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Sanctions and the Blurred Boundaries of International Economic Law

Perry S. Bechky*

I. INTRODUCTION

Economic sanctions are often said to occupy a middle space between communiqués and combat.¹ As this description makes clear, sanctions are a political tool – but a political tool that operates through economic regulation. They are simultaneously economic and political.²

Their dual nature seems to place sanctions in a twilight zone, neither truly in nor out of the academic discipline of international economic law (“IEL”). Sanctions tend to be marginalized in IEL scholarship, generally taking little space in the IEL literature and at the podiums of IEL conferences and courses. While economic sanctions loom large today in headline news and the practice of international trade law, they are not proportionately represented in recent IEL literature. Rather, IEL scholarship seems content to leave sanctions to other disciplines like public international law, economics, and international relations. To be sure, sporadic controversies capture atten-

*Partner, Berliner Corcoran & Rowe LLP, Washington D.C.; Visiting Scholar, Seattle University School of Law. The author thanks Tomer Broude, Anupam Chander, Erich Ferrari, Adrienne Goins, Meredith Kolsky Lewis, and Sirina Tsai for their valuable comments, as well as the organizers and participants of the biennial conference of the International Economic Law Interest Group of the American Society of International Law held at Georgetown University Law Center. The views expressed here are my own and should not be attributed to my law firm or any of its clients. All mistakes are my own. The information in this Article is updated through October 1, 2017.

1. Andreas F. Lowenfeld, *Economic Sanctions: A Look Back and a Look Ahead*, 88 MICH. L. REV. 1930, 1930 (1990) (reviewing BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* (1988)) (“[S]anctions send a message of disapproval – less grave than the use of force but more serious than just a communiqué followed by business as usual.”).

2. Andreas F. Lowenfeld, *Trade Controls for Political Ends: Four Perspectives*, 4 CHI. J. INT’L L. 355, 369 (2003) (concluding that economic sanctions “will continue to hold a place at the intersection of politics, economics, and law”).

tion – typically when they implicate other IEL concerns, as when the Helms-Burton brouhaha erupted at the then-fledgling World Trade Organization (“WTO”).³

This Article contends that sanctions are part of IEL and they warrant more rigorous consideration in IEL scholarship. Sanctions may lie at the edges of the IEL field, and they surely also stand in other fields, but this is no reason for IEL to overlook them. As with “trade and labor” and the other cross-disciplinary “and” topics, exploring the edges is critical to understanding the field – its definition, nature, values, and priorities. Also, sanctions offer a rare example of economic regulation that cuts across many of the traditional subdivisions within IEL. Sanctions thus nicely illustrate Andreas Lowenfeld’s observation in *International Economic Law*:

[E]verything is related to everything else – trade to investment to monetary affairs, dispute settlement to sanctions and to unilateral versus collective action, economic law to ‘public international law’ and to ‘private international law’. . . . [I]t is worth keeping in mind that international economic law influences, and is influenced by, both of these fields, and that the boundaries between them are inevitably blurred.⁴

This Article proceeds in four parts. Part II defines key concepts and gives an overview of economic sanctions law in the United States, introducing the statutes and regulations that govern the most sweeping U.S. sanctions programs. Part III looks to the blurred external boundaries of IEL, drawing on the descriptions of the field offered by such foundational IEL scholars as John Jackson, Andreas Lowenfeld, and Georg Schwarzenberger to show that sanctions belong within IEL. Part IV turns to the blurred internal boundaries within IEL, arguing that economic sanctions warrant further attention by IEL scholars because of the rare way they cut across so many IEL subdivisions. Part IV takes a deep look at the fifty-year-old U.S. embargo of Cuba to demonstrate how it regulates together trade, investment, finance, securities, intellectual property, and more – all in a single, remarkable sentence. Finally, Part V highlights recent developments in sanctions law generating novel and timely questions for academic consideration. In keeping with the themes of this Article, the examples in Part V need cross-disciplinary cooperation between IEL and other disciplines.

It should be noted that this Article draws mainly from U.S. examples to support its theses about the nature and significance of sanctions. These theses might also be illustrated with international and comparative examples. Similarly, the Article discusses many acts taken by the Obama administration. Again, however, while the Trump administration has started making important changes to sanctions policy, those developments continue to support

3. See *infra* Part III.

4. ANDREAS F. LOWENFELD, *Preface to the Second Edition of INTERNATIONAL ECONOMIC LAW*, at v, vii (2d ed. 2008).

the theses advanced here. After all, the nature of sanctions policy endures: it is a political tool that operates through economic regulation. Indeed, the recent trends in U.S. sanctions policy towards creative design and aggressive enforcement are both likely to continue – and may press forward⁵ – making an even stronger case for scholarly attention.

II. A BRIEF INTRODUCTION TO ECONOMIC SANCTIONS

Lowenfeld often describes economic sanctions as “economic [or trade] controls for political ends.”⁶ Accordingly, he defines “economic sanctions” as “measures of an economic – as contrasted with diplomatic or military – character taken by states to express disapproval of the acts of the target state or to induce that state to change some policy or practice or even its governmental structure.”⁷ It follows that sanctions “generally are measures taken not for economic gain, and often at commercial sacrifice” and that “the reason for [the] action . . . is important in making the judgment that [the] action is a sanction.”⁸

While generally aligned with Lowenfeld’s understanding of sanctions as economic measures taken for political reasons,⁹ this Article both enlarges his

5. For some early indications that these trends continue into the Trump administration, see *infra* notes 169–70.

6. LOWENFELD, *supra* note 4, at pt. VIII.

7. *Id.* at 850.

8. *Id.* at 850–51 & n.10; accord MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 12 (1990) (noting “the inherent definitional significance of the objectives of sanctions”); LORI FISLER DAMROSCH, ENFORCING INTERNATIONAL LAW THROUGH NON-FORCIBLE MEASURES 43–44 (1997) (focusing on sanctions imposed for one particular reason, namely to enforce against violations of international law).

9. I prefer Lowenfeld’s definition to several others found in the sanctions literature. First, Michael Malloy’s definition – “any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions with respect to the specified target, in the service of specified foreign policy purposes” – is similar in substance but less elegant. MALLOY, *supra* note 8, at 13 (footnote omitted). Malloy’s “country-specific” element excludes sanctions aimed at multiple targets or a class of similar targets (such as state sponsors of terrorism or states that conduct nuclear tests) and, hence, also excludes secondary sanctions. See *infra* notes 52–62. I also take issue with Malloy’s view that expressing disapproval is not an “appropriate objective” for triggering sanctions. Compare MALLOY, *supra* note 8, at 13, 21 n.8, with Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT’L L. 823 (2009) (supporting the expressive values served by a federal law that authorizes U.S. states to divest from companies doing business with Sudan within specified bounds). Second, Gary Hufbauer and Jeffrey Schott’s definition – “the deliberate government-inspired withdrawal, or threat of withdrawal, of ‘customary’ trade or financial relations” – is overbroad and omits the key purposive element. MALLOY, *supra* note 8, at 12 (quoting GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED 3 (1985)). Finally, Barry Carter’s definition – “coercive economic

definition and focuses on a particular subset of sanctions. First, this Article eschews the state-centric limitation in Lowenfeld's definition, recognizing that recent sanctions frequently target non-state actors, including terrorist groups, transnational criminal organizations, and drug kingpins.¹⁰ Second, this Article focuses on the broad sanctions programs administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, omitting narrower measures that also inhibit economic activity for various political reasons – such as export controls administered by the State and Commerce Departments, Lacey Act restrictions on wildlife trafficking, and denial of most-favored-nation tariff status to communist countries that restrict emigration¹¹ – even though similar arguments about such measures might also be made to support this Article's main theses.

OFAC maintains numerous sanctions programs, including "country-based" programs that target governments and "list-based" programs that target specific persons. The country-based programs today target mainly Cuba, Iran, and Syria, as well as the "Crimea region of Ukraine"¹² and to some extent North Korea.¹³ OFAC has over twenty list-based programs targeting a

measures taken against one or more countries to force a change in policies, or at least to demonstrate a country's opinion about the other's policies" – introduces a vague and contentious element of coercion and applies to only two of a range of possible political goals, omitting, for example, isolation, prevention, punishment, and regime change. *Id.* (quoting CARTER, *supra* note 1, at 4); *cf.* DAMROSCH, *supra* note 8, at 43, 54–57 (considering when sanctions may be deemed coercive under international law and offering several potential goals of sanctions in the context of enforcing international law).

10. See, e.g., Transnational Criminal Organizations Sanctions Regulations, 31 C.F.R. pt. 590 (2017); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (2017); Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. pt. 598 (2017).

11. See generally LOWENFELD, *supra* note 4.

12. OFAC's sanctions programs are listed in 31 C.F.R. ch. V and on OFAC's website, www.ustreas.gov/ofac. Some sanctions programs have titles that may create the impression that they are country-based, while the substance reveals that they only target persons designated on the OFAC lists. In this regard, the Ukraine Related Sanctions Regulations, 31 C.F.R. pt. 589 (2017), target listed persons – mainly Russians – while Executive Order 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014), not yet incorporated into the OFAC regulations, adds sanctions directed against the territory of Russia-occupied Crimea.

13. The North Korea Sanctions Regulations, 31 C.F.R. pt. 510 (2017), mainly sanction listed persons but also include an import ban. Separate regulations administered by the Commerce Department impose special export controls against North Korea. See 15 C.F.R. § 746.4 (2017). With tensions escalating over North Korea's nuclear program, President Trump, Congress, and the United Nations have all tightened sanctions against North Korea so far in 2017. Exec. Order No. 13,810, 82 Fed. Reg. 44,705 (Sept. 20, 2017); Countering America's Adversaries Through Sanctions Act ("CAATSA"), Pub. L. 115–44, 131 Stat. 886, 940 (Aug. 2, 2017) (to be codified at 22 U.S.C. § 9202). Executive Order 13,810 broadly authorizes OFAC to impose secondary sanctions (explained *infra* at notes 48–62) against persons trading with North Korea, regardless of volume or nature of the sales. This could spark legal and

wide variety of sanctioned persons, who are named on OFAC's massive List of Specially Designated Nationals and Blocked Persons ("SDN List") or several other OFAC lists;¹⁴ usually, the sanctions also apply to any entity that is fifty percent or more owned by listed persons.¹⁵

OFAC operates mainly under the authority of the International Emergency Economic Powers Act ("IEEPA").¹⁶ IEEPA authorizes the President to impose economic sanctions to respond to a national emergency. In practice, this means that a President wishing to impose sanctions declares a national emergency in an executive order that simultaneously launches the sanctions program and delegates to the Treasury Department the authority to implement the program (in coordination with the State Department).¹⁷ The President must confirm annually, for each IEEPA program, that the emergency continues.

Congress enacted IEEPA in 1977 in a post-Watergate effort to constrain Presidential action under the Trading with the Enemy Act of 1917 ("TWEA").¹⁸ TWEA previously applied in times of "war or national emergency" but is now limited to wartime.¹⁹ As Congress has not declared war since 1941, the President has not invoked TWEA even in times of armed

diplomatic controversy depending how extensively, and against whom, OFAC uses this authority. Further changes may make the North Korea program more like other country-based programs; for example, the UN requires all Member States to prohibit most "new joint ventures . . . with [North Korean] entities or individuals." S.C. Res. 2371, ¶ 12 (Aug. 5, 2017).

14. OFAC's lists are available on its website, www.ustreas.gov/ofac, including the SDN List (which is over 1000 pages long), the Foreign Sanctions Evaders List, and the Non-SDN Iran Sanctions Act List. Happily, OFAC recently added to its website a searchable "consolidated" database of all of its lists.

15. DEP'T OF THE TREASURY, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (Aug. 13, 2014), https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf ("[A]ny entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered to be a blocked person.").

16. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708 (2012).

17. *See, e.g.*, Exec. Order No. 13,662, 79 Fed. Reg. 16,169, 16,170 (Mar. 20, 2014) ("The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out the purposes of this order."). The Treasury Secretary then further delegates to OFAC the responsibility to administer the sanctions.

18. *But see* Lowenfeld, *supra* note 1, at 1937 ("[M]y perception – I do not have hard evidence in support – is that Congress . . . wrote [IEEPA] . . . and other legislation in the foreign economic policy area with enough play in the joints so that Presidents would *seem*, but would not really *be*, reined in.").

19. Pub. L. No. 95–223, § 101(a), 91 Stat. 1625 (1977) (codified at 50 U.S.C. § 4305).

conflict.²⁰ However, Congress grandfathered pre-existing TWEA sanctions – a list that has dwindled over time to the point where TWEA now governs only one program: Cuba.

An OFAC program may impose a near-total embargo against dealings with a sanctions target or a range of lesser sanctions. For example, in response to Russia's occupation of Crimea, the United States restricted dealings with Crimea; imposed innovative "sectoral sanctions" restricting specified dealings with specified companies in Russia's defense, energy, and finance sectors; added a number of Russians to the SDN List; and tightened certain export controls.²¹ The Russia program thus exemplifies several trends: it has both country-based and list-based aspects, part of the effort to make sanctions "smarter" and more targeted; it reveals the increasing variety and creativity of sanctions; and the Commerce Department's Bureau of Industry and Security ("BIS") plays an important role in administering it.

Other statutes may expand or restrict presidential sanctions authority, either in general or focused on a particular target or class of targets. Important examples include:

- The United Nations Participation Act ("UNPA"), which authorizes the president to act in compliance with sanctions ordered by the Security Council.²²
- The Helms-Burton Act and the Cuban Democracy Act, which require the president to maintain sanctions against Cuba until certain requirements are met.²³ A Congressional compromise in the Trade Sanctions Reform Act originally liberalized agricultural sales, but it imposed strict payment requirements with regard to Cuba only, which constrained the Obama administration from further liberalizing trade with Cuba in this sector.²⁴
- The Berman Amendment, which precludes OFAC from restricting trade with target countries of "information or infor-

20. See, e.g., Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990) (imposing sanctions against Iraq under IEEPA); Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990) (expanding Iraq sanctions pursuant to IEEPA and United Nations Participation Act ("UNPA")); Exec. Order No. 13,290, 68 Fed. Reg. 14,306 (Mar. 20, 2003) (confiscating certain Iraqi assets under IEEPA); Exec. Order 13,303, 68 Fed. Reg. 31,931 (May 22, 2003) (amending Iraq sanctions pursuant to IEEPA and UNPA).

21. See *supra* note 12; 15 C.F.R. § 746.5 (2017).

22. 22 U.S.C. § 287c (2012).

23. Cuban Liberty and Democratic Solidarity (Libertad) Act ("Helms-Burton Act"), 22 U.S.C. §§ 6032(h), 6064 (2012); Cuban Democracy Act, 22 U.S.C. §§ 6005, 6007 (2012).

24. Trade Sanctions Reform and Export Enhancement Act ("TSRA"), 22 U.S.C. § 7207(b) (2012).

mational materials,” including art, books, and musical recordings. Congress also stopped OFAC from prohibiting travel by U.S. nationals, except travel to Cuba.²⁵

- The Iran Sanctions Act (“ISA,” as amended), which requires the president to impose sanctions in certain circumstances on third-country companies that do business with Iran.²⁶ The ISA is a good example of a sanctions program administered mainly by the State Department rather than OFAC.
- The Countering America’s Adversaries Through Sanctions Act (“CAATSA”), which tightened sanctions against Iran, North Korea, and Russia.²⁷ Perhaps most significantly, CAATSA limits the president’s ability to end or even liberalize the sanctions against Russia without Congressional approval.²⁸

OFAC sanctions are typically written in comprehensive prohibitory language, which is then peeled back by exceptions. OFAC has wide authority to issue licenses, which permit certain conduct that would otherwise be forbidden.²⁹ Licensing authority gives OFAC flexibility to administer sanctions in ways that best serve U.S. policy (although Congress sometimes constrains that flexibility where the branches disagree on policy).³⁰ There are two types of licenses: “general licenses” and “specific licenses.”³¹ OFAC publishes

25. Compare IEEPA, 50 U.S.C. § 1702(b)(3)–(4) (2012) (exemptions for travel and informational materials), with TWEA, 50 U.S.C. § 4305(b)(4) (2012) (exemption for informational materials but not travel); see also TSRA, 22 U.S.C. § 7209(b) (2012) (barring the President from authorizing Cuban travel for “tourist activities”).

26. Iran Sanctions Act of 1996, Pub. L. 104–172, 110 Stat. 1541 (1996) (codified at 50 U.S.C. § 1701) (as amended).

27. Countering America’s Adversaries Through Sanctions Act, Pub. L. 115–44, 131 Stat. 886 (2017) (to be codified at 22 U.S.C. § 9401).

28. *Id.* § 216 (to be codified at 22 U.S.C. § 9511). The President objected to section 216 on constitutional grounds in two signing statements, the formal and the colloquial. See Press Release, White House Office of Press Sec’y, President Donald J. Trump Signs H.R. 3364 into Law (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-3364-law/>; Press Release, White House Office of Press Sec’y, Statement by President Donald J. Trump on Signing the “Countering America’s Adversaries Through Sanctions Act” (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-countering-americas-adversaries-sanctions-act/> (“I built a truly great company worth many billions of dollars. . . . I can make far better deals with foreign countries than Congress.”).

29. See 31 C.F.R. § 501.801 (2017).

30. See, e.g., Cuban Democracy Act, 22 U.S.C. § 6005(a)(1) (2012) (“Notwithstanding any other provision of law, no license may be issued for any transaction described in section 515.559 . . .”).

31. See 31 C.F.R. § 501.801 (2017).

general licenses as part of its regulations.³² Persons covered by a general license may engage in the licensed conduct without applying for individual permission although they must comply with the terms and limits of the general license, which sometimes include reporting and recordkeeping requirements.³³ Specific licenses, which are not published, give named licensees permission to engage in particular conduct, again subject to terms and limits set by OFAC.³⁴ OFAC sometimes publishes “statements of licensing policy,” which indicate circumstances in which it is prepared to issue specific licenses.³⁵ Licensing is one of the ways in which OFAC exercises its regulatory authority. By contrast, Congress has withheld from the President the authority to regulate certain transactions (such as trade in informational materials).³⁶ OFAC recognizes that these transactions are beyond its authority by publishing “exemptions.”³⁷

TWEA sanctions regulate conduct by any “person subject to the jurisdiction of the United States.”³⁸ This term is defined to include foreign organizations owned or controlled by U.S. persons, such as foreign subsidiaries of U.S. companies.³⁹ Asserting jurisdiction over foreign-incorporated entities provoked controversies with U.S. allies,⁴⁰ which has caused OFAC to avoid the term since the 1970s in favor of the narrower “United States person.”⁴¹ The narrower term still reaches foreign branches but not separately-incorporated subsidiaries.⁴² This change helped reduce diplomatic controversy over “extraterritoriality,” but domestic advocates of sanctions came to decry what is sometimes called the “subsidiary loophole.”⁴³ In the 1990s, OFAC introduced a middle-ground position, prohibiting U.S. persons from “facilitating” conduct by non-U.S. persons (including their own foreign subsidiaries) that U.S. persons may not lawfully perform themselves – meaning that foreign subsidiaries could transact business with sanctioned countries if they could do so without any support by their parent company or other U.S. persons.⁴⁴ This position failed to satisfy sanctions advocates, however, espe-

32. *Id.*

33. *Id.*

34. *Id.*

35. *See, e.g.*, 31 C.F.R. § 560.523 (2017).

36. *See, e.g.*, IEEPA, 50 U.S.C. § 1702(b)(3)–(4) (2012) (exemptions for travel and informational materials).

37. *See, e.g.*, 31 C.F.R. § 560.210 (2017) (exempting certain transactions from the Iran prohibitions).

38. *See, e.g.*, 31 C.F.R. § 515.201(b)(1) (2017), discussed *infra* Part IV.

39. 31 C.F.R. § 515.329(d) (2017).

40. *See* LOWENFELD, *supra* note 4, at 901–15 (discussing past controversies).

41. *See, e.g.*, 31 C.F.R. §§ 538.208, 538.209 (2017).

42. *See* 31 C.F.R. § 538.315 (2017).

43. *See, e.g.*, Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 L. & POL’Y INT’L BUS. 501, 524 (1999).

44. 31 C.F.R. §§ 560.208, 560.417 (2017).

cially as momentum built for stricter sanctions against Iran.⁴⁵ In 2012, Congress extended the OFAC sanctions against Iran beyond U.S. persons to foreign subsidiaries.⁴⁶ While clearly asserting prescriptive jurisdiction over foreign subsidiaries, Congress seems to have tried to temper the international reaction by specifying that enforcement for violations by a foreign subsidiary would be directed against the U.S. parent rather than the foreign subsidiary.⁴⁷

Finally, the concept of “extraterritorial sanctions” should be compared with its cousin, “secondary sanctions.” Extraterritorial sanctions govern conduct by persons located outside the sending state.⁴⁸ Relatively uncontroversial examples govern the conduct of nationals located abroad – for example, the foreign branches of U.S. banks may not transact business with Iran, and U.S. engineers employed abroad by foreign companies may not design projects to be built in Iran.⁴⁹ Mostly, however, the term “extraterritorial sanctions” is used critically, when accusing the sending state of acting beyond the bounds of prescriptive jurisdiction allowed by international law.⁵⁰ Contro-

45. See, e.g., *Minimizing Potential Threats from Iran: Administration Perspectives on Economic Sanctions and Other U.S. Policy Options: Hearing Before the Senate Banking, Hous. & Urban Affairs Comm.*, 111th Cong. 44 (2009) (statement of Senator Jeff Merkley expressing concern about a “huge loophole”).

46. See Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITRA”), 22 U.S.C. § 8725 (2012); 31 C.F.R. § 560.215 (2017). In January 2016, pursuant to the Joint Comprehensive Plan of Action (“JCPOA”) concerning Iran’s nuclear program, Annex 2, § 5.1.2, OFAC issued General License H, which authorizes foreign subsidiaries of U.S. companies to engage in certain dealings with Iran and further authorizes U.S. parents to take certain actions that would otherwise constitute illegal facilitation. See *Joint Comprehensive Plan of Action*, U.S. DEP’T STATE (July 14, 2015), <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>; U.S. DEP’T TREASURY, IRAN GENERAL LICENSE H (Jan. 16, 2016), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glh.pdf.

47. See 22 U.S.C. § 8725(c). By contrast, in the case of Cuba, OFAC asserts both prescriptive and enforcement jurisdiction over foreign subsidiaries. For a recent example of a penalty paid by a foreign subsidiary for conduct by the foreign subsidiary (and another foreign affiliate) outside of the United States, see *infra* note 110.

48. “The state . . . that imposes the sanction is sometimes called the sender, and the object of the sanction is sometimes called the target.” Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT’L L. 903, 904 n.4 (2013) (citing GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 2 (3d ed. 2007)).

49. See 31 C.F.R. § 560.204 (2017) (applying the prohibition on exporting services to Iran to “a United States person, wherever located”). The extraterritorial impact of the recently-suspended ban on exporting services to Sudan is somewhat narrower, applying to U.S. individuals outside the United States only when they are “ordinarily resident in the United States.” 31 C.F.R. §§ 538.205, 538.406(a)(4) (2017); cf. 31 C.F.R. § 560.410 (2017) (omitting the residency language from the prohibition on exporting services to Iran).

50. In this regard, I concur with John Knox that criticism should more properly be directed against “extrajurisdictionality” because there are in fact various circumstances where states may lawfully assert jurisdiction over conduct beyond their terri-

versal examples include the OFAC rule that prohibits foreign companies from selling to Iran foreign-made products that contain ten percent or more U.S.-origin content, the application of sanctions to foreign-incorporated subsidiaries, and, of course, the Helms-Burton Act and the Iran Sanctions Act.⁵¹

A “secondary sanction,” adapting Lowenfeld’s definition of an economic sanction to this context,⁵² is an economic measure taken for the political end of inducing third states or non-state actors in third states to change their policies or practices concerning economic dealings with the target of the sending state’s “primary sanctions.” While primary sanctions may be enforced by criminal prosecution or civil fines,⁵³ secondary sanctions are enforced by economic measures.⁵⁴

The reason for the sanction – inducing a change in behavior by third parties toward the primary target – is key to understanding its nature as a secondary sanction. In this regard, Senator Alfonse D’Amato, the primary sponsor of the Iran Sanctions Act (which originally applied to Libya as well), bluntly set forth the essence of a secondary sanction: “Now the nations of the world will know they can trade with them [Iran and Libya] or trade with us.

tory. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2010). On the international law of jurisdiction, see generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–433 (AM. LAW INST. 1987).

51. See 31 C.F.R. § 560.205 (2017) (expressly prohibiting certain “reexportation from a third country . . . by a person other than a United States person”); 31 C.F.R. § 560.420 n.3 (2017) (“The provisions of § 560.205 and this section apply only to persons other than United States persons.”). The case against Mohammed Sharbaf, an Iranian citizen located outside the United States, presents an interesting (apparently quite rare) example of enforcement of section 560.205: he was indicted in 2005 but never arrested and, in January 2016, the government dismissed the charges against him (albeit without prejudice) due to “significant foreign policy interests” as part of a deal in which Iran released four Americans. *United States v. Quinn*, 401 F. Supp. 2d 80, 103 & n.23 (D.D.C. 2005) (addressing the section 560.205 charges against Sharbaf in a decision on a motion by his co-defendants); Government’s Motion to Dismiss Indictment, *United States v. Mohammad Sharbaf*, No. 05-CR-018 (JDB), (D.D.C. Jan. 16, 2016); Josh Gerstein, *Obama Grants Clemency to Seven in Iran Deal*, POLITICO (Jan. 16, 2016, 3:38 PM), <https://www.politico.com/blogs/under-the-radar/2016/01/iran-deal-obama-grants-clemency-to-seven-217879> (noting that, in addition to seven pardons, the government also dropped charges against Sharbaf and others).

52. See *supra* notes 6–9.

53. See Economic Sanctions Enforcement Guidelines, 31 C.F.R. pt. 501, app. A (2017).

54. See, e.g., Iran Sanctions Act of 1996, Pub. L. 104–172, § 6, 110 Stat. 1541 (1996), (codified at 50 U.S.C. § 1701) (as amended) (creating a menu of sanctions from which the President may choose, including restrictions on exports from the United States, lending by U.S. banks, and investments in the United States).

They have to choose.”⁵⁵ Indeed, the ISA is a classic example of a secondary sanction: it imposes U.S. sanctions on third states and their businesses that engage in certain economic dealings with Iran in an effort to induce them to curtail those dealings.⁵⁶

Secondary sanctions are extraterritorial, though extraterritorial sanctions need not be secondary. For example, the extension of OFAC rules to foreign branches and (sometimes) subsidiaries of U.S. persons is part of the primary sanctions. Likewise for the rules governing U.S. individuals located outside the United States and reexports by foreign persons outside the United States.⁵⁷ Another example is stickier: until President Obama terminated the Burma sanctions in October 2016, OFAC expressly prohibited U.S. persons from investing in a third-country company “where the company’s profits are predominantly derived” from Burma.⁵⁸ Jeffrey Meyer describes this as a secondary sanction,⁵⁹ and it surely shares some elements with a secondary sanction – in fact, it closely resembles state laws ordering state pension funds not to invest in companies doing business with target countries.⁶⁰ Nevertheless, the purposive element needed to make this rule a secondary sanction is not evident: the public record does not suggest this rule aimed to pressure third-country companies to reduce their business in Burma (in marked contrast with the evidence on, for example, the Iran Sanctions Act).⁶¹ Rather, the rule prevented U.S. persons from doing indirectly what they could not do directly. Understanding the rule as a means of closing the side door aligns it with the many other OFAC rules that address evasion, avoidance, facilitation,

55. Jerry Gray, *Foreigners Investing in Libya or in Iran Face U.S. Sanctions*, N.Y. TIMES (July 24, 1996), <http://www.nytimes.com/1996/07/24/world/foreigners-investing-in-libya-or-in-iran-face-us-sanctions.html>.

56. See generally Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT’L L. 905 (2009) (arguing that secondary sanctions are allowed under the international law of prescriptive jurisdiction when they have sufficient territorial and nationality ties to the sending state, and that ISA largely passes this test).

57. See *supra* notes 49–51.

58. 31 C.F.R. § 537.412(a) (2015) (repealed by Exec. Order No. 13,742, 81 Fed. Reg. 70,593 (Oct. 7, 2016)).

59. See Meyer, *supra* note 56, at 932.

60. See generally Bechky, *supra* note 9, at 823–24 & n.2, 835–36, 843–47.

61. Omnibus Consolidated Appropriations Act, Pub. L. 104–208, § 570, 110 Stat. 3009 (1996) (codified at 22 U.S.C. § 2378) (authorizing the President to prohibit U.S. persons from making “new investment in Burma” and directing the President to coordinate a multilateral strategy with other interested countries, without any threat against countries that do not cooperate with the multilateral strategy); Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 20, 1997) (exercising the statutory authority to prohibit “new investment in Burma”). When OFAC adopted regulations implementing the investment ban, it added the third-country rule as an interpretative gloss on the ban, not as a separate prohibition. 31 C.F.R. § 537.405(a) (2005) (later renumbered § 537.412(a)); Burmese Sanctions Regulations, 63 Fed. Reg. 27,846 (May 21, 1998) (construing the investment ban in section 537.201).

and dealing “directly or indirectly” with sanctions targets.⁶² So understood, this rule too was part of the primary sanctions.

III. ECONOMIC SANCTIONS AND IEL’S BLURRED EXTERNAL BOUNDARIES

In 1948, Georg Schwarzenberger advocated treating IEL as a field separate from “general principles of international law.”⁶³ In today’s vocabulary, Schwarzenberger called for fragmentation:

It would seem that the time has come for the establishment of separate branches of international law Such specialisation will not only result in providing more adequate knowledge in the narrower fields, but

62. These concepts appear throughout OFAC regulations. In the Burma context, *see, e.g.*, 31 C.F.R. §§ 537.202 (2015) (prohibiting direct and indirect financial services), 537.205 (2015) (facilitation), 537.206 (2015) (evasion and avoidance). An alternative reading of section 537.412 is possible, which also keeps it within the primary embargo: the predominance test could be seen as creating a safe harbor that allowed U.S. persons to invest relatively safely in third-country companies that earned some, but not predominant, profits in Burma. In other sanctions programs, which lack Burma’s relatively clear predominance test, U.S. investors must consider where to draw the line when investing in third-country companies that transact some business in or with sanctioned countries. *See, e.g.*, Exec. Order No. 13,219, 66 Fed. Reg. 34,777 (June 26, 2001) (Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans) (no predominance test); Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005) (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters) (no predominance test). Support for this alternative reading may be found in correspondence indicating that other OFAC programs also restrict investments in third-country companies even absent express equivalents to section 537.412. *See, e.g.*, Letter from Linda Robertson, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of the Treasury, to Rep. Frank Wolf 1–2 (Dec. 13, 1999) (on file with author) (applying predominance test to investments in third-country companies doing business with Iran); Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control, to John S. Kavulich II at 1 (undated) (on file with author) (permitting non-controlling secondary-market investments in third-country companies doing business with Cuba, without mentioning the extent of the company’s business in Cuba as a relevant factor). Thus, the nature of these restrictions remains a live question after the end of the Burma sanctions. Indeed, parallel questions also persist about restrictions on selling to third-country companies that make sales to target countries. *See, e.g.*, 31 C.F.R. § 560.204 (2017) (prohibiting sales to third-country persons in certain circumstances, including when “undertaken with knowledge or reason to know” that the items sold will be incorporated into products to be supplied “exclusively or predominantly to Iran”).

63. Georg Schwarzenberger, *The Province and Standards of International Economic Law*, 2 INT’L L.Q. 402, 404 (1948).

is likely to enrich insight into the nature, functions and principles of the law of nations as such.⁶⁴

Schwarzenberger did not offer a definition per se of IEL, instead suggesting that it is concerned with the “intricate legal aspects” of “international economic relations.”⁶⁵ He then listed several topics “considered to fall within the purview of international economic law,” including “[t]he law relating to trading with the enemy”⁶⁶ – which is to say, economic sanctions.⁶⁷

More recently, the discipline of IEL has been associated with the late John Jackson more than any other scholar. As Tomer Broude wrote, it was “Jackson who most promoted the ongoing consolidation of the field, through his professional devotion and through his skills as a clear thinker, effective communicator, and admired teacher.”⁶⁸ Jackson founded the *Journal of International Economic Law* and the Institute of International Economic Law at Georgetown, and he supported younger scholars in their initiative to launch the Society of International Economic Law.⁶⁹

In the inaugural article of the *Journal of International Economic Law*, Jackson wrote: “It is appropriate to ask what we mean by ‘international economic law’. This phrase can cover a very broad inventory of subjects: embracing the law of economic transactions; government regulation of economic matters; and related legal relations including litigation and international institutions for economic relations.”⁷⁰ Having defined his subject matter sparsely, Jackson made clear that, for him at least, the heart of the matter was regulation by governments (alone or together) of economic activity: “The fundamental subject appears to be the question of ‘regulation of economic behaviour which crosses national borders’.”⁷¹

64. *Id.*

65. *Id.* at 402.

66. *Id.* at 405.

67. Lest there be any doubt that Schwarzenberger was referring to sanctions, it should be recalled that, at that time, the main statute authorizing U.S. sanctions was the Trading with the Enemy Act of 1917 – which in turn was named (and modeled) after the British Trading with the Enemy Act of 1914. See TWEA, 50 U.S.C. §§ 4301–41 (2012).

68. Tomer Broude, *A Field of His Own: John Jackson and the Consolidation of International Economic Law as a Scholarly Domain*, 19 J. INT’L ECON. L. 329, 330 (2016).

69. *Id.*

70. John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT’L ECON. L. 1, 8 (1998).

71. *Id.* at 12; accord *id.* at 9 (“[A]rguably in today’s world the real challenges for understanding IEL and its impact on governments and private citizens’ lives, suggest a focus on IEL as ‘regulatory law’, similar to domestic subjects such as tax, labour, anti-trust, and other regulatory topics.”); John H. Jackson, *International Economic Law: Reflections on the “Boilerroom” of International Relations*, 10 AM. U. J. INT’L L. & POL’Y 595, 596–97 (1995) (describing his “priority choice that downplays the transactional law and focuses more on regulation by government institutions”).

Sanctions fit within the discipline described by Jackson. They clearly regulate economic behavior that crosses national borders. To be sure, sanctions aim to restrict economic behavior, not to promote it. It would be folly, however, to define the field as a one-way street including only liberalizing measures while excluding restrictions. No one would deny, for example, that raising tariffs is every bit as much a form of economic regulation as cutting tariffs.

Nor does it matter whether raising tariffs is good or bad economic policy or whether it is motivated by economic or political concerns. Jackson understood this, noting that government regulation of economic matters may reflect “goals that are not so oriented towards economics, such as keeping the peace So we have to construct the institutions that will follow or mediate among these [economic] and other goals such as human rights, crime abatement, drug traffic reduction etc.”⁷² As it happens, the U.S. government maintains today economic sanctions aimed at all four of the noneconomic goals listed by Jackson: keeping peace, promoting human rights, reducing drug trafficking, and abating other crime (especially terrorism).⁷³

Sanctions thus recall the “trade and culture,” “investment and human rights,” and other “and” debates, which examine the relative priorities that should be given to economic and noneconomic values.⁷⁴ In doctrinal terms,

Detlev Vagts laid similar emphasis on regulation in a working definition that he used to guide his survey of IEL articles in the first century of the *American Journal of International Law*: “For practical purposes, in this essay I define international economic law as the international law regulating transborder transactions in goods, services, currency, investment, and intellectual property. I exclude from the inquiry issues of private international law, as well as of economic warfare.” Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT’L L. 769, 769 (2006). Vagts’ closing caveat, the omission of “economic warfare” from his IEL survey, arguably suggests that he may not have regarded economic sanctions as part of IEL or at least not as a core part of IEL. Other readings are also possible, however: he may have excluded sanctions only “[f]or practical purposes,” such as limiting the volume of materials covered by his survey or avoiding overlap with subjects addressed in other surveys.

72. Jackson, *supra* note 70, at 15.

73. See, e.g., 31 C.F.R. pt. 536 (2017) (Narcotics Trafficking Sanctions Regulations); 31 C.F.R. pt. 539 (2017) (Weapons of Mass Destruction Trade Control Regulations); 31 C.F.R. pt. 590 (2017) (Transnational Criminal Organizations Sanctions Regulations); 31 C.F.R. pt. 592 (2017) (Rough Diamonds Control Regulations; enforcing the Kimberly Process); 31 C.F.R. pt. 594 (2017) (Global Terrorism Sanctions Regulations). Such policy concerns can also be seen in the reasons given for imposing or easing country-based sanctions. See, e.g., Exec. Order No. 13,742, 81 Fed. Reg. 70,593 (Oct. 7, 2016) (citing Burma’s progress towards democracy as the ground for terminating sanctions).

74. Lowenfeld similarly ties economic sanctions to the “trade and” debate, noting that both concern questions about which issues governments should prioritize over economic gains (and in which circumstances). Cf. Lowenfeld, *supra* note 2, at 368–69.

these debates often center on the exception provisions of trade and investment treaties.⁷⁵ Thus, it is notable that these treaty provisions embrace economic sanctions. For example, Article XXI of the General Agreement on Tariffs and Trade (“GATT”) excepts from GATT disciplines both sanctions mandated by the United Nations (“UN”) and many unilateral sanctions.⁷⁶ Likewise, the U.S. Model Bilateral Investment Treaty includes language akin to GATT Article XXI⁷⁷ and expressly adds a “denial of benefits” clause to make clear that the investment protections do not benefit persons subject to sanctions.⁷⁸

75. See, e.g., Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.3.2.3, WTO Doc. WT/DS400/AB/R (adopted May 22, 2014) (construing the public morals exception in GATT Art. XX).

76. Article XXI states:

Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. In turn, Article 41 of the UN Charter authorizes the Security Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations. . . .” U.N. Charter art. 41.

77. U.S. Model Bilateral Investment Treaty art. 18, 2012 [hereinafter U.S. Model BIT] (“Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”).

78. The U.S. Model BIT states:

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

Id. art. 17.

Two early WTO cases raised the “trade and sanctions” question – *Massachusetts/Burma*⁷⁹ and *Helms-Burton Act*⁸⁰ – but the complainants did not pursue either case to a panel decision.⁸¹ Two new cases filed in 2017, both still in early-stage consultations, may yet reach a panel – Russia’s challenge to Ukrainian sanctions and Qatar’s claims against the blockade by Bahrain, Saudi Arabia, and the UAE⁸² – and the growth in WTO membership may augur similar cases in the future.⁸³ The absence of WTO decisions on

79. See *United States – Measure Affecting Government Procurement*, WTO Doc. WT/DS88/1 (June 26, 1997). In this case, Japan and the European Union challenged restrictions imposed by Massachusetts against purchasing from companies that did business with Burma. See *id.* The same Massachusetts law was at issue in *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

80. See *Helms-Burton Act*, 22 U.S.C. §§ 6021–6091 (2012). In this case, the European Union challenged the *Helms-Burton Act*, discussed *infra* Part IV.

81. Some GATT-era disputes also implicated Article XXI without producing much in the way of governing jurisprudence, most notably the unadopted GATT panel decision in *United States – Trade Measures Affecting Nicaragua*, L/6053 ¶¶ 5.1–5.3 (Oct. 13, 1986) (unadopted), which decided that assessing the Article XXI defense was outside its terms of reference. Report by the Panel, *United States – Trade Measures Affecting Nicaragua*, ¶¶ 5.1–5.3, WTO Doc. L/6053 (Oct. 13, 1986).

82. See *Ukraine – Measures Relating to Trade in Goods and Services*, WTO Doc. D/S525/1 (June 1, 2017); *Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. D/S528/1 (Aug. 4, 2017).

83. In this regard, Lowenfeld once proposed that one of the reasons why “the GATT/WTO has had little impact on policies of economic sanctions” was that at least twelve states that were “targets of sanctions applied by the Western industrial states were not contracting parties to the GATT at the relevant time.” Lowenfeld, *supra* note 2, at 368–69. Lowenfeld further noted that the WTO system is aimed primarily at combating states’ mercantilist instincts, while “[e]conomic sanctions for political ends are the opposite of mercantilism,” calling instead for “sacrifices, on the ground that there are issues more important than economic advantage.” *Id.* at 369. A remarkable joint statement by Austria and Germany, criticizing CAATSA for subverting cooperation on sanctions for unilateral trade objectives, proposes a bright line between sanctions and trade policy and implies that trade disputes will increase if sanctions cross that line:

The draft bill [CAATSA] of the US is surprisingly candid about what is actually at stake, namely selling American liquefied natural gas and ending the supply of Russian natural gas to the European market. The bill aims to protect US jobs in the natural gas and petroleum industries.

Political sanctions should not in any way be tied to economic interests. . . .

Europe’s energy supply network is Europe’s affair, not that of the United States of America!

Press Release, Fed. Foreign Office, Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the Imposition of Russia Sanctions by the US Senate (June 15,

trade and sanctions plainly deprives IEL scholars of oxygen needed to propel debate,⁸⁴ although the normative questions remain. In principle, at least, it makes no more sense to exclude “and sanctions” questions from the scope of IEL than to ignore *Tuna-Dolphin*⁸⁵ and other “and environment” cases.⁸⁶

Like the subjects of other “trade and” and “investment and” debates, economic sanctions stand simultaneously both inside and outside the realm of economic regulation. As Jackson once suggested, the “and” subjects lie at the “frontier” of IEL⁸⁷ – perhaps a blurred frontier or a set of overlapping

2017), <https://www.auswaertiges-amt.de/en/Newsroom/170615-kern-russland/290666> (emphasis added). If there is more “and sanctions” litigation at the WTO, the Article XXI defense may prove less bulletproof than is sometimes assumed. As Andrew Mitchell wrote recently,

[W]here sanctions are pursued unilaterally . . . States are accorded considerable, but not total, latitude [under GATT XXI] in determining whether they are justified in invoking the exception. However, until there is definitive WTO jurisprudence to the contrary, States should assume that art XXI is not entirely “self-judging” and invocations of art XXI may permit panel review.

Andrew D. Mitchell, *Sanctions and the World Trade Organization*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 284 (Larissa van den Herik ed., 2017).

84. Cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

85. In the *Tuna/Dolphin* cases Mexico challenged U.S. restrictions on imports of tuna caught using fishing methods that did not comport with U.S. standards for the protection of dolphins. See Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WE/DS381/R (Sept. 15, 2011). For discussion of these cases and their impact on the “trade and environment” debate, see, e.g., MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 520–24 (2005).

86. Jackson’s work supports this view. As far back as 1969, he wrote about early sanctions issues arising under Article XXI. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* § 28.4 (1969). He and his co-authors discuss sanctions issues in their casebook. JOHN H. JACKSON, ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* ch. 21.4 (5th ed. 2008). And, as editor in chief of the *Journal of International Economic Law*, he published several articles on sanctions: Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws Under the WTO Government Procurement Agreement*, 2 J. INT’L ECON. L. 3 (1999) (regarding the Massachusetts/Burma case); Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT’L ECON. L. 133 (2002); Carlos Manuel Vázquez, *Trade Sanctions and Human Rights – Past, Present, and Future*, 6 J. INT’L ECON. L. 797 (2003).

87. See Jackson, *supra* note 70, at 12 (“If you begin to push the frontier of the subject, you have to think also of such things as labour regulations, labour standards, and even human rights.”). Describing the “and” subjects as at the frontier of IEL must not be understood as calling them unimportant to IEL. Doctrinally, noneconomic concerns may trump economic concerns in IEL. See, e.g., GATT, *supra* note 76,

frontiers, a space addressed both by IEL and other disciplines of international law. Sanctions thus remind us of Jackson's admonition, apparently contra Schwarzenberger, that IEL "can not be separated or compartmentalized from general or 'public' international law."⁸⁸ Rather, as Lowenfeld observed, "[E]verything is related to everything else . . . [and] the boundaries between them are inevitably blurred."⁸⁹

Indeed, one might go further in challenging the entire idea of IEL as a compartmentalized discipline walled off from other legal subjects. Judith Resnik recently reminded us "[h]ow unnatural borders are."⁹⁰ They are "artifacts of law rather than of land," and they are "made and remade rather than consisting of a natural and stable set of fixtures."⁹¹ Paul Schiff Berman likewise pushes against the "convenient fiction that nation-states exist in autonomous, territorially distinct spheres" and calls for "preserv[ing] spaces for productive interaction among multiple, overlapping legal systems."⁹² Borders are rarely, if ever, the impenetrable Berlin Wall of the public imagination.⁹³ A river makes a truer metaphor: winding, changing, traversable, fertile, uniting a region as much as dividing the shores. All the more so where the borders are not physical but imagined, and engagement across them can promote "productive interaction among multiple, overlapping" disciplines.⁹⁴

IV. ECONOMIC SANCTIONS AND IEL'S BLURRED INTERNAL BOUNDARIES

Much IEL scholarship attends to questions about relationships among the major fields of IEL, for example, questions about trade and investment: is trade law converging or diverging from investment law (and should it converge or diverge)? Should investment law adopt trade law institutions like the WTO Appellate Body and should trade law adopt investment law procedures like private standing – or, conversely, should investment law abandon or restrict private standing? Should trade law terms be transplanted into investment treaties, and should investment provisions be incorporated into regional trade agreements or even the WTO? To what extent should trade and investment jurisprudence inform each other when they apply similar terms in

art. XX. Academically, studying the edges of a field may be crucial to understanding its nature, its values and priorities, and its place among and relationships with other fields.

88. Jackson, *supra* note 70, at 9.

89. LOWENFELD, *supra* note 4, at vii.

90. Judith Resnik, "Within Its Jurisdiction": Moving Boundaries, People, and the Law of Migration, 160 PROC. AM. PHIL. SOC'Y 117, 117 (2016).

91. *Id.* at 117, 122.

92. PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 4, 10 (2012).

93. And even the Berlin Wall, in reality, was overcome numerous times before the very people it tried to keep in tore it down.

94. See *infra* Part V.

different legal and economic contexts? And, are trade and investment law adjudicators from different planets?⁹⁵

One reason these questions arise is because IEL addresses what have traditionally been separate fields of regulation. Separate domestic agencies regulate separate subject matters under separate statutes with separate communities of practitioners. A partial list of IEL-relevant regulators in the United States includes: the Departments of Agriculture, Commerce, Justice, State, and Transportation, the Committee on Foreign Investment in the United States, Customs and Border Protection, the Federal Reserve Board, the Federal Trade Commission; the Internal Revenue Service, the International Trade Commission, the Securities and Exchange Commission, the U.S. Trade Representative, and state banking and insurance regulators. These domestic regulators coordinate transnationally with their regulatory counterparts in other countries, often but not always through the State Department or U.S. Trade Representative. A host of subject-matter-specific international institutions, in varying degrees of institutional formality, has been created to address the needs for regulatory coordination. Again, a partial list includes: the Basel Committee, the Financial Stability Board, the International Monetary Fund, the International Organization of Securities Commissions, the World Bank, and the World Trade Organization.⁹⁶

To be sure, the previous paragraph overstates the degree of separation. In fact, there are overlaps among the subject areas, cooperation or competition among the regulators, and attorneys and scholars who work in multiple fields.

Still, it is rare indeed to find a single regulatory regime that purports to regulate across the range of these fields. This makes sanctions a subject worth study by IEL scholars.

To demonstrate how sanctions regulations cut across IEL fields, we must dig into the details. While OFAC has many sanctions programs, in the interests of brevity, this Article focuses on just one program – Cuba. There are numerous differences (major and picayune) among the OFAC programs

95. See, e.g., Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761 (2015); *Book Symposium on Jürgen Kurtz's The World Trade Organization and International Investment Law*, 9 JERUSALEM REV. LEGAL STUD. 1 (2014) (articles by Giorgio Sacerdoti, Donald McRae, Tomer Broude, and Jürgen Kurtz); JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* 20–28, 80–83, 244–56 (2016); Tomer Broude, *Investment and Trade: The 'Lottie and Lisa' of International Economic Law?* in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM, 139 (Roberto Echandi & Pierre Sauvé eds., 2013); Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008).

96. See generally Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997) (discussing the value “transgovernmental networks” in international governance).

and, as the oldest extant OFAC program, Cuba stands apart from the others in some important respects.⁹⁷ Nevertheless, the Cuba program well illustrates how OFAC regulates across IEL, its idiosyncratic aspects may be applied or adapted in other programs,⁹⁸ and, in any event, a fundamentally similar analysis could show the way other OFAC programs also regulate across IEL.

The United States imposed comprehensive economic sanctions against Cuba over fifty years ago.⁹⁹ President Kennedy started the sanctions in 1962 when the Bay of Pigs was fresh, the Cuban Missile Crisis was yet to come, and public passions against Fidel Castro ran strong.¹⁰⁰ Many details of the Cuba embargo have changed over time, with liberalizing and restricting trends alternating.¹⁰¹

97. Cuba is the last program grandfathered under TWEA, while newer programs rely primarily on IEEPA; it governs foreign subsidiaries of U.S. businesses unlike the IEEPA programs (except Iran); it targets all Cubans, not only the government; it emphasizes travel restrictions, while Congress deprived OFAC of the power to regulate travel to other sanctioned countries; and newer programs tend to use more modern, specific language to set forth their prohibitions.

98. As happened when Congress extended Iran sanctions to foreign subsidiaries. See *supra* text accompanying notes 46–47.

99. Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962).

100. On the historical events, see, e.g., ROBERT A. DIVINE, *SINCE 1945: POLITICS AND DIPLOMACY IN RECENT AMERICAN HISTORY* 110–14 (2d ed. 1979). Bob Dylan nicely captured the public mood:

I had to say something / To strike him very weird
 So I yelled out / “I like Fidel Castro and his beard”
 Rita looked offended / But she got out of the way
 As he came charging down the stairs / Sayin’, “What’s that I heard you say?”
 I said, “I like Fidel Castro / I think you heard me right”
 And I ducked as he swung / At me with all his might
 Rita mumbled something / ‘Bout her mother on the hill
 As his fist had hit the icebox / He said he’s going to kill
 Me if I don’t get out the door / In two seconds flat
 “You unpatriotic / Rotten doctor Commie rat”

BOB DYLAN, *Motorpsycho Nitemare*, on *ANOTHER SIDE OF BOB DYLAN* (Columbia Records 1964).

101. Most recently, the Obama administration tried to shove the Cuba embargo decidedly towards retirement. See Press Release, White House Office of Press Sec’y, Presidential Policy Directive – United States-Cuba Normalization (Oct. 14, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization>. Among other important changes in Cuba policy, OFAC and BIS eased their restrictions five times through 2015 and 2016, and President Obama declared, “The embargo is outdated and should be lifted. My Administration has repeatedly called upon the Congress to lift the embargo, and we will continue to work toward that goal.” *Id.* President Trump, in turn, has committed rhetorically to preserving and enforcing the embargo: “[E]ffective immediately, I am canceling the last administration’s completely one-sided deal with Cuba.” *Remarks by President Trump on the Policy of the United States Towards Cuba*,

The Cuban Assets Control Regulations (“CACR”) prohibit virtually all business between the United States and Cuba except as licensed by OFAC. Their breadth is stunning: they target virtually any Cuban citizen located anywhere worldwide, and they govern conduct not only by U.S. persons but also by foreign-incorporated entities owned or controlled by U.S. persons.¹⁰² One example captures this span in both dimensions: OFAC once insisted that a Sheraton hotel in Mexico, owned by a Mexican subsidiary of a U.S. hotel company, evict a Cuban delegation that was staying at the hotel for meetings with the Mexican government – notwithstanding a Mexican law prohibiting discrimination against hotel guests based on their nationality.¹⁰³

Remarkably, given this sweep, the heart of the CACR prohibitions is expressed in a single sentence, section 201(b):

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury . . . if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since [July 9, 1963] had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in . . . any property . . . by any person subject to the jurisdiction of the United States¹⁰⁴

This sentence generally prohibits a U.S. national from buying a Cuban cigar because the cigar is “property” in which a Cuban national has (or had) an “interest.” Conversely, it also generally prohibits a person subject to the jurisdiction of the United States from selling cars to a Cuban national because the payment is “property” in which a Cuban national has an “interest.” In this

WHITE HOUSE (June 16, 2017, 1:31 P.M.), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-policy-united-states-towards-cuba/>. In practice, however, the Trump administration has announced limited changes focusing mainly on restricting travel to Cuba, especially travel under the popular “people-to-people” educational exchanges, and even those changes will not take effect until OFAC promulgates implementing regulations. Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, § 3 (Oct. 20, 2017). The net effect is that, at this writing, the Trump administration appears to have ratified much of the Obama liberalization. See PERRY BECHKY & MICHELLE TURNER ROBERTS, DÉJÀ VU: NEW RESTRICTIONS ON CUBA TRAVEL (June 22, 2017), http://bcr.tv/BCR_Regulatory_Alert_on_Cuba_Travel_Restrictions_20170622.pdf.

102. See generally 31 C.F.R. pt. 515 (2017).

103. See James C. McKinley, Jr., *Mexico and Cuba Protest Hotel’s Expulsion of Havana Delegation*, N.Y. TIMES (Feb. 7, 2006), <http://www.nytimes.com/2006/02/07/world/americas/mexico-and-cuba-protest-hotels-expulsion-of-havana.html>. OFAC relieved U.S.-owned hotels from this particular burden in 2015 by issuing a general license authorizing services to Cuban nationals attending conferences in third countries (except conferences related to Cuban tourism). 31 C.F.R. § 515.581 (2017).

104. 31 C.F.R. § 515.201(b) (2017).

way, a prohibition against dealings in “property” in which a Cuban person has (or had) an interest regulates virtually all trade in goods between the United States and Cuba without need to expressly ban exports and imports.¹⁰⁵

Importantly, moreover, the Cuban interests in the examples above go further: the Cubans are also said to have an “interest” in the money intended to pay for the cigar, in the cars intended for export to Cuba, and even in the sales contracts themselves. This means that no other person subject to the jurisdiction of the United States may lawfully transact in either the funds or the cars and both become “blocked” (or frozen) until OFAC licenses their “unblocking.”

Compare this to ordinary commercial principles. The seller owns the goods and the buyer owns the funds until the moment of sale. Afterwards, the ownership interests are reversed. There is no time when the buyer or seller owns both the funds and the goods. No matter. OFAC is not bound by the law of ownership – nor even by other legally cognizable interests (such as liens).¹⁰⁶ OFAC defines “interest,” if it can be called a definition, as “an interest of any nature whatsoever, direct or indirect.”¹⁰⁷ Unhelpfully, the Supreme Court has added that “sweeping statutory language” authorizes OFAC

105. More modern OFAC programs do tend to expressly proscribe imports and exports – Iran, for example. See 31 C.F.R. §§ 560.201, 560.204 (2017).

106. *Cf. Consarc Corp. v. OFAC*, 871 F. Supp. 1463, 1465 (D.D.C. 1994) (“Equity and fairness demand that Consarc not be left empty-handed They clearly cannot be deprived of both the proceeds of sale as well as the goods sold but not delivered [to Iraq, under then-existing OFAC sanctions] because of the intercession of the government.”), *rev’d*, 71 F.3d 909, 914 (D.C. Cir. 1995) (“Although Iraq may no longer have any interest in its down payment, it still has some interest in the goods for which the down payment was paid and some interest in the transaction. The text of the statute thus does not clearly forbid OFAC from enforcing its regulation against the down payment or the goods themselves.”).

107. 31 C.F.R. § 515.312 (2017). The word “property” is given a comparable expanse: the term

shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, and other financial securities, bankers’ acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors’ sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

31 C.F.R. § 515.311(a) (2017) (emphasis added).

“to regulate ‘any’ transaction involving ‘any’ property in which a foreign country or national thereof has ‘any’ interest.”¹⁰⁸

The expansiveness of this conception of “interest” can be seen in the following example, which also highlights the impact that U.S. sanctions have on world commerce far beyond bilateral trade between the United States and Cuba: section 201(b) generally prohibits the Canadian branch of a U.S. bank from paying on a letter of credit issued to allow a Canadian company to buy Brazilian steel shipped on a Liberia-flagged vessel, if it should turn out that the vessel is owned by a Panamanian company in turn owned by a Cuban person.

Such expansiveness obviously presents compliance challenges for businesses engaged in world trade. The challenges are compounded by uncertainty about the outer edges of the prohibitions. Five decades on, OFAC has provided precious little guidance about the word “interest.” If a Cuban has a romantic interest in an American, does he or she become blocked property? Presumably not, thanks to the Thirteenth Amendment. If a Cuban has a rooting interest in the New York Yankees, does the team become blocked property? Presumably not, because OFAC must have had evidence of such interest for fifty years without ever acting on it. If a Cuban has an aesthetic interest in Frank Lloyd Wright architecture, a culinary interest in the restaurants of José Andrés, or a scholarly interest in the Model T, do all those properties held in the United States or by any person subject to U.S. jurisdiction worldwide become blocked property? Presumably not, because, well, OFAC can’t really mean “an interest of any nature *whatsoever*,”¹⁰⁹ can it? These examples are all a bit silly, admittedly, but they highlight the difficulties that arise once the concept of “interest” is divorced from legally cognizable property interests and is not otherwise clearly circumscribed. In the infinite variety of possible transactions in world trade, it can be difficult (and expensive) to determine factually whether there is an arguable Cuban interest in any good or party involved in a transaction (even a small one)¹¹⁰ and, if so, to obtain clear and timely legal guidance.

The impact of section 201(b) is not limited to trade in goods. In fact, its breadth sweeps across many other fields of IEL:

- *Tourism* – U.S. nationals cannot travel to Cuba except as licensed by OFAC,¹¹¹ on the view that such travel involves deal-

108. *Regan v. Wald*, 468 U.S. 222, 232 n.16 (1984).

109. 31 C.F.R. § 515.312 (2017) (emphasis added).

110. For example, a Cayman subsidiary of Halliburton recently paid a \$304,706 civil penalty to OFAC, on behalf of itself and a second Cayman affiliate, for transacting business with an oil consortium in Angola, in which Cuba Petróleo had a five percent stake. ENFORCEMENT INFORMATION FOR FEB. 25, 2016 (Feb. 2016), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160225_Halliburton.pdf. OFAC noted that the two companies knew or should have known of the Cuban stake. *Id.*

111. 31 C.F.R. § 515.560 (2017).

ings in “property” in which Cuban persons have an “interest.” Indeed, the Supreme Court endorsed this reading of section 201(b): “[I]t is clear that the authority to regulate travel-related transactions is merely part of the President’s general authority to regulate property transactions.”¹¹² The Court noted that “[p]ayments for meals, lodging, and transportation in Cuba are all transactions with respect to property in which Cuba or Cubans have an interest.” Later, OFAC revised its rules to eliminate any nexus to payment, making clear that it considers simply eating or staying at a Cuban hotel enough to qualify as “dealing” in “property.”¹¹³

- *Trade in Services* – Likewise, across a swath of service industries, section 201(b) generally prohibits persons subject to U.S. jurisdiction from providing unlicensed banking services, insurance services, legal services, transportation services,¹¹⁴ telecommunication services, construction services, and so forth to Cuba or Cubans. Everything from the dire (medical evacuation services) to the minor (manuscript editing services) needs an OFAC license.¹¹⁵ As with travel,¹¹⁶ there is no separate prohibition on exporting services beyond section 201(b), but one can infer that section 201(b) reaches services because OFAC has published various licenses authorizing certain services, which would not otherwise be needed. Again, the services themselves are regulated apart from payment, so (for example) a U.S. law firm cannot provide pro bono legal services to a Cuban without an OFAC license.¹¹⁷

112. *Regan*, 468 U.S. at 232 n.16; see also *id.* at 234 n.18 (“Regulation 201(b)’s general prohibition on transactions involving property in which Cuba or Cubans have an interest is what, as a practical matter, prevents respondents from traveling to Cuba. . . . [T]here were no separate ‘travel restrictions’ The source of all restrictions on property transactions is Regulation 201(b) . . .”).

113. Cuban Assets Control Regulations, 69 Fed. Reg. 33,768 (June 16, 2004) (codified at 31 C.F.R. pt. 515) (repealing provisions allowing “fully-hosted travel” to Cuba on the ground, among others, that “a person who accepts goods or services in Cuba without paying for them is in fact engaging in a prohibited dealing in property in which Cuba or a Cuban national has an interest”).

114. See, e.g., *United States v. Plummer*, 221 F.3d 1298, 1300, 1309–10 (11th Cir. 2000) (holding the U.S. government could prosecute a U.S.-Bahamian dual citizen for transporting Cuban cigars on the high seas).

115. 31 C.F.R. §§ 515.548(b), 515.577(a)(4) (2017).

116. See *Plummer*, 221 F.3d. at 1307.

117. General licenses authorize U.S. lawyers and U.S. law firms to provide certain types of legal services to Cubans (but not other legal services) and to receive payment for licensed services in some circumstances (but not in others, with a reporting re-

- *Investment* – A person subject to U.S. jurisdiction cannot invest in Cuba, directly or indirectly, without an OFAC license. Significant challenges arise when such persons make non-controlling, minority investments in third-country companies that in turn invest in Cuba. U.S. direct investment in Cuba was all but impossible until recently, when OFAC started issuing licenses that permit it in certain circumstances.¹¹⁸
- *Finance* – A person subject to U.S. jurisdiction cannot lend money to a Cuban person without an OFAC license and, similarly, cannot lend money to a third-country person for the purpose of financing that person's business dealings in Cuba. Significant challenges arise when persons subject to U.S. jurisdiction lend to third-country companies that do business in Cuba, including diligence about the extent and nature of such business and representations and warranties to assure that the loan proceeds do not further that business. Such persons are now allowed to engage in certain "microfinancing projects" in Cuba.¹¹⁹
- *Intellectual Property* – A person subject to U.S. jurisdiction cannot register intellectual property in Cuba or otherwise protect intellectual property in Cuba without an OFAC license. While general licenses cover the basics of intellectual property protection in Cuba – including paying registration fees, hiring local agents and counsel, and filing lawsuits¹²⁰ – they do not authorize U.S. businesses to license their intellectual property for commercial use in Cuba because that would give a Cuban person an "interest" in "property."
- *Taxation* – A person subject to U.S. jurisdiction cannot pay taxes or similar charges to Cuba without an OFAC license, as illustrated by the license for airlines to pay overflight fees to Cuba for crossing through Cuban airspace.¹²¹ As licensed travel and business increase, more persons subject to U.S. jurisdiction

quirement concerning the payments in some circumstances). 31 C.F.R. § 515.512 (2017).

118. See, e.g., 31 C.F.R. § 515.573(a) (2017) (authorizing "physical presence" in Cuba in certain circumstances); Victoria Burnett, *American Firm, Starwood, Signs Deal to Manage Hotels in Cuba*, N.Y. TIMES (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/world/americas/american-firm-starwood-signs-deal-to-manage-hotels-in-cuba.html> (discussing specific licenses for Starwood and Marriott to manage hotels in Cuba).

119. 31 C.F.R. § 515.575(b) (2017).

120. 31 C.F.R. § 515.528 (2017).

121. See 31 C.F.R. § 515.548(a) (2017).

may pay taxes in Cuba, relying mainly on an interpretation that, subject to some exceptions, “[a]ny transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized.”¹²²

- *Family Transfers* – Although not commonly regarded as a major topic of IEL, family transfers are crucial to the economies of many countries.¹²³ Without an OFAC license, U.S. nationals cannot send remittances to relatives in Cuba, which – yet again – involve “property” in which a Cuban has an “interest.” Two general licenses issued in 2015 first quadrupled the limit on “donative remittances” to relatives in Cuba (from \$500 to \$2000 per quarter) and then eliminated the dollar limit altogether.¹²⁴ As a result, U.S. remittances to Cuba may now top \$1 billion per year.¹²⁵ Even after the death of a U.S. national, OFAC licenses are needed to pay the proceeds of life insurance policies to Cuban beneficiaries and distribute estates to Cuban heirs.¹²⁶

As central and far-reaching as this one sentence of section 201(b) is, it does not contain the entirety of U.S. sanctions against Cuba. It would be remiss not to mention a few other Cuba sanctions that implicate other aspects of IEL. First, U.S. law mandates the U.S. government to use its “voice and vote” against Cuba’s admission to international financial institutions (“IFIs”), including the World Bank and International Monetary Fund, and threatens to cut the U.S. contribution to any IFI that extends assistance to Cuba over U.S. objection.¹²⁷ Second, U.S. law seeks to inhibit shipping and cruising involving Cuba by denying entry into U.S. ports to any vessel carrying goods or passengers to or from Cuba and (for some purposes) extending such denial for 180 days after the vessel leaves Cuba.¹²⁸ Third, Florida state law previ-

122. See 31 C.F.R. § 515.421(a) (2017).

123. See, e.g., Ralph Chami & Connel Fullenkamp, *Beyond the Household*, 50 FIN. & DEV. 48, 48 (2013) (“In 2011 . . . remittances were at least 1 percent of GDP for 108 countries; and 5 percent of GDP or more for 44 countries. For 22 countries, remittances represented 10 percent or more of GDP . . .”).

124. See Cuban Assets Control Regulations, 80 Fed. Reg. 2291, 2291 (Jan. 16, 2015) (amending 31 C.F.R. § 515.570 to raise the limits from \$500 to \$2000 per quarter); Cuban Assets Control Regulations, 80 Fed. Reg. 56,915, 56,917 (Sept. 21, 2015) (amending 31 C.F.R. § 515.570 to remove the limitation on donative remittances).

125. See Dudley Althaus & José de Córdoba, *For Cubans, U.S. Cash Trickles In*, WALL ST. J. (Jan. 13, 2016) (citing estimates for 2015 between \$770 million and \$1.8 billion).

126. 31 C.F.R. § 515.524(b) (estates), § 515.526 (life insurance), § 515.570 (remittances, including life insurance proceeds) (2017).

127. Helms-Burton Act, 22 U.S.C. § 6034(a)(1), (c) (2012).

128. 31 C.F.R. § 515.207(a) (2017).

ously barred companies from bidding on state contracts if any of their affiliates did business with Cuba, although the courts declared the state law preempted due to conflict with federal law.¹²⁹

Three other provisions affected Cuba until 2015, when the Obama administration removed Cuba from the list of state sponsors of terrorism (“SST”).¹³⁰ These provisions continue to apply to Iran, Sudan, and Syria.¹³¹ First, Congress enacted a special exception to sovereign immunity that permits certain human rights cases to be brought against SST countries.¹³² These cases have led to some large default judgments, and Congress has sought to help plaintiffs execute these judgments, including execution against blocked funds.¹³³ Second, the Securities and Exchange Commission requires enhanced disclosure about business dealings in SST countries, even at business levels that would not normally be regarded as material and even where the conduct was undertaken lawfully by foreign issuers that are not governed by OFAC regulations.¹³⁴ Third, Florida bars state universities from spending state money on travel to SST countries, even where OFAC licenses such travel (in the case of Cuba) or Congress exempts travel from OFAC regulation (in the case of all other countries).¹³⁵

Finally, two U.S. statutes illuminate – and cut across – the blurred internal boundaries of IEL. Both arise out of Cuba’s mass nationalization of property in the 1960s. The United States has long claimed that Cuba owes

129. See *Odebrecht Constr., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1287 (11th Cir. 2013). Florida’s law calls to mind the earlier Massachusetts/Burma controversy, which is discussed extensively in *Odebrecht*. *Id.* at 1274–75, 1280–87 (following *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)). Some WTO members (including Brazil, where the plaintiff’s parent company was based) expressed concerns about inconsistencies between Florida’s law and U.S. obligations under the Government Procurement Agreement, but the domestic courts enjoined the law before any WTO case was filed. *Id.* at 1279–80.

130. See *Rescission of Determination Regarding Cuba*, 80 Fed. Reg. 31,945 (June 4, 2015).

131. *State Sponsors of Terrorism*, U.S. DEP’T STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 22, 2018).

132. Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605A(a)(1) (2012) (creating an exception to immunity for cases alleging “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act”).

133. See FSIA, 28 U.S.C. § 1610(a)(7), (f) (2012) (allowing execution against sovereign assets, even where blocked by OFAC, to satisfy judgments of cases brought under section 1605A); 22 U.S.C. § 8772 (2012) (allowing execution against assets restrained by the Southern District of New York in *Peterson v. Iran*). The Supreme Court upheld section 8772 in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016), discussed *infra* Part V.

134. See *Bechky*, *supra* note 9, at 856–58.

135. See *Faculty Senate of Fla. Int’l Univ. v. Winn*, 616 F.3d 1206, 1211–12 (11th Cir. 2010) (upholding Florida’s Travel Act).

compensation for these nationalizations,¹³⁶ and the State Department reported that bilateral talks about these claims finally began in December 2015.¹³⁷

In the Helms-Burton Act of 1996, the United States sought to dissuade international companies from buying properties taken from U.S. persons (including Cubans who later emigrated to the United States) or otherwise “trafficking” in such properties by subjecting “traffickers” to U.S. lawsuits and denying their executives and their families entry into the United States.¹³⁸ In response, the European Communities filed a WTO case against the United States.¹³⁹ The United States then suggested that it would raise a national security defense, claiming in particular that this defense is self-judging.¹⁴⁰ In other words, the U.S. position would have enabled any WTO Member to invoke a national security defense successfully in any case without any (meaningful) independent check by the panel or Appellate Body.¹⁴¹ This was an explosive position to present to the then-newborn WTO¹⁴² – even more so

136. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 402–03 (1964) (“Our State Department has described the Cuban law [authorizing expropriation of properties owned by U.S. nationals] as ‘manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.’” (quoting State Dep’t Note No. 397, to Cuban Ministry of Foreign Relations (July 16, 1960))). The U.S. government assigned responsibility to assess and value claims by U.S. nationals against Cuba to the Foreign Claims Settlement Commission, which certified 5911 claims with total principal of about \$1.8 billion. See *Completed Programs – Cuba*, U.S. DEP’T JUST., <https://www.justice.gov/fcsc/claims-against-cuba> (last visited Mar. 22, 2018).

137. See Press Release, U.S. Dep’t of State, Senior State Department Official on Cuba Claims Discussions (July 29, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/07/260666.htm>.

138. See Helms-Burton Act, 22 U.S.C. §§ 6081–6085, 6091 (2012).

139. Request for the Establishment of a Panel by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/2 (Oct. 8, 1996). This case also addressed the Iran and Libya Sanctions Act of 1996 (now, the ISA), which originally imposed sanctions on third-country businesses that invested in the Iranian and Libyan oil industries. See *id.*

140. See John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313, 1329 (1998).

141. Cf. José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, 2010–11 Y.B. ON INT’L INVESTMENT L. & POL’Y 319, 347 (“GATT Article XXI, dealing with *certain* (but not all) essential security measures, accords the greatest measure of deference; indeed, its presumptively self-judging (‘which it considers’) language scarcely anticipates any room for independent assessment by a third party adjudicator . . .”).

142. See John H. Jackson, *Helms-Burton, the U.S., and the WTO*, 2 ASIL INSIGHTS 1, 2 (1997) (“These [national security] exceptions, however, if given a broad interpretation could undermine the whole WTO treaty and impair the security and stability of the world trading system for which the WTO has been created.”); Spanogle, *supra* note 140, at 1316 (calling the national security defense a “bogeyman” and “inappropriate and dangerous”).

given the risk that the United States might leave the WTO if it lost the national security argument.¹⁴³ In the end, the two parties reached a political understanding that allowed the Europeans to suspend their case until it expired from inaction.¹⁴⁴

In section 211 of the Omnibus Appropriations Act of 1998, the United States barred the registration or renewal of U.S. trademark rights related to certain businesses expropriated by Cuba, except with the claimholder's consent.¹⁴⁵ This prompted the European Communities to bring a WTO case under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").¹⁴⁶ Although the TRIPS Agreement has a security exception parallel to GATT Article XXI,¹⁴⁷ this time the United States did not raise the national security defense. Ultimately, the Appellate Body found in 2002 that certain aspects of section 211 denied national treatment and most-favored-nation treatment in violation of TRIPS, while rejecting most of the European claims.¹⁴⁸ Nevertheless, many years later, the United States has not yet brought section 211 into conformity with TRIPS.¹⁴⁹

143. By way of analogy, after losing in *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Jurisdiction, 1984 I.C.J. 392 (Nov. 26), the United States did not defend itself on the merits and terminated its submission to the compulsory jurisdiction of the International Court of Justice. See Dep't of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 I.L.M. 1742 (1985). The I.C.J. held that the security exception of the U.S.-Nicaragua friendship treaty was not self-judging but that treaty omits the words "it considers" before "necessary," which are found in the security exception provisions of GATT and the U.S. Model BIT. See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 224 (June 27).

144. See European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997); *DS38: United States – The Cuban Liberty and Democratic Solidarity Act*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm (noting the suspension of the panel in 1997 followed by the lapsing of the panel's authority in 1998).

145. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105-277, § 211, 112 Stat. 2681 (1998).

146. See Appellate Body Report, *United States – Section 211 of the Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002).

147. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 73, Apr. 15, 1994, 33 I.L.M. 81.

148. *United States – Section 211*, *supra* note 146, ¶ 360.

149. See Status Report by the United States, *Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/11/Add.156 (Jan. 15, 2016) ("The United States notes that relevant legislation has been introduced in the current 114th session of the United States Congress. The United States will continue to work on a solution that would resolve this matter.").

V. NEW ISSUES IN SANCTIONS LAW

Economic sanctions deserve to be the subject of sustained academic examination. The economic, diplomatic, and political impacts of sanctions alone suffice to warrant this scrutiny. We are also experiencing a burst of creative energy in sanctions, making the scrutiny novel and timely. In turn, that very energy is also heightening due process and other concerns, leading to new challenges, institutions, and procedures. Sanctions thus promise to generate a stream of new research questions into the foreseeable future. This Part highlights some recent sanctions developments demanding scholarly attention. Keeping with the themes set forth above about border crossing, the following examples call for cross-disciplinary cooperation between IEL and other disciplines.

We have seen already the extent of OFAC sanctions when applied to a Cuban national. Now consider the panoply of legal issues that arise when OFAC directs its power against someone living in the United States. This is not an idle hypothetical: OFAC once named a U.S. citizen, Muhammad Salah, as a Specially Designated Terrorist ("SDT"). Salah's complaint against OFAC reads like George Orwell meets Lewis Carroll.¹⁵⁰ Consider that Salah lived in Illinois and needed OFAC licenses to work, buy food, and get medical treatment for his cancer – and, when OFAC granted him licenses, it often did so with delays, time limits, restrictions, ambiguities, and impracticable requirements (e.g., to keep receipts for every single living expense).¹⁵¹ And this situation went on for seventeen years!¹⁵² As the complaint states, "Salah survives . . . only at the sufferance of OFAC."¹⁵³

To elaborate briefly, Salah is an Arab-American Muslim who pleaded guilty in Israel to aiding Hamas before U.S. law prohibited such aid.¹⁵⁴ Due to Salah's aid to Hamas, a U.S. District Court rendered a summary judgment finding him civilly liable for Hamas' murder of a U.S. citizen, but the Seventh Circuit reversed on the ground that a relevant statute did not come into effect until after Salah's arrest in Israel.¹⁵⁵ When the United States targeted Hamas with anti-terrorism sanctions, OFAC named Salah as an SDT.¹⁵⁶ This designation had the effect of blocking all of his property in the United States and forbidding him from engaging in virtually any transaction in the United

150. See generally Complaint, *Salah v. U.S. Dep't of Treasury*, No. 1:12-cv-07067 (N.D. Ill. Sept. 5, 2012) (available at <https://ccrjustice.org/home/what-we-do/our-cases/salah-v-us-department-treasury>). The summary presented here is based on Salah's complaint against OFAC, as the facts were never adjudicated.

151. *Id.* ¶¶ 1–3.

152. *Id.* ¶ 1.

153. *Id.* ¶ 3.

154. *Id.* ¶ 20.

155. See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 691 (7th Cir. 2008) (en banc) (Posner, J.).

156. See Complaint, *supra* note 150, ¶¶ 15–16, 20.

States without a specific license.¹⁵⁷ While OFAC issued several licenses to Salah (however imperfectly), it also denied some of his applications, meaning that he could not donate to charity or travel to Mecca, both religious obligations for Muslims. OFAC ultimately terminated Salah's designation, apparently preferring that to defending its actions in court.¹⁵⁸

Salah's complaint is rife with constitutional issues: denial of substantive due process by imposing severe consequences on him for conduct that was lawful when done; denial of procedural due process by depriving him of liberty and property without notice and opportunity to respond; interference with his First Amendment freedoms of association, religion, and speech; and imposing quasi-criminal punishments outside the criminal process with its attendant constitutional protections.¹⁵⁹ Salah also claimed administrative violations based on problems with the record and the process for designation.¹⁶⁰

While Salah's case presents a distinct set of issues arising from his intimate ties to the United States, the current criminal prosecution of Reza Zarrab is the polar opposite: Zarrab is a Turkish-Iranian citizen resident in Turkey and his case poses questions about the outer reach of OFAC's grasp.¹⁶¹ Zarrab was arrested in March 2016 at a Miami airport when he tried to bring his family to Disney World.¹⁶² Charged with helping Iran evade U.S. sanctions, he moved to dismiss the prosecution on the ground (among others) that OFAC's regulations generally do not govern conduct of non-U.S. persons

157. *See id.* ¶ 3. OFAC publishes far fewer general licenses permitting dealings with designated terrorists than with Cuba. The existence of unfriendly governments is a stubborn fact and, whatever may be OFAC's wishes, some dealings with such governments are needed to protect U.S. interests. It is much easier to insist that all dealings with terrorists must be specifically licensed.

158. *See Anti-Terror Designations; Anti-Terror Designations Removal*, U.S. DEP'T TREASURY (Nov. 5, 2012), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121105.aspx>. OFAC announced this removal on the same day that the government would have had to answer Salah's complaint. *See* FED. R. CIV. P. 12(a)(2) ("[A] United States agency . . . must serve an answer to a complaint . . . within 60 days after service . . ."); FED. R. CIV. P. 6(a)(1)(C) (extending filing deadlines that fall on a weekend, as here, to Monday).

159. *See generally* Complaint, *supra* note 150. In fact, Salah's blocking persisted despite his *acquittal* of Racketeer Influenced and Corrupt Organization ("RICO") charges concerning his alleged relationship with Hamas, the same allegation that also appears to underpin his SDT designation. Salah was convicted of obstructing justice for making misstatements in the *Boim* case. *See id.* ¶ 28. The same questions about the interplay between sanctions and criminal law may arise on the international plane, where UN sanctions targets may also face charges at the international criminal tribunals.

160. *Id.* ¶ 49.

161. *See* Memorandum of Law in Support of Defendant Reza Zarrab's Motion to Dismiss the Superseding Indictment at 4, *United States v. Zarrab*, No. 1:15-cr-00867 (RMB) (S.D.N.Y. July 18, 2016).

162. *Id.* at 6.

acting outside the United States.¹⁶³ The government responded that Zarrab is subject to U.S. jurisdiction because he conspired to cause banks in the United States to export services to Iran¹⁶⁴ by transacting business in U.S. dollars that cleared through banks in New York.¹⁶⁵ The trial court denied the motion, holding that the indictment alleged a sufficient nexus between Zarrab's conduct and the United States to allow the prosecution to continue.¹⁶⁶ Should Zarrab be convicted, these issues may be considered further on appeal.

The *Zarrab* case sits towards the leading edge of an important trend towards extraterritorial enforcement. An indictment in April 2014 against Li Fangwei (also known as Karl Lee) alleged wire transfers through the U.S. banking system, as well as some transactions more directly involving the United States; the case has not proceeded because Li is not in custody.¹⁶⁷ In September 2016, the government announced charges against a Chinese company and four associated Chinese individuals for causing banks in the United States to export services to a North Korean entity on the SDN List.¹⁶⁸ In February 2017, OFAC issued a "finding of violation" but no penalty against a Taiwanese company that bought oil from Iran (outside the United States, of course) on the ground that the company qualified as a U.S. person bound by OFAC rules because it was engaged in bankruptcy proceedings before a U.S. court and was therefore "present in the United States."¹⁶⁹ In March 2017, a Chinese telecommunications company, ZTE, pled guilty to sanctions and export control violations for reexporting U.S. goods to Iran and lying to the

163. *Id.* at 9.

164. See 31 C.F.R. § 560.203(a) (2017) ("Any transaction . . . that . . . causes a violation of . . . any of the prohibitions set forth in this part is prohibited."); 31 C.F.R. § 560.204 (2017) (prohibiting unlicensed exports of services to Iran).

165. See Government's Memorandum of Law in Opposition to Defendant Reza Zarrab's Motion to Dismiss the Indictment and to Suppress Evidence at 2–3, *Zarrab*, No. 1:15-cr-00867 (RMB) (S.D.N.Y. Aug. 8, 2016).

166. *United States v. Zarrab*, No. 15 CR 867 (RMB), 2016 WL 6820737, at *8–10 (S.D.N.Y. Oct. 17, 2016).

167. See Sealed Superseding Indictment, *United States v. Li Fangwei* (S.D.N.Y.) (No. S1 14 Cr. 144) (available at <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/Li%20Fangwei%20in%20Rem%20Complaint%20and%20S1%20Indictment.pdf>); *id.* ¶¶ 28(a)–(f) (alleging transfers through the United States); *id.* ¶¶ 28(f)–(k) (alleging other acts directly involving the United States); see also *Li Fangwei*, FBI, <https://www.fbi.gov/wanted/counterintelligence/li-fangwei> (last visited Mar. 22, 2018).

168. Press Release, U.S. Dep't of Justice, Four Chinese Nationals and China-Based Company Charged with Using Front Companies to Evade U.S. Sanctions Targeting North Korea's Nuclear Weapons and Ballistic Missile Programs (Sept. 26, 2016), <https://www.justice.gov/opa/pr/four-chinese-nationals-and-china-based-company-charged-using-front-companies-evade-us>.

169. ENFORCEMENT INFORMATION FOR FEB. 3, 2017 (Feb. 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170203_bwc.pdf (describing penalty against B Whale Corporation).

U.S. government about it.¹⁷⁰ Such cases present issues at the intersection of criminal law, foreign relations law (e.g., the presumption against extraterritorial application of U.S. statutes), public international law (especially the law of jurisdiction), and even bankruptcy law and corporate law.

Another case concerning Iran sanctions recently ended with a loss for Iran's central bank at the Supreme Court,¹⁷¹ prompting Iran to initiate a claim against the United States at the International Court of Justice ("ICJ").¹⁷² As mentioned, Congress has created an exception to sovereign immunity that applies only to states designated by the U.S. government as state sponsors of terrorism.¹⁷³ Under this exception, more than 1000 "victims of Iran-sponsored acts of terrorism" (and their heirs and relatives) won default judgments against Iran totaling "billions of dollars" arising from various acts of terror, mostly the 1983 bombing of the Marine barracks in Beirut.¹⁷⁴ When the plaintiffs had difficulty executing the judgments, Congress passed an "unusual statute," which specified that particular blocked assets were to be available to execute those exact judgments.¹⁷⁵ The Iranian bank objected on the ground that Congress had unduly interfered with the judicial process contrary to the separation of powers,¹⁷⁶ but the Supreme Court rejected the argument.¹⁷⁷ The Court considered that Congress did not improperly direct the judiciary how to rule in a particular case because the new statute concerned execution, rather than liability, and it still left some issues to be determined by the judiciary.¹⁷⁸ The Court ended by stressing "Congress' prerogative to alter a foreign state's immunity."¹⁷⁹ While this last point may be true for the U.S. law of sovereign immunity, it is of course the case that no one state may

170. Paul Mozur & Cecilia Kang, *U.S. Fines ZTE of China \$1.19 Billion for Breaching Sanctions*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/technology/zte-china-fine.html>. The Secretary of Commerce, Wilbur Ross, stressed the extraterritorial nature of the case: "We are putting the world on notice: The games are over . . . Those who flout our economic sanctions and export control laws will not go unpunished – they will suffer the harshest of consequences." *Id.*

171. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

172. *See* APPLICATION INSTITUTING PROCEEDINGS (June 14, 2016), <http://www.icj-cij.org/files/case-related/164/19038.pdf>.

173. *See supra* note 132.

174. *Bank Markazi*, 136 S. Ct. at 1319–20. The Court did not quantify the total judgments at issue, but Iran has said that they exceed \$56 billion. APPLICATION INSTITUTING PROCEEDINGS, *supra* note 172, at 3.

175. *See Bank Markazi*, 136 S. Ct. at 1317.

176. In the lower courts, but not at the Supreme Court, *Bank Markazi* raised several other constitutional arguments as well: bill of attainder, ex post facto, equal protection, and takings. *Id.* at 1322 n.14.

177. *Id.* at 1329.

178. *Id.* at 1323–29.

179. *Id.* at 1329.

unilaterally amend the *international* law of sovereign immunity.¹⁸⁰ Thus, in its ICJ case, Iran claims that the United States has violated its sovereign immunity.¹⁸¹ As the Court's jurisdiction is based on the bilateral Treaty of Amity,¹⁸² however, Iran must show that the treaty protects sovereign immunity, an argument that will involve construing terms commonly found in bilateral investment treaties ("BITs"), such as "fair and equitable treatment" and "most constant protection and security . . . in no case less than that required by international law."¹⁸³ So, this case intertwines the disciplines of constitutional law, federal courts, civil procedure, international investment law, and public international law (especially sovereign immunity and allowable responses to state-sponsored terrorism).

Administrative law may emerge as an important issue in sanctions law. In May 2017, the D.C. Circuit partially overturned an OFAC civil penalty on

180. See, e.g., *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, 154–55 (holding that Italy "violated its obligation to respect the immunity which . . . Germany enjoys under international law by allowing civil claims to be brought against it," even where those claims arose from Germany's gross violations of humanitarian law during World War II); HAZEL FOX, *THE LAW OF STATE IMMUNITY* 13–19 (2d ed. 2008) (arguing that sovereign immunity is a matter of international legal obligation and criticizing U.S. cases suggesting that immunity is merely a matter of discretion and comity).

181. *APPLICATION INSTITUTING PROCEEDINGS*, *supra* note 172, at 2–3, 9–10, 12–17.

182. Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. XXI(2), Aug. 15, 1955, 8 U.S.T. 899 [hereinafter Treaty of Amity] (consenting to ICJ jurisdiction over disputes regarding "the interpretation or application of the present Treaty").

183. *Id.* art. IV(1)–(2). Iran's application to the ICJ invokes these provisions of the Treaty of Amity, as well as several others, which protect property, transferability of assets, juridical status, and freedom of commerce. *APPLICATION INSTITUTING PROCEEDINGS*, *supra* note 172, at 13–16. Some of these provisions go beyond the terms typically found in a BIT. For example, Article III(2) intrigues:

Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country.

Treaty of Amity, *supra* note 182, art. III(2). The similarity between the Treaty of Amity and BITs is no coincidence: U.S. friendship, commerce, and navigation ("FCN") treaties in the 1950s added investment-protection provisions even before the world's first BIT in 1959 and thus constitute an important bridge between traditional FCNs and modern BITs. See generally Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203–08 (1988).

the ground that OFAC failed to consider adequately some of the evidence.¹⁸⁴ Considering how rarely OFAC has lost in court, it is striking that one judge would have overturned the entire penalty on the ground that it was based on a “confusing, indeed mystifying, decision” that “fudged the answer to the crucial question” and thus failed “to engage in reasoned decision-making” as required by the Administrative Procedures Act (“APA”).¹⁸⁵ Two months after this decision, and presumably inspired by it, Exxon sued OFAC under the APA and the Due Process Clause for alleged irregularities in a civil penalty proceeding.¹⁸⁶ Exxon contracted with a Russian company (Rosneft) that was not subject to sanctions, but the individual who signed the contracts for the Russian counterparty was an SDN.¹⁸⁷ OFAC found that Exxon illegally dealt in services performed by an SDN by entering the contracts he signed, even though Exxon could have entered the same contracts with the same company had another individual signed them.¹⁸⁸ Exxon’s complaint alleges that OFAC’s findings were “arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law because, among other things, they . . . make meaningless distinctions between Rosneft documents signed by [one executive] and identical Rosneft documents signed by any other Rosneft executive.”¹⁸⁹

Some sanctions measures also implicate particular areas of regulatory expertise. For example, divestment by state and local governments from companies that do business in sanctioned countries raises constitutional questions about federalism and due process, but it also involves pension law and securities law.¹⁹⁰ Bank regulation lies at the core of many OFAC programs, which raises the need for both horizontal and vertical coordination because of

184. *Epsilon Elecs., Inc. v. U.S. Dep’t of the Treasury*, 857 F.3d 913, 927–28 (D.C. Cir. 2017).

185. *See id.* at 932–33 (Silberman, J., dissenting). Epsilon objected that OFAC penalized it for illegally exporting goods to Iran through Dubai without finding that the goods actually reached Iran, a point that the majority deemed unimportant on the ground that the act of exporting (like the act of mailing a birthday card) is complete when the goods are sent regardless whether they arrive. *Id.* at 920–21 (majority opinion).

186. *See* Complaint ¶¶ 1–2, *Exxon Mobil Corp. v. Mnuchin*, No. 3:17-cv-1930 (N.D. Tex. July 20, 2017).

187. *See id.* ¶ 3.

188. ENFORCEMENT INFORMATION FOR JULY 20, 2017 (July 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170720_exxonmobil.pdf.

189. Complaint, *supra* note 186, ¶ 68. Exxon’s case has broad implications for risk management by companies that do business with companies affiliated with SDNs. However, Exxon also raises some fact-specific concerns about whether OFAC’s view in this case was inconsistent with “authoritative guidance from the White House and the Treasury Department” on the same point. *Id.* ¶ 71.

190. For my views on the constitutionality of state-level divestment, see Bechky, *supra* note 9, and Perry S. Bechky, *The Politics of Divestment*, in *THE POLITICS OF INTERNATIONAL ECONOMIC LAW* 337 (Tomer Broude et al. eds., 2011).

the division of bank regulatory responsibilities among state and federal agencies. New challenges have arisen in the past decade as New York has asserted the power to penalize New York-licensed foreign banks that violate OFAC sanctions.¹⁹¹ And the application of OFAC sanctions to the insurance industry raises its own unique challenges because insurance regulation is so heavily vested in state government.¹⁹²

Likewise, with a recent turn towards more criminal prosecution of OFAC violations,¹⁹³ there will be need for greater attention to the interplay of sanctions laws with criminal law, criminal procedure, and evidence. In September 2016, the Seventh Circuit upheld the conviction of Gregory Turner for exporting services to four Zimbabwean SDNs.¹⁹⁴ Turner argued that the jury had to unanimously agree that he had provided services to one or more particular SDNs.¹⁹⁵ The court rejected this argument, holding that it is enough for the jury to agree that Turner had provided services to any SDN without need for any more specificity.¹⁹⁶ In the court's view, therefore, if one were to imagine the jury taking individual votes concerning each of the four SDNs and voting 9-3 for acquittal each time, that would suffice to convict if every juror voted once for conviction. The court's analysis drew on both the wording of the OFAC regulations and general principles of criminal law (the means-element distinction).¹⁹⁷ The Seventh Circuit also considered the meaning of the word "willfully" in sanctions prosecutions, suggesting the possibility that a heightened standard of willfulness may apply in this context.¹⁹⁸ The court did not clearly decide that issue, however, because it invoked the "harmless error" rule and held that Turner would have been con-

191. See, e.g., Jessica Silver-Greenberg & Ben Protess, *Benjamin Lawsky, Sheriff of Wall Street, Is Taking Off His Badge*, N.Y. TIMES (May 20, 2015), <https://www.nytimes.com/2015/05/21/business/dealbook/benjamin-lawsky-to-step-down-as-new-yorks-top-financial-regulator.html> (noting that New York's "fines often surpassed those that federal authorities secured").

192. Congress has gone so far as to create a presumption of "reverse preemption" of federal law as applied to insurance. See McCarran-Ferguson Act, 15 U.S.C. § 1011-1015 (2012); U.S. Dep't of the Treasury v. Fabe, 508 U.S. 491, 500 (1993) (describing the Act as "restor[ing] the supremacy of the States in the realm of insurance regulation").

193. See DEP'T OF JUSTICE, SUMMARY OF MAJOR U.S. EXPORT ENFORCEMENT, ECONOMIC ESPIONAGE, TRADE SECRET AND EMBARGO-RELATED CRIMINAL CASES (Feb. 2017), <https://www.pmdtc.state.gov/compliance/documents/OngoingExportCaseFactSheet.pdf>.

194. *United States v. Turner*, 836 F.3d 849, 853-54 (7th Cir. 2016).

195. *Id.* at 861.

196. *Id.* at 861-63.

197. *Id.* A further wrinkle arose from the fact that this charge in the indictment only named three SDNs. See *id.* at 863-64. Turner also failed in his objection that adding the fourth SDN was an improper broadening ("constructive amendment") of the indictment. See *id.*

198. See *id.* at 860-61.

victed under the heightened standard also.¹⁹⁹ Turner also tried unsuccessfully to suppress some classified evidence obtained under the Foreign Intelligence Surveillance Act, an issue addressed in a separate classified decision.²⁰⁰ Questions about the use of classified evidence in sanctions prosecutions are bound to recur.

Finally, it should also be noted that fascinating questions are arising about sanctions internationally and in other jurisdictions, notably Europe. Consider *Al-Dulimi v. Switzerland*, decided by the Grand Chamber of the European Court of Human Rights in June 2016.²⁰¹ The Grand Chamber held that Swiss courts violated the right to a fair hearing by “an independent and impartial tribunal”²⁰² because they failed to provide meaningful review of a decision by the Sanctions Committee of the UN Security Council to impose sanctions.²⁰³ To appreciate the significance of the Chamber’s action, note that the UN Charter authorizes the Security Council to “call upon the Members of the United Nations,” including Switzerland, to apply measures it deems appropriate to “maintain or restore international peace and security,” including “complete or partial interruption of economic relations.”²⁰⁴ Further, the “supremacy clause” states, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”²⁰⁵ The Grand Chamber decided to presume the Security Council acts consistently with human rights; absent an express decision depriving Al-Dulimi of domestic judicial review, Switzerland was not required to so deprive him and instead was required by the European Convention to grant him judicial review.²⁰⁶ Presto! The Grand Chamber’s presumption avoided a conflict between the two treaties and thus avoided the question, decided by the European Court of Justice in *Kadi*, whether to give effect to European law over the Security Council order.²⁰⁷ *Al-Dulimi* presents important questions about due process and other human rights, the powers of the Security Council, the domestic effect to be given to Security Council decisions in domestic law, and European constitutionalism.

199. *Id.* (discussing *United States v. Dobek*, 789 F.3d 698, 700–01 (7th Cir. 2015), in which the court applied a heightened standard of willfulness to prosecutions for violating the International Traffic in Arms Regulations).

200. *Id.* at 856–58.

201. *Al-Dulimi v. Switzerland*, App. No. 5809/08, Eur. Ct. H.R. (2016).

202. *Id.* at 9; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

203. *Al-Dulimi*, at 9.

204. U.N. Charter arts. 39, 41.

205. *Id.* art. 103.

206. See *Al-Dulimi*, at 129–30.

207. See Cases C-402/05 & C-415/05, *Kadi v. Council of the European Union*, 2008 E.C.R. I-06351.

VI. CONCLUSION

John Jackson once described the noneconomic subjects of the "trade and" debates as lying at the "frontier" of IEL.²⁰⁸ However, Jackson also believed there to be no real border between IEL and public international law.²⁰⁹ Sanctions illustrate this external borderlessness. They likewise ignore or erase the internal borders with IEL. Sanctions, accordingly, call to mind a quotation attributed to the adventurer Thor Heyerdahl: "Borders? I have never seen one. But I have heard they exist in the minds of some people."

208. See Jackson, *supra* note 70, at 12

209. *Id.* at 9 (stating that IEL "can not be separated or compartmentalized from general or 'public' international law").