).

n32 In juxtaposition to contrasting perceptions regarding Iranian politics, lobbying groups have been pressuring Congress hard for a change in U.S. sanctions policies. One of the largest and most active trade-based lobbying group is USA*Engage. See, e.g., USA*ENGAGE Homepage (visited Sept. 2, 1999) <<http://www.usaengage.org/>> (displaying sanctions related information); compare *New Intrigue Roils Iran*, *U.S. News*, Aug. 2, 1999, at 8 (displaying Reuters picture with U.S. activist holding sign saying "Khatami is a Terrorist, down with Khatami.").

n33 See *U.S. Firms Face "No Obstacle" to Iran Oil Industry*, *Agence France-Presse*, Mar. 7, 1999, available in 1999 WL 2559432 [hereinafter *No Obstacle*].

n34 *Id.*

n35 See Andrew Rathnell, *Iran's Liquid Lifeline*, 7 *Jane's Intelligence Rev.* 411, 412 (1998); see also *Crude Cuts: Will Oil Nations Stick or Stay*, *Wall St. J.*, Mar. 26, 1999, at A19.

n36 Rathnell, supra note 35, at 412.

n37 Although foreign investments have been historically threatened by foreign political crises, present day investments are threatened more by domestic political risks. Recent initiatives to invest in the Iranian market have been fraught with domestic political considerations. These are

manifested by the nature in which Iranian sanctions arose. President Clinton announced his Iranian Sanctions policies prior to upcoming presidential elections in front of the World Jewish Congress. This announcement came six days before official notification to Congress after lobbyists put pressure on the administration to take action against investments in Iran. Incidentally, Conoco is a subsidiary of Dupont, in which 25% ownership rested with active members of the World Jewish Congress. Compare Kambiz Foroohar, *Big Oil Versus Clinton*, *Middle E.*, May. 1, 1995, at 18 (alluding to the political nature of Iranian sanctions), with William J. Clinton, *Remarks at the World Jewish Congress Dinner in New York City*, Book I *Pub. Papers* 614-16 (Apr. 30, 1999) [hereinafter *Public Papers 1995*], and *Public Papers 1997*, *supra* note 24, at 653-654.

n38 The terms of D'Arcy's original concession were: of the Iranian country at 16% net annual profit in return for payment to the Shah in the amount of 20,000 and 20,000 worth of shares in the stake. See Yergin, *supra* note 18, at 135-149 (discussing a comprehensive history of early concessions in Iran and the Middle East).

n39 Iran's predominant Shia sect accounts for only 15% of the Muslim world. See John Sabini, *Islam: A Primer* 45(1983)(providing a basic value of the difference between Shia and Sunni faith).

n40 See Yergin, *supra* note 18, at 138 (describing the clash between Shia and Sunni Moslem sects and its impact on foreign oil investments in Iran).

n41 See *id.* at 139; see also Houman A. Sadri, *An Islamic Perspective on Non-Alignment: Iranian Foreign Policy in Theory and Practice*, 16 *J. Third World Stud.* 2946 (1999).

n42 See Yergin, *supra* note 18, at 139.

n43 See Dunham, *supra* note 16.

n44 Compare Yergin, *supra* note 18, at 135-49 (describing historical struggle between U.K. and Russia for power in the Middle East), with Deitchman, *supra* note 26, at 119 (describing contemporary struggle for power in the Middle East).

n45 Cf. Deitchman, *supra* note 26, at 119.

n46 See generally Yergin, *supra* note 18.

n47 Compare Tugendhat, *supra* note 15, with Yergin, *supra* note 18.

n48 See Yergin, *supra* note 18, at 488-70. Much distrust lingers from the suspicion of U.S. involvement in covert operations. Iranians still have not forgotten CIA/MI6 involvement in the 1953 toppling of Muhammed Mossadeq in Operation AJAX. Subsequently, both the Executive and legislative branches continue to fuel this distrust with proposals and funding for covert operations in the Middle East and continual military involvement abroad. See *id.* at 468-70; see also Charles Kurzman, *Soft on Satan: Challenges For Iranian-U.S. Relations*, VI Middle E. Pol'y 63 (Jun. 1998). Compare Milton Viorst, *The Limits of the Revolution*, 74 *Foreign Affairs* 63, 65 (Nov./Dec., 1995) (describing lingering skepticism over previous U.S. covert involvement in Iran), with John Diamond, *Replacing Iran Regime Advocated by Gingrich*, *Wash. Post*, Feb. 9, 1995, at A24, and Associated Press, *House Stealthily Approves \$ 28 Billion Budget for Spy Activities*, *Ariz. Republic/Phoenix Gazette*, Dec. 22, 1995, at A8, (discussing Congressional allocation of \$ 20 million to be used in covert operations against Iran). See generally Mark Bowden, *Black Hawk Down-A Story of Modern War* 1999 (presenting the perception that even innocuous U.S. involvement can escalate to more dubious military action); Alan Cooperman *Et. al.*, *Rolling Up in Iraq Hussein Backs Down for the Moment, but a CIA Operation Is Destroyed*; *Northern Iraq*, U.S. News, Sept. 23, 1996, at 50, 59-60, (alleging recent failure of covert operations in Northern Iraq); Warren Strobel, *America's Plan to Get Saddam. Congress Funded It. Now Clinton Is Fully Behind It. But Will It Work?*, U.S. News, Nov. 30, 1998, (describing \$ 97 million in funding for covert operations under the Iraq Liberation Act); Johanna McGear, *Taking Out Saddam*, *Time*, Nov. 30, 1998, at 46 (providing further details on plans for U.S. covert action against Iraq); *Protestor into Prisoner*, *Economist* 44, Nov. 13, 1999 (reporting on Iran's present concerns over covert operations and the recent secret execution of four student protestors for allegedly collaborating with western intelligence services).

n49 Stephen C. Fairbanks, *A New Era for Iran?*, V Middle East Pol'y 51, 55 (Sept. 1997).

n50 See Jahangir Amuzegar, *Khatami's Iran, One Year Later*, VI Middle East Pol'y 76, 77 (Oct. 1998).

n51 See *id.* at 81.

n52 See *id.*

n53 See *id.* at 88; see also R.K. Ramazani, *The Emerging Arab-Iranian Rapprochement: Towards an Integrated U.S. Policy in the Middle East?*, VI Middle East Pol'y 45 (June 1998) (discussing Iranian initiatives to build trust among its Gulf neighbors).

n54 See Hamid Zangeneh, *The Post-Revolutionary Iranian Economy: A Policy Appraisal*, VI Middle East Pol'y 113, 114 (Oct. 1998) (noting that "just under half of the [Iranian] population is 20 years old or younger, and is in need of education, vocational skills, and jobs").

n55 See Geneive Abdo, Electoral Politics in Iran, VI Middle East Pol'y 128 (June 1999).

n56 See generally e.g., Viorst, *supra* note 48.

n57 See Alan Richards, The Global Financial Crisis and Economic Reform in the Middle East, VI Middle East Pol'y 62, 63, 66 (Feb. 1999) (discussing rising population and urbanization concerns among the Gulf States).

n58 Compare John Page, The Impact of Lower Oil Prices on the Economies of Gulf States, VI Middle East Pol'y 59, 61 (June 1999) (predicting negative per-capita income growth in the Gulf States), and David W. Lesch, Is Syria Ready for Peace? Obstacles to Integration in the Global Economy, VI Middle East Pol'y 94, 101 (Feb. 1999) (discussing the effects of globalization on Syria) with Mark Dennis, The View from Tehran, *Newsweek Int'l*, Dec. 14, 1998 (noting that painfully low oil prices could actually strengthen Iranian moderates).

n59 See Page, *supra* note 58, at 61.

n60 See Richards, *supra* note 57, at 66.

n61 See Jim Anderson, The European Union: Time for a Place at the Table?, VI Middle East Pol'y 160 (Feb. 1999) (noting difference in European and American policies towards Iran and arguing that Dual Containment is squandering priceless U.S. assets when compared to those of European allies).

n62 Britain is one close U.S. ally that is paving new relations with Iran. It recently reestablished diplomatic ties with Iran. See Ian Black, Britain and Iran to Revive Diplomatic Relations, *Guardian* (London), Apr. 13, 1999, at 13.

n63 See Gawdat G. Bahgat, Oil in the Gulf: Prospects for the Twenty First Century, 23 J. Energy & Dev. 83, 91 (1998); see also Yousuf Hasan Jawad Mohammad, Demand for Oil in the Organization for Economic Cooperation & Development Revisited, 23 J. Energy & Dev. 95 (1998). See generally Jeffrey Sachs, *International Economics: Unlocking the Mysteries of Globalization*, Foreign Policy 97 (Spring, 1998).

n64 See William Drozdiak, OPEC Agrees to New Cuts in Output; Glut Has Sent Oil Prices Plunging, *Wash. Post*, June 25, 1998, at C01 (alluding to importance of Iran's role in OPEC by discussing necessary compromise between Saudi Arabia and Iran in order to ensure oil cuts).

n65 See John Calabrese, China and the Persian Gulf: Energy and Security, 53 Middle East J.

351 (detailing China's energy investment in the Middle East).

n66 See generally Bahgat, *supra* note 63; Mohammad, *supra* note 63; Sachs, *supra* note 63.

n67 See S. Fredric Starr, et al., Symposium: Caspian Oil, Pipelines and Politics, V Middle East Pol'y 27, 30-33 (Jan. 1998) (discussing the importance of Central Asia to international oil demands).

n68 See generally Robert R. Copaken, et al., Symposium: Policy Implications of the Price of Oil, VI Middle East Pol'y 34, 50 (June 1999).

n69 See This Century Video Series: Evolution of Revolution-Revolution in Iran, (ABC television broadcast, Apr. 10, 1999) (quoting Imam Khomeini in live translation during 1979 revolution and hostage crisis: "Carter tries to frighten us on the economic front. He does not have the military courage to attack us. Victory will belong to the people who are sitting on waves of oil."). Series hosted by Peter Jennings, abstract also available at ABC Web Page (visited Sep 2., 1999) <<http://abcnews.go.com/century/tvseries/index.html/>>.

n70 Iran maintains 32 producing oil fields-(25 onshore / 7 offshore)-that have been closed to foreign investment since the Iranian Revolution. See Iran-Part 2-The Oil & Gas Fields, 48 APS Rev. Oil Market Trends (May 26, 1997) [hereinafter Part 2].

n71 A barrel of oil is approximately 42 U.S. gallons. For background information on oil production and development, see Energy Information Administration, Petroleum: An Energy Profile, 1999 (visited Sep. 8, 1999) <<http://www.eia.doe.gov/>>; see also Monouchehr Takin, Future Oil and Gas: Can Iran Deliver?, 217 World Oil 96 (1998).

n72 See Iran: Buy-Back Fight Back, Bus. Middle East, Mar. 16, 1999.

n73 See Bahgat, *supra* note 63, at 91.

n74 See generally Bahgat, *supra* note 63; Mohammad, *supra* note 63; Sachs, *supra* note 63.

n75 See Greenberger, *supra* note 10 (stating that U.S. oil companies made purchases of Iranian oil through foreign subsidiaries. Although [31 C.F.R. § 560.407](#) bars importation of Iranian oil, U.S. companies were not prohibited from selling it on the open market prior to the tightening of sanctions in 1995, see [31 C.F.R. § 560.407](#) (1999).

n76 See Rathnell, *supra* note 35, at 411-12.

n77 See Bahree I, supra note 1, at 2.

n78 See generally Part 2, supra note 70.

n79 See id.

n80 See Rathnell, supra note 35, at 412; see also Iran- Part 1-Prospects and Geology, 48 APS Rev. Oil Market Trends (1997) (noting that a gain or loss of \$ 1 barrel in crude prices results in a gain or loss of \$ 912.5 million USD in Iranian export earnings). Compare Bruce Stanley, OPEC's Firmness Could Usher in Higher Fuel Prices; Leaders Are Expected to Maintain Production Cuts Until Next Year, Austin Am. Statesman, Sept. 21, 1999, at D3 (discussing increasing temptation for OPEC members to break quotas with recent rise in oil prices), with Renaissance of "Black Gold"?, Dresdner Bank Trends, Sept. 24, 1999, at 3 (discussing rise in oil prices from twelve-year low of under \$ 10/barrel in December 1998, to over \$ 20/barrel since July 1999).

n81 See Takin, supra note 71, at 96.

n82 See Rathnell, supra note 35, at 412.

n83 See id.

n84 See id.

n85 See id.

n86 See id. Iran's long-term energy strategy puts a major emphasis on gas production, but faces stiff competition from neighboring Gulf States including Oman and Qatar. See id.

n87 Cf. Bahree I, supra note 1.

n88 See Bahgat, supra note 63, at 83, 89.

n89 See id.

n90 The U.S. government has inflated estimates of Caspian oil reserves to a level of 100 billion barrels. See Julia Nanay, The U.S. in the Caspian: The Divergence of Political and Commercial Interests, VI Middle East Pol'y 150 (Oct. 1998) (discussing commercial oil initiatives in the Caspian region).

n91 See Energy Information Administration, Caspian Sea Region (1998) (visited Sept. 8,

1999) <<http://www.eia.doe.gov/cabs/caspian.html>> (providing background information on Caspian energy developments). Proven Caspian Sea reserves are comparable to the reserves in the United States of 22 billion barrels, and the North Sea of 17 billion barrels.

n92 Cf. id.

n93 See Iran to Explore Disputed Caspian Area, *Oil & Gas J.* 34 (1998).

n94 See Bahgat, *supra* note 63, at 90. Compare Iran Stirs Up Trouble in Caspian Waters, 49 *Oil Daily*, (Sept. 10, 1999), available in 1999 WL 10014255.

n95 The Clinton Administration considers the Caucasus of "vital interest" to the United States. See generally Jean- Christophe Peuch, *Caspian Sea Oil: The Role of Private Corporations*, 22 Fletcher F. World Aff. 28 (1998) (citing James Talbott, A Farewell to Flashman: American Policy in the Caucasus and Central Asia, Address at the Johns Hopkins School of Advanced International Studies, Baltimore, Maryland, July 21, 1997, U.S. Department of State Dispatch, Vol. 8, No. 6, July 1997); see also Strategy, *supra* note 25.

n96 See generally Peuch, *supra* note 95.

n97 See Bahgat, *supra* note 63, at 90.

n98 See id.

n99 See Nanay, *supra* note 90, at 154-56.

n100 See 31 C.F.R. § 560.206 et seq. (1999) (denoting prohibited transactions).

n101 See Nanay, *supra* note 90, at 154.

n102 See id. at 150.

n103 See id.

n104 See id.; see also Rathnell, *supra* note 35, at 412 (discussing Pakistani desires for gas pipeline).

n105 See Nanay, *supra* note 90, at 154.

n106 See id.

n107 See id.

n108 See Turkmenistan: Trans-Iran Oil Pipeline, 51 APS Rev. Oil Market Trends (Sept. 21, 1998).

n109 See Nanay, *supra* note 90, at 154.

n110 Compare Rathnell, *supra* note 35, at 411, with Amuzegar, *supra* note 49.

n111 See Iran-Profile-Figures in the Oil Ministry and the NIOC: Dr. Mohammed Hadi Nejad Hosseinian, 48 APS Rev. Downstream Trends (June 9, 1997) (noting Iran's 25-year plan to build 30 petrochemical units at a cost of \$ 12 billion).

n112 See Iran-The Petrochemical Sector, 48 APS Rev. Downstream Trends (June 2, 1999).

n113 The Iranian Constitution was drafted during the revolution and exhibits strong efforts to provide protection from Western involvement. See Hamid Algar, Constitution of the Islamic Republic of Iran 45, 57 (1980) (translating the Iranian Constitution, Articles 44 and 81); see also Asghar Schirazi, The Constitution of Iran: Politics and the State in the Islamic Republic 22 (1997) (discussing the drafting process).

n114 See Maria Kielmas, Mixed Reactions to Opening Up of the Exploration Sector (Iranian Petroleum Sector), 65 Petroleum Econ. 3 (Aug. 1, 1998).

n115 See Iran-The Buy-Back Approach, 52 APS Gas Market Trends (Mar. 29, 1999)[hereinafter Buy-Back].

n116 See Kielmas, *supra* note 114, at 3; see also Iran Signs Oil Contract with French, Canadian Firms, Deutsche Presse Agentur (Apr. 5, 1999).

n117 See Kielmas, *supra* note 114, at 3.

n118 See e.g., Bhushan Bahree, European Oil Majors March Back to Iran-U.S. Sanctions Keep American Rivals on Sidelines for Now, Wall St. J., Mar. 10, 1999, at A19 [hereinafter Bahree II] (stating that the Iranian parliament has approved \$ 5.4 billion USD in investment of projects and estimating needed investment for the offers at \$ 8 billion USD).

n119 See id.

n120 See Major Producers Walk the Tightrope, 219 World Oil 106 (Aug. 1, 1998) [hereinafter Tightrope].

n121 See Bahree II, supra note 118.

n122 See Iran's Bid to Lure Oil Investment Succeeding Despite U.S. Sanctions, Oil Gas J. (Apr. 5, 1999).

n123 See Iran: Pressure Against U.S. Sanctions Grows, Middle East Econ. Production Dig., Mar. 12, 1999 [hereinafter Pressure] (quoting Conoco President of Asia, Africa, & Middle East Exploration & Production).

n124 See U.S. Const. arts. I, § 8, cl. 2, II, § 2. For an excellent treatise on shared Executive and Congressional Foreign Affairs authority under U.S. Constitutional Law, see Louis Henkin, Foreign Affairs and the Constitution (1996).

n125 Compare Alexander, supra note 13, at 1601 (questioning the validity of extraterritorial application of U.S. sanctions laws), with Charles Tait Graves, Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996, [21 Hastings Int'l & Comp. L. Rev. 715 \(1998\)](#) (calling ILSA's extraterritorial application "radical"), and Wynn H. Segall, Running on Empty: U.S. Economic Sanctions and Export Controls in 1997, 32 Int'l L. 271-72 (1998) (describing European and Russian threats of complaint to World Trade Organization over U.S. sanctions policies).

n126 See [United States v. Arch Trading, 987 F.2d 1087, 1093 \(4th Cir. 1993\)](#) (citing [Dames & Moore v. Regan, 453 U.S. 654, 675 \(1981\)](#)).

n127 For a comprehensive look at the political development of the Iranian sanctions regime, see generally Lucien J. Dhooge, Meddling with the Mullahs: An Analysis of the Iran and Libya Sanctions Act of 1996, 27 Denver J. Int'l L. & Pol'y 1 (1998).

n128 The IEEPA authority originally stems from The Trading with the Enemy Act (TWEA). See [50 U.S.C.A. §§ 1601](#), 1701, et. seq. (West 1998); see also [50 U.S.C.A. App. § 5](#) (West, 1998).

n129 See ILSA, supra note 12.

n130 See [50 U.S.C.A. §§ 1701\(a\)](#), 1702(a) (West 1998).

n131 See Exec. Order No. 12,957, supra note 12; see also Exec. Order No. 12,959; Exec. Order

No. 13,059, *supra* note 20; 31 C.F.R §§ 535, 560.

n132 See *id.*

n133 See William J. Clinton, Notice-Continuation of Iran Emergency, March 10, 1999, (visited Apr. 27, 1999) <<http://frwebgate.access.gpo.gov/cgi-bin/>>.

n134 See [31 C.F.R. § 535.201](#).

n135 Iranian sanctions penalties are subject to Congressionally mandated changes. Though the statute quotes a \$ 10k civil penalty, the Federal Civil Penalties Inflation Adjustment Act of 1990 adjusted the original \$ 10k penalty to \$ 11k. Compare [50 U.S.C.A. § 1705\(a\)](#) (West 1998), with [31 C.F.R. §§ 535.701](#), 560.701.

n136 See [50 U.S.C.A. § 1705\(a\)](#).

n137 See *id.* § 1705(b).

n138 *Id.* § 1705(b).

n139 See *id.* § 1705(b).

n140 See *id.* § 1705(b).

n141 See Cecil Hunt, Overview of U.S. Export Controls, 782 Private L. Inst. 17, 23 (1998) (providing general background information on the Office of Foreign Assets Control (OFAC)).

n142 See Iran-What You Need to Know about U.S. Sanctions, U.S. Dept. of Treasury, Office of Foreign Assets Control (1999) (visited Apr. 27, 1999) <<http://www.treas.gov/ofac>>; see also [31 C.F.R. § 560.201](#) *et. seq.*

n143 See *id.*

n144 See OFAC Publication, Export Controls Compliance: Don't Neglect OFAC (PART 1), XIII Society for Int'l Aff. News Notes 2 (Jan./Feb. 1999) [hereinafter SIA I] (visited Sept. 2., 1999) <<http://www.treas.gov/ofac>>; see also ILSA § 6(2), *supra* note 12 (delineating presidential licensing authority).

n145 See SIA I, *supra* note 144 at 4.

n146 See id.

n147 See [31 C.F.R. § 560.206](#) (prohibiting financing or brokering of transactions by a U.S. person relating to goods or services of Iranian origin).

n148 See generally id. § 560.206.

n149 See [31 C.F.R. § 560.525\(a\)\(1\)](#) (preventing legal advice in transactions that may violate sanctions prohibitions).

n150 See 31 C.F.R. § 560 et. seq.

n151 See ILSA, supra note 12, § 3(a).

n152 See id. § 5(a).

n153 See id. § 5(a). ILSA's threshold amount was initially \$ 40 million but its terms lowered it to \$ 20 million after the first year of implementation. See id. § 5(a). The multi tier structure of sanctions continues to result in confusion in current reporting. See Libya Muddling On, Economist, Sept. 4, 1999, at 47 (stating incorrectly that the limitation of investment under ILSA is currently capped at \$ 40 million).

n154 See ILSA, supra note 12, § 5(a).

n155 See id. § 6.

n156 See id. § 6.

n157 The U.S. State Department reviews foreign transactions for their validity under ILSA in a long and drawn out process that allows for waivers if the State Department deems that base countries adequately discourage Iran from state- sponsored terrorism. See U.S. Govt: Sanctions Decision on Iran Oil Deals Months Away, Dow Jones Telerate Energy Serv., Feb. 18, 1999 [hereinafter Dow Telerate I].

n158 See ILSA, supra note 12, § 14

n159 See id. § 14.

n160 See id. § 14.

n161 See, e.g., Rex J. Zedalis, *The Total SA Case Meaning of "Investment" Under the ILSA*, [92 Am. J. Int'l L. 539, 547 \(1998\)](#) (arguing that ILSA will pose an interpretive challenge for lawyers).

n162 See generally ILSA, *supra* note 12.

n163 See ILSA, *supra* note 12, §§ 4(C), 9(C).

n164 See Madeline Albright, *Statement by the Secretary of State, Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case*, May 18, 1998, (visited Sept. 2, 1999) <<http://www.usia.gov>> (announcing waivers).

n165 See *id.*

n166 See *Campion Walsch, U.S. Sanctions Waiver on Iran's Balal Oil Deal Not Assured*, *Dow Jones News Serv.*, Apr. 5, 1999 (quoting U.S. State Department Spokesman: "We are deeply concerned about this investment. The U.S. remains strongly opposed to investment in Iran's petroleum sector.").

n167 See *id.*

n168 See *U.S. Eases Three Trade Embargoes*, *Houston Chron.*, July 27, 1999, at 3 (noting recent ease in sanctions on Iran, Libya, and Sudan, for food and medical supplies).

n169 Compare *Carol Giacoma, Sanctions Deemed Unlikely in Latest Iranian Oil Deal*, *Seattle Times*, Mar. 4, 1999, at A21, with *Paul Bagnell, Bow Valley Inks Offshore Deal in Iran: May Face U.S. Sanctions: Ottawa Ready to Resist Any Pressure from Washington*, *Nat'l Post*, Apr. 5, 1999, at C01.

n170 See *id.* But cf. ILSA, *supra* note 12, § 8.

n171 See ILSA, *supra* note 12, § 8.

n172 Over 500 U.S. corporations have formed the National Foreign Trade Council to lobby Washington on sanctions policies. See *Crow*, *supra* note 31; see also *Pressure*, *supra* note 123.

n173 See *SIA I*, *supra* note 144, at 2-4.

n174 See *id.*; see also *George Gedda, U.S.-Iran Relations Remain Stagnant*, *Associated Press Report*, Aug. 1, 1999 (visited Sept. 2, 1999).

<http://www.iriantrade.org/NewsUpdates/00000258.htm/> (discussing U.S. ease in sanctions for foodstuffs and medicines).

n175 See SIA, I supra note 144, at 2-4.

n176 See id.

n177 See id. at 2.

n178 See id.

n179 See id.

n180 See id.

n181 See id.

n182 See, e.g., Thomas W. Lippman, Politicians at Odds on Sanctions as Policy; Administration Says Tool Can Be Costly, Wash. Post, May 19, 1998, at A17.

n183 See The Comprehensive Iranian Sanctions Act of 1995-S. 277, Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 104th Cong. 47, 75 (1995) [hereinafter Senate Hearings] (testimony of Kensington & attached: Kenneth R. Timmerman, Our Confused Signals over Iran, Wall St. J., Feb. 15, 1999) (stating that the Conoco deal would "fund terrorism" and that sanctions are needed to "send a message" to our allies).

n184 See Ellen Laipson, et. al., Symposium: U.S. Policy Toward Iran-From Containment to Relentless Pursuit?, IV Middle East Pol'y 5 (1995); see also William Wallace & Jan Zielonka, Misunderstanding Europe, 1 Foreign Affairs 65, 75 (Nov./Dec., 1998) (quoting Senator Jesse Helms walking out on the British Foreign Secretary over sanctions issues: "To hell with international law.").

n185 See Bagnell, supra note 169, at C01 (quoting spokesman for Canadian Department of Foreign Affairs and International Trade regarding possible U.S. efforts to sanction Canadian investment deals in Iran: "We don't like it. There is nothing illegal about Canadian companies doing business in Iran or Libya." Also noting that the French Foreign Ministry does not recognize U.S. unilateral sanctions as legitimate: "Elf is free to sign contracts with Iran if it wants. It's a commercial decision.").

n186 See Peter L. Glossop, Recent United States Trade Restrictions Affecting Trade with

Cuba, Iran, and Libya-A View from Outside the United States, Paper 2A presented at International Resources Law Conference sponsored by Rocky Mountain Mineral Law Foundation and IBA Section on Energy & Natural Resources Law, Denver, Colorado, Mar. 3-4, 1997 [hereinafter Rocky Mountain Paper 2A]; see also M. Jean Anderson, U.S. Economic Sanctions on Cuba, Iran & Libya: Helms Burton & the Iran & Libya Sanctions Act, Paper 2B; presented at International Resources Law Conference sponsored by Rocky Mountain Mineral Law Foundation and IBA Section on Energy & Natural Resources Law, Denver, Colorado, Mar. 3-4, 1997 [hereinafter Rocky Mountain Paper 2B].

n187 See id.

n188 See Rocky Mountain Paper 2B, supra note 186.

n189 But see Gary Hufbauer, Does International Law Matter to Congress, 92 Am. Soc'y Int'l L. Proc. 332, 334 (1998). The United States refuses to submit the issue of sanctions for international review with the World Trade Organization. Id.

n190 See id.

n191 See also Harvey Oyer, Note, The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations Under NAFTA, [11 Fla. J. Int'l L. 429, 444-45 \(1997\)](#) (discussing U.S. refusal to submit sanctions issues to the WTO and noting that foreign powers may also issue "clawback" provisions authorizing parties affected by U.S. sanctions to countersuit for damages).

n192 See Rocky Mountain Paper 2A, supra note 186; Rocky Mountain Paper 2B, supra note 186.

n193 See Masood Farivar, Arco/Exploration/Iran-4: Steps for Entering Energy Sector, Dow Jones News Service, Mar. 2, 1999 (quoting Don Voelte, President of Arco on the limits of U.S. sanctions laws).

n194 See Maher Chmaytelli, U.S. Oil Firms Left Out, Frustrated as Iran Opens for Business, Agence France-Presse, Mar. 18, 1999 (noting European anxiety over possible U.S. competition in Iranian market if sanctions are lifted).

n195 Cf. Bahree II, supra note 118, at A19 (noting U.S. firms barred by American sanctions).

n196 See Crow, supra note 31.

n197 See id.

n198 Over 450 delegates from 150 companies attended the 1998 Iranian sponsored oil conference in London, England-U.S. firms were well represented. See Chmaytelli, *supra* note 194 (quoting Conoco President Archie Dunham: "Conoco is ready to return to Iran as soon as sanctions are lifted."); see also Anne K. Rhodes, *Iran Pressing Fiscal Incentives, Assurances to Attract Investors to its Petrochemical Sector*, 97 *Oil & Gas J.* 20 (1999) (discussing increased foreign investment opportunities in the Iranian petrochemical sector and quoting CEO Archie Dunham at the March 1999 Middle East Petroleum and Gas Conference in Dubai, United Arab Emirates).

n199 See id. See also *Iran Open to Offers*, *Tech. Rev. Middle East*, July 15, 1998.

n200 Shell initially avoided Iranian offers because of its assets in the United States, but it later returned to negotiations with Iran over South Pars Gas development and is currently an active bidder on further Iranian contracts. See *U.S. Firm Bids for Oil Schemes Despite Sanctions*, *Middle East Econ. Dig.*, Jan. 29 1999, at 16 [hereinafter *Bids*] (discussing Arco's bids for contracts in Iran); see also *Buy-Back*, *supra* note 115.

n201 See id. See also *Shell Poised to Strike Deal with Iran / Oil Giant Said Prepared to Ignore Threat of U.S.-Imposed Sanctions*, *Houston Chron.*, Aug. 19, 1999, at 2 [hereinafter *Shell Poised*] (quoting Shell source: "Shell would go ahead with the Soroush and Nowruz project. American sanctions are a concern, but Shell will seek a waiver").

n202 Iran began utilizing conferences to actively solicit Western development interest 1991. It continues to rely on such conferences to market its oil investment opportunities. See *Oil's New World Order: For a Quarter of a Century Oil-Producing Countries Have Fought to Keep Western Companies Out; Now They are Wooing Them Back*, *Economist* 67, 13 July 1991; see also *News Release, Status Report on Iran's Efforts to Lure Oil-Field Investment*, in *Petroleum Intelligence Wkly*, May 19, 1997 (discussing Iranian showcase oil and gas conference in Esfahan, Iran attracting some of the biggest names in the industry); *News Release, SMI Ltd, The Iranian Petroleum Summit Announcement*, (visited Sept. 4, 1999) <<http://www.iraniantrade.org/cyprusspcl.html>> (announcing 14-15 September, 1998 oil and gas conference at Hilton Hotel in Nicosia, Cyprus hosted by the National Iranian Oil Company and British Petroleum).

n203 U.S. companies are spending thousands of dollars just for their representatives to attend conferences on Iranian investment opportunities. See *Andrea Lorenze, Canadian Advantage - Gaining Entry to Vast Resources of Iran and Iraq*, *Oilweek*, May 3, 1999; see also *Bids*, *supra* note 200.

n204 See 31 C.F.R. §560 et. seq. (1999).

n205 See Bids, *supra* note 200, at 16.

n206 See Iran: Foreign Branch Offices Allowed, 20 Middle East Exec. Rep. 4 (1997); see also Farivar, *supra* note 193 (discussing ARCO's desire to open a branch office in Iran).

n207 See Amy McClellan, EU Firms Exempted from U.S. Sanctions, *Lloyd's List Int'l*, May 25, 1998, at 4 (noting BP's plans to open a representative office in Tehran).

n208 *Id.*; see generally S.E. Rayner, *The Theory of Contracts in Islamic Law* (1991).

n209 See [31 C.F.R. § 560.523](#) (1999).

n210 See Steve Liesman, Despite Sanctions, Mobil, Arco Signal Interest in Iran's Oil, Gas, *Wall St. J. Int'l*, Mar. 4, 1999, at A11 (discussing Mobil and Arco's acquisition of geographical data sets-quoting Mr. Lance Johnson, President, Mobil Exploration and Production Division: "We're doing about anything we can within the guidelines. We're trying to have a profile that positions us for when the sanctions are lifted.").

n211 See *id.*

n212 See Conoco Applauds U.S. Decision to Waive Sanctions in Total Deal, *Agence France-Presse*, May 18, 1998 (recounting Conoco President's view that companies should be able to invest in the Iranian market).

n213 See Country Report Iran 2nd Quarter 1998-Oil & Gas: Mobil Pushes for Swap Deal, *Econ. Intelligence Unit Limited*, May 20, 1998, at 26 [hereinafter Report] (describing Swap transaction between Mobil and Iran concerning Kazakh oil. Mobil is seeking to expand swaps in 1999. A typical Swap would be 1-2 million barrels of unrefined oil for amount of refined oil in equal value); see also Nanay, *supra* note 90, at 153-55 (discussing Chevron Swap arrangements).

n214 See Report, *supra* note 213, at 26.

n215 See *id.*

n216 See Nanay, *supra* note 90; see generally Starr, *supra* note 67.

n217 See *id.*

n218 See [31 C.F.R. § 560.206](#) (1999).

n219 See *id.*

n220 See *id.*

n221 See SIA I, *supra* note 144.

n222 See Strategy, *supra* note 25.

n223 See [31 C.F.R. § 560.303](#) (1999)(describing "Iranian" as any territory or marine area over which Iran claims sovereign rights and where partial or total control receives benefit).

n224 See Bids, *supra* note 200, at 16.

n225 See *id.*; see also ILSA, *supra* note 12.

n226 See [31 C.F.R. § 560.206](#) (1999).

n227 See *id.*

n228 See [50 U.S.C.A. § 1705](#)(b) (West 1998). See generally 31 C.F.R. § 560 (1999).

n229 See Bruised but Unbroken: How Oil and Gas Companies Fought 1998 and Won, Oil & Gas J., Jan. 4, 1999, at 18- 23 (failing to discuss sanctions as a consideration for merger).

n230 See e.g., Shell Reorganizes for Speed and Profit, Oil & Gas J., Dec. 21, 1998, at 31 [hereinafter Shell Reorganizes] (discussing Shell's merger considerations).

n231 See U.S. Mergers, Acquisitions Soar in 1998, Oil & Gas J., Jan. 4, 1999, at 23.

n232 Experts often state that a company's size can impede the speed at which a company can move into the Gulf market. A large company such as Shell is likely to consider the benefits of merging with a smaller company specialized in Middle East exploration, (e.g., Arco), in order to break into the Iranian market. Compare Campion Walsch, Exxon-Mobil/Persian Gulf- 3: Competition Still Intense, Dow Jones Telerate Energy Serv., Dec. 1, 1998, available in EN News database, with Shell Reorganizes, *supra* note 230.

n233 BP-Amoco is headquartered in London, England, and it is generally considered that BP

absorbed Amoco during their recent merger. As a result, an issue remains as to whether or not U.S. administrative agencies will treat Amoco as a U.S. company for purposes of ILSA sanctions. Since BP-Amoco maintains approximately 50% of its assets in the United States it would still be subject to the jurisdiction of OFAC proscriptions. Compare David B. Ottaway & Martha M. Hamilton, BP-Amoco Seek to Drill in Iran; Firm Claims Waiver for U.S. Sanctions, Wash. Post, Jan. 30, 1999, at E01 [hereinafter Ottaway] (discussing BP-Amoco proposal to develop three major oil fields in southern Iran), with Big Oil gets Bigger Targeting Reserves, Middle E. Econ. Dig. Aug. 28, 1998, at 2 [hereinafter Bigger] (discussing BP-Amoco merger, noting Amoco's extensive involvement in the Caspian and Middle East).

n234 See Maureen Lorenzetti, Conoco Asks U.S. Okay to Run Iranian Crude, 76 Platt's Oilgram News Apr. 13, 1998, available in 1998 WL 9827594 (discussing Conoco-Petronas-Statoil (40%-45%-15%) joint-venture partnership arrangement in Melaka-II, Malaysian oil refinery project and Conoco's proposal to allow its partner Petronas to process Iranian heavy crude). Experts assess that proposal will likely win approval from U.S. authorities. Id.

n235 See id.

n236 The Iran-Libya Sanctions Act makes a distinction between a "Person" and a "United States Person." Under ILSA provisions a corporation is considered "foreign" if it is not organized under the laws of the United States and U.S. persons do not own, directly or indirectly more than 50% of the outstanding capital stock or interest. See ILSA, supra note 12, § 14(7),(17). Foreign corporations that merge with U.S. subsidiaries may be able to avoid ILSA sanctions if they can re-characterize operations as non-U.S. if the U.S. subsidiary maintains less than 50% of the outstanding capital stock or if assets are moved outside U.S. jurisdiction. Still, evasion of Iranian sanctions regulations is prohibited by [31 C.F.R. §§ 535.208, 560.203](#) and a U.S. subsidiary might have a difficult time escaping the long arm of Federal Court "minimum contacts" jurisdiction. See [International Shoe Co. v. Washington, 326 U.S. 310](#), (1945), and its progeny.

n237 See ILSA, supra note 12, § 5.

n238 See generally Rocky Mountain Paper 2A, supra note 186 (discussing Blocking Legislation); Rocky Mountain Paper 2B, supra note 186 (discussing Blocking Legislation).

n239 Incidentally the BP-Amoco merger provides a good example of a subsidiary poised to take advantage of the Iranian market. See Amoco License Tops Caspian Sea Action, Oil & Gas J., Jun. 29, 1998, at 34 (discussing Amoco's initiatives in the Caspian sea); see generally also Bigger, supra note 233.

n240 See United Nations, World Investment Report 1997, Transnational Corporations, Market

Structure and Competition Policy 9 (1997) (noting that a primary means of entering foreign markets is through cross-border merger).

n241 See Bigger, *supra* note 233, at 2.

n242 See Farivar, *supra* note 193 (discussing Arco's interest in smaller "exploitation" projects in Iran); see also Chmaytelli, *supra* note 194 (noting Syntroleum Corp., a U.S. specialized company in Liquefied Gas Technology (LGT), with interest in Iranian gas development).

n243 See Anne Rhodes & Patrick Crow, BP/Amoco Merger Creates Oil "Super-Major," *Oil & Gas J.*, Aug. 17, 1998, at 34.

n244 See Ottaway, *supra* note 233, at E01.

n245 BP has been out of the Iranian market since Iran's 1979 Revolution. See McClellan, *supra* note 207, at 4.

n246 See Albright, *supra* note 164.

n247 See [31 C.F.R. § 560.203](#) (1999) (prohibiting any transaction by any U.S. person that has the purpose of evading any of the sanctions regulations).

n248 See *id.* § 560.203.

n249 Compare *id.* § 560.203, with Burrell, *supra* note 232. The Department of Treasury routinely coordinates with the Department of State and the Department of Commerce to enforce sanctions. Confirmed by Author in personal conversation with OFAC representatives, Jul. 22, 1999.

n250 See Daniel Southerland, Over a Barrel in Iraq? Clinton Policy Sidelines U.S. Firms in the Rush for Rights to Tap 'Super-Giant' Field, *Wash. Post*, May 7, 1995, at H01 (quoting Lawrence Goldstein, President of Petroleum Industry Research Foundation, describing the effect of U.S.-Iraqi sanctions on U.S. companies). Although the topic differs, the situation is both analogous and aptly prescient of the current situation regarding U.S. Iranian sanctions.

n251 Of the three most recent contracts signed between Western energy corporations and Iran, all are partnership arrangements: Total-Petronas-Gazprom (South Pars Gas Fields); Bow Valley-Elf (Balal Oil Field); Elf-Agip (Dorood Oil Field).

n252 See Pelletreau, *supra* note 9, at 24.

n253 See id.

n254 See id. at 25.

n255 See generally id.

n256 See Christophe de Roquefeuil, France's Elf, Canada's Bow Valley Sign Iranian Oil Deal, *Agence France-Presse*, Apr. 4, 1999 (indicating that Bow Valley's second partner to the Balal Oil Field contract, Premier of U.K. backed out as a result of financial difficulties).

n257 See Kielmas, *supra* note 114 (indicating that major European creditors can not cover the risks of major Iranian oil development offers).

n258 See [31 C.F.R. § 560.206](#) (prohibiting financing for Iranian oil development transactions).

n259 See id.

n260 See Roquefeuil, *supra* note 256.

n261 See id.; see also House Hearings, *supra* note 31 (testimony of Stuart Eizenstaat) (indicating that the United States pressured Bow Valley's initial partner Bakrie to back out of its partnership arrangement and that Bakrie was also limited due to the Asian financial crisis).

n262 Compare 31 C.F.R. § 560, with ILSA, *supra* note 12.

n263 See Pelletreau, *supra* note 9, at 24.

n264 See id. Total SA sold all its facilities and operations in the United States to Ultramar Diamond Shamrock Corporation before entering a second agreement with Iran for South Pars Gas Fields development.

n265 See Oil: Elf Doubles Activities in Iran-Abstract, *Les Echos*, reprinted in *World Reporter*, Apr. 6, 1999.

n266 See Elf-Agip Sign Dorood Contract with Iran, *Oil & Gas J.*, Mar. 8, 1999, at 31.

n267 See Thomas Kamm, et al., Target Calls Bid Hostile; Takeover Would Create Biggest Firm in France, *Wall St. J.*, July 6, 1999, at A3 (discussing Total-Elf merger).

n268 See generally Rocky Mountain Paper 2A; supra note 186; Rocky Mountain Paper 2B, supra note 186.

n269 Interestingly, the Executive Branch has stated that the basis for its waiver is that European countries are cooperating with the United States in efforts to curb Iranian support for terrorist activities and acquisition of WMD technology. Yet, in issuing its waiver, the President did so under ILSA Section 9C not Section 4C. Ostensibly this choice was made to avoid answering questions regarding the extent of foreign cooperation on Iranian issues. A 9C waiver is issued if the President makes a determination that such a waiver is in the national interest, while a 4C waiver requires a foreign country to establish specific sanctioning procedures. Compare Albright, supra note 164, with ILSA, supra note 12, §§ 4(c), 9(c).

n270 See Rocky Mountain Paper 2A, supra note 186.

n271 [United States v. Ehsan, 163 F.3d 855, 859 \(4th Cir. 1998\).](#)

n272 See id.

n273 See generally [Dames & Moore v. Regan, 453 U.S. 654 \(1981\)](#) (holding that the Executive Branch has wide authority under IEEPA regulations so long as it has "implicit approval" from Congress).

n274 See generally id.

n275 See Senate Hearings, supra note 183 (indicating that the sanctions were passed to "set an example" for other nations to follow).

n276 See id.

n277 See ILSA, supra note 12, § 4 (requiring the President to attempt establishment of a multi-lateral sanctions regime against Iran upon ILSA's enactment).

n278 [163 F.3d 855 \(4th Cir. 1998\).](#)

n279 [Id. at 857.](#)

n280 Id.

n281 Id.

n282 See [id. at 857, 859.](#)

n283 See id.

n284 See [id. at 857.](#)

n285 [Id. at 860.](#)

n286 See [id. at 859.](#) The Court noted that "[t]he obvious purpose of the order is to isolate Iran from trade with the United States." Id.

n287 See Henkin, *supra* note 124, at 131-48 (discussing the courts in foreign affairs matters).

n288 [987 F.2d 1087 \(4th Cir. 1993\).](#)

n289 [Id. at 1090.](#)

n290 See id.

n291 See [id at 1090-96.](#)

n292 See id.

n293 See id.

n294 See id.

n295 See, e.g., [Consarc Corp. v. United States Treasury Dep't, 71 F.3d 909, 315 U.S. 201](#) App. D.C. 201 (D.C. Cir. 1995) (holding that OFAC's asset blocking and fund freezing under Iraqi sanctions regulations was permissible and granting wide latitude to the Executive Branch in enforcement measures).

n296 Case analysis refutes any argument that ILSA can be interpreted with ambiguity. See Zedalis, *supra* note 159, at 542 (making a narrow textual argument that some petroleum services may not fall under the "ambit" of ILSA).

n297 Commercial policy reasons for not enforcing U.S.- Iranian sanctions might include claims that U.S. subsidiaries have only limited control over foreign partnership arrangements and therefore should not be subjected unfairly to domestic political constraints.

n298 See OFAC-Frequently Asked Questions (FAQ's) (visited Apr. 26, 1999) <<http://www.ustreas.gov/ofac/tliran.pdf>> (suggesting each financial institution designate an OFAC compliance representative and that each institution must check every financial transaction against OFAC list of prohibited companies).

n299 See id.

n300 See id.

n301 See id.

n302 Mehrdad Balali, Khatami Seeks Support for Iran Investment, Reuters, Aug. 28, 1999, (visited 8 Sept. 99) <<http://www.iraniantrade.org/NewsUpdates/0000029e.html>> (quoting Iranian President Mohammad Khatami).

n303 See Specialized Financing: Iraq to Mirror Iran Financing Method, Project & Trade Fin., July 1, 1997, at 19.

n304 For an excellent case-book analyzing energy contract formation, clauses, and an overview of transaction types see Ernest E. Smith, et. al., International Petroleum Transactions 358, 667 (1993); see, e.g., Buy-Back, supra note 115; Nanay, supra note 90.

n305 See OECD, Countertrade - Developing Country Practices 14 (1985).

n306 See id. at 14, 26.

n307 See Cedric Guyot, Countertrade in International Business, 20 Int'L Law 921, 925 (1986). Swaps are simply non- currency barter transactions. See id. (describing in detail various counter-trade transactions).

n308 See Report, supra note 213 (noting that Mobil is seeking to expand Swap deals with Iran in 1999).

n309 See Lorenzetti, supra note 234 (discussing Conoco- Petronas-Statoil (40%-45%-15%) joint-venture partnership arrangement in Melaka-II, Malaysian oil refinery project and Conoco's proposal to allow its partner Petronas to process Iranian heavy crude-experts assess that proposal will likely win approval from U.S. authorities).

n310 See Guyot, supra note 307, at 948.

n311 See Dick Francis, *Countertrade Handbook* 30-31 (1987).

n312 See Bahree II, *supra* note 118.

n313 See Guyot, *supra* note 307, at 921-22.

n314 See *id.* at 955.

n315 See Francis, *supra* note 311, at 30.

n316 See generally Sheila Page, *How Developing Countries Trade-The Institutional Constraints* 69 (1994) (discussing historical views of counter-trade and citing a total of 215 documented counter-trade transactions in the Middle East between 1980-1987).

n317 See OECD, *supra* note 305, at 34-35.

n318 See Francis, *supra* note 311, at 193.

n319 See OECD, *supra* note 305, at 34-35.

n320 See *id.*

n321 See *id.* (describing exchange between Iran-New Zealand 84 million; exchange between Iran-China \$ 500 million USD; exchange between Iran-Brazil \$ 400 million; exchange between Iran-Japan \$ 770 million; exchanges documented between 1981-1983 and included exchange of oil for commodities, services, products, and foodstuffs).

n322 See, e.g., Bahree II, *supra* note 118.

n323 See OECD, *supra* note 305, at 32.

n324 See Buy-Back, *supra* note 115.

n325 See *id.*

n326 See *id.*

n327 Iran's Supreme Economic Council must approve current foreign contracts. See Francis, *supra* note 311, at 193; see also Bhushan Bahree, *Iran, in Blow to U.S. Sanctions, Advances ELF-ENI Oilfield Deal*, *Wall St. J. Int'l*, Feb. 18, 1999, at A17 [hereinafter Bahree III].

n328 See Guyot, *supra* note 307, at 948.

n329 See Walied El-Malik, *Minerals Investment Under the Shari'a Law* 9 (1993).

n330 See Iran Survey: Hard Times, How Not to Attract Investment, *Economist*, Jan. 18, 1997.

n331 Worldwide concern over oil-price declines has been well documented in recent periodicals. See e.g., *The Next Shock?*, *Economist*, Mar. 6, 1999, at 23 [hereinafter *Shock*].

n332 World Bank, *Global Economic Prospects and the Developing Countries* 77-78(1996) (citing Iran's GDP Growth rate for 1994 at a dismal -0.1% and a rising inflation rate at 35.4%).

n333 See Tightrope, *supra* note 120, (citing the Iranian's \$ 6 Billion USD government deficit through Mar. 21, 1999).

n334 See Rathnell, *supra* note 35, at 411-12.

n335 See Tightrope, *supra* note 120.

n336 See Schirazi, *supra* note 113, at 23.

n337 Compare Bruce Stanley, *Oil Ministers Target Production Cuts*, *Bryan-College Station Eagle*, Mar. 21, 1999, at A6, with Steve Liesman, et al., *Crude Cuts: Will Oil Nations Stick or Stray?*, *Wall St. J.*, Mar. 26, 1999, at A19, and Steve Liesman, et al., *Oil Producers' Pact to Slash Supplies is Unlikely to Succeed, Skeptics Contend*, *Wall St. J.*, Mar. 15, 1999, at A3 (discussing the likelihood that increased oil prices and economic difficulties will encourage OPEC members to violate newly set production cuts).

n338 See Stanley, *supra* note 337, at 46.

n339 Saudi consideration of increased production and Iraq's desire to expand exports will result in an even stronger impetus for OPEC members to cheat on production quotas, resulting in the possibility of a flooded oil market. See *Aramco Self-Sufficient*, *Gulf States News.*, Feb. 19, 1999, at 1 (discussing Crown Prince Abdullah's suggestion in 1998 that the Saudi oil sector could be open to participation by foreign oil companies); see also A.F. Alhajji, *Why Do Some OPEC Members Cheat?*, 23 *J. Energy & Dev.* 59 (1998) (noting that the real value of oil drops for countries such as the UAE when OPEC cuts production).

n340 Depressed oil prices have pushed Iran deeper into recession and resulted in a near

collapse of Iran's currency, the Rial. See Iran: Survival, Against the Odds, *Economist*, Feb. 6, 1999, at 48.

n341 See *id.*

n342 See, e.g., Fadhil J. Chalabi, *Iraq's Oil: The Economic & Political Constraints*, 18 *Middle East Exec. Rep.* 9 (1995); see also, e.g., *Libya: Energy Sector Opens up to Foreign Investment*, *Middle East Econ. Dig.* (Apr. 30, 1999).

n343 See Alhajji, *supra* note 339, at 59.

n344 Recent press reports ironically call Iranian contracts "risk free." See, e.g., Bahree I, *supra* note 1.

n345 See *id.*

n346 See *id.*

n347 See Buy-Back, *supra* note 115.

n348 See *id.*; see also Bahree II, *supra* note 118.

n349 See Shock, *supra* note 331, at 24 (displaying cover "Drowning in Oil" and discussing the possibility of a flooded petroleum market).

n350 Prior to the Iranian Revolution, Iran implemented provisions to safeguard its natural resources from domestic corruption and foreign manipulation. Despite the protections offered to foreign investors under its initial Petroleum Legislation, the Iranian revolution led to the nationalization of foreign investment assets. Compare Rouholla K. Ramazani, *Oil and Law in Iran*, Vol. II, No. 2 *J. of John Bassett Moore Soc'y Int'l L.* 56-69 (1962) (later renamed *VA Int'l L.J.*) (discussing background information on the legal environment controlling early Iranian energy contracts) with Rhodes, *supra* note 198 (describing modern day legal protections under Iran's Law for Attraction and Protection of Foreign Investments).

n351 The United States has deployed military forces to the Gulf more often than in any other area of the world since Operation Desert Storm ended in 1991. Military standoffs over continued Iraqi aggression have resulted in major deployments of U.S. forces in recent years. Although U.S. air strikes have become the norm, these deployments and their ensuing operations could potentially disrupt oil development projects in the region. Compare Strategy, *supra* note 25 (noting high deployment rates to the Gulf), with Alan Cooperman, et al., *Rolling Up in Iraq*, U.S.

News, Sept. 23, 1996 (discussing deployment under Operation Desert Strike) Pipeline Attack Renews Drive for Policy Change (Iraqi Oil Exports), Oil Daily, Mar. 23, 1999 (discussing U.S. air-strikes and terrorist bombing damaging Iraqi-Turkish oil pipeline), Why the Bombs are Falling on Iraq, Economist, Mar. 6, 1999, at 42 (discussing recent U.S./U.K. air strikes in response to Iraqi aggression), and Richard Newman, Bombs over Baghdad, U.S. News, Jan. 4, 1999.

n352 See Kielmas, *supra* note 114.

n353 See Lawrence W. Newman, A Personal History of Claims Arising Out of the Iranian Revolution, 27 NYU J. Int'l L. & Pol. 631 (1995) (describing the successes of the U.S.-Iranian Claims Tribunal, but noting the lengthy time of the dispute resolution process).

n354 See Guyot, *supra* note 307, at 948.

n355 See Al-Wazzan Visit Successful: Kuwait Hails Iran Reforms, Kuwait Times, Oct. 5, 1999 (quoting Kuwaiti Minister of Commerce, Abdulwahhab Al-Wazzan).

n356 The author requested copies of actual Western- Iranian investment contracts from multiple organizations including, Conoco, the U.S. State Department, and the U.S. Treasury Department. These were not released, however, for reasons of business confidentiality and corporate value.

n357 The author personally contacted Barrows to receive Sirri Gas and Balal Oil contract synopses. These are reprinted in Barrows Company Petroleum Concessions Handbook (1999), available by purchase at the Barrows Internet Website (visited Apr. 27, 1999) <<http://www.barrows-company.com>> [hereinafter Barrows Contract Synopses]. Contract synopses also on hand with the Fla. J. Int'l L.

n358 See Tightrope, note 120 (discussing Total SA's contract for offshore Sirri Fields A and E).

n359 Total SA's Sirri and South Pars contracts are often confused in press releases. See Hillary Durgin, Iran Stays Closed to U.S. Companies/Policy Opens Door for Foreign Oil Firms, Houston Chron. May 19, 1998, at P1 (distinguishing between Total SA's separate Sirri & South Pars contracts).

n360 See Tightrop, note 120 (discussing Bow Valley's difficulties in sealing deal with its original partner Pell Frishman, an U.K. engineering firm).

n361 See House Hearings, *supra* note 31 (testimony of Stuart E. Eizenstat, alluding to U.S. State Department's success in pressuring Bakrie to back out of partnership arrangement).

n362 See Dow Telerate I, *supra* note 157.

n363 See Elf, Agip Sign Dorood Contract with Iran, *Oil & Gas J.*, Mar. 8, 1999, at 31 (discussing Dorood contract).

n364 See generally Smith, *supra* note 304.

n365 See Barrows Contract Synopses, *supra* note 357.

n366 See *id.*

n367 See generally R.D. Bishop, *International Arbitration of Petroleum Disputes: The Development of a "Lex Petrolea,"* Centre for Energy Petroleum and Mineral Law Policy, Oxford (1997).

n368 See Barrows Contract Synopses, *supra* note 357.

n369 See generally El-Malik, *supra* note 329.

n370 See Jack J. Coe, Jr., *Int'l Commercial Arbitration* 80-85 (1997) (discussing *Lex Mercatoria*).

n371 See Barrows Contract Synopses, *supra* note 357.

n372 See *id.*

n373 See Newman, *supra* note 353, at 635.

n374 See Coe, *supra* note 369, at 159-84 (discussing arbitral clauses and drafting considerations).

n375 See *id.*

n376 See *id.*

n377 See *id.*

n378 See *id.* at 903 (displaying tabular information: "Scoreboard of Adherence to Transnational Arbitration Treaties").

n379 See generally Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 *Bus. Law* 577 (1990).

n380 In contrast to Iranian sanctions regulations, Afghan sanctions are not extraterritorial. See Pamela Constable, *Afghanistan Opens Lines to the World; Phone System First Investment Since '79*, *Wash. Post*, May 8, 1999, at A13 (reporting on Telephone Systems International Inc., a New Jersey-based investment group, and its recent \$ 240 million joint venture with Afghanistan's Communications Ministry); see also John Lancaster, *Afghanistan Rulers Accused of Giving Terrorist Refuge; Clinton Bans Trading with Taliban Militia*, *Wash. Post*, Jul. 7, 1999, at A15, (reporting on recent sanctions on Iran; in contrast to Iranian sanctions Afghan sanctions are not extraterritorial).

n381 See *id.*

n382 See *Barrows Contract Synopses*, *supra* note 357.

n383 See *id.*

n384 See *id.*

n385 See *id.*

n386 See Smith, *supra* note 304, at 334-49, 708-21 (discussing production sharing agreements and counter-trade models in international energy transactions).

n387 See *Barrows Contract Synopses*, *supra* note 357.

n388 See *id.*

n389 See *id.*

n390 See *id.*

n391 See Smith, *supra* note 304, at 349-63 (discussing domestic content clauses).

n392 See *Barrows Contract Synopses*, *supra* note 357.

n393 See id.

n394 See id.

n395 See id.

n396 See id.

n397 See id.

n398 See id.

n399 See id.

n400 See id.

n401 See id.

n402 See id.

n403 See id.

n404 See *Shell Poised*, supra note 201 (noting that Shell has recently reached advanced negotiations over Soroush and Nowruz oil development projects and quoting industry source in full: "Shell would go ahead with the Soroush and Nowruz project. American sanctions are a concern, but Shell will seek a waiver. Besides, other companies have made deals in Iran, and Shell expects it would get the same treatment they did."). Despite having substantial assets subject to U.S. jurisdiction, Shell is "prepared to proceed" with its recent contract for development of the Soroush and Nowruz oil fields. See *Shell to Invest in Iranian Oil, Risking U.S. Penalty*, N.Y. Times, Nov. 15, 1999, at C10 (quoting Royal Dutch Shell's Country Chairman in Iran, Mr. Edi Cartier).

n405 Compare Anne Q. Connaughton, *Factoring U.S. Export Controls and Sanctions Into International Trade Decisions*, [27 Stetson L. Rev. 1211 \(1998\)](#) (discussing general considerations but not addressing quantification of domestic political risk), with Tugendhad, supra note 15, at 146.

n406 Interview with Dan Littmann, Business and Management Consultant, in Chicago, Ill., (July 19, 1999).

n407 Exxon and Mobil are currently seeking merger. See Next: Exxon-Mobil, Oil & Gas J., Jan. 11, 1999, at 31; see also Little Big Men, Economist, May 15, 1999, at 74 (presenting tabular display of recent mergers).

n408 In December 1998, British Petroleum and Amoco received approval for merger from the U.S. Federal Trade Commission. See BP-Amoco Finish Merger after FTC Approval, Oil & Gas J., Jan. 11, 1999, at 31.

n409 Total SA merged with Petrofina in 1998. See Total, Petrofina, Revise Merger Expectations, Oil & Gas J., Dec. 21, 1998, at 30.

n410 See id.

n411 The Iranian Transactions Regulations, specifically provisions under [31 C.F.R. § 560.525](#), leave much to be desired with regard to regulating a lawyer's conduct under sanctions. This provision combined with professional ethics rules raises interesting ethical questions when considering at what point merger advice becomes legally prohibited. It is clear that a lawyer is proscribed from giving merger advice if such advice facilitates illegal activity. This issue becomes complicated, however, when one considers the possibility of an American lawyer working in a foreign branch office, either stateside or abroad, in a merged company. The ethical dilemma occurs if he is requested to indirectly assist the controlling corporation in Iranian investment operations or given a transfer into foreign operations. Since sanctions violations carry criminal and civil penalties, assistance of such operations may be detrimental to a legal career. As to what extreme this would be enforced by the bar or the courts is not known. Should a lawyer decline to take a phone call from a client, or another office, if he knows that the individual he will be helping is working on an Iranian investment? Or, should he decline an offer for a new position because it involves handling Iranian transactions in a foreign office of a merged company? Compare [31 C.F.R. § 560.525](#) (prohibiting exportation of legal services to the Government of Iran or its entities, and precluding representation and counseling that "facilitates transactions" that violate the sanctions regulations), with Model Rules of Professional Conduct Rules 1.16, 8.4.

n412 See Bigger, supra note 233 (discussing the advantages smaller companies have in moving quickly into the smaller upstream opportunities available in the Middle East and quoting a chief executive officer for a small-scale oil company: "I am happy to see the merger, because the bigger they are the easier it is for us."); see also Farivar, supra note 193.

n413 See id.

n414 See Tightrope, *supra* note 120 (noting that Iran has not offered investment opportunities in its most lucrative onshore fields).

n415 See Rhodes, *supra* note 198 (quoting Iranian Deputy Minister of Economic Affairs and Finance).

n416 See Lancaster, *supra* note 380.

n417 See Thomas L. Friedman, *Mideast Sanctions Proving Ineffective, Economic Forces Favor Iraq, Iran*, *Arizona Republic*, Oct. 28, 1997, at B5 (noting that powerful economic forces are against sanctions).

n418 See generally Roger Fisher, et al., *Beyond Machiavelli* 4 (1994) (advocating fresh thinking in international conflict resolution).

n419 As of the August, 1999, the U.S. Government has not issued an enforcement decision on Bow Valley, Elf, and Total. Inconsistencies in its policy towards Iran continue to arise on a recurring basis. Compare Alan George, *U.S. Exports Conflict with Iran Embargo*, *Middle East*, July 1, 1995, (discussing Senate report on export of nuclear equipment to Iran), with *Meanwhile There's Iran*, *Economist*, June 27, 1998, at 27 (describing President Clinton's veto on legislation designed to impose sanctions on suppliers of missile technology to Iran), and *A Very Crude Form of Politics: The Future Shape of the Oil Industry Is Being Determined as much by American Foreign Policy as by Free Competition*, *Economist* 64, May 6, 1995.