



Fall 9-1-1997

## Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law

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### Recommended Citation

Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 Wash. & Lee L. Rev. 1601 (1997).

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# Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law

Richard G. Alexander\*

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## *I. Introduction*

On August 5, 1996, Congress enacted the Iran and Libya Sanctions Act of 1996 (ILSA).<sup>1</sup> Congress passed ILSA based on findings that Iran and

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\* I would like to thank Professor Frederic Kirgis, Dave Butow, and John Dalton for their invaluable assistance during the development of this Note. I would also like to thank my family for their constant love and support.

1. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C.A. § 1701 (West Supp. 1997)).

Libya, and their acts in support of international terrorism, endanger the national security and foreign policy interests of the United States.<sup>2</sup> Section 5 of ILSA requires the President to sanction<sup>3</sup> any person<sup>4</sup> who, with actual knowledge,<sup>5</sup> invests \$40 million or more in either Iran or Libya, so long as that investment directly and significantly contributes to the development of either country's petroleum resources.<sup>6</sup> Congress reasoned that limiting the development of Iran's and Libya's petroleum resources would deny them the revenues produced by such resources and thereby deprive them of the financial means to support acts of international terrorism.<sup>7</sup>

ILSA has engendered a significant amount of criticism. Critics claim that, by purporting to govern "any person," ILSA exceeds the limits imposed by international law on the United States's jurisdiction to prescribe law.<sup>8</sup> "Jurisdiction to prescribe" is a state's authority to make its laws applicable to certain persons or activities.<sup>9</sup> This criticism is not surprising given that prior legislation and regulation based on national security and foreign policy typically contained rules applicable only to "persons" somehow affiliated with the United States.<sup>10</sup>

2. *Id.* § 2(1)-(4).

3. *See id.* § 6 (listing possible sanctions for person in violation of ILSA); *infra* note 17 and accompanying text (reproducing Section 6).

4. *See* Iran and Libya Sanctions Act § 14(14) (defining "person" to include both natural persons as well as business entities); *infra* note 18 (reproducing Section 14(14)).

5. *See* Iran and Libya Sanctions Act § 5(a) (requiring actual knowledge); *infra* note 19 (discussing possible meanings and implications of "actual knowledge" requirement).

6. Iran and Libya Sanctions Act § 5(a), (b)(2). Section 5 also prohibits certain transactions with Libya that violate Resolutions 748 and 883 of the United Nations Security Council. *Id.* § 5(b)(1); *see infra* note 16 (discussing Iran and Libya Sanctions Act § 5(b)(1)).

7. *See* Iran and Libya Sanctions Act § 3(a) (declaring that policy behind Iran and Libya Sanctions Act (ILSA) "is to deny Iran the ability to support acts of international terrorism" by limiting development of its petroleum resources); *see also infra* notes 67-68 and accompanying text (discussing congressional reasoning behind enacting ILSA). Although not explicitly stated, the policy that lies behind Congress's regulation of investments contributing to the development of Iran's petroleum resources presumably also lies behind the identical provision that regulates these same investments in Libya. *See* Iran and Libya Sanctions Act § 5(b)(2) (providing regulation identical to that found in § 5(a), but pertaining to investments in Libya rather than Iran).

8. *See infra* note 55 (providing criticisms from foreign states).

9. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1986) [hereinafter RESTATEMENT (THIRD)] (defining "jurisdiction to prescribe" as state's authority "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

10. *See* Export Administration Act of 1979, 50 U.S.C. app. § 2404(a)(1) (1994) (authorizing President to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United

This Note examines whether the United States possesses the jurisdiction to prescribe and enforce ILSA against a person abroad who lacks affiliation with the United States. Part II analyzes ILSA in detail and sets the stage for a critical analysis of its legitimacy.<sup>11</sup> Part III discusses how international law impacts domestic legislation such as ILSA and foreign policy decisions of states.<sup>12</sup> Part IV reviews the generally recognized principles of prescriptive jurisdiction in international law and concludes that ILSA violates these principles.<sup>13</sup> Finally, Part V addresses the separate question of whether the United States has the jurisdiction to enforce ILSA.<sup>14</sup>

## II. *The Iran and Libya Sanctions Act of 1996*

Section 5(a) of ILSA provides that:

[T]he President shall impose 2 or more of the sanctions . . . [listed in] section 6 if the President determines that a person has, with actual knowledge, . . . made an investment of \$40,000,000 or more . . . that directly and significantly contributed to the enhancement of Iran's ability to develop petroleum resources of Iran.<sup>15</sup>

Section 5(b)(2) provides an identical provision regulating investments in Libya.<sup>16</sup> Possible sanctions for a Section 5 violation include: (1) denying

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*States*" (emphasis added)); 31 C.F.R. § 515.559 (1996) (prohibiting certain trade between Cuba and foreign companies owned or controlled by *United States resident or national*). *But see* Cuban Liberty and Democratic Solidarity (LIBERTAD) (Helms-Burton) Act of 1996, Pub. L. No. 104-114, § 302, 110 Stat. 785, 815 (to be codified at 22 U.S.C.A. § 6082 (West Supp. 1997) (creating right of action in U.S. courts for U.S. nationals against *any person* who profits from property which Cuban government confiscated after January 1, 1959). The Helms-Burton Act, like ILSA, has given rise to heated complaints about the scope of its prescriptions that govern any person. *See* Lionel Barber, *EU Takes Anti-Cuba Legislation to World Trade Body*, FIN. TIMES, Oct. 2, 1996, at 1 (covering European Union's criticisms of Helms-Burton Act).

11. *See infra* Part II (analyzing ILSA).

12. *See infra* Part III (discussing impact of international law on legislation such as ILSA and foreign policy decisions).

13. *See infra* Part IV (reviewing principles of prescriptive jurisdiction in international law).

14. *See infra* Part V (addressing whether United States has jurisdiction to enforce ILSA).

15. Iran and Libya Sanctions Act § 5(a). *But see id.* § 5(f) (providing exceptions to mandatory sanctions found in § 5(a) and § 5(b)).

16. *Id.* § 5(b)(2). Section 5(b)(1) also pertains to Libya. This section mandates the President to sanction any person who, with actual knowledge, provided Libya with goods, services, technology, or other items prohibited by Resolutions 748 and 883 of the Security Council of the United Nations. *Id.* § 5(b)(1). Before the President may impose sanctions under this section, the provision of such items must significantly and materially: (a) contribute to Libya's ability to acquire certain weapons; (b) contribute to Libya's ability to develop its petroleum resources; or (c) contribute to Libya's ability to maintain its aviation capabilities. *Id.* Because

Export-Import bank financing; (2) denying export licenses; (3) prohibiting U.S. financial institutions from making loans worth over \$10 million per year to sanctioned persons; (4) prohibiting sanctioned financial institutions from serving as primary dealers of U.S. government bonds or as repositories of U.S. government funds; (5) banning U.S. government procurement of any goods or services from sanctioned persons; and (6) Presidential import sanctioning in accordance with the International Economic Powers Act.<sup>17</sup> The President

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Section 5(b)(1) deals with violations of U.N. Security Council Resolutions, it involves issues beyond the scope of this Note. Consequently, this Note focuses solely on Sections 5(a) and 5(b)(2), which regulate the investments in Iran and Libya respectively.

17. See *id.* § 6 (enumerating possible sanctions under ILSA). Section 6 provides that upon finding a violation of ILSA:

(1) The President may direct the Export-Import Bank of the United States not to give approval to the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to any sanctioned person.

(2) The President may order the United States Government not to issue any specific license and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under –

(i) the Export Administration Act of 1979;

(ii) the Arms Export Control Act;

(iii) the Atomic Energy Act of 1954; or

(iv) any other statute that requires the prior review and approval of the United States Government as a condition for the export or reexport of goods or services.

(3) The United States Government may prohibit any United States financial institution from making loans or providing credits to any sanctioned person totaling more than \$10,000,000 in any 12 month period unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.

(4) The following prohibitions may be imposed against a sanctioned person that is a financial institution:

(A) Neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate, or permit the continuation of any prior designation of, such financial institution as a primary dealer in United States debt instruments.

(B) Such financial institution may not serve as an agent of the United States Government or serve as a repository for United States Government funds.

The imposition of either sanction under subparagraph (A) or (B) shall be treated as 1 sanction for purposes of section 5, and the imposition of both sanctions shall be treated as 2 sanctions for purposes of section 5.

(5) The United States Government may not procure, or enter into any contract for the procurement of, any goods or services from the sanctioned person.

(6) The President may impose sanctions, as appropriate, to restrict imports with respect to a sanctioned person, in accordance with the International Emergency Economic Powers Act (50 U.S.C. 1701 and following).

*Id.*

must impose two or more of these sanctions against any person<sup>18</sup> who, with actual knowledge,<sup>19</sup> violates Section 5, regardless of the person's nationality or residency. The unusually broad scope of the statute's applicability raises a difficult question: What authority does Congress have to impose its law on persons abroad having no connection to the United States? The answer to this question depends largely on the scope of the United States's jurisdiction to prescribe law, an issue addressed in Part IV.

### III. *Relevance of International Law*

International law is part of our federal law and must be ascertained and administered by our courts.<sup>20</sup> As with all American federal law, however, Congress may modify or repeal its force and effect within the United States through subsequent legislative acts.<sup>21</sup> Such a congressional modification or repeal, of course, does not relieve the United States of its obligation to obey international law.<sup>22</sup> Moreover, such congressional action does not relieve the United States of the consequences that stem from a violation of international law.<sup>23</sup> Rather, the real effect of such congressional action manifests itself in the American judiciary. United States courts will enforce national legislation such as ILSA, and thereby supplant the domestic effect of non-customary international law, even if the statute violates established international legal principles.<sup>24</sup>

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18. See *id.* § 14(14) (defining "person" to include both natural and juridical persons). Section 14(14) defines "person" as:

- (A) a natural person;
- (B) a corporation, business association, partnership, society, trust, any other non-governmental entity, organization or group, and any governmental entity operating as a business enterprise; and
- (C) any successor to any entity described in subparagraph (B).

*Id.*

19. *Id.* § 5(a). ILSA fails to define "actual knowledge." The term could plausibly take on either of two meanings: (1) that the person is aware that he is investing \$40,000,000 or more in Iran or Libya; or (2) that the person is aware that his investment of \$40,000,000 or more "directly and significantly" contributes to the development of either country's petroleum resources. This Note will demonstrate the meaning Congress intended does not affect the conclusion that ILSA violates international law.

20. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that international law also serves as American law); RESTATEMENT (THIRD) § 111 (same).

21. I. A. SHEARER, STARKE'S INTERNATIONAL LAW 74 (11th ed. 1994) (citing *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925)).

22. See RESTATEMENT (THIRD) § 115(1)(b) (stating that congressional modification of international law does not relieve United States of its international obligation).

23. See *id.* (stating that congressional modification of international law does not relieve United States of consequences of violation of that obligation).

24. See RESTATEMENT (THIRD) § 115 cmt. a (stating that "[a]n act of Congress will . . .

Although international law may "bend[ ] to the will of Congress,"<sup>25</sup> international law and ILSA's status thereunder still prove important for two major reasons. First, whether ILSA violates international law determines whether the United States will be internationally responsible for the harm caused by U.S. enforcement of the statute.<sup>26</sup> Second, although international law lacks a central executive for its enforcement, the legality of a statute nevertheless plays a role in the enacting state's as well as other states' foreign policy decisions.<sup>27</sup> If foreign states consider ILSA to be a violation of international law, they may respond in ways that defeat the effectiveness of the Act.<sup>28</sup> For instance, some states have previously counteracted the extraterritorial effect of certain U.S. laws by passing statutes prohibiting its nationals from obeying such laws.<sup>29</sup> This type of retaliatory statute in response to ILSA may force the United States to abandon the Act altogether, as it has done with prior laws that other nations considered violative of international law.<sup>30</sup>

The famous "pipeline" controversy provides the best example of such a U.S. abandonment.<sup>31</sup> Under the authority of the Export Administration Act

be given effect as domestic law in the face of an earlier international agreement of the United States other than a treaty, or a preexisting rule of customary international law").

25. *The Over the Top*, 5 F.2d at 842.

26. See RESTATEMENT (THIRD) § 901 (discussing redress for violation of international law).

27. See LOUIS HENKIN, *HOW NATIONS BEHAVE* 88-98 (2d ed. 1979) (discussing role of international law in state's foreign policy decisions).

28. See SHEARER, *supra* note 21, at 189 (providing examples of states enacting blocking statutes in order to counter what they believe to be impermissible extraterritorial application of United States antitrust laws). In protest to many extraterritorial exercises of United States jurisdiction in the past, nations have enacted blocking statutes to protect their citizens from enforcement attempts by the United States. See generally D.L. Jones, *Legislative Attempts to Protect Trading Interests*, 8 COMMONWEALTH L. BULL. 353 (1982) (discussing blocking statutes); A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* (1985) (same); A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981) (discussing British blocking statute). Recently, foreign states have enacted blocking statutes that create a cause of action for its citizens to recover from judgments incurred in the United States as a result of the Helms-Burton Act. David E. Sanger, *Europe Postpones Challenge to U.S. on Havana Trade*, N.Y. TIMES, Feb. 13, 1997, at A6.

29. See *The Protection of Trading Interests (U.S. Reexport Control) Order 1982*, reprinted in 21 INT'L LEGAL MATERIALS 852 (1982) (ordering certain British companies to disregard U.S. prohibitions and honor contractual obligations with Soviet Union); Flora Lewis, *France Defies Ban by U.S. on Supplies for Soviet Pipeline*, N.Y. TIMES, July 23, 1982, at A1 (discussing French statute that ordered its companies to honor contractual obligations with Soviet Union despite U.S. regulations prohibiting those companies from doing so).

30. See *infra* notes 31-36 and accompanying text (discussing example of U.S. abandonment of extraterritorial application of regulations).

31. See Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW

of 1979 (EAA), President Reagan responded to the Soviet Union's partial responsibility for the repression in Poland by prohibiting the provision of oil and gas equipment to the Soviet Union.<sup>32</sup> This prohibition covered exports and re-exports of U.S.-origin goods as well as goods produced by foreign subsidiaries of U.S. companies.<sup>33</sup> Perhaps even more controversial, the prohibition applied to products of completely independent, foreign corporations that had produced these goods under a licensing agreement with an American company.<sup>34</sup> The European Economic Community strongly protested these prohibitions on the ground that the prohibitions violated international law.<sup>35</sup> This opposition to the regulations eventually led the United States to

& POL'Y INT'L BUS. 1, 60-92 (1982) (discussing "pipeline" controversy); Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 354-56 (1982) (same); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1308-36 (1983) (analyzing legal issues underlying "pipeline" controversy).

32. See Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250, 27,250-52 (1982) (not codified because act repealed). These regulations under the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1994), proposed the following modification to 15 C.F.R. § 385.2(c):

(c)(1) As authorized by Section 6 of the Export Administration Act of 1979, prior written authorization by the Office of Export Administration is required for foreign policy reasons for the export or reexport to the U.S.S.R. of oil and gas exploration, production, transmission of refinement goods of U.S. origin as defined in CCL entries 6098F, 6191F, 6388F, 6389F, 6390F, 6391F, 6431F, 6491F, 6598F, 6685F, 6779F, and 6780F. Also included in the scope of this control are technical data of U.S. origin (other than that authorized under General License GTDA) related to oil and gas exploration, production, transmission and refinement and other goods that require a validated export license for shipment to the Soviet Union and that are intended for use in oil or gas exploration, production, transmission or refinement. The foreign product of such data is also controlled (§ 379.8). The term "refinement" includes refinery operations directed to energy usage, but excludes petrochemical feedstock processes. In addition, prior written authorization is required for the export to the U.S.S.R. of non-U.S. origin goods and technical data by any person subject to the jurisdiction of the United States.

(2) For the purposes of this § 385.2(c) only, the term "person subject to the jurisdiction of the United States" includes

- (i) Any person, wherever located, who is a citizen or resident of the United States;
- (ii) Any person actually within the United States;
- (iii) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; or
- (iv) Any partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (i), (ii), or (iii) of this section.

*Id.* at 27,252.

33. *Id.*

34. *Id.*

35. See *European Communities: Comments on the U.S. Regulations Concerning Trade*



abandon its enforcement.<sup>36</sup> Similarly, strong international opposition to ILSA as violative of international law could lead the United States to repeal or to amend the Act.

#### IV. *Generally Recognized Principles of Jurisdiction to Prescribe Law and Their Bearing on ILSA*

International law arises from two primary sources: international agreements and international custom.<sup>37</sup> Similar to contracts, international agreements bind only the states that consent to them.<sup>38</sup> Customary international law, however, generally binds all states.<sup>39</sup> The formation of a customary international law requires the presence of two elements: (1) a factual element – the repetition of similar acts by the states, and (2) a psychological element called the *opinio juris sive necessitatis* – the feeling on the part of the states that they are acting in accordance with a legal obligation.<sup>40</sup>

Customary international law has established that a nation may have jurisdiction to prescribe law with respect to:<sup>41</sup>

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with the U.S.S.R., 21 INT'L LEGAL MATERIALS 891 (1982) (discussing European Community's objection to President Reagan's prohibitions on certain trade with former Soviet Union). In addition to complaints from foreign governments, some foreign courts refused to respect the regulations. See *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, 22 INT'L LEGAL MATERIALS 66 (1982) (providing Dutch court's refusal to recognize United States regulations that prohibited company from fulfilling contractual obligations with Soviet Union as breach of contract defense).

36. See Richard M. Weintraub, *President Lifts Sanctions on Soviet Pipeline*, WASH. POST, Nov. 14, 1982, at A1 (noting U.S. abatement of sanctions under regulations that gave rise to pipeline controversy). But see Bernard Gwertzman, *Reagan Lifts the Sanctions on Sales For Soviet Pipeline; Reports Accord With Allies*, N.Y. TIMES, Nov. 14, 1982, at A1 (stating that United States lifted sanctions because of agreements reached with allies regarding plan to restrict trade with Soviet Union, not because of pressure from objecting states).

37. Allen DeLoach Stewart, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LA. L. REV. 1389, 1392 (1993). See generally IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-14 (4th ed. 1990).

38. Stewart, *supra* note 37, at 1392.

39. *Id.* International law recognizes a rare exception to the principle that customary law is binding upon all states when a state has persistently refused to follow the practice from which the rule has developed. BROWNIE, *supra* note 37, at 10.

40. Lazare Kopelmanas, *Customs as a Means of the Creation of International Law*, 1937 BRIT. Y.B. INT'L L. 127, 129; see RESTATEMENT (THIRD) § 101 (discussing formation of customary international law).

41. See RESTATEMENT (THIRD) §§ 402, 404 (providing list of jurisdictional principles). Throughout its discussion of jurisdictional principles of customary international law, this Note cites many judicial decisions, mainly from U.S. courts, supporting and explaining these principles. It is important to understand that case law is not binding authority for the existence of a customary international law. Judicial decisions do, however, serve the important purpose of

- (1) Conduct that takes place within its territory and issues regarding the status of persons, or interests in things, present within its territory (Territoriality Principle).<sup>42</sup>
- (2) Conduct occurring outside its territory that has or is intended to have substantial effects within its territory (Objective Territoriality Principle or Effects Principle);<sup>43</sup>
- (3) Activities of its own nationals outside as well as within its territory (Nationality Principle);<sup>44</sup>
- (4) Conduct of nonnationals outside its territory that is directed against the security of the state or against a limited class of other state interests (Protective Principle);<sup>45</sup> and
- (5) Certain offenses recognized by the community of nations as of universal concern, such as piracy, war crimes, genocide, hijacking of aircraft, slave trade, and perhaps certain types of terrorism (Universality Principle).<sup>46</sup>

Each of these jurisdictional principles constitutes an independent basis for jurisdiction. A statute that cannot find justification for its prescription in one or more of these principles violates international law.<sup>47</sup> Furthermore, even if ILSA falls within one of these jurisdictional principles, its legality under international law ultimately depends on whether such an exercise of prescriptive jurisdiction is reasonable.<sup>48</sup> International law, however, does not require a showing of reasonableness when the universality principle justifies

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evidencing a pattern of practice in the international community (the first requisite element to establishing a customary international law). *See supra* note 40 and accompanying text (providing elements of customary international law).

42. RESTATEMENT (THIRD) § 402(1)(a), (b).

43. *Id.* § 402(1)(c).

44. *Id.* § 402(2).

45. *Id.* § 402(3).

46. *Id.* § 404. The *Restatement (Third)* also recognizes some other bases for extra-territorial jurisdiction. For instance, under the passive personality principle, a state has jurisdiction to prescribe law – particularly criminal law – to an act committed outside its territory by a person not its national where the victim of the act was its national. *Id.* § 402 cmt. g. A prime example of a state's exercise of the passive personality principle can be found in the Omnibus Diplomatic Security and Anti-terrorism Act of 1986. 18 U.S.C. § 2332 (1994). The Act makes it a crime to kill, or attempt to conspire to kill, or to cause serious bodily injury, to a national of the United States outside the territory of the United States. *Id.*; *see* RESTATEMENT (THIRD) § 402 reporters' note 3 (providing examples of state's exercise of passive personality principle).

47. *See* RESTATEMENT (THIRD) §§ 402, 404 (suggesting that principles mentioned in § 402 as well as universality principle examined under § 404 serve as only grounds on which state may assert prescriptive jurisdiction).

48. *See id.* § 403 (discussing reasonableness requirement).

an exercise of prescriptive jurisdiction.<sup>49</sup> Thus, to meet the requirements of international law, ILSA must withstand a two-step test. First, one of the jurisdictional principles must support the prescriptions in ILSA. Second, ILSA must satisfy the reasonableness requirement unless the universality principle legitimately applies, in which case international law does not require a showing of reasonableness. As shown below, ILSA, with its provisions governing investment activities of noncitizens abroad, fails both prongs of the test. Consequently, Congress lacked the prescriptive jurisdiction to pass ILSA, and therefore, the statute violates international law.

### A. Territoriality Principle

The sovereignty and equal status of each nation are among the most fundamental precepts of international law.<sup>50</sup> From this respect for each state's sovereignty and equality flows the territoriality principle, which provides a state with jurisdiction to prescribe rules concerning property, persons, and activities within its territory.<sup>51</sup> The territoriality principle cannot serve as a jurisdictional basis for ILSA. This principle would only support regulation of the investment activities of persons within the United States.<sup>52</sup> ILSA, however, regulates persons both inside and outside U.S. borders,<sup>53</sup> and thus, the territoriality principle cannot support these prescriptions.

The territoriality principle is, however, relevant to an understanding of the jurisdictional conflict surrounding ILSA. This principle reflects a central

49. See *id.* § 404 (providing that exercise of jurisdiction under universality principle need not meet reasonableness requirement).

50. BROWNLEE, *supra* note 37, at 287.

51. RESTATEMENT (THIRD) § 402(1)(a), (b). In discussing the territoriality principle, Lord MacMillan stated: "It is an essential attribute of the sovereignty of this realm, as it is of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits, and in all causes civil and criminal, arising within these limits." *Compania Naviera Vascongada v. Steamship Christina*, 1 All E.R. 719, 725 (H.L. 1938). Territoriality stands as the most universally recognized jurisdictional base and for good reason. See Harold G. Maier, *Jurisdictional Rules in Customary International Law*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE* 64, 67 (Karl M. Meessen ed., 1996) (asserting that territoriality principle "is the most universally recognised [principle] because control over defined territory is not only a legal prerequisite for statehood but is also essential to permit a state's government to be responsible to other nations for internal compliance with its external community commitments").

52. See *supra* note 51 and accompanying text (explaining territoriality principle).

53. See *supra* note 18 (providing ILSA's definition of "person" to include all persons, regardless of nationality or locality). ILSA also regulates persons inside U.S. borders. See *supra* note 18 and accompanying text (discussing how ILSA governs any person, regardless of person's locality). In this respect the territoriality principle does support ILSA. However, this Note focuses on whether a jurisdictional principle supports ILSA's regulation of noncitizens abroad who have no affiliation with the United States.

attribute of every sovereign state – the authority to control activities within its borders. Thus, one state's attempt to apply its rules to persons or activities in another's territory often infringes on the latter state's sense of sovereignty and thereby produces serious resentment and objection.<sup>54</sup> By regulating certain investment practices of persons situated in other states, ILSA infringes upon the territorial jurisdiction, and arguably the sovereignty, of the states in which these persons act.<sup>55</sup> Thus, whether ILSA amounts to an impermissible infringement depends on whether the Act can be grounded in another jurisdictional principle and also on whether such an exercise of jurisdiction would pass the reasonableness test.

### B. Effects Principle

International law also recognizes a state's jurisdiction to prescribe rules of law regulating conduct outside its territory that has or is intended to have a substantial effect within its territory.<sup>56</sup> This jurisdictional basis is commonly known as the "effects" principle or the "objective territoriality" principle. As the latter term suggests, the effects principle derives from the territoriality principle.<sup>57</sup> The relationship between the objective territoriality principle and the territoriality principle arises from the understanding that acts done outside a jurisdiction, but producing or intended to produce substantial effects within a jurisdiction, justify a state's regulation of the person causing, or intending to cause, the effect *as if he had been present within the territory*.<sup>58</sup> The effects

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54. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (stating that "[a]ny restriction upon [a state's territorial jurisdiction] from an external source would imply a diminution of its sovereignty").

55. See *ASEAN Questions US Sanctions Law Against Libya and Iran*, Agence France-Presse, Sept. 12, 1996, available in 1996 WL 12136528 (covering concern by Association of Southeast Asia Nations over ILSA sanctions on non-U.S. companies) [hereinafter *ASEAN Questions*]; Barber, *supra* note 10, at 1 (covering European Union's criticisms of ILSA and Helms-Burton Act); James Kynge, *Malaysia Angered by US Sanctions Threat*, FIN. TIMES, Nov. 1, 1996, at 6 (providing foreign opposition to ILSA). Izhar Ibrahim, Indonesia's Director General of Political Affairs, stated that ILSA "does not conform with the principles of international law. It is the law of one state being imposed on another." *ASEAN Questions, supra*. In response to ILSA, Mahathir Mohamad, Malaysia's Prime Minister, stated: "We are a sovereign nation . . . We will not submit to US dictation." Kynge, *supra*, at 6.

56. RESTATEMENT (THIRD) § 402(1)(c); see *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974) (invoking effects principle to establish jurisdiction over cashing abroad of stolen U.S. social security checks drawn on U.S. Treasury); *D.P.P. v. Doot*, 1 All E.R. 940 (H.L. 1973) (invoking effects principle to establish jurisdiction to apply English law to conspiracy entered into outside England but intended to occur inside its territory); *Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10 (invoking effects principle to establish Turkey's jurisdiction to apply Turkish law to officers of French ship that collided with Turkish ship on high seas).

57. See *supra* part IV.A (explaining territoriality principle).

58. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (explaining how effects principle

principle serves as a justification for the punishment of acts such as firing a gun into another state's territory or sending libelous publications across a state's boundary.<sup>59</sup> Other examples of conduct abroad that have been subject to jurisdiction under the effects principle include acts of conspiracy<sup>60</sup> and violations of antitrust laws.<sup>61</sup> The international community's acceptance of the principle is not only logical, but also is necessary: To deny a state the authority to regulate activities outside its borders that produce or were intended to produce substantial effects within its borders would place each state and its citizens at the mercy of the internal acts and politics of every other state.<sup>62</sup>

The effects principle cannot justify the prescriptions in ILSA. First, the international community does not uniformly agree that the effects principle can justify the regulation of activity outside a state's boundaries when the activity complies with the laws of the state in which the acts were carried out.<sup>63</sup> This uncertainty over a state's authority to regulate acts that are lawful in the state from which they originate casts doubt on the legitimacy of ILSA under the effects principle, in as much as ILSA regulates investment activities that are perfectly lawful where carried out.<sup>64</sup>

or objective territoriality principle derived from territoriality principle); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980) (same).

59. RESTATEMENT (THIRD) § 402 cmt. d.

60. See generally *D.P.P.*, 1 All E.R. 940 (invoking effects principle to establish jurisdiction to apply English law to conspiracy entered into outside England but intended to occur inside its territory); *R. v. Baxter*, 2 All E.R. 359 (C.A. 1971) (invoking effects principle to establish jurisdiction to apply English law to attempts to obtain property unlawfully by sending deceptive material from Ireland).

61. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979) (invoking effects principle to justify applying Sherman Anti-Trust Act to acts abroad); *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (invoking effects principle to establish jurisdiction to apply Sherman Anti-Trust Act abroad, even though most of acts took place in Honduras and allegations generally concerned foreign citizens); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (utilizing effects principle to justify applying Sherman Anti-Trust Act to acts abroad). For a foreign court decision applying the effects principle in the antitrust setting, see *Imperial Chem. Indus., Ltd. v. Commission*, [1971-73] Common Mkt. Rep. (CCH) 8001, 8030 (E.C.J. 1972) (invoking effects principle to justify EEC Commission's regulation of restrictive business practices that take place outside common market).

62. See Maier, *supra* note 51, at 66 (discussing effects doctrine as articulated in *Lotus* case).

63. See RESTATEMENT (THIRD) § 402 reporters' note 2 (providing controversial examples of states using effects principle to justify application of economic regulation — such as antitrust laws — on basis of economic effects of certain acts, which were lawful where carried out); see also *supra* notes 31-36 and accompanying text (discussing United States prohibitions on foreign companies from supplying certain products to Soviet Union).

64. See *supra* note 55 (citing examples of states that have specifically refrained from regulating investments at issue in ILSA).

Second, the plain language of the effects principle provides even stronger evidence that it cannot justify ILSA. As stated above, a state has jurisdiction to prescribe rules concerning conduct outside its territory that *has or is intended to have* a substantial effect within its territory.<sup>65</sup> Thus, the effects principle provides two situations in which the United States may have prescriptive jurisdiction: (1) when the regulated conduct in fact *has* a substantial effect in the United States, regardless of intent; or (2) when a person acts *with the intent to produce* a substantial effect within the United States. A brief discussion of each situation demonstrates that the effects principle cannot justify ILSA.

The act of investing in Iran's or Libya's petroleum resources lacks a sufficient nexus to the United States to claim tenably that such conduct *has a substantial effect* in the United States. In Section 3 of ILSA, Congress declared that the U.S. objective is to deny Iran and Libya the ability to support acts of international terrorism by limiting the development of their petroleum resources.<sup>66</sup> Thus, by regulating investment in either state's petroleum resources, Congress sought to disrupt the following chain of causation:<sup>67</sup> (1) an investment in Iran or Libya's petroleum development increases their revenues; (2) an increase in revenues allows Iran and Libya to increase their funding of international terrorists and their acts of terrorism; (3) these states in fact devote more of their revenues toward funding terrorists; (4) with increased funding, the terrorist groups perform more terrorist acts; and (5) the increase in terrorists acts include more acts against the United States, thereby producing a *substantial effect* within the United States.

In order for the first formulation of the effects principle to support ILSA, one must determine that the investment activity addressed in ILSA *has* a substantial effect within the United States, not that the act of investing *may have* a substantial effect within the United States. The causal chain above indicates only that investment in Iran's or Libya's petroleum resources could possibly have a substantial effect in the United States. It falls short of demonstrating that such investment will necessarily have a substantial effect in the

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65. RESTATEMENT (THIRD) § 402(1)(c).

66. Iran and Libya Sanctions Act § 3.

67. See H.R. REP. NO. 104-523, pt. 2, at 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1316 (discussing Congress's rationale behind ILSA). The House Report states that:

[I]nvestment in the petroleum sector in Iran and Libya is generating revenues which facilitate the ability of [both governments] to carry out unlawful and immensely threatening behavior . . . . Without foreign investment, production of Iran's oil and gas sector will fall, which will choke off revenue to the government of Iran and thereby deny it the resources it employs to threaten the national security interests of the United States.

*Id.*

United States. Too many variables could easily cause a break in Congress's speculative reasoning.

If the effects principle justified ILSA, absurd implications would follow. For example, if the principle provided justification, the United States theoretically would have jurisdiction to pass legislation prohibiting any person from providing humanitarian aid to the people of Iran. This type of assistance would free up Iranian revenues that could be spent funding international terrorists. Furthermore, this increase in revenues could set off the same chain of causation that Congress used to justify the regulation of the investment activities in ILSA.

Both the act of investing in petroleum resources and the act of providing humanitarian aid possibly could have a substantial effect in the United States, but the effects principle does not support regulations based on such tenuous chains of causation. Indeed, the idea that a state could utilize the effects principle to regulate conduct based on results that such conduct may or may not produce gives rise to a common concern with this principle – that it could provide a state with potentially limitless jurisdiction to prescribe law.<sup>68</sup> Consequently, American and foreign courts tend to interpret the effects principle as requiring that the conduct *directly* affect the state attempting to exercise extraterritorial jurisdiction.<sup>69</sup> Direct effects do not depend upon intervening events.<sup>70</sup> Rather, direct effects flow from their source without

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68. See Michael Akehurst, *Jurisdiction in International Law*, 1972-73 BRIT. Y.B. INT'L L. 145, 154 (describing effects principle as "a slippery slope which leads away from the territorial principle towards universal jurisdiction"); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws* 1957 BRIT Y.B. INT'L L. 146, 159 (stating that "[i]f indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another country, then there were virtually no limit to a State's territorial jurisdiction"); see also Note, *supra* note 31, at 1327-28 (discussing potentially limitless scope of jurisdiction founded on effects principle).

69. See *Carey v. National Oil Corp.* 453 F. Supp. 1097, 1101 (S.D.N.Y. 1978) (finding no direct effect in United States from contract breaches with American foreign subsidiary), *aff'd per curiam*, 592 F.2d 673 (2d Cir. 1979); *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978) (finding no direct effect in United States from collapse of airport terminal roof in Iran causing American deaths), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); Note, *supra* note 31, at 1329 (citing cases supporting requirement of direct effect and discussing direct effect requirement); see also *United States v. Javino* 960 F.2d 1137, 1143 (2d Cir. 1992) (finding in dicta that making of firearms in foreign country – unless imported into United States – has too attenuated effect to support jurisdiction). But see *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) (finding direct, substantial, and foreseeable effect from importation of defective gun that caused physical injury in United States). For a foreign court's interpretation of the effects principle as requiring a direct effect, see *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, 22 INT'L LEGAL MATERIALS 66, 72-74 (1982) (stressing importance of examining whether acts in question "have direct and illicit effects within the territory of the United States").

70. Note, *supra* note 31, at 1329.

deviation or interruption.<sup>71</sup> At best, the conduct regulated by ILSA indirectly affects the United States. The only direct effects in the United States, if any, arise from the acts of the terrorists allegedly supported by the Iranian and Libyan governments.<sup>72</sup> ILSA, however, does not regulate these acts.

The second formulation of the effects principle provides a state with jurisdiction to prescribe rules concerning conduct *intended* to have substantial effect in the state.<sup>73</sup> This version, like the first, does not support ILSA. ILSA regulates any person who, with actual knowledge, invests in the development of Iran's or Libya's petroleum resources.<sup>74</sup> Thus, the President must sanction a person under ILSA regardless of whether the person intended for her investment to produce effects, such as those stemming from terrorist acts, in the United States. Therefore, at the very least, ILSA is overbroad. For the effects principle to support prescriptive jurisdiction, Congress would have to tailor the language of ILSA to regulate only those persons who contribute to either country's petroleum resources *with the intent that such a contribution have a substantial effect in the United States*.

In sum, the effects principle fails to provide a jurisdictional basis for ILSA. The investment activity regulated by ILSA does not have a direct and substantial effect in the United States. Moreover, ILSA purports to regulate behavior not intended to produce substantial effects in the United States.

### C. Nationality Principle

International law recognizes a state's authority to prescribe rules for its citizens either within or outside its territory.<sup>75</sup> By definition, the nationality

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71. *Id.*

72. See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 431 (arguing that effect against which Helms-Burton Act is directed, if any, was caused by government of Cuba, not by persons over whom United States seeks to exercise jurisdiction).

73. RESTATEMENT (THIRD) § 402(1)(c); see *id.* § 402 cmt. d.

When the intent to commit the proscribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable, the fact that a plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable.

*Id.* States commonly exercise jurisdiction based on this version of the effects principle in cases of conspiracy, where the objective is thwarted before the ill effects are felt in the target state. See *United States v. Brown*, 549 F.2d 954, 956-57 (4th Cir. 1977) (invoking effects principle to establish jurisdiction over conspiracy to import heroin from West Germany); *United States v. Yousef*, 927 F. Supp. 673, 682 (S.D.N.Y. 1996) ("The fact that the planned consequences of the plot did not come to fruition, and thereby did not directly injure any United States citizen does not wrest jurisdiction over the prosecution from the court.").

74. Iran and Libya Sanctions Act § 5(a).

75. RESTATEMENT (THIRD) § 402(2). The nationality principle has been an often used justification for prior foreign policy legislation. The Comprehensive Anti-Apartheid Act of 1986 provided that "[n]o national of the United States may, directly or through another person, make



principle cannot support ILSA's prescriptions applicable to the group of persons with whom this Note is concerned – noncitizens abroad.<sup>76</sup>

#### D. Protective Principle

The protective principle provides a state with jurisdiction to prescribe laws governing conduct outside its territory directed against the security of the state or against a limited class of other state interests.<sup>77</sup> The protective principle only applies to acts generally recognized as crimes by developed legal systems.<sup>78</sup> Examples of such offenses include espionage, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws.<sup>79</sup>

The protective principle cannot serve as a jurisdictional basis for ILSA. First, ILSA does not regulate conduct *directed* against U.S. national security

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any new investment in South Africa." Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 310, 100 Stat. 1086, 1102 (1986) (repealed 1993). A more controversial use of the nationality principle arises when a state applies its laws to foreign subsidiaries which are owned or controlled by *nationals* of the regulating state. See RESTATEMENT (THIRD) § 414 (addressing state's jurisdiction with respect to activities of foreign branches and subsidiaries). For instance, regulations promulgated under the Cuban Democracy Act prohibit foreign firms owned or controlled by United States *nationals* from engaging in certain transactions with Cuba or its nationals. See Cuban Democracy Act, 22 U.S.C. § 6005 (1994) (enabling regulations of transactions with Cuba); 31 C.F.R. § 515.559 (1996) (providing regulations under Cuban Democracy Act).

76. See Iran and Libya Sanctions Act § 5 (imposing no restrictions on nationality or locality of person against whom United States may impose sanctions). If Congress limited ILSA to the regulation of only U.S. nationals, the United States would have a stronger argument for ILSA's legality under international law. Even employing this limitation, however, the nationality principle may still fail to justify ILSA. See BROWNLIE, *supra* note 37, at 303 (discussing how nationality principle often applies to serious offenses only).

77. See *United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir. 1968) (finding U.S. jurisdiction to prohibit foreign citizens from knowingly making false statements in visa application to U.S. consular officials because defendant's action had potentially adverse effect on governmental function of United States); *Rocha v. United States*, 288 F.2d 545, 550 (9th Cir. 1961) (prosecuting defendants for conspiring abroad to arrange sham marriages between aliens and American citizens); *United States v. Evans*, 667 F. Supp. 974, 981 (S.D.N.Y. 1987) (upholding U.S. regulation of foreign persons who wish to resell American-made defense articles); *United States v. Zehe*, 601 F. Supp. 196, 198 (D. Mass. 1985) (recognizing jurisdiction to regulate acts of espionage against United States that occurred outside U.S. territory); *United States v. Rodriguez*, 182 F. Supp. 479, 491 (S.D. Cal. 1960) (prosecuting defendants for false statements on immigration applications) *aff'd in part, rev'd in part sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961); *United States v. Chandler*, 72 F. Supp. 230, 233 (D. Mass. 1947) (finding jurisdiction to apply U.S. treason law to defendant regardless of whether violation occurred outside U.S. territory); see also RESTATEMENT (THIRD) § 402(3) & cmt. f (discussing protective principle). For a Dutch court's recognition of the protective principle, see *Compagnie Europeenne Des Petroles S.A. v. Sensor Nederland B.V.*, 22 INT. LEGAL MATERIALS 66 (1982).

78. RESTATEMENT (THIRD) § 402 cmt. f.

79. See *id.* (listing examples of acts over which states may prescribe laws pursuant to protective principle); see also *supra* note 77 (citing cases invoking protective principle).

interests nor against any other U.S. interest recognized by the protective principle.<sup>80</sup> Rather, ILSA regulates any person who engages in the investment activity described in the Act, regardless of whether that person directed the investments against, or intended to affect, the national security interests of the United States or any other interest relevant to the protection principle. Second, as stated above, in order for the protective principle to justify ILSA, developed legal systems typically must recognize the regulated act as a crime.<sup>81</sup> Developed legal systems have not recognized the act of investing in the development of another state's petroleum resources as a crime; therefore, the protective principle cannot apply.<sup>82</sup>

### *E. Universality Principle*

Under the universality principle, every state has jurisdiction to prescribe punishment for certain offenses recognized by the international community as being of universal concern.<sup>83</sup> Examples of such offenses include<sup>84</sup> piracy,<sup>85</sup> war crimes,<sup>86</sup> slave trading,<sup>87</sup> hijacking aircrafts,<sup>88</sup> genocide,<sup>89</sup> and

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80. See RESTATEMENT (THIRD) § 402(3) (requiring that in order for protective principle to apply, regulated conduct must be "directed against the national security interests of the state or against a limited class of other state interests"). Congress based ILSA on U.S. national security interests as well as foreign policy interests. Iran and Libya Sanctions Act § 2. Foreign policy interests do not qualify under the "limited class of other state interests" on the basis of which a state may prescribe law pursuant to the protective principle. OPPENHEIM'S INTERNATIONAL LAW 471 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); see RESTATEMENT (THIRD) § 402(3) (stating that protective principle applies only in cases where actor directs conduct against security of state or against "a limited class of other state interests"). Thus, because Congress proffered no other interests that may qualify under this "limited class," this Note will focus on whether the investment activities sufficiently affect U.S. national security interests so as to justify use of the protective principle to support ILSA's prescriptions.

81. RESTATEMENT (THIRD) § 402 cmt. f ("International law recognizes the right of a state to punish . . . offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems . . .").

82. See *supra* note 55 (providing objections to ILSA from European Union, under whose laws persons may lawfully engage in investment activity regulated by ILSA).

83. RESTATEMENT (THIRD) § 404.

84. See *id.* (providing acts which fall under universality principle). The *Restatement* interprets the universality principle broadly to include all the acts mentioned in the text of this Note. *Id.* Some view the universality principle much more narrowly. See BROWNLIE, *supra* note 37, at 304-05 (asserting that only piracy definitely falls under universality principle); SHEARER, *supra* note 21, at 212 (claiming that only two clear-cut cases fall under universality principle: piracy and war crimes).

85. RESTATEMENT (THIRD) § 404; see *United States v. Smith*, 18 U.S. (5 Wheat) 153, 161 (1820) (stating that it is "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever").

86. RESTATEMENT (THIRD) § 404; see *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 297-98 (Sup. Ct. of Israel 1962) (finding prescriptive jurisdiction over war crimes

certain acts of terrorism.<sup>90</sup> The heinous nature of these acts justifies giving every state jurisdiction to apply and to enforce its laws against the offender.<sup>91</sup> The offender's nationality is irrelevant to the universality principle, as is the effect of the offender's conduct in the state attempting to exercise jurisdiction.<sup>92</sup> The international community considers persons carrying out these acts to be "enemies of all people."<sup>93</sup> Providing every state with jurisdiction to address these offenses ensures, as much as possible, that they do not go unpunished.<sup>94</sup>

Consider the following argument defending ILSA under the universality principle: In the eyes of many, Iran and Libya are terrorist states. Presum-

and acts of genocide pursuant to universality principle); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 581-83 (6th Cir. 1985) (recognizing Israel's jurisdiction to apply its laws to defendant alleged to have committed war crimes within Nazi concentration camps). In *Eichmann*, the supreme court of Israel found jurisdiction to apply its laws to defendant for his acts as the principle executioner of Hitler's "final solution." *Eichmann*, 36 Int'l L. Rep. at 287. Pursuant to the universality principle, the *Eichmann* court found prescriptive jurisdiction over these acts despite fact that the defendant was not a citizen of Israel and the defendant committed the acts both outside of Israel and before Israel became a nation. *Id.* at 283-84. In *Demjanjuk*, the court faced the issue of whether to fulfill Israel's request for the extradition of the defendant, charged with offenses stemming from his acts in Nazi concentration camps. *Demjanjuk*, 776 F.2d at 576, 578-79. Although defendant committed none of the offense in the requesting state, a usual condition to extradition, the court ruled that, pursuant to the universality principle, Israel has prescriptive jurisdiction over the defendant's acts. *Demjanjuk*, 776 F.2d at 582.

87. RESTATEMENT (THIRD) § 404.

88. *Id.*; see *Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988) (finding that United States had jurisdiction to prescribe punishment for hijacking of Jordanian civilian aircraft), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

89. RESTATEMENT (THIRD) § 404; see *Eichmann*, 36 Int'l L. Rep. at 297-98 (finding prescriptive jurisdiction over war crimes and acts of genocide pursuant to universality principle).

90. RESTATEMENT (THIRD) § 404. The inability of the international community to agree on what constitutes terrorism prevents it from definitely representing an offense over which all states have prescriptive jurisdiction. See *id.* cmt. a (discussing lack of agreement in international community on definition of terrorism). Nevertheless, states generally accept as falling under the universality principle terrorist acts such as assaults on the life of diplomatic officials, kidnapping, and indiscriminate assaults against people at large. *Id.*

91. See *Yunis*, 681 F. Supp. at 900 (recognizing that protective principle applies to heinous and widely condemned acts); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981) (stating that any state may take universal jurisdiction over "heinous" crimes); RESTATEMENT (THIRD) § 404 cmt. a (suggesting that universality principle rests on universal condemnation of those activities that fall under principle).

92. See RESTATEMENT (THIRD) § 404 (imposing no citizenship or effects requirement in order to exercise jurisdiction under universality principle).

93. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985); see *United States v. Smith*, 18 U.S. (5 Wheat) 153, 161 (1820) (acknowledging every state's jurisdiction over piracy because it represents "an offense against the law of nations, [and] . . . an offense against the universal law of society, [and because a pirate is] . . . an enemy of the human race").

94. SHEARER, *supra* note 21, at 212.

ably, the universality principle provides the United States with jurisdiction to prescribe punishments not only for those who carry out these acts of terrorism, but also for those who support or assist these acts. Thus, the United States may permissibly prescribe rules regarding those who invest in Iran or Libya because investment in a known terrorist state is tantamount to support of that state's terrorist acts or that state's participation in terrorist acts. Essentially, the argument rests on an accomplice liability theory.<sup>95</sup>

This argument contains a major flaw. The act of investing in petroleum resources of a known terrorist state does not meet the requirement for justification under the universality principle – the community of nations does not recognize this investment activity as an offense that universally concerns all states.<sup>96</sup> Further, those who invest in Iran's or Libya's petroleum resources do not represent "common enemies of all mankind."<sup>97</sup> Indeed, if the investment acts regulated by ILSA were so heinous and so widely condemned so that jurisdiction could be based on the universality principle,<sup>98</sup> the European Union and other states would not be objecting so adamantly to ILSA.<sup>99</sup> One cannot tenably classify the investment acts regulated in ILSA with acts of genocide, piracy, or hijacking an aircraft. At the very least, the United States should amend ILSA to include an intent requirement before attempting to justify the Act under the universality principle. Such a requirement should demand that, before imposing sanctions, the President must determine that the person intended to support the terrorist acts of Iran or Libya. Currently, ILSA only requires a finding that the person knowingly invested in the petroleum resources of Iran or Libya.

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95. See Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 437 (making accomplice liability argument to justify U.S. jurisdiction to enact Helms-Burton Act). Clagett argues for the Helms-Burton Act's legitimacy under international law. *Id.*; see *supra* note 10 (explaining Helms-Burton Act). Clagett asserts that the United States has jurisdiction over noncitizens abroad who knowingly and intentionally deal in or benefit from property that the Cuban government wrongfully expropriated from United States citizens in the early 1960s. Clagett, *supra*, at 437. Clagett argues that those persons who knowingly benefit from such property are culpable and as subject to U.S. prescriptive jurisdiction (under the effects principle) as those who carried out the acts of confiscation. *Id.*

96. See *supra* note 55 (providing international community's objections to ILSA); see also RESTATEMENT (THIRD) § 404 (providing that universality principle only justifies rules concerning "offenses recognized by the community of nations as of universal concern").

97. In re Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (asserting that universal principle provides every state with jurisdiction over persons whose acts make them enemies of all mankind, prosecution of whom every state has an equal interest in punishing).

98. See *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988) (acknowledging that universality principle only applies to heinous and widely condemned acts); see also RESTATEMENT (THIRD) § 404 cmt. a ("Universal jurisdiction over the specified offenses is a result of universal condemnation of th[e]se activities . . .").

99. See *supra* note 55 (citing heated objections to ILSA).

A second flaw in the attempt to justify ILSA under the universality principle also exists. Commentators and at least one court have suggested that the universality principle does not cover terrorism, or that it only covers some forms of terrorism.<sup>100</sup> Some commentators go further and claim that the universality principle applies only to piracy and war crimes.<sup>101</sup> Nevertheless, even if the universality principle applies to acts of terrorism, the mere act of investing in a terrorist state does not amount to a heinous act, recognized by the international community as being of universal concern.<sup>102</sup>

Thus, none of the jurisdictional principles provide support for the extra-territorial application of ILSA to noncitizens abroad. Consequently, ILSA violates international law. If, however, one of the jurisdictional principles supported ILSA, the Act still would have to meet the reasonableness requirement, discussed below, to establish legality under international law. This additional consideration is necessary in every case except for justification under the universality principle, which does not require attendant reasonableness.<sup>103</sup> If the universality principle justifies a state's exercise of prescriptive jurisdiction, the inquiry ends and jurisdiction is legitimate under international law.

#### F. Reasonableness

Situations often arise in which the jurisdictional principles outlined above—territoriality, effects, nationality, protective, and universality—enable two or more states to claim prescriptive jurisdiction over certain conduct. For example, one state may prescribe rules based on the territoriality principle, and another state may prescribe rules based on the nationality principle.<sup>104</sup> Similarly, one state may prescribe rules governing activities in its territory, and another state may prescribe rules based on the effect that such activities produced in its territory.<sup>105</sup> If any of the jurisdictional principles discussed

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100. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (asserting that terrorism does not amount to offense over which every state has jurisdiction under universality principle); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 80, at 470 (suggesting that universality principle may not cover terrorism); SHEARER, *supra* note 21, at 212 (claiming that only two clear-cut cases fall under universality principle: piracy and war crimes). But see Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 242 (1982) (asserting that terrorism represents violation of law of nations).

101. See *supra* note 84 (providing examples of commentators who view universality principle as only definitely covering piracy and war crimes).

102. See RESTATEMENT (THIRD) § 404 (providing that universality principle confers state with prescriptive jurisdiction only over offenses recognized by community of nations as being of universal concern).

103. See *id.* (providing that exercise of jurisdiction under universality principle need not meet reasonableness requirement).

104. *Id.* § 403 cmt. d.

105. *Id.*

above justify ILSA, then the situation would exist where both the United States and the state in which the investment activities originated may arguably claim prescriptive jurisdiction.

Because of the potential for overlapping jurisdictional authority, customary international law recognizes that even when one of the above-mentioned bases for jurisdiction supports a state's law, a state may not prescribe rules governing activities having connections with another state when the exercise of such jurisdiction would be unreasonable.<sup>106</sup> As demonstrated above, none of the recognized jurisdictional principles justify ILSA.<sup>107</sup> Assuming, however, that the United States did have legitimate support from one of these principles, the ultimate legality of the Act's provisions governing noncitizens abroad would depend on its reasonableness.

### 1. Reasonableness Factors

Section 403(2) of the *Restatement (Third) of Foreign Relations Law* lists several factors to consider when making the reasonableness determination.<sup>108</sup> Section 403(2) provides:

Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) . . . the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate

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106. *Id.* § 403(1); see *United States v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) (finding that extraterritorial application of Firearms Act fails to meet reasonableness requirement); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (recognizing that extraterritorial application of Sherman Anti-Trust Act must meet reasonableness requirement); *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (expressing reasonableness requirement in terms of international comity and fairness), *aff'd*, 749 F.2d 1373 (9th Cir. 1984); *United States v. Evans*, 667 F. Supp. 974, 980-81 (S.D.N.Y. 1987) (rejecting defendant's argument that United States unreasonably regulated foreign persons who wish to resell American made defense articles). The court in *Timberlane* reflected the logic behind the reasonableness requirement in stating that "at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." *Timberlane*, 549 F.2d at 609. For a foreign court's recognition of the reasonableness requirement, see *German Court Backs Cartel Office in Banning Effects of Foreign Merger on Domestic Market*, 4 Comm. Mkt. Rptr. (CCH) ¶ 40,571 (June 5, 1984).

107. See *supra* Part IV (explaining how jurisdictional rules do not justify ILSA).

108. RESTATEMENT (THIRD) § 403(2).

- such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
  - (e) the importance of the regulation to the international political, legal, or economic system;
  - (f) the extent to which the regulation is consistent with the traditions of the international system;
  - (g) the extent to which another state may have an interest in regulating the activity; and
  - (h) the likelihood of conflict with regulation by another state.<sup>109</sup>

The reasonableness factors do not carry equal importance in all situations.<sup>110</sup> This discussion focuses only on those factors clearly pertinent to ILSA. Examination of these factors demonstrates that ILSA represents an unreasonable attempt by the United States to exercise prescriptive jurisdiction over noncitizens located abroad.

The first factor calls for consideration of the extent to which the activity takes place within the United States, or has a substantial, direct, and foreseeable effect upon or in the United States.<sup>111</sup> The investment activities over which prescriptive jurisdiction is questionable (i.e., the investments by noncitizens abroad) do not take place within the United States. Nor do these

109. *Id.*; see *id.* § 403 cmt. b (noting that § 403(2) does not provide exhaustive list of considerations).

110. *Id.*

111. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818, (1993) (Scalia, J., dissenting) (stating that reasonableness inquiry turns on many factors including extent to which activity takes place within territory of regulating state); *United States v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) (same); *Plessey Co. v. General Elec. Co.*, 628 F. Supp. 477, 490-91 (D. Del. 1986) (finding that jurisdiction of Williams Act not triggered, in part because activities took place outside of United States); RESTATEMENT (THIRD) § 403(2)(a) (providing reasonableness factors). But see *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948 (D.C. Cir. 1984) (criticizing consideration of this factor because proper analysis already requires weighing this factor when deciding whether one of threshold jurisdictional principles supported jurisdiction) (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) and *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976), *aff'd*, 749 F.2d 1373 (9th Cir. 1984)). The court in *Laker Airways* criticized the *Timberlane* and *Mannington Mills* courts for turning to factors already considered when making the threshold determination of whether an exercise of jurisdiction can be justified by one of the jurisdictional principles. *Laker Airways*, 731 F.2d at 948. The *Laker Airways* court insinuated that courts already consider, for example, the extent to which the activity takes place within the territory in determining whether the territoriality principle can support a particular exercise of prescriptive jurisdiction. *Id.*; see *supra* Part IV.A (discussing territoriality principle). Similarly, the *Laker Airways* court argued that the extent to which the activity has a substantial, direct, and foreseeable effect upon the territory already received consideration during the application of the effects principle. *Laker Airways*, 731 F.2d at 948; see *supra* Part IV.B (discussing effects principle).

investments have a substantial, direct, and foreseeable effect on the United States, a point explained in the discussion under the effects principle.<sup>112</sup> At best, the investments made by noncitizens abroad indirectly affect the United States.<sup>113</sup>

The second factor looks at the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated.<sup>114</sup> ILSA's questionable prescriptions govern noncitizens who do not reside in the United States. In addition, the regulated investment activity has no *economic* connection to the United States. Indeed, Congress did not attempt to base ILSA on the possible *economic* effects that the investment activities could have on the United States.<sup>115</sup> Rather, Congress based ILSA on the alleged effects of the investment activities on national security and foreign policy interests of the United States.<sup>116</sup> Thus, the second factor fails to support a reasonableness finding.

The third factor contains many subfactors, one of which weighs the extent to which other states regulate such activities.<sup>117</sup> This factor clearly demonstrates ILSA's unreasonableness. No other nation attempts to regulate noncitizens abroad investing in another state's natural resources.<sup>118</sup> A different subfactor weighs the degree to which the desirability of such regulation is generally accepted.<sup>119</sup> Arguing ILSA's general acceptability is difficult in

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112. See *supra* notes 67-68 and accompanying text (discussing effects principle).

113. See *supra* notes 69-72 and accompanying text (discussing indirect effects on United States from ILSA regulated behaviors).

114. RESTATEMENT (THIRD) § 403(2)(b). Factor (b) also suggests looking at "the connections . . . between [the regulating] state and those whom the regulation is designed to protect." *Id.* This factor arguably favors ILSA because the regulating state and those whom Congress presumably intended to protect (U.S. citizens) have a close connection.

115. See Iran and Libya Sanctions Act §§ 2-3 (declaring that Congress based ILSA on national security interests of United States, not on economic interests).

116. *Id.*

117. RESTATEMENT (THIRD) § 403(2)(c).

118. See *supra* note 55 (providing states' criticism of ILSA, which suggest novelty of Act's reach). The author cannot definitively conclude that no other state regulates noncitizens abroad investing in another state's natural resources. However, the degree to which states have objected to ILSA suggests the novelty of this type of regulation.

119. RESTATEMENT (THIRD) § 403(2)(c). Some American courts and commentators have criticized an attempt to weigh "the degree to which the desirability of a regulation is generally accepted." See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (criticizing certain reasonableness factors); Harold G. Maier, *Resolving Extra-territorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 37-39 (1984) (discussing weaknesses of some reasonableness factors). Critics argue that this factor would require the courts to second guess the determinations by their own legislatures that the regulations in question were desirable. *Laker*, 731 F.2d at 949; Maier, *supra*, at 34. The *Laker* court reasoned that courts should not second guess legislative determinations of the desirability of American laws.



light of the adamant objections from the European Union, Canada, Mexico, and Malaysia over the intrusiveness of the act to their sense of sovereignty.<sup>120</sup>

Another consideration under the third reasonableness factor is the importance of the regulation to the regulating state.<sup>121</sup> The importance of ILSA to the United States is difficult to measure. Even if ILSA represents extremely important U.S. foreign policy, the other factors heavily outweigh this sub-factor and clearly suggest the unreasonableness of ILSA.

The fourth and fifth factors are more difficult to apply to the circumstances surrounding ILSA and reveal little as to ILSA's unreasonableness. In measuring reasonableness, the fourth factor considers whether there exists justified expectations that might be protected or hurt by the regulation.<sup>122</sup> The United States could argue that it has a justified expectation in being free to protect itself from the terrorist acts of Iran and Libya. However, the expectations of noncitizens abroad counterbalance this U.S. expectation. Noncitizens abroad have a justifiable expectation in being free from U.S. regulation of their investments in something as innocuous as another state's petroleum resources.

The fifth factor weighs the importance of the regulation to the international political, legal, or economic system.<sup>123</sup> Congress enacted ILSA for national security and foreign policy reasons, not for economic reasons.<sup>124</sup> Thus, the United States probably could not argue the importance of the Act to the international economic system. Measuring whether ILSA is important to the international political and legal systems is more difficult. Unlike the clear importance of permitting states to regulate extraterritorially those who carry out acts of terrorism, the political and legal importance of the extraterritorial regulation of investments in the petroleum resources of Iran or Libya is less obvious and depends on one's perspective. Determining this importance

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*Laker Airways*, 731 F.2d at 949; see Maier, *supra*, at 34 (discussing *Laker's* criticism). The *Laker* court highlights alleged problems inherent in many of the other reasonableness factors as applied in the American legal system in addition to the one discussed in the text. See *Laker*, 731 F.2d, at 949 (discussing problems with other reasonableness factors).

120. See *supra* note 55 (citing complaints about ILSA from various states).

121. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818-19 (1993) (Scalia, J., dissenting) (weighing importance to United States of extraterritorial application of Sherman Anti-Trust Act); *United States v. Noriega*, 746 F. Supp. 1506, 1514-15 (S.D. Fla. 1990) (upholding extraterritorial application of drug trafficking laws because of strong interest of United States in halting flow of drugs across its borders), *aff'd*, 117 F.3d 1206 (11th Cir. 1997); RESTATEMENT (THIRD) § 402(2)(c) (providing that reasonableness depends, in part, on importance of regulation to regulating state).

122. RESTATEMENT (THIRD) § 402(2)(d).

123. *Id.* § 402(2)(e).

124. See Iran and Libya Sanctions Act §§ 2-3 (declaring that Congress enacted ILSA for national security and foreign policy reasons, not for economic reasons).

would require a discussion of issues beyond the scope of this Note. Nevertheless, whatever this factor suggests as to the reasonableness of ILSA, it cannot outweigh the other, more easily applicable factors that strongly suggest the Act's unreasonableness.

The sixth factor considers the extent to which the regulation is consistent with the traditions of the international system.<sup>125</sup> This factor fails to support ILSA. The historical practice of nations has not included regulations as broad in scope as ILSA. History has seen one set of similarly broad extraterritorial regulations during the "pipeline" controversy.<sup>126</sup> However, in the face of vehement objections from other states, the United States abandoned these regulations.<sup>127</sup> Thus, if anything, the international system traditionally has frowned on such broad regulations.

Under the seventh factor, reasonableness depends on the extent to which another state may have an interest in regulating or refraining from regulating the activity.<sup>128</sup> The heated objection from foreign states to the extraterritorial application of ILSA evinces their serious interest in refraining from regulating the investment activities of their resident citizens.<sup>129</sup> As independent and equal sovereigns, these states have a strong interest in their freedom to decide how much regulation to impose on their own capital exports.<sup>130</sup> Moreover, Iran's and Libya's support of terrorism endangers many states,<sup>131</sup> not just the United States. Accordingly, each endangered state has an interest in deciding for itself how best to address this danger. By refraining from regulating the investment activities addressed by ILSA, these countries have implicitly decided that the potential return to the investor outweighs the speculative threat to their national security. It would be unreasonable and ultimately an

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125. RESTATEMENT (THIRD) § 403(2)(f).

126. See *supra* notes 31-36 and accompanying text (discussing "pipeline" controversy).

127. See *supra* notes 31-36 and accompanying text (discussing "pipeline" controversy).

128. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (stating that because Great Britain has "heavy" interest in regulating restrictive practices of its reinsurance companies compared to "slight" interest of United States, extraterritorial application of Sherman Act in case would be unreasonable); *United States v. Javino*, 960 F.2d 1137, 1143 (2d Cir. 1992) (finding that foreign state's interest in regulating manufacturing of firearms was sufficient to conclude that extraterritorial application of United States Firearms Act would be unreasonable); RESTATEMENT (THIRD) § 403(2)(g) (providing that reasonableness depends, in part, on extent to which another state has interest in regulating activity); see *id.* § 403 reporters' note 6 (providing that reasonableness depends, in part, on extent to which another state has interest in regulating or refraining from regulating activity).

129. See *supra* note 55 (citing foreign opposition to ILSA).

130. See Maier, *supra* note 51, at 69 (stating that state has interest in its "freedom as an independent sovereign to govern its own society within its own territory").

131. See Ed Blanche, *Iran Seen as Spearheading 'Troika of Terrorism' Against West*, L.A. TIMES, Apr. 3, 1988, at A5 (discussing terrorist bombings linked to Iran and Libya).

infringement on the sovereign authority of these other states for the United States to preempt their interests by regulating the matter.

The final factor evaluates the likelihood of conflict with regulation by another state.<sup>132</sup> History has provided situations in which a person has faced conflicting commands from different countries.<sup>133</sup> In these situations, compliance with both commands proved impossible.<sup>134</sup> In the case of ILSA, a conflict of this nature is unlikely. A state cannot feasibly contradict ILSA's prescriptions by ordering its resident citizens to disregard the Act from this point forward and invest in Iran or Libya (although a state can order persons within its territory to fulfill existing contractual obligations relating to investments). There are, however, possible conflicts of a different nature that support the conclusion of the Act's unreasonableness. Conceivably, a French investor might appeal to a French court for an order to disregard the prescriptive rules of ILSA. The French investor could also seek a similar order from the state's legislature. The possibility of these latter conflicts suggests ILSA's unreasonableness.

Under the final factor, some courts have considered the likelihood of conflict with another state's policies.<sup>135</sup> This consideration suggests the unreasonableness of ILSA. A number of states have made clear their policies, which conflict with ILSA, of giving persons within their territory freedom to make investment decisions with respect to petroleum development in Iran or Libya.<sup>136</sup>

Thus, even if one of the jurisdictional principles supports ILSA, the Act fails to satisfy the reasonableness requirement. The primary considerations supporting this conclusion include: many of those who engage in investment

132. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (considering "degree of conflict with foreign law or policy"); *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) (same), *aff'd*, 749 F.2d 1378 (9th Cir. 1984); RESTATEMENT (THIRD) § 403(2)(h) (providing that reasonableness depends, in part, on likelihood of conflict with regulation of another state).

133. See *Britain Defying U.S. Restriction in Soviet Project*, N.Y. TIMES, Aug. 3, 1982, at A1 (providing example of Britain ordering certain companies to fulfill contractual obligations with Soviet Union despite fact that such action would amount to violation of American statute); *Compressors Leave LeHavre for Soviet*, N.Y. TIMES, Aug. 27, 1982, at D1 (providing example of France ordering French companies to fulfill contractual obligations with Soviet Union despite fact that such action would amount to violation of American statute). The conflicting commands cited here arose during the pipeline controversy. See *supra* notes 31-36 (discussing "pipeline" controversy).

134. See *supra* note 133 (providing examples of situations in which companies could not comply with both commands of different states).

135. See *Mannington Mills*, 595 F.2d at 1297 (considering degree of conflict with another state's policies); *Timberlane*, 549 F.2d at 615 (same).

136. See *supra* note 55 (providing examples of states whose policies allow persons within their territory freedom in making investment decisions with respect to petroleum development in Iran or Libya).

activities proscribed by ILSA do so wholly outside the boundaries of the United States; these same persons have no connection by way of nationality, residence, or economic activity with the United States; their acts fail to have a direct effect on the United States; other states do not regulate, and have not regulated, foreign persons abroad who invest in natural resources of other states; the traditions of the international system do not support the scope of the Act's applicability; and states, as independent and equal sovereigns, have a substantial interest in deciding for themselves whether to regulate investment activities within their boundaries that have no direct impact on other states.

## 2. *Concurrent Jurisdiction: When the Exercise of Jurisdiction Would Be Reasonable for More than One State*

To address all possibilities, it is worth considering what would happen if one of the jurisdictional principles did justify ILSA and if the Act represented a reasonable exercise of prescriptive jurisdiction. In this situation, the United States and the nation from which the investment acts originate would have concurrent jurisdiction. Concurrent jurisdiction over certain persons or activities creates few problems.<sup>137</sup> The difficulties arise, however, when those states possessing jurisdiction promulgate conflicting orders that force a person to choose which order to follow.<sup>138</sup>

International law does not provide a definitive rule for resolving reasonable, but conflicting, assertions of prescriptive jurisdiction.<sup>139</sup> However,

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137. See Harold G. Maier, *Extraterritorial Jurisdiction and the Cuban Democracy Act*, 8 FLA. J. INT'L L. 391, 393-394 (1993) (discussing how concurrent jurisdiction is not problem per se).

138. See *supra* note 133 (providing examples of companies subject to conflicting commands).

139. Maier, *supra* note 137, at 394. An earlier school of thought believed that in cases of conflicting commands from states exercising reasonable prescriptive jurisdiction, international law required a tribunal to balance the interests of the states involved and confer jurisdiction upon that state whose exercise of jurisdiction was more reasonable. *Id.*; see RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(3) (Tentative Draft No. 2, 1981) [hereinafter RESTATEMENT (REVISED)] (suggesting that, in case of conflicting commands, state with greater interests in regulating acts in question would have jurisdiction as matter of law). But see *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-51 (D.C. Cir. 1984) (criticizing balancing of interests test provided in *Restatement (Revised)*); Maier, *supra* note 119, at 39 (same). The *Laker* court criticized the court in *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976), for engaging in the balancing test by weighing factors such as "the importance of the regulation to the regulating states." *Laker*, 731 F.2d at 949. The *Laker* court objected to the balancing of such factors because their political nature made them inappropriate for a judiciary to evaluate comparatively. *Id.* In response to such criticism, the *Restatement (Third)* now reflects the principle of comity, in which a state with reasonable jurisdiction *should*, but is not required by international law, defer to the jurisdiction of another state whose interests are greater. RESTATEMENT (THIRD) § 403(3).

judicial and governmental bodies have turned to the principle of comity in resolving these conflicts.<sup>140</sup> In simplest terms, the comity principle embodies a kind of international golden rule: each nation gives the respect to the laws, policies, and interests of other nations that it would have others give to its own in the same or similar circumstances.<sup>141</sup>

The principle of comity is not relevant to ILSA. The comity principle only applies when a party faces conflicting commands from two states asserting reasonable jurisdiction.<sup>142</sup> As noted, a state cannot feasibly order persons within its territory to disregard ILSA and to invest in Iran or Libya.<sup>143</sup> Thus,

Despite the *Restatement (Third)*'s recognition that international law does not require application of the balancing of interest test in situations of conflicting, but reasonable, assertions of jurisdiction, the question of what standard a given domestic court will employ remains unsettled. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (stating need to employ balance of interest test); *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976) (applying balance of interest test).

140. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (employing comity analysis); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 954 (D.C. Cir. 1984) (same); Maier, *supra* note 51, at 69-72 (discussing comity principle); Maier, *supra* note 119, at 38 (same); Maier, *supra* note 137, at 394 (same). Some courts have turned to a balancing of interest test in lieu of applying the comity principle. See *supra* note 139 (citing cases which apply balance of interest test).

141. See Maier, *supra* note 119, at 15 (discussing golden rule); Maier, *supra* note 51, at 70 (same). See generally *Hilton v. Guyot*, 159 U.S. 113 (1895) (discussing international comity). Speaking on the principle of comity, the United States Supreme Court in *Hilton v. Guyot* stated:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Id.* at 163-64.

142. See *Hartford Fire Ins. Co.*, 509 U.S. at 799 (requiring conflict before applying comity principle); Maier, *supra* note 137, at 394 (same); see also *Hartford Fire Ins. Co.*, 509 U.S. at 799 (stating that "the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States . . . laws," even where the foreign state has a strong policy to permit or encourage such conduct" (emphasis added) (quoting RESTATEMENT (THIRD) § 415 cmt. j)).

143. See *supra* text accompanying note 136 (discussing how person will probably not face conflicting commands with respect to issue of investment in Iran or Libya). It is worth noting that while a person cannot face commands conflicting those in ILSA, a person can face inconsistent commands. For instance, a noncitizen abroad may face both the commands of ILSA as well as commands from her government requiring her to ignore the provisions in ILSA. A true conflict does not exist however because this noncitizen abroad can comply with her government's commands without violating ILSA (i.e., the person may ignore ILSA, but choose not to invest in Iran or Libya for reasons other than ILSA). Nevertheless, a jurisdictional tension would exist, the resolution of which may rely on principles of comity.

according to international law, if the United States has reasonable jurisdiction over the noncitizen abroad, then theoretically both it and the state in which the investor is located legitimately possess jurisdiction.<sup>144</sup> In such a situation, states usually handle these jurisdictional tensions through agreements on the diplomatic level or by appealing to international organizations such as the World Trade Organization.<sup>145</sup> But, as the prior discussion demonstrates, the circumstances surrounding ILSA fail to provide a situation in which two states possess legitimate jurisdiction over the noncitizens abroad. None of the jurisdictional principles discussed support the United States's claim to jurisdiction over these people.<sup>146</sup> And even if one of the jurisdictional principles support ILSA, applying the Act's provisions to noncitizens abroad would violate the reasonableness requirement.<sup>147</sup>

### V. Jurisdiction to Enforce

In addition to restrictions on a state's jurisdiction to prescribe a law, international law imposes restrictions on a state's jurisdiction to enforce the law.<sup>148</sup> These latter restrictions limit the measures a state may employ to induce or compel compliance with its laws.<sup>149</sup> To induce compliance with its laws, a state may use judicial and nonjudicial enforcement measures.<sup>150</sup> The *Restatement* discusses how nonjudicial enforcement measures usually entail the denial of opportunities normally open to the person against whom enforcement is sought.<sup>151</sup> ILSA provides a prototypical example of such nonjudicial enforcement methods. Upon finding a violation of ILSA, the President may impose the following sanctions:<sup>152</sup> (1) denial of Export-Import Bank financing;<sup>153</sup> (2) denial of export licenses;<sup>154</sup> (3) prohibition against U.S. financial institutions lending more than \$10 million per year to the sanctioned

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144. See *RESTATEMENT (THIRD)* § 403 (failing to require that one state defer in situation of two states possessing reasonable claims of jurisdiction).

145. See Barber, *supra* note 10, at 1 (discussing how European Union has challenged ILSA and Helms-Burton Act by filing claim with World Trade Organization).

146. See *supra* Parts IV.A-E (arguing ILSA's lack of support from jurisdictional principles).

147. See *supra* Part IV.F (discussing ILSA's failure to meet reasonableness requirement).

148. See *RESTATEMENT (THIRD)* § 431 (discussing jurisdiction to enforce).

149. *Id.* § 401.

150. *Id.* § 431(1); see *id.* § 431 cmt. c (discussing popular nonjudicial enforcement measures employed by states).

151. *Id.*

152. See Iran and Libya Sanctions Act § 6 (listing possible sanctions under ILSA); see also *supra* note 17 (reproducing section providing possible sanctions under ILSA).

153. Iran and Libya Sanctions Act § 6(1).

154. *Id.* § 6(2); see *RESTATEMENT (THIRD)* § 431 cmt. c (listing denial of right to engage in export transactions as typical example of nonjudicial enforcement measure).

person;<sup>155</sup> (4) prohibition against sanctioned financial institutions serving as primary dealers of United States government bonds or as repositories of U.S. government funds;<sup>156</sup> (5) ban on any United States government procurement of any goods or services from the sanctioned person;<sup>157</sup> and (6) import sanctions imposed by the President in accordance with the International Economic Powers Act.<sup>158</sup>

The *Restatement* sets out the requirements a state must satisfy in order to establish jurisdiction to enforce a law.<sup>159</sup> First, the United States must possess jurisdiction to prescribe ILSA.<sup>160</sup> Second, the Act must satisfy a reasonableness test for enforcement.<sup>161</sup> Finally, the United States must provide a certain level of notice and opportunity to be heard to the person against whom the United States seeks to enforce its law.<sup>162</sup>

Part IV discussed how Congress lacked jurisdiction to prescribe ILSA.<sup>163</sup> Assuming, however, that Congress did have jurisdiction to prescribe and that ILSA therefore satisfies the first requirement, ILSA still fails the other two

155. Iran and Libya Sanctions Act § 6(3).

156. *Id.* § 6(4).

157. *Id.* § 6(5); see RESTATEMENT (THIRD) § 431 cmt. c (listing denial of eligibility to bid on governmental contracts as typical nonjudicial enforcement measure).

158. Iran and Libya Sanctions Act § 6(6).

159. RESTATEMENT (THIRD) § 431. *Restatement (Third)* Section 431 provides:

(1) A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its law or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403.

(2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.

(3) A state may employ enforcement measures against a person located outside its territory

(a) if the person is given notice of the claims or charges against him that is reasonable in the circumstances;

(b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and

(c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

*Id.*

160. *Id.* § 431(1).

161. See *id.* § 431(1) cmt. d (discussing reasonableness requirement). Presumably, this reasonableness requirement is different from the reasonableness requirement for establishing jurisdiction to prescribe.

162. *Id.* § 431(3).

163. See *supra* Part IV (analyzing principles of jurisdiction to prescribe and concluding that ILSA violates these principles).

requirements. The *Restatement* does not explain the reasonableness test. Nor does it explicitly discuss whether the test is different from the reasonableness test a state must pass in order to establish jurisdiction to prescribe.<sup>164</sup> Comment (d) of section 431 of the *Restatement* does, however, provide one example of an application of the reasonableness test.<sup>165</sup> The circumstances of this example bear a remarkable resemblance to the circumstances surrounding ILSA. Comment (d) indicates that it might be reasonable for the United States to deny a foreign company of its export privileges – the right to participate in the export of United States goods – because the company had knowingly resold a strategic article of United States origin to country *X* in violation of United States law.<sup>166</sup> However, Comment (d) further provides that it would be unreasonable for the United States to deny a foreign company export privileges (as does ILSA) simply because it traded with country *X* in goods not of United States origin.<sup>167</sup> Comment (d) deems such a sanction unreasonable because ordinarily the United States would lack jurisdiction to prescribe law with respect to such trade.<sup>168</sup> ILSA involves a person's investment with country *X* (Iran or Libya) rather than trade. Nevertheless, the circumstances involved in the *Restatement's* example and the circumstances underlying ILSA strikingly resemble one another. This resemblance suggests that the United States lacks jurisdiction to enforce ILSA because the Act does not satisfy the requirement of reasonableness.

Assuming that ILSA meets the reasonableness requirement, validation of the Act can occur only if its enforcement measures provide a certain level of notice and opportunity to be heard.<sup>169</sup> The *Restatement* suggests a two-step

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164. See RESTATEMENT (THIRD) § 431 (failing to explain reasonableness test under state's jurisdiction to enforce). Courts and commentators have given little attention to both the reasonableness test specifically and the broader concept of a state's jurisdiction to enforce more generally. Courts and commentators cite to the proposition that a state must have jurisdiction to enforce its law, but both fail to discuss the concept any further.

165. *Id.* § 431 cmt. d (providing that state's exercise of jurisdiction to enforce is subject to principle of reasonableness). Note that comment (d) contains some ambiguity in its discussion of the reasonableness requirement. In making the reasonableness determination, comment (d) suggests considering the factors relevant to making a reasonableness determination under the same analysis of a state's jurisdiction to prescribe. See *id.* § 403 (requiring that exercise of jurisdiction to prescribe be reasonable). Presumably, because the *Restatement (Third)* mentions the reasonableness requirement under § 403 as well as under § 431, a state must meet a reasonableness requirement when determining both whether a state has jurisdiction to prescribe and whether it has jurisdiction to enforce.

166. See RESTATEMENT (THIRD) § 431 cmt. d (providing example of application of reasonableness requirement).

167. *Id.*

168. *Id.*

169. See *id.* § 431(3) (discussing requirement of notice and opportunity to be heard).



analysis under this requirement.<sup>170</sup> First, the state must provide the person against whom the state intends to enforce its law with reasonable notice of the charges against him.<sup>171</sup> Second, the state must provide that person an opportunity to be heard, usually in advance of enforcement.<sup>172</sup>

When faced with nonjudicial enforcement measures as in ILSA, the *Restatement* does not require formal notice such as the service of process required for judicial enforcement.<sup>173</sup> Nonetheless, the state must give at least some notice to the person charged, whether by mail, telegraph, telephone, or use of intermediary.<sup>174</sup> Such notice should inform the person: (1) that the enforcing state believes that the person has violated that state's law; (2) that the state intends to execute the enforcement measures; and (3) that the person has an opportunity to be heard before the state commences its enforcement action.<sup>175</sup>

Although the practices of the United States in implementing ILSA may prove otherwise, ILSA, as written, fails to meet the notice requirement. The most ILSA mandates in the form of notice can be found in Section 9. Upon a determination of a violation, Section 9 "urges" the President to consult with the government of the state in which the offender resides.<sup>176</sup> Following this consultation, Section 9 mandates sanctions against the person unless the President certifies to Congress that the foreign government has taken specific and effective actions to terminate the investment activity.<sup>177</sup>

This consultation does not amount to sufficient notice as required by international law. International law requires the United States to inform *the person charged* that the United States government believes he has violated the Act and to inform this person that he has an opportunity to respond to the charges.<sup>178</sup> ILSA requires no such notice. Consequently, ILSA fails to satisfy

170. See *id.* (dividing notice and opportunity to be heard into two separate requirements).

171. *Id.*; see *id.* § 431 cmt. e(i) (discussing notice requirement).

172. *Id.* § 431(3); see *id.* § 431 cmt. e(ii) (discussing opportunity to be heard requirement).

173. See *id.* § 431 cmt. e (stating that international law does not require service of process in order to meet notice requirement).

174. *Id.*

175. *Id.*

176. Iran and Libya Sanctions Act § 9(a)(1).

177. *Id.* § 9(a)(2).

178. See RESTATEMENT (THIRD) § 431(3) cmt. e (requiring that enforcing state "give notice to the person charged that he is believed to have violated the enforcing state's law, that measures of enforcement are contemplated, and that he has an opportunity to respond before enforcement action will be taken"). The *Restatement* allows for the use of an intermediary when giving notice. See *supra* note 175 and accompanying text (listing methods by which notice can be effected). One could argue that by consulting with the government of the state in which the charged person resides, the United States is using that government as an intermediary. This

the notice requirement, which means that it also fails to provide an opportunity to be heard as required by international law.

This lack of notice and opportunity to be heard presents potentially grave problems for many foreign persons. For example, the President may erroneously determine that a person has violated ILSA. Without a procedure for allowing the person to refute this finding, ILSA may deprive this person of essential exports that they cannot obtain from other states. The inequity and senselessness of such an erroneous deprivation is obvious. In addition, two provisions of ILSA exacerbate the inequity. Section 9(b)(2) requires that sanctions, once levied, remain in effect for at least one year.<sup>179</sup> Additionally, Section 11 of the Act prohibits any court from reviewing a determination to impose sanctions under ILSA.<sup>180</sup>

Thus, the United States lacks the jurisdiction to enforce ILSA for three reasons. First, Congress lacked the jurisdiction to prescribe ILSA. Second, the Act's enforcement measures fail to meet the reasonableness requirement. Finally, ILSA's sanctioning mechanism provides inadequate notice and opportunity to be heard.

## VI. Conclusion

Congress appeared to have acted with good intentions when it passed ILSA. As the problem of terrorism remains unresolved, it continues to haunt various states and their citizens. One almost feels a moral obligation to support a state's effort to eradicate the roots of this evil.

Nevertheless, the broader interests in both the rule of law and the equal status of every nation place a necessary limit on a state's remedial powers. International law recognizes a state's authority to prescribe law under five major principles: territoriality, effects, nationality, protective, and universality.<sup>181</sup> Those states opposing ILSA can turn to the territoriality principle to support their decision to regulate or to refrain from regulating the capital exports from their respective states.<sup>182</sup> The United States, however, lacks

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argument is flawed because nothing in ILSA requires the President to consult with the foreign government. See Iran and Libya Sanctions Act § 9(a)(1) (stating that Congress merely "urges" President to consult with foreign government of state in which offender resides). Moreover, nothing in ILSA requires the President to request that the foreign government notify the charged person. See *id.* (failing to require President to request that foreign government inform offender of charges against him).

179. Iran and Libya Sanctions Act § 9(b)(2).

180. *Id.* § 11.

181. See *supra* Parts IV.A-E (discussing five jurisdictional principles).

182. See *supra* Part IV.A (discussing territoriality principle); see also RESTATEMENT (THIRD) § 402 introductory note (stating that, despite existence of other principles, territoriality and nationality remain principal bases of jurisdiction to prescribe).

support for those prescriptions in ILSA that cover noncitizens abroad.<sup>183</sup> At best, these prescriptions rest on questionable argumentation under the less settled effects, protective, and universality principles.<sup>184</sup>

Even if ILSA legitimately falls within one of these principles, the Act's unreasonableness brings it in violation of international law.<sup>185</sup> States have an unquestionable interest in controlling the activities of persons within their territory.<sup>186</sup> Allowing the United States to undercut this interest by regulating persons having no relevant connection to the United States is unreasonable and a contradiction of the central precept of international law that all nations are of equal status.<sup>187</sup>

Finally, at the very least, the United States lacks jurisdiction to enforce ILSA.<sup>188</sup> The Act fails to require that the United States government provide the charged person with adequate notice. Without providing notice, ILSA also fails to satisfy the requirement that the charged person be given an opportunity to be heard. Thus, despite its seemingly defensible political grounds, ILSA fails to meet three necessary elements for establishing the Act's legality: It lacks support from the recognized prescriptive principles; it runs afoul of notions of reasonableness; and it falls short of meeting the requisite elements for establishing jurisdiction to enforce.

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183. See *supra* Parts IV.A-E (discussing how ILSA lacks support from jurisdictional principles).

184. See *supra* Parts IV.B, D, E (discussing ILSA under effects, protective, and universality principles).

185. See *supra* Part IV.F (discussing ILSA's failure to meet reasonableness requirement).

186. See Maier, *supra* note 51, at 69 (stating that each state has interest in its "freedom as an independent sovereign to govern its own society within its territory").

187. See BROWNIE, *supra* note 37, at 287 (stating that sovereignty and equal status of each nation remains one of most fundamental precepts of international law).

188. See Part V (discussing lack of jurisdiction to enforce ILSA).