

2011

U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction

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Recommended Citation

Quinton Cannon Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 Fordham L. Rev. 2347 (2011).

Available at: <http://ir.lawnet.fordham.edu/flr/vol79/iss5/15>

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COMMENT

U.S. ENERGY SANCTIONS AND THE RACE TO PREVENT IRAN FROM ACQUIRING WEAPONS OF MASS DESTRUCTION

*Quinton Cannon Farrar**

The United States has used economic sanctions targeting the energy sector that is so vital to Iran’s economy with varying degrees of intensity since the Iran Hostage Crisis of 1979. By and large, the sanctions did not have their intended effect. By 2010, Iran was the foremost state-sponsor of terrorism and was on the brink of acquiring the capability to develop nuclear weapons—a phenomenon that could have cataclysmic repercussions for American interests in the Middle East and beyond.

In July 2010, Congress passed and President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, in an effort to use the most drastic sanctions measures yet to finally change the course of Iran’s behavior. This Comment begins by tracing the history of United States petroleum-related sanctions against Iran through various inflection points since 1979. This Comment then discusses the political context, content, and preliminary implementation of the latest round of sanctions against Iran. Thereafter, this Comment critically analyzes the legal bases, political challenges, and inherent policy difficulties surrounding the new sanctions law. Finally, this Comment proposes a number of policy recommendations for the President and Congress in light of the changing policy landscape.

In sum, this Comment concludes that a far-reaching, robustly applied, multilateral sanctions policy remains the last, best hope of peacefully preventing Iran from acquiring weapons of mass destruction.

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INTRODUCTION

On July 1, 2010, President Barack Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of

2010 (Comprehensive Act).¹ “In short,” President Obama said at the bill signing ceremony, “with these sanctions, along with others, we are striking at the heart of the Iranian Government’s ability to fund and develop its nuclear program. We’re showing the Iranian Government that its actions have consequences.”² Substantively, the Comprehensive Act greatly expanded the types of actors (including non-U.S. corporations) that may be sanctioned for their relationship with Iran; increased the number of sanctions which the President must impose on actors in violation of the law; and, at least in theory, made it more difficult for the President to avoid issuing sanctions.³ The President acknowledged that the bill he was signing amounted to “the toughest sanctions against Iran ever passed by the United States Congress.”⁴

The drafters of the Comprehensive Act paid particular attention to focusing sanctions on Iran’s energy sector.⁵ Today, Iran holds the third largest proven petroleum reserves in the world behind Saudi Arabia and Canada,⁶ and the second largest natural gas reserves behind only Russia.⁷ Revenues from the state-dominated energy sector account for nearly 80% of Iran’s export earnings and roughly 40% of all government revenue.⁸ Yet, in spite of its enormous reserves, Iran’s energy infrastructure is decaying, and without foreign investment and expertise, Iran faces a serious production decline.⁹ Moreover, due to its lack of refining capacity, Iran has to import close to half of all the gasoline it needs to meet domestic consumption requirements.¹⁰

By targeting firms that invest in Iran’s domestic energy infrastructure or export refined petroleum products to Iran, the Comprehensive Act presents the Obama Administration and its allies around the world with a tremendous opportunity to put pressure on the Iranian regime to cease both its development of nuclear weapons and its funding of international terrorism. Since his election in 2005, Iranian President Mahmoud Ahmadinejad has tried to impose a markedly populist fiscal policy

1. Pub. L. No. 111-195, 124 Stat. 1312 (2010) (codified as amended at 22 U.S.C. §§ 8501–8551). The Senate passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Comprehensive Act) by a vote of 99-0; the House passed the bill by a vote of 408-8. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 13 (2011).

2. Remarks on Signing the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 2010 DAILY COMP. PRES. DOC. 568 (July 1, 2010).

3. § 102, 124 Stat. at 1317–28; *see also* Jay Solomon et al., *U.S. Adds Its Own Sanctions on Iran*, WALL ST. J., July 2, 2010, at A7.

4. Remarks on Signing the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, *supra* note 2, at 2.

5. § 102, 124 Stat. at 1317–28; *see also* KATZMAN, *supra* note 1, at 12–13.

6. SHAYERAH ILIAS, CONG. RESEARCH SERV., RL34525, IRAN’S ECONOMIC CONDITIONS: U.S. POLICY ISSUES 12 (2010).

7. *Id.* at 13.

8. *Id.* at 21.

9. Spencer Swartz & Benoit Faucon, *Iran’s Falling Oil Output Means Less Revenue*, *Clout*, WALL ST. J., June 26, 2010, at A7.

10. ILIAS, *supra* note 6, at 21.

providing extensive public subsidies on gasoline, food, and housing.¹¹ Although inflation was already quite high in Iran at the time of the passage of the Comprehensive Act in July 2010,¹² once Ahmadinejad phased out the subsidies in December 2010, due to fiscal pressure from mismanagement of the economy and increasing international isolation, price increases in such consumer staples as food, fuel, and transportation immediately began to cause pain to Iranians.¹³ Whereas Ahmadinejad was able to repress domestic unrest following his reportedly fraudulent reelection in 2009,¹⁴ the political fallout resulting from the across-the-board price shocks in 2011 could be widespread.¹⁵ Thus, by attempting to cut off Iran from the global petroleum markets, American policy makers have the potential to make the cost of gasoline so dear, and the revenues from foreign investment so scarce, that the Iranian regime, if it does not suspend its nuclear program, must face the unenviable dilemma of further destroying the Iranian fiscal system or facing the wrath of the Iranian population.

Yet, to what avail? In the past, American sanctions against Iran have been largely unsuccessful in isolating the Iranian regime and forcing it to end its belligerent behavior.¹⁶

As Part I of this Comment details, following the 1979 Iranian Revolution, U.S. relations with Iran have been exceptionally adversarial. From the time the Khomeinist regime took power, Iran has been assessed as an “unusual and extraordinary threat to the national security, foreign policy and economy of the United States.”¹⁷ At no point, however, has the United States’s rivalry with Iran hit as critical of an impasse as it has today. Iran poses a potentially existential threat to Israel,¹⁸ is actively seeking to

11. *Id.* at 6. Gasoline subsidies alone represented roughly 12% of Iran’s gross domestic product. *Id.* The subsidies allowed gasoline to be sold at the equivalent of thirty-eight cents per gallon. William Yong, *Gas Prices Soar in Iran as Subsidy is Reduced*, N.Y. TIMES, Dec. 20, 2010, at A6.

12. In 2009, Iran’s consumer prices rose on a year-over-year average of greater than 13%. ILIAS, *supra* note 6, at 5.

13. Ramin Mostaghim & Borzou Daragahi, *Prices and Anger Rise in Iran After Subsidies Lifted*, L.A. TIMES, Dec. 23, 2010, at A3.

14. *See infra* notes 158–62 and accompanying text.

15. *See* Mostaghim & Daragahi, *supra* note 13 (reporting on work stoppages across Iran and emboldened political opposition to Ahmadinejad).

16. *See infra* Part I.

17. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) (executive order from President Carter freezing Iranian assets during hostage crisis); *see also infra* note 38 and accompanying text.

18. In a recent visit to the United States, Israeli Prime Minister Benjamin Netanyahu stated in a speech:

The greatest danger facing Israel and the world is the prospect of a nuclear-armed Iran. Iran threatens to annihilate Israel. It denies the Holocaust. It sponsors terror. It confronts America in Afghanistan and Iraq. It dominates Lebanon and Gaza. . . . Now, this is what Iran is doing without nuclear weapons. Imagine what it would do with them. Imagine the devastation that its terror proxies, Hezbollah and Hamas and others, would wreak under an Iranian nuclear umbrella.

Benjamin Netanyahu, Prime Minister, Israel, Speech at the General Assembly of the Jewish Federations of North America in New Orleans (Nov. 8, 2010), *available at* <http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speechga081110.htm>. Prime Minister Netanyahu went on to argue that while the economic sanctions imposed upon Iran

undermine the delicate and hard-won peace in Iraq,¹⁹ and continues to be the largest state sponsor of terrorism in the world.²⁰ In sum, as a recent National Security Strategy memorandum stated, the United States “may face no greater challenge from a single country than from Iran.”²¹

The assessment of Iran’s threat to the national interests of the United States stems in large part from Iran’s weapons of mass destruction programs.²² According to recent International Atomic Energy Agency estimates, Iran has developed enough uranium for two nuclear weapons.²³ Although the uranium has only been enriched to a level that would be suitable for civilian energy purposes, U.S. intelligence officials estimate that Iran is currently only three to five years away from developing nuclear weapons if it continues to enrich uranium for belligerent purposes.²⁴

Additionally, Iran’s support for international terrorist groups continues to undermine the Israeli peace process, destabilize the extremely tentative political equilibrium inside of U.S. allies Iraq and Lebanon, and has been directly responsible for the death of American servicemen in Iraq and Afghanistan.²⁵ Moreover, in the wake of the September 11 terrorist attacks

by the United States and its allies were exacting a toll on the Iranian government, they will not change the Iranian regime’s drive to attain a nuclear weapon unless they are backed by “a credible threat of military action.” *Id.*

In a provocative article in the September 2010 issue of *The Atlantic Monthly* entitled “The Point of No Return,” author Jeffrey Goldberg raised increased speculation that the Israeli military will preemptively strike at Iran’s nuclear infrastructure to prevent or delay the development of nuclear weapons by a regime that has repeatedly threatened to wipe the State of Israel off the map. Jeffrey Goldberg, *The Point of No Return*, ATL. MONTHLY, Sept. 2010, at 56. In response to Netanyahu’s contention that only the credible threat of military action can cause Iran to end its nuclear ambitions, Secretary of Defense Robert Gates stated that while “when it comes to Iran . . . all options are on the table,” the Obama Administration “continue[s] to believe that the political, economic approach that we are taking is in fact having an impact in Iran.” Phil Stewart & Arshad Mohammed, *U.S. Says Sanctions Against Iran “Having Impact,”* REUTERS (Nov. 8, 2010, 3:31 AM), <http://www.reuters.com/article/idUSTRE6A70JA20101108>. Although it is not clear what the Obama Administration’s next course of action will be if the economic sanctions do not work and Iran continues to develop nuclear weapons, the Administration has repeatedly warned Israel that a military strike could have far-reaching consequences that are detrimental to both countries’ interests in the region. See Goldberg, *supra*, at 59–61.

19. KENNETH KATZMAN, CONG. RESEARCH SERV., RL32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES 40 (2010) (detailing Iranian efforts to engage in a proxy war by providing arms, training, guidance, and financing to pro-Iranian militia groups involved in sectarian violence that has killed American soldiers).

20. *Id.* at 37.

21. *Id.* at 19 n.9.

22. International scrutiny of Iran’s nuclear program intensified in 2003 when it was revealed that A.Q. Khan, the nuclear scientist behind Pakistan’s development of nuclear weapons, sold Iran nuclear technologies and designs. *Id.* at 23.

23. *Id.*

24. *Id.* Iranian leaders claim that Iran is developing nuclear technologies for peaceful energy purposes, which they claim is their right as a party to the international Nuclear Non-Proliferation Treaty. *Id.* at 24. These claims have been met with widespread skepticism in the United States in part because of the perception that Iran’s regime views a nuclear weapon as the strategic instrument it can use to dominate the Persian Gulf region. *Id.* Furthermore, Iran is developing uranium enrichment sites that appear unsuitable for purely civilian uses. *Id.* at 23.

25. *Id.* at 36–48.

and the continuing Global War on Terror, Iran's cooperation with Al Qaeda and support for the Taliban and other militants in Afghanistan have caused the rift between the United States and Iran to grow deeper.²⁶

As the Obama Administration prepares to implement the Comprehensive Act, there are legitimate questions over whether this new sanctions regime will actually be given substance and force.²⁷ After all, following the passage of the Iran and Libya Sanctions Act of 1996 (ILSA),²⁸ the Clinton and Bush Administrations did not sanction a single foreign company investing in Iran's energy sector, because of a desire to avoid international trade conflicts.²⁹ Although the language of the Comprehensive Act is apparently tougher and gives the President less discretionary space to avoid carrying out sanctions,³⁰ it is not clear whether the Obama Administration will have the temerity to carry out the sanctions to an extent that will make them effective.³¹

In Part I, this Comment recounts the history of U.S. sanctions toward Iran, including the failures of the 1996 Iran and Libya Sanctions Act. Part II examines the present state of sanctions against Iran including President Obama's diplomatic efforts and the mandates imposed by Congress's passage of the Comprehensive Act. In Part III, this Comment critically analyzes the potential legal and policy implications of the Comprehensive Act. Part III discusses: (1) the legal barriers posed to implementing the sanctions; (2) whether the amended language instituted by the Comprehensive Act will make it any more likely that extraterritorial sanctions will be effectively implemented; and (3) whether, given the checkered history of U.S. economic sanctions, the Act will have the desired effect or potentially backfire. In Part IV, this Comment asserts that the full implementation of the Comprehensive Act represents the last best chance to prevent Iran from acquiring nuclear weapons without resorting to armed conflict. This Comment contends that the Obama Administration should sanction companies from countries—especially China—that are not cooperating in implementing sanctions that do energy-related business with Iran.

26. *Id.* at 44–47.

27. *See, e.g.*, Press Release, Senator Jon Kyl, Kyl Reaction to Sanctions on NAFTIRAN (Sept. 30, 2010), available at <http://kyl.senate.gov/record.cfm?id=328110> (“For more than 12 years, the Iran Sanctions Act has not been enforced. . . . The Administration, by continuing to ignore blatant violations of our sanctions laws by Chinese companies, has undermined our sanctions regime on Iran.”).

28. Pub. L. No. 104-172, 110 Stat. 1541.

29. *See* KATZMAN, *supra* note 1, at 6.

30. For instance, under the previous legislation, the President could issue a waiver if it was “important” to the United States’s national interest. § 9(c), 110 Stat. at 1547. The Comprehensive Act amends that provision, requiring that the President only issue a waiver if it is “necessary” to the national interest. The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 102(c)(2)(B), 124 Stat. 1312, 1322 (codified as amended at 22 U.S.C. § 8513(f)(1)).

31. *See, e.g.*, Josh Rogin, *Will the Obama Administration Sanction Chinese Companies Doing Business in Iran?*, FOREIGN POLICY: THE CABLE (Oct. 5, 2010, 1:31 PM), http://thecable.foreignpolicy.com/posts/2010/10/05/will_the_obama_administration_sanction_chinese_companies_doing_business_in_iran.

I. A HISTORY OF UNITED STATES SANCTIONS AGAINST IRAN'S ENERGY SECTOR (1979–2009)

The United States has used economic sanctions targeted against Iran's energy sector as a foreign policy tool since the time of the Iranian Revolution and the subsequent Hostage Crisis of 1979. This part traces the history of those sanctions over the thirty years from the Hostage Crisis until the inauguration of President Barack Obama in 2009. As this part demonstrates, such sanctions were largely unsuccessful in causing Iran to alter its belligerent behavior.

A. Primary Sanctions by Executive Order

1. The Hostage Crisis (1979–1981)

Mass demonstrations in opposition to the government of the Shah of Iran, Mohammad Reza Pahlavi, caused the collapse of the Shah's regime in January 1979.³² After stoking the revolution in exile,³³ the Iranian cleric Ayatollah Ruhollah Khomeini returned to Iran to declare an Islamic Republic of Iran.³⁴ From the beginning, Khomeini fiercely opposed the policies of the United States, stating that “[a]ll our problems come from America.”³⁵

On November 4, 1979, pro-Khomeini radicals seized the U.S. embassy in Iran and took sixty-six Americans hostage.³⁶ U.S. President Jimmy Carter acted almost immediately by issuing a proclamation imposing a ban on the importation of Iranian oil into the United States.³⁷ Two days later, when he learned that the Iranians were about to pull all of their assets out of American banks, Carter issued an executive order, which blocked all property within U.S. jurisdiction owned by the Central Bank and Government of Iran, thereby freezing their assets.³⁸ By April 1980,

32. KENNETH M. POLLACK, *THE PERSIAN PUZZLE: THE CONFLICT BETWEEN IRAN AND AMERICA* 134–35 (2004).

33. *Id.* at 131.

34. *See id.* at 145.

35. *Id.* at 146; *see also id.* at 156 (“Khomeini’s obsessive hatred for the United States was a central motivating force in his decision making.”).

36. *Id.* at 153.

37. *Id.* at 164; *see* Proclamation No. 4702, 44 Fed. Reg. 65,581 (Nov. 12, 1979) (“[R]ecent developments in Iran have exacerbated the threat to the national security posed by imports of petroleum and petroleum products. Those developments underscore the threat to our national security which results from our reliance on Iran as a source of crude oil.”).

President Jimmy Carter derived statutory authority to suspend imports of petroleum from Iran from Section 232 of the Trade Expansion Act. *Id.* (citing the Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (2006)). Section 232 authorizes the President to regulate imports of a commodity if the President determines that the commodity “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” *Id.* § 1862(b)(3)(A).

38. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979); POLLACK, *supra* note 32, at 164. In order to freeze the assets by executive order, the President acted under the authority vested in him by the International Emergency Economic Powers Act (IEEPA). Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) (citing the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (2006)). In order to impose economic

President Carter broke diplomatic relations with Iran and issued executive orders instituting a total embargo on U.S. exports to Iran, imposing a ban on all imports from Iran, and prohibiting U.S. citizens from traveling to Iran or conducting financial transactions there.³⁹

These sanctions did not have their desired effect, however, as Iran refused to release the hostages.⁴⁰ As a result of the Iranian intransigence in the face of sanctions, President Carter ordered a military rescue attempt, Operation Eagle Claw, which ended tragically when a sandstorm caused some of the American helicopters to crash in the Iranian desert.⁴¹ Eight American servicemen lost their lives.⁴²

The Hostage Crisis did not come to an end until President Ronald Reagan took office in January 1981.⁴³ On January 19, 1981, the United States and Iran signed a negotiated settlement known as the Algiers Accords.⁴⁴ On January 21, 1981, after 444 days as hostages, the American captives were finally released.⁴⁵ Pursuant to the Algiers Accords, the United States revoked all of the previous executive orders that prevented oil imports from Iran and barred American oil companies from doing business with Iran.⁴⁶

2. The Lebanese Civil War

Beginning in August 1982, the United States stationed Marines in Beirut, Lebanon as part of an international peacekeeping force during the Lebanese Civil War.⁴⁷ On April 18, 1983, a suicide-bomber detonated a truck packed with explosives at the American Embassy in Beirut.⁴⁸ Sixty-three people were killed.⁴⁹ Later that year, on October 23, 1983, another suicide bomber

sanctions under the IEEPA, the President must declare a state of national emergency, defined by the Act as any “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.” 50 U.S.C. § 1701(a). It is interesting to note that, despite the requirements of the IEEPA that he do so, President Carter never consulted with Congress when imposing sanctions on Iran; nor did Congress insist upon it. HOSSEIN ALIKHANI, *SANCTIONING IRAN: ANATOMY OF A FAILED POLICY* 53 (2000).

39. Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (Apr. 17, 1980) (prohibiting all imports from Iran and imposing a ban on travel to Iran); Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980) (imposing an export ban on Iran); POLLACK, *supra* note 32, at 167.

40. POLLACK, *supra* note 32, at 166–67.

41. *Id.* at 168–69.

42. *Id.* at 169.

43. *Id.* at 172.

44. *Id.*

45. *Id.*

46. See Exec. Order No. 12,282, 46 Fed. Reg. 7,925 (Jan. 19, 1981) (revoking previous executive orders sanctioning Iran).

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the U.S. Supreme Court held that it was within the President’s authority under Article II of the Constitution as the country’s chief diplomat to negotiate the terms of the Algiers Accords and dispose of claims against foreign countries without express authorization of Congress. *Id.* at 686.

47. PATRICK TYLER, *A WORLD OF TROUBLE: THE WHITE HOUSE AND THE MIDDLE EAST—FROM THE COLD WAR TO THE WAR ON TERROR* 283–84 (2009).

48. *Id.* at 290–92.

49. *Id.* at 291.

detonated a truck bomb inside the U.S. Marine Corps barracks in Beirut.⁵⁰ A total of 241 American servicemen were killed.⁵¹

The pro-Iranian militant Islamist group Hizbollah claimed responsibility for both blasts, and American intelligence determined that Iranian officials supervised the planning of the attacks.⁵² The suicide attack on the Marine barracks, at the time, caused the greatest loss of American lives in one day since Vietnam,⁵³ and led to the withdrawal of American forces from Lebanon.⁵⁴

In response to Iran's support for Hizbollah and complicity in the Beirut bombings, in January 1984, the State Department declared Iran a "state sponsor of terrorism."⁵⁵ This designation earned Iran a number of economic sanctions which effectively denied foreign aid to Iran and denied the use of credit guarantees or other financial assistance from American parties to be used by Iran in acquiring weapons.⁵⁶

3. The Iran-Iraq War

On September 22, 1980, Saddam Hussein's Iraqi Army invaded Iran.⁵⁷ Although the Reagan Administration, following the release of the American hostages, came into office wanting to have little to do with Iran, the battlefield successes of the Ayatollah's armies in 1982 caused the Administration to fear that the Iranians would drive through Iraq westward to Jordan and Israel, or southward into the oil-rich Gulf states.⁵⁸ In response, the United States began to supply Iraq with civilian goods and intelligence; and in spite of its arms embargo against both countries, the United States began to encourage its European allies to supply Iraq with the munitions it needed to conduct the war.⁵⁹

Throughout the Iran-Iraq War, the Reagan Administration imposed a number of economic sanctions against Iran, seeking to further restrict its access to goods that could have military purposes and deny its ability to finance its war and terror propagation.⁶⁰ Furthermore, in order to protect the oil shipping lanes of the Persian Gulf, which were under attack by Iranian-laid mines and Iranian armored vessels, the U.S. Navy got directly involved in the war by escorting oil tankers through the Gulf.⁶¹

50. *Id.* at 297–98.

51. *Id.* at 298.

52. *See* POLLACK, *supra* note 32, at 203.

53. TYLER, *supra* note 47, at 298.

54. POLLACK, *supra* note 32, at 205.

55. KATZMAN, *supra* note 19, at 61. On January 13, 1984, Secretary of State George Shultz openly accused Iran of participating in the bombing of the Marine barracks. ALIKHANI, *supra* note 38, at 154.

56. ALIKHANI, *supra* note 38, at 154.

57. POLLACK, *supra* note 32, at 184–86.

58. *Id.* at 233–34.

59. *Id.* at 234.

60. ALIKHANI, *supra* note 38, at 154–56.

61. *See* POLLACK, *supra* note 32, at 223–27 (detailing the Tanker War).

Yet, in spite of Iran's belligerence and the designation of the country as a state sponsor of terrorism, the United States continued to buy petroleum from Iran. By 1987, Iran had become the second leading source of oil for the United States.⁶² In fact, the U.S. Department of Energy was purchasing Iranian oil for the Strategic Petroleum Reserve.⁶³

Outraged by the Department of Energy's purchases of Iranian oil, in 1987 Congress passed resolutions calling for a ban on Iranian imports.⁶⁴ President Reagan, not wanting to be outdone by Congress,⁶⁵ issued an Executive Order on October 29, 1987 prohibiting importation of Iranian crude oil and all other Iranian products.⁶⁶

4. Clinton Administration Executive Orders

Following the conclusion of the Iran-Iraq War in 1988 and the Persian Gulf War with Iraq in 1991, little changed with respect to America's policies toward Iran.⁶⁷ The United States pursued a policy of "dual containment" in which it made multilateral efforts to isolate both Iraq and Iran internationally.⁶⁸ When the Republicans took control of Congress in 1995 behind new House Speaker Newt Gingrich's "Contract with America," however, they immediately began to press President Bill Clinton to strengthen his policies against Iran.⁶⁹ At that time, Iran had begun aggressively pursuing weapons of mass destruction, was overtly undermining American efforts in the Israeli-Palestinian peace process, and remained the world's largest state sponsor of terrorism.⁷⁰ President Clinton's previous multilateral containment strategies had done little to persuade Iran to change its belligerent behavior.⁷¹ Moreover, in spite of the ban still in place from the Reagan Administration,⁷² by 1995, the United States was Iran's third largest trading partner and the largest purchaser of its oil.⁷³ Thus, the Clinton Administration appeared hypocritical when trying to persuade foreign countries to prevent their companies from doing business with Iran while looking the other way as American companies did

62. See Jonathan Fuerbringer, *Senators, 98 to 0, Back Import Ban Against Tehran*, N.Y. TIMES, Sept. 30, 1987, at A1.

63. ALIKHANI, *supra* note 38, at 156.

64. *Id.* at 156; see also Fuerbringer, *supra* note 62.

65. ALIKHANI, *supra* note 38, at 156.

66. Exec. Order No. 12,613, 52 Fed. Reg. 41,940 (Oct. 29, 1987). To impose the import ban on Iran, President Reagan used the statutory authority of the International Security and Development Cooperation Act of 1985, § 505, 22 U.S.C. § 2349aa-9 (2006), which prohibits imports from state sponsors of terrorism. Exec. Order No. 12,613, 52 Fed. Reg. 41,940.

67. For a summary of U.S.-Iran relations during the George H.W. Bush Administration, see POLLACK, *supra* note 32, at 244-59.

68. See ALIKHANI, *supra* note 38, at 166-70 (detailing dual containment sanctions); POLLACK, *supra* note 32, at 259-65 (detailing the policy behind dual containment).

69. POLLACK, *supra* note 32, at 270.

70. *Id.* at 265-70.

71. *Id.* at 270.

72. See *supra* note 66 and accompanying text.

73. POLLACK, *supra* note 32, at 270.

the same.⁷⁴ This issue culminated when Conoco, an American oil company, signed a one billion dollar contract to develop oil fields in Iran on March 6, 1995.⁷⁵

Shortly thereafter, on March 15, President Clinton signed an executive order prohibiting all petroleum development deals with Iran by U.S. companies, declaring that Iran “constitute[s] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”⁷⁶ Yet, even this move was criticized as too weak on Capitol Hill because the executive order allowed American companies to purchase oil from Iran and sell it to third countries—a practice that then accounted for a quarter of all oil sold by Iran.⁷⁷ Hoping to be able to finally take the moral high ground in encouraging multilateral sanctions against Iran,⁷⁸ on May 6, 1995, Clinton went even further in signing another executive order which banned all trade with Iran, including by the foreign subsidiaries of American corporations.⁷⁹ U.S. trade with Iran diminished immediately.⁸⁰

B. Iran and Libya Sanctions Act of 1996

1. The Passage of Extraordinary Measures

President Clinton’s executive orders did not do a great deal to inhibit Iran or influence foreign nations; it ironically only ended up hurting the American businesses forced to end commerce with Iran.⁸¹ As a result of a process dubbed “backfilling,” in which companies move into sanctioned countries to take over contracts abandoned by companies complying with the sanctions,⁸² the effect on Iran of losing American markets and investors was essentially nullified.⁸³ Instead, the Iranians were able to find new buyers for their oil at similar prices and new companies to invest in their energy sector.⁸⁴

Some members of Congress were chaffing to extend sanctions even further to foreign companies doing business in Iran, which they thought would increase multilateral involvement in the sanctions.⁸⁵ The Clinton

74. *Id.*

75. *Id.* at 271.

76. Exec. Order 12,957, 60 Fed. Reg. 14,615 (Mar. 15, 1995). President Clinton used his statutory authority under the IEEPA to impose the sanctions. *Id.*; see also *supra* note 38.

77. Douglas Jehl, *Oil Concern Ends a Deal with Iran as President Acts*, N.Y. TIMES, Mar. 15, 1995, at A1.

78. POLLACK, *supra* note 32, at 273.

79. Exec. Order 12,959, 60 Fed. Reg. 24,757 (May 6, 1995). In addition to the statutory authority vested in the President by IEEPA, see *supra* note 38, President Clinton relied on Section 505 of the International Security and Development Cooperation Act of 1985 to cut off all commerce with Iran by American companies and their foreign subsidiaries, Exec. Order 12,959, 60 Fed. Reg. at 24,757; see also *supra* note 66.

80. POLLACK, *supra* note 32, at 273.

81. See *id.*

82. See generally Rogin, *supra* note 31 (describing practice of backfilling).

83. POLLACK, *supra* note 32, at 273.

84. *Id.*

85. See ALIKHANI, *supra* note 38, at 288.

Administration struck a deal with Congressional members to postpone consideration of such legislation that had the great possibility of alienating many of America's trading partners in exchange for Clinton's promise that he would pressure U.S. allies at the G7 summit in June 1995 to limit trade with Iran.⁸⁶ Those efforts failed.⁸⁷

A year later, on June 25, 1996, a truck bomb decimated a building at the Khobar Towers complex in Saudi Arabia that was used to house American military personnel deployed to defend Saudi Arabia.⁸⁸ Nineteen Americans were killed and another 372 were wounded.⁸⁹ It was quickly proven that a group known as Hizballah al-Hijaz, a thinly-veiled proxy for the Iranian Revolutionary Guard that had been trained and equipped in Iran, was responsible for the carnage.⁹⁰

Exasperated with both Iran and America's allies, Congress acted.⁹¹ Senator Alfonse D'Amato of New York introduced legislation that would impose "extraterritorial" sanctions on foreign companies investing in Iran's energy sector.⁹² The D'Amato bill required the President to impose at least two out of a list of six sanctions on foreign companies that invested more than \$20 million in one year in Iran's energy sector.⁹³ The law gave the President discretion to waive sanctions if the home country of the violating firm agreed to impose economic sanctions on Iran, or if the President certified that a waiver was "important" to the United States's national interest.⁹⁴ Senator Edward Kennedy of Massachusetts eventually added Libya to the sanctions for its complicity in the Pan Am Flight 103 bombing,⁹⁵ as well as its more endemic support for terrorism and efforts to

86. *Id.*

87. *Id.* at 288–89. The G7 then included Canada, France, Germany, Japan, the United Kingdom, and Italy. *Id.* The insult to the United States was compounded when the French firm Total S.A. took over the \$600 million contract that the Clinton Administration pressured Conoco to abandon. *Id.*

88. POLLACK, *supra* note 32, at 282.

89. *Id.*

90. *Id.*

91. *Id.* at 286.

92. *Id.* at 287. Extraterritorial sanctions "reach beyond U.S. borders to . . . attach economic penalties to foreign firms for their dealings with sanctioned countries. Their aim is to broaden the observance of unilateral measures by applying U.S. law to private actors in third countries that have not imposed parallel controls." KENNETH A. RODMAN, SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT 1 (2001).

93. The six sanctions from which the President could choose were: (1) denial of Export-Import Bank assistance for exports, (2) denial of export licenses or other specific permission under the U.S. export control laws, (3) denial of loans in excess of \$10 million in any twelve month period from U.S. financial institutions, (4) prohibitions on sanctioned financial institutions from designation as a primary dealer in U.S. debt or as a repository of government funds, (5) ban on contracts with the U.S. government, and (6) case-by-case imposition of import restrictions. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6, 110 Stat. 1541, 1545–46 (codified as amended at 50 U.S.C. § 1701 note).

94. § 9, 110 Stat. at 1547–48.

95. POLLACK, *supra* note 32, at 287.

acquire weapons of mass destruction.⁹⁶ Congress passed the bill—entitled the Iran and Libya Sanctions Act—on July 23, 1996.⁹⁷

Many members of the executive branch despised the bill.⁹⁸ The ILSA was designed to proscribe wholly foreign activities by wholly foreign entities conducting such activities that were entirely legal in their home countries.⁹⁹ The bill amounted to a secondary boycott of Iran.¹⁰⁰ The United States had been the staunchest opponent to the secondary boycotts imposed upon Israel by Arab countries.¹⁰¹ In fact, Congress had made complying with the Arab boycotts a crime for U.S. companies.¹⁰² Furthermore, secondary boycotts were forbidden by the rules of the World Trade Organization (WTO).¹⁰³ For Clinton Administration diplomats and economic officials who were fighting to liberalize world trade, the ILSA undermined their case for trading partners to lower trade barriers.¹⁰⁴

As was often the case, however, President Clinton’s political advisors won the day.¹⁰⁵ They pointed out that Iran had just killed nineteen Americans and was despised by the American public at large, and that the bill had passed Congress by such an overwhelming margin that the President’s veto could have been easily overridden, thereby making the President appear even weaker.¹⁰⁶ Others in the Administration saw the Act as a useful tool to convince Iran’s trading partners that serious action needed to be taken to punish Iran.¹⁰⁷ On August 5, 1996, President Clinton signed the ILSA into law, stating: “I can only hope that some day soon, all countries will come to realize that you simply can’t do business with people by day who are killing your people by night.”¹⁰⁸

2. Challenges from the Inception

The passage of the ILSA infuriated Iran’s trading partners in the European Union, Russia, and elsewhere around the world.¹⁰⁹ The European

96. § 3(b), 110 Stat. at 1542.

97. POLLACK, *supra* note 32, at 287.

98. *Id.* at 287.

99. ALIKHANI, *supra* note 38, at 389 (“Investment in Iranian petroleum resources is perfectly lawful for non-US companies outside the United States.”).

100. *Id.*

101. *Id.* at 311.

102. *Id.*

103. POLLACK, *supra* note 32, at 287.

104. *Id.*

105. *Id.* at 287–88.

106. *Id.*

107. *Id.* at 287–88.

108. Remarks on Signing the Iran and Libya Sanctions Act of 1996 and an Exchange With Reporters, 32 WEEKLY COMP. PRES. DOC. 1403–04 (Aug. 5, 1996).

109. POLLACK, *supra* note 32, at 288; *see also* ALIKHANI, *supra* note 38, at 320 (quoting a European ambassador as stating: “American diplomacy has a taste for embargoes and boycotts which we do not share. . . . [W]e have not elected the American Congress, we have never voted for it and I do not see why we should let it legislate for the rest of the world.”).

International furor over extraterritorial sanctions had been sparked earlier in 1996 when Congress passed the Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. §§ 6021–6091 (2006)—better known as the Helms-Burton Act—which was aimed at foreign

Union declared the extraterritorial sanctions illegal,¹¹⁰ and passed legislation forbidding European companies from complying with the ILSA.¹¹¹ The European Council regulation held that no judgment made pursuant to the ILSA by a U.S. court or administrative body would be recognized or enforceable in any manner.¹¹² The regulation also obliged the officers of European companies to report to the European Commission whether their commercial interests were being affected by U.S. actions so that the European Union would be fully aware of the pressures the United States was exerting on European companies.¹¹³ Furthermore, to counteract the ILSA's requirement that the President investigate whether a sanctionable act has occurred, the European regulation prohibited anyone from providing any information which could facilitate the President in making such a determination.¹¹⁴

In October 1996, the European Union initiated formal WTO proceedings against the United States over the extraterritorial sanctions.¹¹⁵ The United States pressured the European Union to end the proceedings on the grounds that the sanctions involved foreign policy and national security issues that were outside the purview of the WTO.¹¹⁶ The Clinton Administration announced, when the WTO dispute resolution panel was formed, that it would not participate in the case on the theory that the United States had discretion to determine unilaterally whether the WTO's national security provisions applied.¹¹⁷

Despite the countermeasures imposed by the European Union, not a single foreign company entered into a development deal with Iran for over a year.¹¹⁸ The mere threat of U.S. sanctions was seemingly having the desired effect of deterring companies from investing in Iran.¹¹⁹ It was not

corporations that were negotiating joint ventures with the state-owned businesses of the Cuban government. RODMAN, *supra* note 92, at 176–83. Some of the property involved in certain joint ventures had been seized by the Cuban government after the Cuban revolution from Cubans who fled to America. *Id.* at 176–77. The most controversial piece of the bill created a private right of action for U.S. citizens, including naturalized Cubans, to sue foreign corporations for trafficking in confiscated property. *Id.* at 177–78.

110. POLLACK, *supra* note 32, at 288.

111. The blocking statute also had application to the Helms-Burton Act. ALIKHANI, *supra* note 38, at 326; Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 81–83 (1999).

112. ALIKHANI, *supra* note 38, at 326–27.

113. *Id.* at 327.

114. *Id.*

115. Clark, *supra* note 111, at 87.

116. *Id.* at 88.

117. Clark, *supra* note 111, at 88 n.129; *see also* Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997, at A1 (quoting Stuart Eizenstat, the Clinton Administration's point person for negotiating with the European Union over the sanctions, stating that the World Trade Organization (WTO) panel had "no competence" to rule on U.S. foreign policy).

118. *See* POLLACK, *supra* note 32, at 287–88.

119. *Id.*; *see also* RODMAN, *supra* note 92, at 187 ("ILSA influenced energy firms with significant U.S. business because they recognized that this is an issue with strong congressional support and a powerful domestic constituency. . . . Given the uncertainties of

until September 1997 that the first project that was determined to be in violation of the ILSA was signed, a \$2 billion contract for Total S.A. of France and its partners, Gazprom of Russia, and Petronas of Malaysia, to develop a gas field in Iran.¹²⁰

Faced with a direct challenge to the enforcement of the sanctions on the one hand, and the European blocking statutes and WTO proceedings from the European Union on the other, the Clinton Administration was faced with a strategic dilemma. Congress was infuriated by the Total S.A. deal and began putting pressure on the Administration to issue sanctions.¹²¹ Earlier that year in April 1997, however, the Administration came to an agreement with the EU just days before the WTO formal proceedings were slated to begin, wherein the EU agreed to suspend its WTO dispute so long as the Administration avoided sanctioning European firms under the Helms-Burton Act or the ILSA.¹²² Thus, if the Clinton Administration sanctioned Total S.A., it would unravel the negotiated understanding with the EU and resume the WTO dispute;¹²³ but if the Administration waived the sanctions, according to one Administration official, “every non-American energy firm on the globe [was] going to race in after [Total].”¹²⁴

Seeking to find a common ground that would pacify Congress and avoid a trade war with Europe, Clinton finally reached a negotiated compromise with the EU on May 18, 1998.¹²⁵ The European Union agreed to work harder to tighten export controls on materials and technology that Iran could use to develop weapons of mass destruction.¹²⁶ Accordingly, the Clinton Administration agreed to waive ILSA sanctions for the Total S.A. contract,¹²⁷ and indicated further that EU firms would continue to receive such waivers.¹²⁸ The standoff resulted in a clear victory for the Europeans, leaving European companies to invest freely in Iran;¹²⁹ and once the agreement was reached, the floodgates to Iranian investment opened.¹³⁰

U.S. behavior, foreign oil companies initially took a risk-averse approach and held off from Iranian contracts.”)

120. KATZMAN, *supra* note 1, at 6.

121. ALIKHANI, *supra* note 38, at 329–30 (stating that thirteen senators wrote to President Clinton warning that “[a] decision not to sanction will reveal the United States as a paper tiger, thus opening the floodgate for future investments and enriching a nation bent on buying weapons of mass destruction and funding terrorism”).

122. European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Barton Act and the U.S. Iran and Libya Sanctions Act, U.S.-Eur., Apr. 11, 1997, 36 I.L.M. 529; *see also* Clark, *supra* note 111, at 89.

123. *See* RODMAN, *supra* note 92, at 187.

124. *Id.* (second alteration in original).

125. *Id.* at 188.

126. *Id.*

127. *See* ALIKHANI, *supra* note 38, at 330–31. Secretary of State Madeleine Albright stated that the reasons for invoking the “national interest” waiver included increased European cooperation on issues of nuclear proliferation and terrorism, and that “granting the waiver will prevent retaliation against U.S. firms which the imposition of sanctions would probably engender and avoid possible challenges based on claims related to treaties and other international obligations.” *Id.*

128. KATZMAN, *supra* note 1, at 6 & n.7.

129. ALIKHANI, *supra* note 38, at 330.

130. POLLACK, *supra* note 32, at 289.

Thus, what deterrent effect the ILSA might have had outside of actually imposing sanctions became nullified once companies understood that sanctions were not much more than an empty threat.

C. The Bush Administration: Continuation of a Failed Policy

When President George W. Bush's Administration began—with several former oil executives in senior positions, including the President himself and his Vice President—it appeared that the Administration might support eliminating energy sanctions against Iran.¹³¹ With the ILSA set to expire in August 2001, Congress moved early in President Bush's first term to pass laws extending the sanctions.¹³² President Bush unsuccessfully tried to negotiate a lesser extension of two years, but, faced with veto-proof majorities in both houses, signed the five-year extension proposed by Congress.¹³³

The potential for a rapprochement with Iran, which was considered possible following Iran's initial cooperation against the Taliban in Afghanistan after the terrorist attacks of September 11,¹³⁴ was eliminated by President Bush's January 2002 State of the Union Address, in which President Bush included Iran, along with Iraq and North Korea, in an "axis of evil" that threatened the United States and free peoples around the world.¹³⁵ Moreover, from the beginning of the War in Afghanistan, sources showed that Iran was arming and training terrorists to kill American soldiers and giving safe harbor to members of Al-Qaeda.¹³⁶ Given that President Bush argued that the United States would not distinguish between terrorists and the states that harbored them, it appeared as if Iran would become a prime target for action in the "Global War on Terror."¹³⁷

131. *Id.* at 343. Reacting to the Clinton-era oil company sanctions in 1996, Vice President Richard Cheney, then the Chairman of Halliburton, called the sanctions "self defeating," and remarked that "[t]here seems to be an assumption that somehow we know what's best for everybody else." *Id.*

132. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN-LIBYA SANCTIONS ACT 4 (2003).

133. *Id.* President Bush, in his signing statement, did soften the rhetoric of the law which he was signing by leaving open the possibility that he would be amenable to discontinuing the sanctions should relations with Iran improve: "I believe that we should review sanctions frequently to assess their effectiveness and continued suitability." Statement on Signing the ILSA Extension Act of 2001, 37 WEEKLY COMP. PRES. DOC. 1132 (Aug. 3, 2001).

134. See generally MICHAEL A. LEDEEN, THE IRANIAN TIME BOMB 178–98 (2007) (detailing U.S.-Iran relations in the period following 9/11); POLLACK, *supra* note 32, at 343–352.

135. Address Before a Joint Session of Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 135 (Jan. 29, 2002) ("States like these and their terrorist allies constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic."); see also POLLACK, *supra* note 32, at 352.

136. LEDEEN, *supra* note 134, at 180; POLLACK, *supra* note 32, at 351.

137. LEDEEN, *supra* note 134, at 178.

Preoccupied by wars in Afghanistan and Iraq, however, the Bush Administration never developed a formal strategy for dealing with the Iranian threat throughout its two terms in office.¹³⁸ As such, the Clinton Administration policy of avoiding the enforcement of sanctions under the ILSA continued under the Bush Administration as well—and not just for firms who were covered by the United States’s trade agreement with the European Union.¹³⁹

Faced again with an expiration deadline for the sanctions in 2006, Congress voted for another five-year extension.¹⁴⁰ In this legislation, however, Congress created a formal reporting structure for Congress to conduct oversight to ensure the law was being enforced properly.¹⁴¹ The 1996 version of ISLA did not create formal investigative guidelines through which the President was expected to make his determinations; it merely gave to the President the power to sanction parties once he had made determinations based on his own discretion.¹⁴² In 2006, Congress, although using precatory language, sought to close this loophole by providing that the President “should” initiate an investigation “upon receipt by the United States of credible information” that a party was violating the law.¹⁴³ The amended statute also provided that the President “should” make his determinations within 180 days and report to Congress the basis for his determinations.¹⁴⁴

Despite Congress’s efforts, however, no firms were sanctioned as required by the law.¹⁴⁵ Yet, other than the May 1998 national interest waiver granted by the Clinton Administration, no waivers of sanctions were issued to the long list of companies in violation of the law; nor were reports of investigations submitted to Congress.¹⁴⁶

In addition to all of the oil investments that were signed in violation of American sanctions, Iran’s gas sector, which was virtually non-existent

138. *See id.* at 184 (“[T]he Bush [A]dministration still had no formal Iran policy and, like its predecessors, had not effectively responded to the ongoing Iranian war against us.”).

Perhaps contrary to public perception, President Bush balked at using force to strike Iranian nuclear facilities, resisting the urgings of more hawkish aides and commentators such as William Kristol of *The Weekly Standard* and Charles Krauthammer of *The Washington Post*, whom Bush referred to in private as “the bomber boys.” Goldberg, *supra* note 18, at 60.

139. Aside from European firms, companies from India, China, Russia, and Switzerland, among many others, signed development contracts. KATZMAN, *supra* note 1, at 24–28. The Bush Administration expressed a desire to maintain President Clinton’s multilateral strategy of working with the Europeans to persuade Iran to end its nuclear enrichment and support for terrorism, and therefore did not want to antagonize them by enforcing sanctions against their companies. KATZMAN, *supra* note 132, at 4.

140. Iran Freedom Support Act, Pub. L. No. 109-293, § 201, 120 Stat. 1344 (2006) (codified as amended at 50 U.S.C. § 1701 note).

141. *See* KATZMAN, *supra* note 132, 5–6.

142. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6, 110 Stat. 1541, 1545 (1996) (codified as amended at 50 U.S.C. § 1701 note).

143. § 201, 120 Stat. 1344, 1345.

144. § 201, 120 Stat. at 1345–46.

145. KATZMAN, *supra* note 1, at 6.

146. *Id.*

prior to its opening to foreign investment in 1998, has today become an increasingly integral part of Iran's economy.¹⁴⁷ What is more, the U.S. government has enriched foreign firms who have been in violation of its policy on Iran with government contracts.¹⁴⁸ In essence, the U.S. government has looked the other way at violations of its laws, thereby making the sanctions laws ineffectual through non-enforcement.¹⁴⁹

II. THE COMPREHENSIVE IRAN SANCTIONS ACCOUNTABILITY AND DIVESTMENT ACT OF 2010

As Part I of this Comment demonstrated, by the time President Barack Obama and the 111th Congress entered office in 2009, it was clear that the status quo policy with respect to Iran was a failure. This part discusses the efforts of both the President and Congress to reshape the Iran policies of America and its international partners, culminating with the passage and implementation of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010.

A. *Speaking Softly: President Obama's Failed Policy of Outreach*

President Obama's Administration took office in January 2009, with the belief that it had an opportunity for renewed diplomatic dialogue to deter Iran from developing weapons of mass destruction and build a constructive framework of relations after three decades of hostility.¹⁵⁰ In pursuit of its "open-hand" policy toward Iran,¹⁵¹ the Obama Administration articulated that it would offer enticements such as aiding in the development of Iran's peaceful nuclear energy and helping to integrate Iran into the global economy in exchange for Iranian suspension of its nuclear program.¹⁵²

On March 19, 2009, in a videotaped peace greeting to "the people and leaders of the Islamic Republic of Iran" on the occasion of the Iranian New

147. *Id.*

148. Jo Becker & Ron Nixon, *U.S. Enriches Companies Defying Its Policy on Iran*, N.Y. TIMES, Mar. 7, 2010, at A1. Nearly \$15 billion was paid to companies that were investing in Iran's energy sector, in direct violation of the ILSA. *Id.* Additionally, oil and gas companies that have invested in Iran have won lucrative leases to some fourteen million acres of offshore and onshore federal land for energy exploration. *Id.*

149. *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-58, IRAN SANCTIONS: IMPACT IN FURTHERING U.S. OBJECTIVES IS UNCLEAR AND SHOULD BE REVIEWED 15 (2007) (noting that State Department officials contended that the Act "has been useful in raising U.S. concerns over Iran" as a diplomatic tool).

150. KATZMAN, *supra* note 19, at 50–51; *see also* Remarks on Signing the Comprehensive Iran Sanctions, *supra* note 2 (President Obama stated: "Since taking office, I've made it clear that the United States was prepared to begin a new chapter of engagement with the Islamic Republic of Iran."). *But see* Michael Ledeen, Op-Ed, *We've Been Talking to Iran for 30 Years*, WALL ST. J., Sept. 30, 2009, at A23 (quoting Defense Secretary Robert Gates as noting that "every administration since 1979 has reached out to the Iranians in one way or another and all have failed").

151. Six days after his inauguration Obama reiterated the sentiments he made in his inaugural address by stating that "[i]f countries like Iran are willing to unclench their fist, they will find an extended hand from us." Yochi J. Dreazen & Jay Solomon, *Obama Offers Open Channels to Pakistan, Iran, North Korea*, WALL ST. J., Jan. 28, 2009, at A10.

152. KATZMAN, *supra* note 19, at 50–51.

Year, Obama stated: “My [A]dministration is now committed to diplomacy that addresses the full range of issues before us This process will not be advanced by threats. We seek instead engagement that is honest and grounded in mutual respect.”¹⁵³ Then, in early April, the State Department formally declared that the United States would participate in face-to-face negotiations with the Iranians.¹⁵⁴ Thereafter, President Obama stepped up his efforts toward direct negotiations by writing a letter directly to Iran’s supreme leader, Ayatollah Ali Khamenei, expressing a desire to amicably resolve the conflict over Iran’s nuclear program and to bring an end to decades of hostility between the two countries.¹⁵⁵

Although the Iranians never responded directly to any of Obama’s overtures, in late May the Iranians successfully tested a rocket capable of striking Israel and U.S. military bases in the Middle East.¹⁵⁶ Iranian President Mahmoud Ahmadinejad celebrated the test by declaring: “In the nuclear case, we send them a message: Today the Islamic Republic of Iran is running the show.”¹⁵⁷

When the Iranian regime violently suppressed popular protests that arose in response to the June 12, 2009 presidential elections that were widely thought to be rigged in favor of Ahmadinejad, President Obama vacillated, initially refusing to condemn the fraudulent elections or the crackdown that followed.¹⁵⁸ Only after the graphic scenes of the Iranian repression were seen by the world, and only after several European leaders had already strongly denounced the Iranian regime, did Obama make a statement condemning the violence.¹⁵⁹ Nevertheless, Obama did not publicly support the opposition,¹⁶⁰ and moreover, the President hedged his language by assuring the Iranians: “I’ve made it clear that the United States respects the sovereignty of the Islamic Republic of Iran and is not interfering with Iran’s affairs.”¹⁶¹ Obama held fast to his policy of outreach toward Iran.¹⁶²

On September 9, 2009, Iran finally responded to the invitation to negotiate—five months after the invitation was proffered—by issuing a negotiation proposal which conspicuously ignored issues surrounding its nuclear enrichment.¹⁶³ Instead, Iran publicly ruled out any compromise on the nuclear issue, insisting that it would never give up its right to a nuclear

153. Jay Solomon, *Obama Video Message Reaches Out to Iranians*, WALL ST. J., Mar. 20, 2009, at A3.

154. Jay Solomon, *U.S. to Join Iran Nuclear Talks*, WALL ST. J., Apr. 9, 2009, at A10.

155. Jay Solomon & Chip Cummins, *U.S. Further Ramps Up Contact With Iran*, WALL ST. J., Mar. 21, 2009, at A5.

156. Chip Cummins, *Iran Tests Missile, Launching Pre-Election Show of Defiance*, WALL ST. J., May 21, 2009, at A8.

157. Stephen F. Hayes, *Obama Caves to Iran*, WKLY. STANDARD, Sept. 28, 2009, at 9.

158. *Id.*

159. *Id.*

160. *Id.*

161. President’s News Conference, 2009 DAILY COMP. PRES. DOC. 498 (June 23, 2009).

162. Hayes, *supra* note 157, at 9.

163. Farnaz Fassih & Jay Solomon, *Iran Rejects Compromise Over Its Nuclear Program*, WALL ST. J., Sept. 10, 2009, at A1.

program.¹⁶⁴ Later that month, the United States revealed publicly for the first time that the Iranians were clandestinely enriching uranium at a nuclear facility that they were keeping secret from the international community.¹⁶⁵ At this time, Obama's engagement strategy began to come under serious criticism internationally, as French President Nicholas Sarkozy remarked: "I support the extended hand of the Americans, but what good have proposals for dialogue brought the international community? More uranium enrichment and declarations by the leaders of Iran to wipe a UN member state [Israel] off the map."¹⁶⁶

Obama revealed the existence of the secret Iranian enrichment facility in the hopes of gaining additional leverage in the face-to-face negotiations with Iran—which began on October 1, 2009 in Geneva, Switzerland—by uniting the multilateral negotiating group against Iran.¹⁶⁷ Joined by the other permanent members of the U.N. Security Council—China, France, Russia, and the United Kingdom—plus Germany (P5+1), the United States offered to forestall efforts to impose increased sanctions in exchange for the suspension of Iran's nuclear enrichment.¹⁶⁸ While Iran did not agree to the so-called "freeze for freeze" agenda, the Iranian delegation did agree in principle to transfer a large amount of its enriched nuclear fuel to Russia and France so that the outside countries could enrich it to be used by Iran for peaceful purposes.¹⁶⁹ While some members of the Obama Administration were cautiously optimistic about what Iran's concessions meant for breaking the stalemate, critics saw the concessions—coupled with Iran's refusal to suspend enrichment—as a cynical ploy to buy time to avoid sanctions and continue enrichment.¹⁷⁰

The critics were right. Iran very quickly reneged on its offer to ship its enriched uranium abroad,¹⁷¹ and the Obama Administration's year-end deadline for negotiations came and went without any progress.¹⁷² In sum, despite the President's conciliatory attitude, the Iranian regime remained intractable throughout the one-year timetable he imposed for

164. *Id.*

165. Jonathan Weisman et al., *West Raps Iran Nuclear Site*, WALL ST. J., Sept. 26, 2009, at A1.

166. Goldberg, *supra* note 18, at 65.

167. *See* Weisman et al., *supra* note 165.

168. Jay Solomon & Farnaz Fassihi, *U.S. and Iran Make Offers on Nuclear Talks*, WALL ST. J., Oct. 1, 2009, at A11.

169. Marc Champion & Jay Solomon, *Iran Agrees To Transfer Uranium Abroad*, WALL ST. J., Oct. 2, 2009, at A1.

170. *See, e.g., id.*

171. Chip Cummins et al., *Iran Seeks to Alter Agreement*, WALL ST. J., Oct. 30, 2009, at A13. The State Department documents released by WikiLeaks in 2010 show that President Ahmadinejad was in favor of the deal, but was attacked by the Iranian Parliament. Jay Solomon, *Offers, Doubts Greet Iran Talks*, WALL ST. J., Dec. 2, 2010, at A14. Iran's Supreme Leader Ayatollah Ali Khamenei eventually sided against Ahmadinejad and scuttled the deal. *Id.* The Austrian diplomat who was the source of this information reported that "Iran's failure to follow through . . . may have been due to a decision by Khamenei either that the West was not trustworthy . . . or that Iran could get more." *Id.*

172. Glenn Kessler, *While Protests Roil Iran, U.S. Prepares Sanctions*, WASH. POST, Dec. 30, 2009, at A1.

negotiations.¹⁷³ Instead, Obama's failed outreach was met with dilatory tactics through which Iran bought valuable time in developing a nuclear weapon.¹⁷⁴

B. Carrying a Big Stick?: The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

Toward the end of the one-year deadline for negotiations imposed by the Obama Administration, members of Congress began to grow impatient with both Iran and the Administration.¹⁷⁵ Over the objections of some members of the Administration,¹⁷⁶ both the Senate and the House introduced and passed legislation that was meant to strengthen and expand sanctions against Iran that were already in place,¹⁷⁷ as well as to pressure the Administration to use all the tools at its disposal to achieve results.¹⁷⁸ The Administration successfully lobbied the House-Senate conference committee to delay the completion of sanctions until it could finish its efforts in persuading the U.N. Security Council to enact sanctions of their own.¹⁷⁹ House Bill 2194, The Comprehensive Iran Sanctions, Accountability, and Divestment Act, was passed overwhelmingly by both houses on June 24, 2010.¹⁸⁰ The President signed it into law on July 1.¹⁸¹

The Comprehensive Act greatly expands the scope of sanctionable activities beyond previous law so as to include efforts by foreign firms to (1) sell, lease, or provide to Iran any goods, services, technology, information, or support that would allow Iran to maintain or expand its petroleum refineries; and (2) supply refined petroleum products.¹⁸² The triggering threshold for supplying refined petroleum is a \$1 million transaction.¹⁸³ The Comprehensive Act requires that the above listed

173. See Matthew Lee, *Clinton: New Sanctions on Iran Needed*, ASSOCIATED PRESS, Dec. 14, 2009, available at <http://www.iranenergyproject.org/303/clinton-new-sanctions-on-iran-needed> (quoting Secretary of State Hillary Clinton as remarking: "I don't think anyone can doubt that our outreach has produced very little in terms of any kind of a positive response from the Iranians").

174. See KATZMAN, *supra* note 19, at 23–24 (detailing Iran's nuclear development efforts).

175. Kevin Bogardus, *Democratic Senators Frustrated with State Department on Iran*, THE HILL (Oct. 6, 2009), <http://thehill.com/business-a-lobbying/61921-dem-senators-frustrated-with-state-dept-on-iran>.

176. See *id.*

177. See KATZMAN, *supra* note 1, at 16–23 (detailing the contents of the House and Senate legislation in comparison to the final law).

178. See *id.* at 16 (stating that the House made its policy explicit in the House Bill by stating that it "shall be U.S. policy to fully enforce" the ILSA).

179. *Id.* at 13.

180. *Id.*

181. *Id.*; see also *supra* notes 1–2 and accompanying text.

182. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 102, 124 Stat. 1312, 1317–19 (codified at amended at 50 U.S.C. § 1701 note).

183. *Id.* at 1318.

sanctionable activities “directly and significantly” assist Iran in developing refining capability or in obtaining refined petroleum.¹⁸⁴

The Comprehensive Act further requires that the sanctionable activity be done knowingly, defined as either with actual knowledge or where the party “should have known, of the conduct, circumstances, or the result.”¹⁸⁵ The constructive knowledge standard is also extended with respect to the ownership and control of foreign subsidiaries by their American parent corporations.¹⁸⁶ This is a significant extension of corporate liability from the previous ILSA which held parent corporations liable only if they approved and/or facilitated the prohibited activity.¹⁸⁷

These provisions have the potential of bringing many different companies into violation of the law, including financial services companies, telecommunications companies, shipping companies, insurance and reinsurance companies, and steel companies.¹⁸⁸ The question remains how broadly this Administration and future administrations will construe these provisions in determining which companies to investigate.

In light of the fact that only one investigation was conducted under the ILSA, Congress has sought to strengthen the name-and-shame function of the sanctions by mandating that the President initiate an investigation upon the receipt of credible information that sanctionable conduct has occurred, and that he report a determination to Congress within 180 days.¹⁸⁹ The investigation provision was previously optional.¹⁹⁰ The President was, however, given some diplomatic leeway in conducting investigations by the Comprehensive Act. For one, the investigations remain permissive, as opposed to mandatory, until July 1, 2011, a year after the date of enactment.¹⁹¹ Thereafter, the President can request that the imposition of mandatory investigations be delayed provided that the President gives Congress written reports on the efficacy of his diplomatic efforts to prevent

184. *Id.* at 1317. The bill does not define the term “directly and significantly” so this remains an important interpretive issue that must be addressed by the Administration. *Id.* at 1316–17 (the “directly and significantly” standard is not included in the Act’s definition section).

185. *Id.* at 1317.

186. *Id.* at 1320. If American corporations are in fact sanctioned for the activities of their foreign subsidiaries, it will be interesting to see how courts apply the constructive knowledge standard in interpreting how much knowledge parent corporations should have for the acts of their subsidiaries. A discussion of the possible interpretations, however, is beyond the scope of this Comment.

187. Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067, 66,068 (Dec. 16, 1996).

188. *See* Solomon et al., *supra* note 3. Although this Comment focuses on the impact and efficacy of energy sanctions, the Comprehensive Act also imposes new restrictions implemented by the Treasury department on both domestic and foreign financial institutions, freezing out of the American financial system those companies that transact with or perform financial services for any blacklisted Iranian institution designated for sanction (for example the Iranian Revolutionary Guard Corps, the Central Bank of Iran, and the state-run entities of the energy sector). *Id.*; *see also* § 102, 124 Stat. at 1331–35.

189. § 102, 124 Stat. at 1327.

190. *See supra* notes 142–44 and accompanying text.

191. § 102, 124 Stat. at 1326–28.

parties and governments from engaging in sanctionable activities.¹⁹² Furthermore, under an additional diplomatic carve-out called the “Special Rule,” the President is not required to investigate a party that is no longer engaging in the activity at issue or has taken significant steps toward stopping the activity.¹⁹³

In the event the President actually initiate an investigation, either voluntarily or by mandate, the Comprehensive Act, at least in theory, has made it more difficult for the President to issue a waiver for a company in violation. Under the previous legislation, the President could issue a waiver if it was “important” to the United States national interest.¹⁹⁴ The Comprehensive Act amends that provision, requiring that the President may only issue a waiver if it is “necessary” to the national interest.¹⁹⁵ Of course, given that no President has issued a waiver since the sanctions for the Total S.A. project were waived in 1998,¹⁹⁶ the increased standard may have little observable effect.

Additionally, the Comprehensive Act now requires the President to impose three different sanctions on violating companies,¹⁹⁷ and has added three new sanctions to the previous menu of six from which he must choose.¹⁹⁸ If implemented, the three new sanctions have the possibility to impose a great deal of economic harm on global firms who violate the United States’s sanctions policies. The new sanctions are: (1) prohibition on foreign exchange transactions subject to United States’s jurisdiction; (2) prohibition on transfers of credit or payment between, by, through, or to financial institutions that are subject to United States’s jurisdiction; and (3) prohibition on transacting or exercising any right, power, or privilege with respect to property subject to the jurisdiction of the United States.¹⁹⁹

In terms of preventing public taxpayers’ dollars from enriching companies in violation of the sanctions, the law contains a provision requiring companies seeking U.S. Government procurement contracts to certify, by conducting an internal evaluation, that neither they nor any subsidiary engages in sanctionable activity.²⁰⁰ Furthermore, the Comprehensive Act establishes a framework giving state and local governments the authority to implement divestment laws that prohibit the use of public funds such as pension funds and endowments to invest in, or do business with, companies that invest in Iran’s energy sector.²⁰¹ To

192. *Id.* at 1326–27.

193. *Id.* at 1325.

194. *See supra* note 94 and accompanying text.

195. § 102, 124 Stat. at 1322.

196. *See supra* notes 127–28 and accompanying text.

197. § 102, 124 Stat. at 1317–18.

198. *Id.* at 1320–21; *see also supra* note 93.

199. *Id.* at 1321.

200. *Id.* at 1321–22; *see also supra* note 148 and accompanying text.

201. *Id.* at 1341–43. By providing a framework for state and local governments to divest from companies investing in Iran’s energy sector, and providing further that such regulations will not be preempted by any federal law or regulation, *id.* at 1343, Congress prevented certain constitutional preemption challenges to the state and local ordinances.

further encourage divestment from companies enriching the Iranian regime, the Comprehensive Act provides a safe harbor provision for asset managers by preventing shareholders and trustees from suing them for either divesting from or avoiding investing in companies that violate the Comprehensive Act.²⁰²

In sum, on the surface the amended sets of sanctions are clearly intended to force foreign firms to choose between either doing business with Iran, or losing all economic interest in and with the United States.²⁰³

C. An International Consensus Tentatively Emerges

As part of his strategy of engagement with Iran, President Obama has sought to build a unified multilateral coalition in both negotiating and applying pressure on Iran.²⁰⁴ In that regard, the Obama Administration is

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Supreme Court held that a Massachusetts statute that barred state entities from buying goods and services from any party identified on a state-compiled list as doing business with Burma (Myanmar) was preempted by a statute later passed by Congress directing sanctions at Burma. *Id.* at 388. The Court reasoned that the Massachusetts law prohibited some activity the federal law allowed, and allowed some activity the federal law prohibited. *Id.* at 376. As such, the Court found that the Massachusetts law was “an obstacle to the accomplishment of Congress’s full objectives under the federal Act,” because it took away some of the President’s discretion in applying the diplomatic leverage Congress specifically intended. *Id.* at 373. The Divestment section of the Comprehensive Act seems written with *Crosby* in mind.

On a related note, the Insurance Commission of California has begun to require insurance companies that operate in California to disclose their dealings with Iran and companies that invest in Iran. Jaime L. Brockway, *California Insurance Commissioner Sues to Stop Iran Investments*, INS. & FIN. ADVISOR (Nov. 15, 2010), <http://ifawebnews.com/2010/11/15/california-insurance-commissioner-sues-to-stop-iran-investments>. The Commission has prohibited any such company from selling insurance in California. Former Insurance Commissioner Steve Poizner claimed legal authority to do so, stating that “[s]ince companies doing business with Iran face financial risk, I have the authority to protect insurer portfolios from investments in those companies.” *Id.* To date more than one thousand insurance companies in California have agreed to forgo business with the list of fifty companies promulgated by Poizner’s office as doing business with Iran’s energy, nuclear, and military sectors. *Id.* Additionally, the California Insurance Commission has disqualified some \$6 billion in holdings by insurance companies in those fifty blacklisted companies. *Id.*

Because the insurance premiums of private citizens do not seem to fall under the definition of assets that states are authorized to divest under the Comprehensive Act, it does not appear as if California’s regulations would fall under the authorized umbrella of the statute. *See* § 102, 124 Stat. at 1341–43. As a result, the regulations could raise some preemption challenges under *Crosby*.

202. § 102, 124 Stat. at 1343–44; *cf.* Amy Deen Westbrook, *What’s In Your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151 (2010) (detailing how U.S. investment dollars capitalize companies that do business with state sponsors of terrorism, including Iran).

203. *See* Solomon et al., *supra* note 3 (quoting Representative Ron Klein (D-FL), one of the Comprehensive Act’s original sponsors, as stating: “Foreign companies are going to have to make a choice: Do they want to do business with us or with the Iranians?”).

204. *See* Remarks on Signing the Comprehensive Iran Sanctions, *supra* note 2.

having more success than previous administrations in getting international allies to go along with the latest round of sanctions.²⁰⁵

On June 9, 2010, the U.N. Security Council passed a binding resolution to take aim at Iran's ability to develop weapons of mass destruction, while targeting Iran's conventional military and Revolutionary Guard Corps for the first time.²⁰⁶ The United States wanted to target Iran's financial, insurance, and other industries, but China and Russia—permanent members of the Security Council with absolute vetoes over all resolutions—insisted that sanctions not impact Iran's day-to-day economy or foreign trade.²⁰⁷ The United States was, however, able to insert some language in the preamble to the resolution which mentions the link between Iranian Central Bank and Iran's energy sector revenues and the regime's proliferation activities.²⁰⁸ American officials argued that such language was broad enough to sanction companies dealing with both the Central Bank and the energy sector.²⁰⁹ This gave President Obama the imprimatur of the U.N. to sign off on harsh the sanctions passed by Congress, and to encourage allies to do the same.²¹⁰

In contrast to the debacle President Clinton faced when trying to convince Europe to join the sanctions against Iran,²¹¹ the European Union followed on the heels of the passage of the Comprehensive Act in July 2010 with robust sanctions of its own.²¹² While they do not go so far as to ban importing oil and gas from Iran, or exporting refined petroleum (i.e., gasoline) to Iran,²¹³ European sanctions are similar to the American ones in that they ban European companies from investing in Iran's energy sector as well as selling goods and services to Iran that could be used in developing its energy sector.²¹⁴ Furthermore, the EU sanctions contain measures to deny Iran access to financial markets, freeze the assets of certain targeted individuals and entities, and comprehensively ban all military equipment.²¹⁵ Because the EU is Iran's largest partner, the EU measures have a good chance of having a significant impact.²¹⁶

To date—in addition to the European Union—Japan, South Korea, Canada, and Australia have all enacted measures to restrict investment in

205. See John Pomfret, *Chinese Firms Bypass Sanctions on Iran, U.S. Says*, WASH. POST, Oct. 18, 2010, at A1 (“The Obama [A]ministration has cobbled together a growing network of countries and companies that have announced measures to cut investments in Iran.”).

206. See KATZMAN, *supra* note 1, at 41–42, 45–48 (detailing the provisions of the U.N. sanctions resolutions).

207. Neil MacFarquhar, *U.N. Approves New Sanctions To Deter Iran*, N.Y. TIMES, June 10, 2010, at A1.

208. *Id.*

209. *Id.*

210. *Id.*

211. See *supra* Part I.B.2.

212. Stephen Castle, *Europe Toughens Penalties on Iran for Nuclear Work*, N.Y. TIMES, July 27, 2010, at A7.

213. See KATZMAN, *supra* note 1, at 43, 45–48.

214. See *id.* at 45.

215. See *id.* at 46–48.

216. Castle, *supra* note 212.

Iran's energy sector.²¹⁷ Thanks to these new sanctions, many of Iran's suppliers of refined petroleum have ceased business with Iran, and many of the companies investing in its energy sector have either pulled out or are winding down their operations.²¹⁸ As a result, China has become Iran's last major remaining trading partner still willing to do oil and gas deals.²¹⁹

D. Preliminary Implementation

On September 30, 2010, after its first round of investigations pursuant to the Comprehensive Act, the State Department announced that it was imposing sanctions on the Switzerland-based Naftiran Intertrade Company, a wholly owned subsidiary of an Iranian state-owned company.²²⁰ During the same briefing, the State Department announced that four major European oil companies had pledged to end their investment in Iran's energy sector.²²¹ Such a pledge brought the four companies under the "Special Rule" of the Comprehensive Act, which allows companies to avoid sanctions by making assurances that they will end their investments.²²²

Although encouraged by the Administration's willingness to actually use the sanctions that are available, many lawmakers on Capitol Hill remain more concerned with the companies that were not included in the sanctions than the one that was.²²³ The Administration, however, has countered such concerns by reiterating that the purpose of the Comprehensive Act is not necessarily to impose sanctions per se, but rather to use them as credible diplomatic leverage in encouraging countries and companies to pull out of

217. Pomfret, *supra* note 205.

218. See *Energy-Related Companies Ending Iran Ties*, FOUND. FOR DEF. OF DEMOCRACIES: THE IRAN ENERGY PROJECT, <http://www.iranenergyproject.org/companies-cutting-ties-with-iran.pdf> (last updated Sept. 23, 2010).

219. See Pomfret, *supra* note 205.

220. Rogin, *supra* note 31; see also James Steinberg, Deputy Sec'y of State, Briefing on Iran Sanctions Act Implementation (Sept. 30, 2010), available at <http://www.state.gov/s/d/2010/148479.htm>.

221. Steinberg, *supra* note 220 (identifying the four companies as Total S.A. of France, Statoil of Norway, Eni of Italy, and Royal Dutch Shell of the United Kingdom and the Netherlands).

222. Steinberg, *supra* note 220 ("These companies have provided assurances to us that they have stopped or are taking significant verifiable steps to stop their activity in Iran and have provided assurances not to undertake new energy-related activity in Iran that may be sanctionable."); see also Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 102, 124 Stat. 1312, 1325 (codified as amended at 50 U.S.C. § 1701 note). The exact language of the "Special Rule" provides that the President need not investigate a party that "is no longer engaging in the [sanctionable] activity or has taken significant verifiable steps toward stopping the activity; and . . . the President has received reliable assurances that the [party] will not knowingly engage in [a sanctionable activity] in the future." *Id.*; see also *supra* note 193 and accompanying text.

223. See Rogin, *supra* note 31 (quoting a joint statement from Senators Joseph Lieberman (I-CT), Susan Collins (R-ME), and Jon Kyl (R-AZ): "We are particularly concerned that the majority of the companies that . . . [are] still selling gasoline to Iran are in China. We urge the Administration to complete its own investigations swiftly and enforce the sanctions law, comprehensively and aggressively, against any violators.").

Iran.²²⁴ Thus, the Administration will apply the formal sanctions available to it only after all diplomatic options have been exhausted.²²⁵

The Obama Administration has reportedly been engaged in diplomatic talks with China to persuade China's companies to end their business ties with Iran, which are enabling the regime in Tehran to skirt sanctions.²²⁶ If the Chinese are not forced to end their investment in Iran, or worse, if they take over projects abandoned by companies in countries that are complying with the sanctions, there is great concern that the tentative consensus toward sanctions could crumble.²²⁷

Nevertheless, the preliminary results of the sanctions demonstrate that they are beginning to have their desired effect. According to members of the Obama Administration who testified before the House Committee on Foreign Affairs on December 1, 2010, the sanctions have caused an eighty-five percent drop in refined petroleum imports into Iran, and have cost Iran close to \$60 billion in foreign energy investments, as well as the technology and expertise that come with them.²²⁸ Furthermore, Iran has been almost entirely frozen out of the international financial system.²²⁹ Iran has suffered significant economic difficulties since the passage of the multilateral sanctions with fears of inflation rising and their currency—the rial—becoming devalued.²³⁰ There are signs of domestic unrest as the Iranian middle class is blaming the regime for the economic difficulties.²³¹ And, as a sign that the sanctions are not just harming Iran economically but causing changes in behavior, the pressures from the sanctions have caused Iran to cut back its funding for the terror group Hezbollah by more than forty percent.²³²

224. See Steinberg, *supra* note 220 (“I found a chance to talk with a number of members of Congress who have been very positive about the actions that we’ve taken. We’ve acted fully in accordance with law. And what they understand is that the goal here is not to impose sanctions for sanctions’ sake, but to end companies from doing business within Iran. And so we believe the model that we would like to see every company follow, is to follow the model taken by the four European firms.”).

225. See *id.*

226. See Pomfret, *supra* note 205; see also Steinberg, *supra* note 220.

227. See Pomfret, *supra* note 205 (quoting a senior U.S. official as stating: “What the Japanese and European companies are most concerned about is that they’ve left projects that are real prizes in Iran. Their biggest concern is stepping away under pressure and having the Chinese go in.”). But see Steinberg, *supra* note 220 (“[I]n addition to our encouragement of people not to undertake so-called backfill type activities, we obviously make it clear to others the potential consequences if their firms were to do that in a way that would violate [the Comprehensive Act].”).

228. *Implementing Tougher Sanctions on Iran: A Progress Report: Hearing Before the H. Comm. on Foreign Affairs*, 111th Cong. 14–15 (2010) (statement of William J. Burns, Undersecretary of State for Political Affairs).

229. *Id.* at 22–24 (statement of Stuart A. Levey, Undersecretary of Treasury for Terrorism and Financial Intelligence).

230. *Id.* at 32.

231. KATZMAN, *supra* note 1, at 50–51.

232. Yaakov Katz, *Iran Said To Have Cut Hezbollah Aid by 40%*, JERUSALEM POST, Dec. 16, 2010, at 2 (“Iran has in recent years provided Hezbollah with close to \$1 billion in direct military aid, but due to the impact of the recent round of international sanctions, the Islamic Republic has been forced to cut back on the funding. The money is used by Hezbollah to

When Iran agreed to meet with the P5+1 to negotiate for the first time in over a year in December 2010, the Obama Administration became cautiously optimistic that the sanctions were beginning to force the Iranian regime to accept that continuing nuclear development was not worth the severe costs imposed by the sanctions.²³³ Iran remained intransigent at the talks, however, as its negotiator insisted that Iran would never give up its right to nuclear enrichment.²³⁴ The Obama Administration left the negotiations promising to test “Iran’s pain threshold” by refusing to allow Iran’s disingenuous efforts of negotiating to undermine the even tougher application of sanctions.²³⁵

It remains to be seen how the Obama Administration balances all of the diplomatic concerns that a successful implementation entails, and whether Congressional pressure will have any impact on the Administration’s execution of the Comprehensive Act. Moreover, the true measure of the Comprehensive Act’s success will not be in the number of companies that end their investment in Iran, but rather in the costs the sanctions exact on the Iranian regime. The metric for success requires that the Iranians permanently suspend nuclear development.

III. ISSUES IN EFFECTIVE IMPLEMENTATION: A CRITICAL ANALYSIS

Given its sweeping nature and extraterritorial focus, the Comprehensive Act is certain to face a number of inherent structural challenges as it is interpreted and applied by the executive branch going forward. This part critically analyzes the legal, political, and endemic policy challenges that the Comprehensive Act may face if it is to be implemented as the 111th Congress intended.

buy advanced weaponry, train and pay its operatives and establish military positions and sustain them throughout Lebanon.”).

233. See Glenn Kessler, *Clinton Vows ‘Good Faith’ Talks with Iran*, WASH. POST, Dec. 4, 2010, at A8.

234. Glenn Kessler, *Little Progress Seen as Talks with Iran Come to End*, WASH. POST, Dec. 8, 2010, at A9. One senior U.S. official stated that the talks were accompanied by a fair amount of “Iranian venting and posturing.” *Id.*

235. David E. Sanger, *Harder Push To Stop Iran from Making Nuclear Fuel*, N.Y. TIMES, Dec. 11, 2010, at A6. Aside from the precarious economic condition in which the sanctions have placed the Iranian regime, the P5+1 may have more leverage over Iran now that it has been revealed that the Iranian nuclear development facilities suffered major setbacks when a computer worm known as Stuxnet caused Iranian centrifuges to stop working. David Crawford & Jay Solomon, *Report Says Computer Worm Stymied Iran Nuclear Sites*, WALL ST. J., Nov. 24, 2010, at A13. On November 29, 2010, the Iranian nuclear program was targeted by another seemingly covert attack when two separate car bombs killed one prominent Iranian nuclear scientist and injured another. Farnaz Fassihi, *Bombs Target Iranian Nuclear Scientists*, WALL ST. J., Nov. 30, 2010, at A15.

A. *Legal Barriers to Effective Implementation: Limits to Prescriptive Jurisdiction*

1. Limits from Customary International Law

Prior to the enactment of the Iran and Libya Sanctions Act, economic sanctions either directly targeted Iran by preventing the importation of Iranian oil into the United States,²³⁶ or targeted American corporations by preventing them from investing in Iran.²³⁷ The Iran and Libya Sanctions Act—and the Comprehensive Act which amended it—intentionally went beyond domestic enforcement by targeting the overseas activities of foreign firms to force those firms to choose between doing business with Iran and having access to American markets.²³⁸ This section analyzes whether, in practice, any potential domestic U.S. legal barriers exist to the prospective implementation of the sanctions regime.

It is well settled that Congress has the power under the U.S. Constitution to enact laws that regulate conduct occurring extraterritorially.²³⁹ The Constitution specifically grants Congress broad power to regulate commerce with foreign nations, and one component of this grant is the power to regulate commerce that occurs beyond U.S. territory.²⁴⁰ Congress has used this power to regulate activity of non-U.S. citizens beyond its borders in such substantive areas as antitrust, foreign corrupt practices, and economic sanctions.²⁴¹

Under international law, however, a state's power to regulate an actor's conduct is subject to the limitations of its prescriptive—or legislative—jurisdiction.²⁴² Presently, American courts limit the extraterritorial jurisdictional reach of American laws based on the “effects doctrine,” which posits that a country may only regulate conduct of foreign nationals that occurs outside that country's territory if such conduct “has or is intended to have substantial effect within its territory.”²⁴³ Even if such

236. See *supra* note 46 and accompanying text.

237. See *supra* notes 76–80 and accompanying text.

238. See *supra* Parts I.B, II.B.

239. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 2–3 (1992); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”).

240. See U.S. CONST. art. I, § 8, cl. 3; Born, *supra* note 239, at 4.

241. See RODMAN, *supra* note 92, at 32.

242. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987) [hereinafter RESTATEMENT] (defining prescriptive jurisdiction as the power “to make its law applicable to the activities, relations, or status of persons, or the interests of person in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”).

243. RESTATEMENT, *supra* note 242, at § 402; see, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (“[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”).

Throughout much of U.S. history, however, American courts extended the jurisdiction of American laws based on a more limited doctrine of public international law known as the territorial principle, which holds that absent consent, a state's sovereignty is exclusive within

substantial effects are found however, the jurisdictional reach of American laws should not be extended extraterritorially if doing so would be unreasonable to the extent that another state has greater interest in regulating the activity.²⁴⁴

According to the *Charming Betsy* canon of statutory construction, American courts will not apply a statute in a manner that violates customary international law, absent Congress's clear intent to do so.²⁴⁵ Notwithstanding the limitations on Congress's prescriptive jurisdiction imposed by customary international law, however, it is well settled that Congress possesses the power to enact statutes that violate principles of customary international law.²⁴⁶ Thus, in U.S. courts or other domestic fora, federal legislation will override any inconsistent rules of international law, including rules that place limits on the jurisdictional reach of statutes.

As such, when examining whether courts will subject a statute to a customary international law analysis under the effects doctrine, one must look to the statute itself for the unambiguous intent of Congress to extend the law to conduct of non-U.S. citizens outside of the United States.²⁴⁷ In the case of the Iran and Libya Sanctions Act and the subsequent Comprehensive Act, the intent of Congress is clear. The laws were drafted to specifically regulate the activities of non-U.S. parties conducting business with Iran.²⁴⁸ Hence, regardless of whether or not the sanctions are impermissibly extraterritorial under the effects doctrine analysis, Congress

its territory. RODMAN, *supra* note 92, at 30–31. Any attempt by a foreign power to extend its laws extraterritorially represented a violation of the state's territorial sovereignty to enact laws as it sees fit. *Id.* at 31. Justice Oliver Wendell Holmes stated the legal doctrine succinctly in *American Banana Co. v. United Fruit Co.*—a case in which the Court refused to apply the Sherman Anti-Trust Act to the United Fruit Company for its activities in Costa Rica and Panama—stating that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” 213 U.S. 347, 356 (1909). The more permissive effects doctrine phased out the territorial principle after World War II as American economic interests became more and more globalized and American policy makers sought to have those worldwide interests protected by American law. RODMAN, *supra* note 92, at 30–31.

244. See RESTATEMENT, *supra* note 242, at § 403; see also *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 609 (9th Cir. 1976).

245. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“An act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .”); see also *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (limiting extraterritorial application of prescriptive jurisdiction in an ambiguous statute); RESTATEMENT, *supra* note 242, at § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

246. See *Born*, *supra* note 239, at 5; see also *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984) (“Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law.”); RESTATEMENT, *supra* note 242, at § 403 cmt. g (“If construction of a statute that accommodates the intent of Congress within the limits of international law is not fairly possible, the statute is nevertheless valid . . .”).

247. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its law beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority . . . is a matter of statutory construction.”).

248. See *supra* Parts I.B, II.B.

validly has the authority to regulate the activities of foreign interests doing business with Iran's energy sector.

2. Constitutional Limits

Although it must be granted that Congress has the constitutional authority to pass extraterritorial sanctions laws, the Constitution may nonetheless prevent their specific application in certain instances. According to Gary B. Born's comprehensive survey on the subject, "either the Due Process Clause or the Foreign Commerce Clause might preclude extension of federal law to conduct abroad that has only *de minimis* contact with or effect upon the United States or its nationals."²⁴⁹ Pursuant to this standard, the Constitution may prevent sanctions from being enforced upon parties that do not have a sufficient presence in the United States or whose activities—in this case conducting energy-related transactions with Iran—do not have sufficient effects on the United States or its nationals.

Analyzing the minimum contacts prong of the standard with respect to the Comprehensive Act, it is clear that each of the nine sanctions options, on their face, are designed to affect a sanctioned party's contact with the U.S. economy.²⁵⁰ It follows, therefore, that in order for a targeted sanction to be effectively punitive under the Comprehensive Act, the U.S. government must deprive a party of its economic interests in the United States and thus, *a fortiori*, the sanctioned party must have previously "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]."²⁵¹ Thus, each of the sanctions, by their very nature would pass a deferential *de minimis* contacts test.

With respect to the effects prong of the constitutional limitation, Iran's history of bellicosity, which has only increased in recent years as it has raced to develop nuclear weapons and undermine the United States's expanded presence in Afghanistan and Iraq, has had a destabilizing effect on American interests and has cost American blood and treasure.²⁵² In drafting the sanctions, Congress explicitly drew a link between the Iranian regime's ability to conduct energy transactions and its ability to develop nuclear weapons and support terrorist groups.²⁵³ Thus, insofar as the

249. Born, *supra* note 239, at 5–6. The Due Process Clause of the Fifth Amendment limits the assertion of personal jurisdiction over foreign defendants in federal courts who do not have sufficient minimum contacts with the United States. *See* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (applying a Fifth Amendment minimum contacts test to a foreign defendant to establish personal jurisdiction in a case arising under a federal statute); Born, *supra* note 239, at 6 n.16. Similarly, legislation which sought to regulate commerce abroad that had no meaningful connection to the United States could ostensibly be challenged as exceeding Congress's power under the Foreign Commerce Clause. Born, *supra* note 239, at 6 n.16.

250. *See supra* notes 93, 199 and accompanying text.

251. *Weltover*, 504 U.S. at 620 (alteration in original) (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985) (internal quotation marks omitted)).

252. *See supra* notes 17–24 and accompanying text.

253. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 3, 110 Stat. 1541, 1541–42 (codified as amended at 50 U.S.C. § 1701 note). The preamble to United Nations

fundamental purpose of the extraterritorial sanctions laws is to counteract and eliminate the Iranian regime's ability to harm American lives and interests by punishing the countries and companies that give Iran the funding to do so, the government should prevail in meeting the deferential *de minimus* effects test as well.

That said, federal courts have never imposed restraints on the specific application of extraterritorial laws by finding them unconstitutional,²⁵⁴ and only a few lower federal courts have even alluded in dicta to such a possibility.²⁵⁵ Thus, foreign parties sanctioned under the Comprehensive Act are unlikely to find any legal protection—either from the domestic application of customary international law or the prohibitions of the Constitution.

B. Political Barriers to Effective Implementation

1. The Inter-Branch Conflict: A Classic Problem of Foreign Relations Law

In comparison to the delineated roles the Constitution assigns to the executive and legislative branches of government in the domestic sphere, the Constitution says relatively little in defining and separating the roles of the two political branches in managing the country's foreign affairs.²⁵⁶ Accordingly, there is often considerable overlap between the powers of Congress and the President when it comes to setting policy for the United States in foreign affairs.²⁵⁷ As a result, inter-branch conflicts between the

Security Council Resolution 1929, which preceded passage of the Comprehensive Act, also drew such a link. *See supra* notes 208–10 and accompanying text.

254. *See* RODMAN, *supra* note 92, at 32; Born *supra* note 239, at 6.

255. Born *supra* note 239, at 6; *see, e.g.*, United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990); Tamari v. Bache & Co. (Leb.), 730 F.2d 1103, 1107 n.11 (7th Cir. 1984); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

256. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 141 (3d ed. 2009) (“Constitutional text does not explicitly address many important issues concerning the foreign relations authority of the federal political branches.”); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1984, at 201 (Randall Bland et al. eds., 5th ed. 1984) (“[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67 (1990) (“One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authority among the branches.”).

Article I grants Congress the power to declare war, raise armies, regulate commerce with foreign nations, and define and punish offenses against the law of nations (i.e. customary international law). U.S. CONST. art. I. Article II of the Constitution makes the President the Commander-in-Chief of the armed forces, grants him the power appoint ambassadors, and, with the advice and consent of two-thirds of the Senate, gives the President the power to make treaties. U.S. CONST. art. II.

257. *See* KOH, *supra* note 256, at 67 (“[T]he document grants clearly related powers to separate institutions, without ever specifying the relationship between those powers, as for example, with Congress’s power to declare war and the President’s power as commander-in-chief.”); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone

President and Congress have led to many of the constitutional controversies in foreign affairs law since the time of the founding.²⁵⁸ This section analyzes the constitutional inter-branch conflicts created by the Comprehensive Act.

Whereas a paradigmatic inter-branch conflict in foreign affairs law occurs when the President has acted without the express authorization of Congress or the Constitution,²⁵⁹ the past, present, and future implementation of the Iran sanctions laws presents the converse problem: Presidential inaction conflicting with Congressional mandates. On the one hand Congress has the power under the Foreign Commerce Clause to pass laws to punish trade with Iran,²⁶⁰ and the President has the constitutional duty to “take Care that the Laws be faithfully executed.”²⁶¹ On the other hand, the President is the country’s chief diplomat and, as such, responsible for the conduct of the United States’s foreign relations—an area beyond the institutional competency of Congress.²⁶²

of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

258. For instance, during the Neutrality Controversy of 1793, President George Washington was adamant that the United States stay out of the war that had broken out between Revolutionary France and the rest of Europe. BRADLEY & GOLDSMITH, *supra* note 256, at 12–13. Washington’s cabinet debated whether or not the President—consistent with his powers under the Constitution—had the authority to issue a proclamation of neutrality. *Id.*

Arguing in the newspapers in the pseudonymous Pacificus-Helvidius debate, Alexander Hamilton (Pacificus) posited that the Constitution vested a unitary executive power in the President, and among the powers traditionally understood as executive was the power to serve as “the organ of intercourse between the Nation and foreign Nations.” *Id.* at 14. As such, the prerogative to declare the country neutral in foreign conflicts belonged to the President. *Id.* at 15–16.

In contrast, James Madison (Helvidius) argued that with the power declare war, also came the power to choose to not go to war. *Id.* at 16–18. The Constitution gave Congress the power to declare war, and it therefore followed that the President needed an act of Congress to make an official proclamation of neutrality. *Id.*

Washington issued a proclamation of neutrality, but, perhaps to mollify concerns about its constitutionality, never included the word neutrality in the proclamation. *Id.* at 13.

259. *See, e.g., Youngstown*, 343 U.S. at 589 (holding that the President’s Commander-in-Chief powers did not grant him authority to seize a steel mill during the Korean War when Congress had declined to give him such power through legislation); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (holding that the executive lacked the authority to seize American vessels sailing away from French ports when Congress had only authorized the President to seize American vessels sailing to French ports); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (dismissing a suit by thirty-two members of Congress against the President over whether the President could withdraw from a treaty without the authorization of Congress).

260. *See supra* notes 239–41 and accompanying text.

261. U.S. CONST. art. II, § 3, cl. 4.

262. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . Congress itself is powerless to invade it. . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”) (internal quotation marks omitted); *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253–54 (2001) (arguing that the Founders intended

It is in this respect that the constitutional conflict between the President and Congress has arisen over extraterritorial sanctions. While Congress has wanted to see that the laws it passes are enforced,²⁶³ the President has been reluctant to involve the United States in a trade imbroglio with foreign nations.²⁶⁴

Due to separation of powers concerns, courts are hesitant to get involved in settling the disputes between the political branches. For one, a lack of standing will prevent members of Congress from suing to enjoin the President to enforce the sanctions.²⁶⁵ Additionally, following the political question doctrine, courts are reluctant to interject themselves into controversies between the President and Congress in political matters such as how the President is exercising his discretion in carrying out a law in the realm of foreign affairs.²⁶⁶ Consequently, given the institutional advantages of the executive branch in foreign affairs,²⁶⁷ successive Presidents have thus far seized wide discretion in choosing to not investigate companies and enforce sanctions as prescribed by law.²⁶⁸

2. Past Precedent: The ILSA & Presidential Inaction

Going back to the first passage of the Act, between the time of its enactment in August 1996 and the May 1998 issuance of a national-interest waiver by the Clinton Administration, only one investment deal drew the investigative scrutiny of the Iran and Libya Sanctions Act: the Total S.A. investment to which the State Department granted the waivers.²⁶⁹ With respect to the Total S.A. deal, Representative Benjamin Gilman, the lead

for all foreign affairs powers not specifically delegated to Congress to be exclusively executive).

263. See *supra* note 223 and accompanying text.

264. See *supra* notes 127–28 and accompanying text.

265. See *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that Congressmen lacked standing to challenge the Line-Item Veto Act as unconstitutional because they had not suffered a legally cognizable injury); *Kucinich*, 236 F. Supp. 2d at 6–12 (following *Raines*, dismissed suit by Congressmen for lack of standing).

266. The political question doctrine dates back to the seminal case of *Marbury v. Madison* in which Chief Justice John Marshall stated that some government actions are “mere political act[s]” and are therefore not “examinable in a court of justice.” 5 U.S. (1 Cranch) 137, 164–65 (1803). The political question doctrine is often invoked in cases in which courts refuse to exercise jurisdiction in suits involving foreign affairs. See BRADLEY & GOLDSMITH, *supra* note 256, at 58. In *Goldwater v. Carter*, Justice William Rehnquist argued that a suit by Senator Goldwater concerning the President’s power to abrogate a treaty should be dismissed as a nonjusticiable political question “because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.” 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

267. See BRADLEY & GOLDSMITH, *supra* note 256, at 173 (discussing the executive branch’s institutional advantage as having control over “a massive bureaucracy devoted to foreign affairs”); CORWIN, *supra* note 256, at 201 (positing that the executive’s institutional advantages over Congress include “the unity of the office, its capacity for *secrecy* and *dispatch*, and its superior sources of *information*; to which should be added . . . that it is always on hand and ready for action”).

268. See *supra* notes 145–46 and accompanying text.

269. POLLACK, *supra* note 32, at 289.

House sponsor of the law,²⁷⁰ tried to assert congressional authority in the face of presidential inaction.²⁷¹ Using the unambiguous language of the Constitution, Gilman stated: “Mr. President, refusing to enforce the law in this case is not an option, not least because your oath of office requires you to see that the law is faithfully executed.”²⁷² In spite of Gilman’s admonitions, however, once it became clear that President Clinton and his successors were not willing to risk international trade disputes to enforce sanctions against foreign companies, the threat of sanctions lost credibility.²⁷³ Foreign investment in Iran returned to normal.²⁷⁴

Subsequently, as required by the ILSA, the State Department reported to Congress every six months on the developments of the ILSA, frequently noting that U.S. diplomats had raised concerns with companies and their parent governments about investing in Iran.²⁷⁵ Yet, no companies were specifically mentioned, nor were any investment projects published in the *Federal Register* as required by the law.²⁷⁶ As such, the formal investigation and reporting procedures of the ILSA were never subsequently implemented, nor was the President ever forced to issue another waiver of sanctions.²⁷⁷ Hence, the public and political pressure that would have been placed on the President to sanction companies in violation never manifested itself due in part to the structural loopholes of the law.

3. Congressional Initiative: Signs of a Change?

Congress sought to close some of the loopholes in the law by reducing executive discretion and making certain other provisions mandatory. As amended, the law now requires the Administration to initiate an investigation into the possible imposition of sanctions upon the receipt of “credible information” that a party is engaged in sanctionable activity.²⁷⁸ Further, once an investigation has been initiated, the President must determine within 180 days whether the party under investigation is eligible for sanctions and notify Congress of its determination.²⁷⁹ Congress did give the President some diplomatic flexibility by allowing President to avoid investigating a party if the party stops, or takes significant steps to stop, the sanctionable activity.²⁸⁰

If the President does in fact follow the letter of the law and investigates companies investing in Iran’s energy sector or selling refined petroleum to Iran, the law now mandates that the President impose at least three different

270. ALIKHANI, *supra* note 38, at 299.

271. *Id.* at 329.

272. *Id.*

273. POLLACK, *supra* note 32, at 287.

274. *Id.* at 289.

275. KATZMAN, *supra* note 1, at 6.

276. *Id.*

277. *Id.* at 20–21.

278. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 102, 124 Stat. 1312, 1325 (codified as amended at 50 U.S.C. § 1701 note).

279. *Id.*

280. *Id.*

sanctions on the violating party.²⁸¹ Furthermore, whereas when Secretary of State Albright issued a waiver of sanctions in 1998 she had to justify that doing so was “important to the national interest,”²⁸² as currently amended, the President may only waive sanctions now if it is “necessary to the national interest,” and further if the President provides a detailed report to Congress on the party’s prohibited activities.²⁸³ This may not prevent the President from waiving sanctions, but it will provide the Administration less leeway in justifying its waivers to Congress and the public.²⁸⁴

In spite of the stricter language of the sanctions as amended by the Comprehensive Act, the Administration is still free to implement the law at its discretion based on its own independent interpretation of the law. For instance, in the State Department’s first public briefing on how it was implementing the extraterritorial sanctions of the Comprehensive Act on September 30, 2010, Deputy Secretary of State James Steinberg attempted to allay congressional concern that the Administration was not sanctioning firms with significant ties to Iran.²⁸⁵ Steinberg stated that some of the instances did not reach the “threshold question about whether there’s credible evidence of sanctionable activity.”²⁸⁶ Moreover, Steinberg alluded to ongoing negotiations with companies and their home countries about withdrawing from Iran.²⁸⁷

As of this writing, no foreign company that is not wholly-owned by Iran has been sanctioned by the Administration, despite the purported limits on the President’s discretion. Hence, Congress’s attempt to set policy through its legislative powers failed again to overcome the President’s diplomatic supremacy in shaping foreign affairs policy. Alternatively, for Congress to see its policies effectively implemented, it can still bring to bear upon the President its institutional powers of political pressure, oversight, and investigation.

In the months since the passage of the Comprehensive Act, the Congressional committees with jurisdictional oversight for the sanctions—including the House Committee on Foreign Affairs and the Senate Committee on Banking, Housing and Urban Affairs—have conducted hearings in which members of the Administration had to answer for the manner in which the executive branch was implementing the Comprehensive Act. Moving forward, Representative Ileana Ros-Lehtinen (R-FL), the chair of the House Foreign Affairs Committee in the 112th

281. *Id.* at 1319.

282. *See supra* notes 94, 127 and accompanying text.

283. § 102, 124 Stat. at 1322.

284. *See* Lauren Rozen, *Congress Cool to Iran Sanctions Waivers*, POLITICO (June 11, 2010, 2:01 PM), http://www.politico.com/blogs/laurarozen/0610/Congress_cool_to_Iran_sanctions_waivers.html (quoting Sen. Ben Cardin (D-MD), stating: “The president wants, as any president wants, flexibility in this legislation, and I understand why they want that. . . . But this is a situation and this is an issue where we are not going to give them all the waivers they want. . . . It can be helpful for the administration to say ‘well, I wish I could do something, but Congress is independent and they have required this.’”).

285. Steinberg, *supra* note 220.

286. *Id.*

287. *Id.*

Congress, has stated that Iran will be the Committee's "No. 1, No. 2 and No. 3 priority," and has expressed a keen interest in using the Committee's oversight powers to reverse the trend that has seen "[t]he bills that we pass become interesting historical documents but not really bills that have been implemented."²⁸⁸ Additionally, outside of the formal committee structure, several members of the House have formed a bipartisan Working Group on Iran Sanctions Implementation in order to hold the Administration to account for effectively implementing the sanctions,²⁸⁹ while numerous senators have taken the Administration to task for its evasiveness in implementing the legislation.²⁹⁰

All told, the legislators who have sought to get out in front of this issue have done so with an understanding of the institutional weakness of Congress in the realm of foreign relations laws.²⁹¹ In the words of Senator Christopher Dodd (D-CT), the lead Senate sponsor of the Comprehensive Act, "as a coequal branch of government . . . we delegate to the administration and the executive branch to conduct foreign policy, and you can't have 535 Members of Congress conducting foreign policy, I understand that point."²⁹² Nonetheless, it is clear from the tone of the members of both houses of Congress, from both political parties, that the legislative branch has found a renewed seriousness in seeing that foreign companies do not violate American sanctions laws with impunity. It remains to be seen whether the political pressure coming from Congress will have any effect on how the Administration conducts its diplomacy and implements the law.

C. Endemic Barriers to Effective Implementation

Questions remain as to whether the multilateral energy sanctions regime the United States and its allies have constructed have, by their very nature, any possibility of being successful in bringing Iran back to the negotiating table over its nuclear programs. The endemic issues the sanctions policy faces are two-tiered: (1) sanctions of this kind have not been enforced in the past and therefore lack the credibility to serve as a future deterrent; and (2) even if the sanctions do sufficiently deter investment in Iran, they are

288. Bridget Johnson, *The World from the Hill: Iran 'No. 1' on Agenda for Foreign Affairs Panel Leader*, THE HILL (Dec. 19, 2010, 8:32 PM), <http://thehill.com/news-by-subject/foreign-policy/134423-incoming-foreign-affairs-chairwoman-has-iran-no-1-no-2-and-no-3-on-to-do-list>.

289. See Press Release, Rep. Howard Berman (D-CA), Reps. Berman, Ros-Lehtinen Announce Launch of Bipartisan Working Group on Iran Sanctions Implementation (Aug. 3, 2010), available at http://www.house.gov/apps/list/press/ca28_berman/Iran_Sanctions_WG_forms.shtml.

290. See Rogin, *supra* note 31.

291. See Johnson, *supra* note 288 (quoting Representative Ros-Lehtinen as remarking that Congress "can't force the administration" to investigate companies and impose sanctions); see also *infra* note 292 and accompanying text.

292. *Minimizing Potential Threats from Iran: Administrative Perspectives on Economic Sanctions and Other U.S. Policy Options: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 31 (2009), (statement of Sen. Christopher Dodd, Chairman, S. Comm. on Banking, Housing, and Urban Affairs).

not effective enough to cause the Iranian regime to change course. This section analyzes the possibility of overcoming these problems for the sanctions to achieve their objective of causing Iran to determine that costs of nuclear enrichment outweigh their benefit.

1. Sanctions Lack Credibility

While the United States has taken the lead in working with its allies around the world to reduce business ties with Iran, there is an acute concern on Capitol Hill that as countries pull out of Iran, other countries—China in particular—will move in to take over the abandoned projects.²⁹³ When the United States banned companies from doing business with Iran during the Clinton Administration, the sanctions only had a harmful effect on Iran for as long as the deterrent threat of those sanctions on foreign companies remained credible.²⁹⁴ Once they lost their credibility, foreign firms ignored them with impunity.²⁹⁵ Insofar as Iran was not damaged by the sanctions, they were self-defeating; the only harm came to the companies—such as Conoco—that had to sacrifice lucrative business deals that enriched foreign firms (e.g. Total S.A.).²⁹⁶

Presently, countries who have signed on to the sanctions will be watching to follow America's lead.²⁹⁷ If the Obama Administration does not enforce the sanctions on violating firms, the detrimental effect could be two-fold: (1) the Iranians will continue to have gasoline suppliers and foreign direct investors in their energy sector thereby nullifying any disincentive to continue their nuclear program, and (2) the tentative international consensus toward sanctions could crumble as U.S. allies refuse to enforce their own sanctions when they perceive the futility of depriving their corporations—and their tax coffers—of business opportunities.²⁹⁸

The preliminary returns on this front are promising, though far from perfect. As a result of sanctions-related pressure, a plethora of foreign companies from around the world have either ended their business dealings with Iran or pledged to do so in the immediate future.²⁹⁹ Consequently, Iran's refined petroleum imports have dropped by 85%, and Iran has lost some \$60 billion in foreign investments.³⁰⁰ And this is in spite of the fact that, as of this writing, no non-Iranian firm has been formally sanctioned.³⁰¹

293. Rogin, *supra* note 31.

294. *See supra* notes 118–28 and accompanying text.

295. *See supra* notes 118–30 and accompanying text.

296. *See supra* notes 75, 118–30 and accompanying text.

297. *See* Mark Dubowitz & Laura Grossman, FOUND. FOR DEF. OF DEMOCRACIES, IRAN'S CHINESE ENERGY PARTNERS: COMPANIES ELIGIBLE FOR INVESTIGATION UNDER U.S. SANCTIONS LAW 5 (2010), available at <http://www.iranenergyproject.org/iran-chinese-energy-partners.pdf>.

298. *Id.* (“No other country, including America's most stalwart allies, will force its companies to abandon lucrative opportunities in Iran if Chinese firms take their stakes in every deal.”).

299. *See supra* note 218 and accompanying text.

300. *See supra* note 228 and accompanying text.

301. *See supra* Part II.D.

This is a sign that in many areas of the world, the sanctions are being taken seriously as a credible deterrent, and that the United States need not, in the words of Deputy Secretary of State Steinberg, “impose sanctions for sanctions’ sake” to achieve their policy objectives.³⁰²

It appears, however, that the main credibility problem remains with China.³⁰³ Chinese firms have not only signed large development deals with Iran on their own, but they have also back-filled projects abandoned by firms in compliance with the sanctions.³⁰⁴ This leaves the Obama Administration with a difficult choice: to sanction the Chinese firms that are in violation of the Comprehensive Act and face the political costs of China’s response, or to ignore the violations and make it less likely that America’s allies will force their companies out of Iran.³⁰⁵

The Obama Administration has remained ambiguous and diplomatic about the measures it has taken with respect to Chinese violators.³⁰⁶ Although China has increased its investment in Iran’s energy development, not wanting to be tied to a country whose decaying capacity may not be able to meet its future energy demands, China has simultaneously hedged its reliance on Iranian petroleum imports.³⁰⁷ This is a good sign. Congressional pressure is mounting, however, for the Administration to enforce the sanctions laws against China,³⁰⁸ and it may, perhaps, make the difference between having a successful sanctions policy on the one hand, and being resigned to a world with a nuclear-armed Iran on the other.³⁰⁹

2. Sanctions Lack Strength

Even if the United States and its coalition of willing partners are able keep their companies from doing business with Iran, the question remains as to whether cutting Iran off from imported gasoline or investment in its energy sector will inflict enough pain on the regime to achieve their objectives. Some critics of the sanctions policy argue that they may only further entrench the Iranian regime by giving it a credible reason to blame the United States for the hardships of Iranians.³¹⁰ Others argue that nothing

302. Steinberg, *supra* note 220.

303. See Dubowitz & Grossman, *supra* note 297, at 5, 11–12; Pomfret, *supra* note 205.

304. See Dubowitz & Grossman, *supra* note 297, at 7–11; Pomfret, *supra* note 205.

305. See Dubowitz & Grossman, *supra* note 297, at 12.

306. See, e.g., Steinberg, *supra* note 220 (“[W]e don’t believe that it would be productive or useful in the context of [the investigatory process], in terms of achieving our results to discuss specific firms. So we are engaging in conversations. We will sustain the confidentiality of those so long as we think it’s productive to achieving the results we’re trying to achieve.”); *supra* notes 226–27 and accompanying text.

307. See Reuel Marc Gerecht & Mark Dubowitz, *The Logic of Our Iran Sanctions*, WKLY. STANDARD, Jan. 3, 2010, at 11, 12 (“China cut crude imports from Iran between January and September 2010 by approximately 17 percent from the same period in 2009, even as the world’s biggest energy consumer bought more oil. . . . [T]he Chinese [do not] want to bet their economic security on an Iranian energy sector in rapid decline.”).

308. See Rogin, *supra* note 31; see also *supra* Part III.B.3.

309. See Dubowitz & Grossman, *supra* note 297, at 12.

310. See, e.g., Katie Paul, *Iran Sanctions: Too Much Too Soon*, NEWSWEEK.COM (Dec. 10, 2009), <http://www.newsweek.com/blogs/the-gaggle/2009/12/10/iran-sanctions-too->

short of military force will cause the Iranians to take the costs of enrichment seriously because Iran may be far enough in its nuclear development process that the sanctions, which may take some time to exact a crippling blow, will not act dramatically enough to keep Iran from attaining weapons of mass destruction.³¹¹ The Obama Administration has remained steadfast, however, that following the dual-track of inflicting punitive sanctions while remaining open to negotiations will be the most successful course to follow.³¹²

Early signs of the sanctions success are promising, as they are causing pain throughout Iran's economy and pockets of domestic unrest continue to emerge.³¹³ Given the repressive nature of Iran's regime, however, it cannot be expected to capitulate just on the basis of internal factors alone.³¹⁴ To counter the sanctions effectiveness the regime has ended consumer subsidies and increased levels of security forces to control dissidents.³¹⁵ Instead, as the Obama Administration has acknowledged, the Iranian regime must be pushed further to the brink—to the point where the government's survival is put in jeopardy.³¹⁶

As of this writing, the Administration has not yet indicated the steps it will take to radically alter Iran's political calculus.³¹⁷ While it has stressed that all options are on the table when it comes to preventing Iran from acquiring a nuclear weapon,³¹⁸ there seems to be almost no palate for the two options that would most critically damage Iran's nuclear enrichment: a full international embargo of Iran's oil, or a military strike against Iran.³¹⁹ The Stuxnet computer worm and the covert strike against two of Iran's leading nuclear scientists probably bought the Administration some time,³²⁰

much-too-soon.html; Stephen M. Walt, *Looking for One Good Man (or Woman)*, FOREIGN POL'Y (Dec. 8, 2009, 9:45 PM), http://walt.foreignpolicy.com/posts/2009/12/08/looking_for_one_good_man_or_woman.

311. See, e.g., John Bolton, Op-Ed., *The Case for Striking Iran Grows*, WALL ST. J., Feb. 12, 2010, at A23. Israeli Prime Minister Benjamin Netanyahu falls within this camp, leading to the speculation that Israel will strike Iran's nuclear facilities if the United States does not. See *supra* note 18; see also Goldberg, *supra* note 18.

312. See Gerecht & Dubowitz, *supra* note 307, at 11–12; see also Robert M. Gates, Sec. Def., *Remarks by Sec. Gates at Wall Street Journal CEO Council 2010 Meeting* (Nov. 16, 2010), available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4720> (“I think that the political economic strategy is the one that we have to continue to pursue and ratchet up . . . [T]hat's the only long-term solution.”).

313. See Mostaghim & Daragahi, *supra* note 13.

314. Cf. *supra* notes 158–62 and accompanying text.

315. See Farnaz Fassih, *Tehran Ramps Up Arrests To Stall Subsidy-Cut Fight*, WALL ST. J., Nov. 4, 2010, at A17.

316. See Gerecht & Dubowitz, *supra* note 307, at 13 (“If the West is to stop Tehran's quest for a nuke, it must convince the supreme leader, and the Revolutionary Guards who oversee Iran's nuclear program, that their pursuit of the bomb will destroy the regime.”); Sanger, *supra* note 235.

317. The Administration has indicated more sanctions are on the way to test “Iran's pain threshold,” but it has not indicated yet what this may entail. Sanger, *supra* note 235.

318. See *supra* note 18; see also Editorial, *Mr. Gates on Iran*, WASH. POST, Nov. 19, 2010, at A22.

319. See Gerecht & Dubowitz, *supra* note 307, at 12; see also Editorial, *supra* note 318.

320. See *supra* note 235; see also Gerecht & Dubowitz, *supra* note 307.

but as of now, the two sides remain at a stalemate with no indication that Iran will change course despite the effectiveness of the sanctions.³²¹

IV. RECOMMENDATIONS

With the understanding that a crippling, multilateral sanctions regime targeting Iran represents the last, best hope of peacefully preventing Iran from acquiring nuclear weapons, both Congress and the President will have to play important roles in shaping how America's policy is implemented going forward. This part proposes a number of policy recommendations for both of the political branches as they continue to struggle with the challenges posed by Iran.

A. *The President*

As the Commander-in-Chief of the U.S. military, the country's chief diplomat, and the executive officer responsible for enforcing American sanctions laws, the President has the responsibility of ensuring that the full weight of his resources are used to prevent Iran from acquiring nuclear weapons.³²² The President's strategy will have to be multi-faceted—oftentimes requiring delicacy, but sometimes the use of a big-stick—and concentrated on two fronts: (1) Iran, and (2) America's allies and Iran's trading partners. This section discusses potential policy options on both fronts with an eye toward making the U.S. sanctions laws effective.

1. Iran

President Obama's open-handed diplomatic strategy has demonstrated that engagement with Iran has costs.³²³ Face-to-face negotiations have lent the Iranian regime legitimacy, prestige, and domestic credibility; have made the regime appear as a falsely sincere counterparty in negotiations; and have bought the regime more time to enrich nuclear fuel and avoid harsher sanctions by holding out the opportunity for further negotiations.³²⁴ Going forward, the President should be wary of Iranian dilatory tactics and not premise the softening of sanctions upon these insincere offers to negotiate.

Moreover, when it comes to negotiating with the Iranians, the Administration should insist upon dealing with parties who are actually empowered to forge an agreement. Too much time and effort has been wasted thus far by the P5+1 in negotiating with diplomats who are powerless to come to meaningful agreements while the Supreme Leader, Ayatollah Khamenei, is the real center of power.³²⁵ Unless the Supreme Leader is behind the negotiations, they will continue to be meaningless.

At this stage in Iran's enrichment process, the objectives for the United States in negotiating with Iran should be different from the "freeze for

321. *See supra* note 234 and accompanying text.

322. *See supra* Part III.B.

323. *See supra* Part II.A.

324. *See supra* Part II.A.

325. *See supra* note 171 and accompanying text.

freeze” deal the two sides tentatively agreed upon in 2009. Under that agreement, Iran would suspend some nuclear enrichment and export it out of the country to be reprocessed while the United States would suspend its sanctions.³²⁶ The Iranians have repeatedly shown that they cannot be trusted when it comes to nuclear monitoring,³²⁷ and thus, conceding any enrichment capacity to the Iranians could very well be conceding to a bomb.

Instead, with the continued leverage from the sanctions which are decimating Iran’s economy,³²⁸ the Administration should insist upon a full suspension of enrichment by Iran. Using these sanctions, as well as additional measures which he could request from Congress,³²⁹ the Administration should force the Iranian regime to choose between ending enrichment or destroying much of its energy sector, the revenues of which it requires for its political survival.³³⁰ The Administration has already said that it plans to increase economic pressure on Iran in order to test “Iran’s pain threshold.”³³¹ That pain, whatever form it takes, should be inflicted in earnest before the next round of negotiations.

Lastly, the President should continue to make clear to the Iranian regime that the United States will not allow Iran to attain nuclear capability under any circumstances, and that all options—including military ones—are on the table.³³² While a negotiated settlement is always preferable, and increased sanctions remain the last best hope of reaching such a settlement, the Iranian regime must feel sufficiently threatened to relinquish its quest for nuclear weapons.³³³ The sanctions, which are beginning to cripple the Iranian economy, coupled with the credible threat of force against Iran, could finally lead the Iranian regime to believe that its nuclear pursuit may destroy it.

2. America’s Allies and Iran’s Trading Partners

As the history of the Iran and Libya Sanctions Act has shown, the key to having an effective sanctions policy is having multilateral partners invested in it.³³⁴ Accordingly, the Administration must play a critical role in persuading countries that have not curtailed their energy partnerships with Iran to do so, and further, in persuading the countries that have implemented sanctions to enforce them and extend them further.

With respect to America’s allies, more than at any time in the past, there is now greater acknowledgement around the world of the seriousness of

326. *See supra* notes 168–69 and accompanying text.

327. *See supra* note 165 and accompanying text.

328. *See supra* notes 228–32 and accompanying text.

329. *See infra* Part IV.B.2.

330. *See supra* note 8 and accompanying text.

331. *See supra* note 235 and accompanying text.

332. *See supra* note 18.

333. *See supra* Part III.C.2.

334. *Compare supra* Part I.B.2 (detailing international resistance to U.S. sanctions against Iran), *with supra* Part II.C (detailing the emerging international consensus over the need for sanctions to prevent Iran from acquiring nuclear weapons).

Iran's impending nuclear development and the role that investment in Iran's energy sector plays in funding that nuclear development.³³⁵ Now that the Europeans and other major economies such as Japan, South Korea, Canada, and Australia have taken the first step toward undermining the long-term viability of Iran's energy sector by prohibiting investment therein,³³⁶ the Administration should encourage its allies to take the next step in raising the short-term costs of nuclear proliferation by the Iranian regime by instituting sanctions on par with those imposed by the United States.

Moreover, the Administration should continue to put diplomatic pressure on its allies and their private companies to adhere to the sanctions they already have in place.³³⁷ If such private companies continue to invest in Iran's energy sector despite the sanctions in place in their home countries, the Administration should insist those countries sanction the companies, lest the United States do so itself.

On this point, one of the key factors in convincing America's allies not only to enforce their sanctions but also to expand them will be the leadership role the Administration takes in enforcing American sanctions against violators in non-cooperative countries.³³⁸ As complying companies have wound down their investments in Iran, Chinese companies have moved in to back-fill those contracts. Foreign governments will be un eager to enforce sanctions against their own companies if doing so will only enrich others.³³⁹ Right now there is a strong international consensus towards sanctions, but it may not continue if the sanctions only appear—in the words of former Vice President Cheney, in his previous life as an oil executive—"self-defeating."³⁴⁰

The Administration should continue to use diplomatic channels to vigorously discourage the Chinese and non-compliant companies from taking over abandoned contracts and entering new ones.³⁴¹ Furthermore, if it has not already done so, the Administration should commence the formal investigation procedures of the Comprehensive Act with respect to the companies about which it has "credible evidence" of sanctionable activities.³⁴² The Administration can use these formal investigations as added leverage to give the violating parties an out under the "special rule" which allows a waiver of sanctions for companies that pledge to end their investment. If this fails, the Administration should actually impose sanctions on the violating parties such that they are truly forced to choose between investing in Iran and having access to the American economy.

Notwithstanding the complicated and sometimes precarious trade relationship between China and the United States, there is a long set of

335. *See supra* Part II.C.

336. *See supra* note 217 and accompanying text.

337. *See supra* note 218 and accompanying text.

338. *See supra* note 297 and accompanying text.

339. *See supra* note 298 and accompanying text.

340. *See supra* note 131.

341. *See supra* note 226 and accompanying text.

342. *See* Steinberg, *supra* note 220; *supra* note 286 and accompanying text.

precedents for the United States imposing sanctions on Chinese companies and individuals over counter-proliferation issues.³⁴³ Chinese oil companies need access to American financial markets, natural resources, and intellectual capital more than the United States needs them.³⁴⁴ Understanding that the purpose of implementing the Comprehensive Act is not to impose sanctions for the sake of imposing sanctions,³⁴⁵ history has shown nonetheless that at some point violators need to be punished if the sanctions are to be taken seriously.³⁴⁶ It could be the key to holding the international coalition together and landing a crippling blow to the Iranian regime.

B. Congress

Insofar as Congress has already done the work of drafting and enacting a sweeping set of sanctions designed to isolate the Iranian regime, most of the activity to apply leverage and pressure to bring an end to Iranian nuclear enrichment will take place in the executive branch. That does not mean, however, that Congress should be relegated to an entirely passive role in preventing Iran from acquiring nuclear weapons and funding terrorist groups. Instead, through its core constitutional competencies of oversight and legislation, Congress should ensure that the President is properly enforcing the sanctions that he currently has at his disposal, and that the President is given expanded options to meet a changing policy landscape.

1. Oversight and Investigation

Congress has an obvious interest in seeing that the laws it passes are “faithfully executed,” yet it is beyond Congress’s power to force the Executive to investigate violations or apply sanctions.³⁴⁷ What Congress can do, however, is to conduct oversight hearings through the committee structure of Congress to make the Administration accountable for its actions vis-à-vis the sanctions laws and put political pressure on the President to enforce those laws in a manner consistent with the national interest.³⁴⁸ In this respect, much of Congress’s role will be shaped in reaction to how the President executes the law.

Representative Ilena Ros-Lehtinen (R-FL), chair of the House Foreign Affairs Committee in the 112th Congress, has stated that Iran will be the Committee’s “No. 1, No. 2 and No. 3” priority, which is a good sign.³⁴⁹

343. See Dubowitz & Grossman, *supra* note 297, at 29–34 (listing ninety Chinese entities that have been sanctioned by the United States between 1991 and 2010).

344. See *id.* at 11–27 (detailing the presence of Chinese energy firms in American markets); Mark Dubowitz, *Put China To A Choice: Tehran or Texas*, FORBES.COM (Oct. 17, 2010, 8:51 PM), <http://blogs.forbes.com/energysource/2010/10/17/put-china-to-a-choice-tehran-or-texas/>.

345. See *supra* note 224 and accompanying text.

346. See *supra* note 130 and accompanying text.

347. See *supra* Part III.B.

348. See *supra* note 288 and accompanying text.

349. Johnson, *supra* note 288.

According to Representative Ros-Lehtinen, she and her colleagues intend to prevent the Comprehensive Act from becoming another “interesting historical document[]” that goes unimplemented by the President by conducting “oversight hearings that will ask the administration, ‘Why aren’t you sanctioning more banks and companies and countries? What are we doing and what are you waiting for?’”³⁵⁰ Such hearings should be conducted with the same searching objectives by Representative Ros-Lehtinen’s counterparts in the Senate as well.

During these hearings, Congress should use the open-source reporting on Iran’s energy sector available from the Government Accountability Office, the Congressional Research Service, the media, and other assorted outlets to present the Administration with “credible evidence” of sanctionable activity,³⁵¹ which would require further investigation according to the law.³⁵² In this respect, Congress should continue to insist that the Administration explain its interpretation of the credible evidence standard and whether or not it had commenced investigations into parties about which credible evidence existed.

Moreover, the Comprehensive Act contains a number of formal oversight mechanisms that require the President to report to Congress on the Administration’s efforts to discourage sanctionable involvement with Iran.³⁵³ Depending upon the President’s reports, the Comprehensive Act may require the President to conduct mandatory investigations into countries and companies in apparent violation of the law.³⁵⁴ Should the President request a temporary postponement of the investigations for diplomatic reasons as the law allows, Congress should be sensitive to giving the President such diplomatic flexibility without unnecessarily embroiling the United States in a difficult situation with countries such as China and Russia.

If it becomes clear that the President’s diplomatic negotiations have proven unsuccessful, however, the investigatory latitude given to the President should not be indefinite. Only then should the mandatory investigation provision be triggered. In a circumstance where an investigation yields parties in violation of the law, the President would not be backed into an inescapable corner because he could still issue a waiver to the sanctions as President Clinton did in 1998.³⁵⁵ If such a waiver is issued, again Congress should hold the President accountable for explaining his understanding of the “necessary to the national interest” standard.³⁵⁶

350. *Id.*

351. *See, e.g.,* KATZMAN, *supra* note 1; Dubowitz & Grossman, *supra* note 297; Pomfret, *supra* note 205.

352. *See supra* notes 189–93 and accompanying text.

353. *See supra* notes 189–93 and accompanying text.

354. *See supra* notes 189–93 and accompanying text.

355. *See supra* notes 127–28 and accompanying text.

356. *See supra* note 195 and accompanying text.

2. Legislation

Although the Comprehensive Act represented, in the words of President Obama, “the toughest sanctions against Iran ever passed by the United States Congress,”³⁵⁷ there are still policy actions Congress can take to react to the dynamics of the Iranian problem that have evolved in the months since the Act’s passage. On the one hand, America’s allies around the world have proven more amenable to adopting economic sanctions against Iran than at any time in the past.³⁵⁸ On the other hand, in spite of the pain the current sanctions are causing to the Iranian treasury, Iran remains immovable in its refusal to negotiate over its nuclear enrichment program.³⁵⁹ Congress can once again take the lead in refining the scope of sanctions to increase the pressure on Iran and to further encourage allies to cut ties with Iran.

In order to sufficiently change the Iranian regime’s political calculus, Congress should create policy that will ratchet up the pain on the Iranian regime to the point that it fears for its survival.³⁶⁰ To do so, Congress should take aim at Iran’s Achilles’ heel: its dependence on revenues from oil exports.³⁶¹ An absolute extraterritorial ban on purchasing Iranian crude (i.e., an embargo) would cause painful shocks to the global oil markets and would likely be opposed by America’s allies.³⁶² Sanctions that indirectly affect demand for Iranian oil by making it more difficult for Iran to engage in petroleum transactions and invest in the infrastructure necessary to bring oil to market could allow Iran’s competitors to increase oil production to counter any slack in global oil supply, however.³⁶³ Such a policy could be just as effective as an embargo without causing major diplomatic problems.

Legislation introduced in December 2010 by Senators Robert Casey (D-PA) and Scott Brown (R-MA) seeks to accomplish just that.³⁶⁴ Among its provisions, the bill expedites the process for the Treasury Department to investigate and designate the front-companies used by the Iranian Revolutionary Guard Corps—which controls much of the country’s petroleum industry—to evade sanctions.³⁶⁵ Sanctions would then be imposed on any party doing business with these front-companies.³⁶⁶

Additionally, the bill would sanction entities that subscribe to Iran’s sovereign debt, pay in advance for oil deliveries, or sign long-term contracts

357. *See supra* note 4 and accompanying text.

358. *See supra* Part II.C.

359. *See supra* note 234 and accompanying text.

360. *See supra* Part III.C.2.

361. *See supra* note 8 and accompanying text.

362. *See* Gerecht & Dubowitz, *supra* note 307, at 11–12.

363. *See id.* at 13.

364. Stop Iran’s Nuclear Program Act of 2010, S. 4008, 111th Cong. (2010); *see also* Press Release, Sen. Robert P. Casey, Jr., Casey, Brown Introduce Legislation To Stop Iran’s Nuclear Program (Dec. 3, 2010), *available at* <http://casey.senate.gov/newsroom/press/release/?id=2ea974d6-9fc0-4cb6-8170-7efeb4bb5a96>.

365. S. 4008; *see also* Press Release, *supra* note 364.

366. S. 4008; *see also* Press Release, *supra* note 364.

to pay for oil and gas from Iran.³⁶⁷ The effect of these provisions would be to deny Iran access to the large up-front cash inflows it desperately needs to invest in its decaying infrastructure, or, otherwise, to deny Iran the ability to use the long-term supply contracts as collateral to raise debt.³⁶⁸ Such punitive measures could greatly reduce Iran's ability to bring oil to market and deny the Iranian regime the revenue it needs to survive.

In sum, the 112th Congress should pass the Casey-Brown measure—or others like it—as early as possible. Once passed, Congress should encourage the President to persuade America's foreign partners to continue to do whatever is necessary to choke off Iran's energy sector.

CONCLUSION

The issues raised by the Comprehensive Act are issues that are common to the conflicts created by the implementation American foreign policy. As this Comment discusses, the Comprehensive Act raises potential legal and political conflicts between the President and Congress, the United States and its international allies, as well as between the United States and its adversaries.

If the world does not want to live with a nuclear Iran, which has long made its belligerent ambitions apparent, then the world must learn from its past mistakes. The Iranian regime must be sufficiently accosted for its aggressions if it is to sacrifice its nuclear ambitions. Short of war, the rigorous sanctions that have been passed by the U.S. Congress and legislatures around the globe represent the only legitimate option to prevent Iran from acquiring weapons of mass destruction. Nevertheless, it remains to be seen how far the President will go to prevent a nuclear Iran.

367. S. 4008; *see also* Press Release, *supra* note 364.

368. *See* Gerecht & Dubowitz, *supra* note 307, at 13.