

The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and their Supporters

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|--|-----|
| Introduction..... | 850 |
| I. Background, Structure, Statutory Basis, and Use of Executive Order 13,382..... | 852 |
| A. Background of Executive Order 13,382..... | 852 |
| B. Structure of Executive Order 13,382..... | 854 |
| C. Statutory Foundation for Executive Order 13,382: IEEPA, NEA, and UNPA..... | 860 |
| D. How Executive Order 13,382 Has Been Used | 864 |
| II. Challenges to U.S. Proliferation Sanctions | 882 |
| A. Domestic Challenges: U.S. Congress..... | 883 |
| B. Domestic Challenges: U.S. Courts | 886 |
| 1. Challenges to IEEPA..... | 886 |
| 2. Challenges under the APA | 888 |
| 3. Due Process Challenges | 890 |
| 4. Takings Claims..... | 894 |
| 5. Other Constitutional Claims | 897 |
| C. International Diplomatic Challenges..... | 899 |
| D. European Court Challenges..... | 904 |
| E. Potential Claims Before International Bodies and Tribunals..... | 909 |

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| | |
|------------------|-----|
| Conclusion | 912 |
|------------------|-----|

INTRODUCTION

In October 2007, the Department of State imposed nonproliferation sanctions on Iran's Ministry of Defense and the Iranian Revolutionary Guards Corps (IRGC) in response to Iran's persistent refusal to cease enrichment activities and make full disclosure regarding its nuclear program.¹ The Department of the Treasury simultaneously designated other Iranian entities for sanctions pursuant to its counter-terrorism and non-proliferation authority.² The sanctions resulted in the blocking or freezing of assets of the designated entities and a prohibition on any transaction or dealing by U.S. persons with the designated entities. Officials in the George W. Bush administration characterized the sanctions as the most severe imposed on Iran since the U.S. response to the 1979 seizure of the U.S. Embassy in Tehran.³ In contrast, critics have dismissed the very same kind of penalties authorized by the UN Security Council as too weak.⁴ How should the nonproliferation sanctions of the United

1. Additional Designation of Entities Pursuant to Exec. Order No. 13,382, 72 Fed. Reg. 71,991 (Dec. 19, 2007); Press Release, U.S. Dep't of the Treasury, Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support of Terrorism (Oct. 25, 2007), available at <http://www.treas.gov/press/releases/hp644.htm>. The IRGC is Iran's second, but more powerful, military wing.

2. Additional Designation of Entities Pursuant to Exec. Order No. 13,382, 72 Fed. Reg. 62,520 (Nov. 5, 2007); Press Release, U.S. Dep't of the Treasury, *supra* note 1.

3. Robin Wright, *U.S. to Impose New Sanctions Targeting Iran's Military*, WASH. POST, Oct. 25, 2007, at A1 (attributing to senior administration officials the characterization of the sanctions as "the broadest set of punitive measures imposed on Tehran since the 1979 takeover of the U.S. embassy").

4. See, e.g., *Iran Sanctions: Hearing on S. 970 Before the S. Comm. on Finance*, 110th Cong. 11 (2008) [hereinafter *Iran Sanctions Hearing*] (statement of Orde Kittrie, Visiting Associate Professor, University of Maryland School of Law), available at <http://finance.senate.gov/sitepages/hearing040808.htm> (select "Orde Kittrie" hyperlink) ("The weak multilateral sanctions imposed thus far on Iran by the United Nations Security Council are simply not up to the task of slowing Iran's nuclear program."); Howard LaFranchi, *Will EU and US be tougher now on Iran?*, CHRISTIAN SCI. MONITOR, Dec. 27, 2006, at 1, 10 (relating criticism of UN Security Council Resolution 1737, including that exempting the Russian-built plant at Bushehr was too high a price to pay to get Council unanimity); Andrew C. McCarthy, *Sending the Mullahs to Bed Without Supper*, NAT'L REV. ONLINE, Dec. 26, 2006, at <http://article.nationalreview.com/?q=ZmNiZDFINzI2ZmNkYWRhNDcwMWZjZjZjMzJhMmUyNTU=> (characterizing Security Council Resolution 1737 as "toothless sanctions on an unfazed regime" and criticizing the Bush administration for claiming it sent a strong signal when, rather, it sends a message that "there will be no meaningful consequences as the evermore bellicose mullahs pursue their nukes").

States and the international community be judged? If such sanctions are not prompting Iran or other actors to change, should they be tightened, abandoned in favor of other options, or allowed to continue?

This Article reviews the legal framework in the United States for freezing the assets of individuals and entities engaged in proliferation-related activities, as well as those of their supporters. The U.S. strategy over the past several years should be placed within both the context of past efforts by the United States and the context of international sanctions aimed at countering the threat of proliferation. While these nonproliferation sanctions regimes entail some litigation risks, those risks—like the risks entailed in the very similar terrorism-related sanctions regime—are minimal. Criticisms abound that such sanctions are ineffective. Rather than dismissing nonproliferation sanctions based on their perceived lack of effect in achieving the desired change in behavior by proliferators, the United States and the international community must maintain nonproliferation sanctions because these sanctions protect the integrity of the national and global systems and actors within the jurisdictions imposing them. By distancing themselves from proliferators and their supporters, the United States, other countries, as well as voluntary private actors, seek to avoid the potential realization—after that dreaded day when terrorists deploy weapons of mass destruction (WMD) that they had a part in aiding or abetting such a horrible catastrophe.⁵ Regardless of their impact on the target, nonproliferation sanctions must be used to send that strong signal of abhorrence for proliferant behavior. The approach used by the George W. Bush administration in its second term, in blocking assets of proliferators and their supporters while also seeking similar actions on the part of key allies and the private sector, strikes the correct balance in protecting that integrity without being overly punitive in a way that would strengthen opposition to U.S. policies. The strategy also properly balances the sometimes dueling concerns of protecting national security and maintaining internationally recognized minimum standards such as due process.

5. *See, e.g.*, GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 6 (2004) (describing the American national security community's focus after September 11 on when the "second shoe" would drop and surveying the array of "horribles," including an attack with a nuclear bomb); *id.* at 15 ("[G]iven the number of actors with serious intent, the accessibility of weapons or nuclear materials from which elementary weapons could be constructed, and the almost limitless ways in which terrorists could smuggle a weapon through American borders . . . a nuclear terrorist attack on America in the decade ahead is more likely than not.").

The first half of this Article describes Executive Order (E.O.) 13,382, the authority used to freeze assets of proliferators and their supporters. This Article provides its history; places it in the context of relevant U.S. laws; reviews how it has been used in conjunction with efforts to enlist allies and private companies to similarly freeze assets of proliferators and their supporters; and assesses its effectiveness. The second half of the Article analyzes the challenges such asset freeze measures may face: domestically, from Congress and courts in the United States, and internationally, in diplomatic relations, before judicial bodies, and in potential claims brought before international tribunals. As used by the Bush Administration—cautiously and with solicitous requests for others to voluntarily join in—E.O. 13,382 has played a successful role in advancing U.S. nonproliferation policy without subjecting the U.S. government to condemnation in its own courts or abroad.

I. BACKGROUND, STRUCTURE, STATUTORY BASIS, AND USE OF EXECUTIVE ORDER 13,382

A. *Background of Executive Order 13,382*

Executive Order 13,382 of June 28, 2005, entitled “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,” provides the State Department with the authority to designate entities and individuals for a block or freeze of their assets due to their proliferation-related behavior.”⁶ President Bush issued the Order using his authority under the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act (NEA).⁷

President Bill Clinton declared the national emergency underlying E.O. 13,382 in November 1994 when he issued E.O. 12,938. In that executive order, President Clinton found “that the proliferation of nuclear, biological, and chemical weapons (‘weapons of mass destruction’) and of the means of delivering such weapons,” qualified as the kind of threat described in IEEPA, namely an “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”⁸ Under President Clinton’s E.O. 12,938, the Secretary of State could impose sanctions on any person determined to have “knowingly and mate-

6. Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005).

7. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07 (2000); National Emergencies Act, 50 U.S.C. § 1631 (2000).

8. Exec. Order No. 12,938, 59 Fed. Reg. 58,099 (Nov. 14, 1994).

rially contributed” to efforts to “use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.”⁹ The sanctions included prohibitions on U.S. government procurement and imports into the United States from the sanctioned person. In 1998, President Clinton issued E.O. 13,094, which amended E.O. 12,938 to expand in several ways the basis on which the Secretary of State could make a determination to impose sanctions.¹⁰ First, the knowledge requirement was removed by eliminating “knowingly” as a modifier of “contributed.” Second, attempted contributions were added. Third, nuclear and radiological weapons, as well as missiles capable of delivering WMD, were added to the previous ban on chemical and biological weapons. Finally, a ban on U.S. government assistance was added to the procurement and import bans as the measures to be applied upon making the predicate determination. Sanctions imposed under E.O. 12,938, as amended by E.O. 13,094, were implemented by the Office of Foreign Assets Control (OFAC) within the Department of the Treasury as one of over thirty economic sanctions programs administered by that office.¹¹

The events of September 11, 2001, and their aftermath, led the Bush administration to further amend the IEEPA-based sanctions relating to the proliferation of WMD by issuing E.O. 13,382. The Silberman-Robb Commission, tasked after September 11 with reporting to the President on U.S. intelligence capabilities regarding WMD,¹² recommended that the President use the same type of sanctions program against proliferators and their supporters that was already in place to combat terrorism and its supporters, namely blocking or freezing assets as authorized by E.O. 13,224.¹³ E.O. 13,224 followed much more directly on the heels of September 11 and the national emergency declared under IEEPA based on the unusual and extraordinary threat of foreign terrorist attacks on

9. *Id.* at 58,100.

10. Exec. Order No. 13,094, 63 Fed. Reg. 40,803 (July 28, 1998).

11. *Weapons of Mass Destruction: Stopping the Funding—the OFAC Role: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 109th Cong. 28 (2006) [hereinafter *OFAC WMD Hearing*] (statement of Robert W. Werner, Dir., Office of Foreign Assets Control).

12. Press Release, White House, Bush Administration Actions to Implement WMD Commission Recommendations (June 29, 2005), available at <http://www.fas.org/irp/news/2005/06/wh062905-wmd.pdf> (reviewing the formation pursuant to E.O. 13,382 of this bipartisan, independent commission to advise on improving the intelligence capabilities of the United States regarding WMD).

13. COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 531 (2005), available at http://govinfo.library.unt.edu/wmd/report/wmd_report.pdf [hereinafter *SILBERMAN-ROBB COMMISSION REPORT*].

the United States and its nationals.¹⁴ The Silberman-Robb Commission cited the “virtually universal recognition” that the “intersection of terrorism and proliferation” posed the greatest threat to the United States.¹⁵ One past director of OFAC explained in a congressional hearing that the events of September 11 made the prospect of WMD in the hands of terrorists more real, inspiring E.O. 13,382 and other measures.¹⁶ The White House press release announcing the Bush administration’s actions to implement the Commission’s recommendations identified signing E.O. 13,382 as one key step in promoting nonproliferation.¹⁷

B. *Structure of Executive Order 13,382*

Like E.O. 13,224, E.O. 13,382 identifies several categories of “persons” (which may be individuals or entities)¹⁸ subject to sanctions: first, the eight listed in the annex to the Order that were specifically designated by President Bush; second, those determined by the Secretary of State to be involved in proliferation; third, those determined by the Secretary of the Treasury to have provided support for either proliferation activities or previously designated proliferators; and fourth, those determined by Treasury to be owned or controlled by, or acting or purporting to act for or on behalf of, any other designated persons.¹⁹

The eight entities listed in the annex and designated by President Bush were familiar entities to the nonproliferation community and their designation could hardly be questioned. For example, Korea Mining Development Trading Corporation, also known as KOMID or the Changgwang Sinyong Corporation,²⁰ is a notorious North Korean missile exporter that had been sanctioned previously under other U.S. laws.²¹ Another North Korean entity identified in the annex was also al-

14. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

15. SILBERMAN-ROBB COMMISSION REPORT, *supra* note 13, at 531.

16. OFAC WMD Hearing, *supra* note 11, at 29 (statement of Robert W. Werner).

17. Press Release, White House, *supra* note 12.

18. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, 38,568 (June 28, 2005).

19. Compare *id.* § 1, at 38,567, with Exec. Order No. 13,224, Fed. Reg. at 49,079–80 (describing four categories as subject to sanctions: first, an initial list of persons in an annex to E.O. 13,224, selected by the president; second, foreign persons determined by the Secretary of State to have committed, or to pose a risk of committing, acts of terrorism; third, persons determined by the Secretary of the Treasury to be related by ownership, control, or agency to those committing acts of terrorism; and fourth, those determined by the Secretary of the Treasury as providing support for acts of terrorism or those previously designated for committing acts of terrorism).

20. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, NONPROLIFERATION: WHAT YOU NEED TO KNOW ABOUT TREASURY RESTRICTIONS (2009), available at <http://www.treas.gov/offices/enforcement/ofac/programs/wmd/wmd.pdf>.

21. See, e.g., *North Korea Missile Update—2005*, RISK REP., Nov.–Dec. 2005, at

ready well-known and had appeared on U.S. and other countries' export control watch lists: Korea Ryonbong General Corporation.²² Four Iranian entities were designated in the annex based on their involvement in Iran's nuclear technology and missile programs,²³ and one Syrian entity was listed for its role in developing non-conventional weapons and their delivery systems.²⁴ Unlike designations under some other executive orders, namely E.O. 13,224 related to terrorism,²⁵ the administration prepared a substantial evidentiary record documenting the proliferation-related activities of the entities listed in the annex.²⁶

As of January 2009, the State and Treasury Departments had made 121 subsequent designations pursuant to E.O. 13,382.²⁷ The State Department's authority to make additional "primary" designations of proliferators extends to the following category of persons, described in Section 1(a)(ii) of E.O. 13,382:

[A]ny foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern²⁸

<http://www.wisconsinproject.org/countries/nkorea/missileupdate2005.html> (reporting that North Korea funds its own missile program through missile exports to other countries and that the Changgwang Sinyong Corporation is its "most notorious missile exporter"); *see also OFAC WMD Hearing, supra* note 11, at 31 (statement of Robert W. Werner); U.S. Dep't of State, Nonproliferation Sanctions, at <http://www.state.gov/t/isn/c15234.htm> (listing multiple instances when Changgwang Sinyong Corporation was sanctioned under the Iran Nonproliferation Act of 2000).

22. *OFAC WMD Hearing, supra* note 11, at 31 (statement of Robert W. Werner).

23. *Id.* at 32.

24. *Id.*

25. *See Humanitarian Law Project v. United States*, 463 F. Supp. 2d 1049, 1066 (C.D. Cal. 2006), *reh'g granted*, 484 F. Supp. 2d 1099 (C.D. Cal. 2007) (agreeing with vagueness challenge to President Bush's own designation of twenty-seven persons in annex to E.O. 13,224 and explaining that "the EO provides no explanation of the basis upon which these twenty-seven groups and individuals were designated, and references no findings akin to those the secretary of treasury is required to make.").

26. *OFAC WMD Hearing, supra* note 11, at 35 (statement of Robert W. Werner).

27. OFFICE OF FOREIGN ASSETS CONTROL, *supra* note 20 (listing 119 designations). *But see infra* note 41 (indicating that two entities were designated and subsequently removed).

28. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, 38,567 (June 28, 2005).

E.O. 13,382 also amended E.O. 12,938 so that this same language now provides the criteria for imposing the procurement, assistance and import bans under E.O. 12,938, as previously amended.²⁹

In March 2007, the State Department designated the Defense Industries Organization of Iran and in October 2007 it added the Ministry of Defense and Armed Forces Logistics (MODAFL) and the IRGC to the list.³⁰ Subsequently, on July 8, 2008, the State Department designated two individuals, Mohsen Fakhrizadeh-Mahabadi and Yahya Rahimi Safavi, and one company, TAMAS, for their involvement in the nuclear or missile programs in Iran.³¹ By the end of 2008, the State Department had designated only six entities pursuant to its authority to make primary designations under E.O. 13,382. Given the breadth of the authority to make these primary designations, the State Department has exercised remarkable restraint in naming only six persons between 2005 and 2008.

A designation may be based on mere attempts to engage in activities or transactions that contribute materially to proliferation.³² In addition, a person is subject to designation for engaging in activities that only “pose a risk” of materially contributing to proliferation as opposed to making any actual contribution.³³ And the nonexhaustive list of examples of activities that could form the basis of a designation ranges from efforts merely to transport WMD or their means of delivery (e.g., WMD-capable missiles), to efforts to manufacture, acquire, possess, or develop such items, to efforts to actually use them.³⁴ There is no requirement that the activities be engaged in knowingly. Thus, for example, a transporter of goods who remains ignorant of the nature of those goods could, theoretically, fit within the broad terms of the State Department’s designation authority under E.O. 13,382 if the goods trans-

29. *Id.* at 38,568.

30. Additional Designation of Entity Pursuant to Exec. Order No. 13,382, 72 Fed. Reg. 15,930 (Apr. 3, 2007).

31. Press Release, U.S. Dep’t of State, Designation of Iranian Individuals and Entity for Proliferation Activities (July 8, 2008), at <http://merln.ndu.edu/archivepdf/iran/State/106607.pdf>. On January 12, 2009, the Department of State announced sanctions on A.Q. Khan and his associates for their involvement in a nuclear proliferation network, including ten designations under E.O. 13,382 by the Secretary of State. Press Release, U.S. Dep’t of State, Designation of A.Q. Khan and Associates for Nuclear Proliferation Activities (Jan. 12, 2009), at <http://merln.ndu.edu/archivepdf/wmd/state/113774.pdf>. Such a large number of simultaneous State Department designations is unusual and unlikely to recur absent the detection of another nuclear network on the scale of the A.Q. Khan network.

32. Exec. Order No. 13,382, 70 Fed. Reg. at 38,567.

33. *Id.*

34. *Id.*

ported were of a sensitive nature such that they would pose a risk of contributing materially to a person's or country's efforts at a WMD or missile program. The State Department's designation authority, however, is limited in one key way: it extends only to *foreign* persons.

The Treasury Department's designation authority falls into two categories: designations of persons who provide support for other designees or the activities for which persons can be designated, as described in Section 1(a)(iii) and designations of persons who are owned or controlled by, or act or purport to act for or on behalf of, other designees, as described in Section 1(a)(iv).³⁵ Treasury's designations based on relationships with other designees are referred to as "derivative" designations.³⁶ Designations by Treasury have been far more numerous than those by State. Within months after President Bush issued E.O. 13,382, Treasury designated eight North Korean entities and two Iranian entities as derivatives, owned or controlled by entities listed in the annex.³⁷ As of January 2009, Treasury's designations under E.O. 13,382 numbered 113 (115 minus two subsequently removed from the list).³⁸

Despite the relatively higher frequency of its designations, Treasury has also exhibited restraint in using its authority under E.O. 13,382. Like the authorization for the State Department, the language authorizing Treasury's designations is exceedingly broad. A target can be designated for providing any kind of "support" for either another designated person or just proliferation activities generally.³⁹ Treasury's designations have focused mainly on financial support, although more recent designations of Iranian shipping companies mark a slight departure.⁴⁰ Treasury has typically designated entities that are clearly and directly owned or controlled by or acting on behalf of other designees, namely, subsidiaries and company heads, rather than exploiting the breadth of the Order in extending to targets that are less directly owned or acting on behalf of other designees without such explicit authorization or title. Unlike State's authority, Treasury's designation authority extends to

35. *Id.* at 38,567.

36. *OFAC WMD Hearing*, *supra* note 11, at 33 (statement of Robert W. Werner).

37. *Id.* at 34.

38. OFFICE OF FOREIGN ASSETS CONTROL, *supra* note 20.

39. Exec. Order No. 13,382, 70 Fed. Reg. at 38,567 (noting that support can be "financial, material, technological, or other").

40. *See, e.g.*, Press Release, Office of Foreign Assets Control, Recent OFAC Actions (Sept. 10, 2008), at <http://www.treas.gov/offices/enforcement/ofac/actions/20080910.shtml>.

U.S. as well as foreign persons. U.S. entities have been designated, although one was subsequently delisted.⁴¹

Typical of most administrative processes, the designation of targets under E.O. 13,382 revolves around compiling an evidentiary record. Treasury and State officials cull intelligence and diplomatic reporting, public and law enforcement referrals, open source information, and sometimes include field work in order to compile the evidentiary package.⁴² Before the announcement and publication in the *Federal Register* of a new designation, the agencies must find unclassified sources of identifying information such as known aliases, date of birth, place of birth, address, passport number, or other unique data that will distinguish a targeted person from others with similar names.⁴³ The evidentiary package is reviewed by the numerous agencies that comprise the interagency E.O. working group, including attorneys at the Departments of Justice, Treasury, and State.⁴⁴ With the announcement of a new designation, the Treasury Department serves blocking orders or cease and desist orders on any U.S. persons involved with a designee.⁴⁵

There are several explanations for the restraint exercised by State and Treasury under such broad grants of authority. First, the agencies are required by the language of the Order to make their determinations “in consultation” with each other, as well as with the Attorney General, and other relevant U.S. government agencies.⁴⁶ These agencies include the Departments of Commerce, Defense, and Homeland Security; the Federal Bureau of Investigation; Customs and Border Patrol; Immigration and Customs Enforcement; the various bank regulators; and the intelli-

41. See, e.g., Press Release, Office of Foreign Assets Control, Recent OFAC Actions (Dec. 17, 2008), at <http://www.treas.gov/offices/enforcement/ofac/actions/20081217.shtml> (notifying the public of the addition of “ASSA CORP.” of New York to the Specially Designated Nationals (SDN) list for the nonproliferation of WMD (NPWMD) program); Press Release, Office of Foreign Assets Control, Recent OFAC Actions (June 13, 2006), at <http://www.treas.gov/offices/enforcement/ofac/actions/20060613.shtml> (notifying the public of the addition to the SDN list for the NPWMD program of “G.W. AEROSPACE, INC. (a.k.a. GREAT WALL AEROSPACE, INC.), 21515 Hawthorne Blvd., Suite 670, Torrance, CA 90503; California Corporate Number C1458237 (United States)”). However, G.W. Aerospace was subsequently removed from the SDN list. Press Release, Office of Foreign Assets Control, Treasury Lifts Sanctions on Chinese Firm (June 19, 2008), at <http://www.treas.gov/press/releases/hp1042.htm> (determining that G.W. Aerospace and its parent company no longer meet the criteria for designation pursuant to E.O. 13,382 because they had implemented compliance programs to prevent future dealings with Iran).

42. *OFAC WMD Hearing*, *supra* note 11, at 35 (statement of Robert W. Werner).

43. *Id.* at 36.

44. *Id.*

45. *Id.* at 37.

46. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, 38,567 (June 28, 2005).

gence community agencies.⁴⁷ Each of these agencies has unique equities at stake in a potential designation. The State Department may be concerned about the possible impact of a designation on ongoing diplomatic efforts with the country that has jurisdiction over a proposed target. Evidence of this interaction can be seen in the lack of any designations of North Korean entities after the Six Party Talks achieved a critical milestone by reaching the Initial Actions agreement in February 2007, putting North Korea back on track toward its commitment to abandon its nuclear weapons.⁴⁸ The intelligence community exercises a veto-like power over proposed designations that would, in its view, compromise its sources and methods of intelligence gathering.⁴⁹ The interagency process of proposing, vetting, and eventually approving the designation of a proposed target occurs via the E.O. 13,382 working group, co-chaired by Treasury and State, which meets regularly.⁵⁰ In addition, the U.S. government may be stymied in its effort to designate a person if it has not been able to find unclassified identifying information for a potential target.

A second reason for restraint may be even more deliberate. The deciding agency, along with its interagency partners, considers the actual impact of a particular designation before it is made. Robert Werner, while serving as director of OFAC, the office within Treasury that administers E.O. 13,382, explained in congressional testimony in 2006 that the group considers “whether designation of the candidate would actually assist in disrupting or impeding the activities of a larger target, such as a proliferation network.”⁵¹ Then Assistant Secretary of State Paula DeSutter likewise explained that economic sanctions should reasonably be used only when the potential long term benefits are important enough compared to the costs imposed on the United States’ own economy and commercial entities.⁵² The State Department, in exercising its discretion under various nonproliferation sanctions authorities, may decide not to impose sanctions because the foreign government with jurisdiction over an entity or individual who has engaged in proliferation-

47. *OFAC WMD Hearing, supra* note 11, at 29 (statement of Robert W. Werner).

48. Press Release, U.S. Dep’t of State, North Korea: An Important First Step (Feb. 20, 2007), at <http://www.state.gov/documents/organization/80680.pdf>.

49. *OFAC WMD Hearing, supra* note 11, at 37 (statement of Robert W. Werner).

50. *Id.* at 36 (statement of Robert W. Werner).

51. *Id.* at 35 (statement of Robert W. Werner).

52. Paula DeSutter, U.S. Assistant Sec’y of State for Verification, Compliance and Implementation, Remarks at the 2007 Carnegie International Nonproliferation Conference: Tomorrow’s Solutions: Are Sanctions Effective? (June 26, 2007), available at <http://www.carnegieendowment.org/files/sanctions.pdf>.

related activities has itself taken action against that entity or individual.⁵³ This restraint by the executive agencies responsible for E.O. 13,382 comports with President Bush's stated intention at the time E.O. 13,224 was announced, namely, to exercise such broad powers "responsibly, with due regard for the culpability of the persons and entities potentially covered by the order, and in consultation with other countries."⁵⁴

E.O. 13,382, like its model, E.O. 13,224, includes two significant determinations that are not featured in all IEEPA sanctions. First, in Section 3 of E.O. 13,382 and Section 4 of E.O. 13,224, the President stated his determination that the making of humanitarian donations—ordinarily exempt from blocking under IEEPA—would impair the effectiveness of the sanctions and would therefore be prohibited.⁵⁵ Second, Section 5 of E.O. 13,382 and Section 10 of E.O. 13,224 include the finding that even for sanctioned persons who have a "constitutional presence in the United States," prior notice of the sanctions would not be provided because it would render the sanctions ineffective.⁵⁶ The due process issues surrounding the implementation of these sanctions are discussed further below.

C. Statutory Foundation for Executive Order 13,382: IEEPA, NEA, and UNPA

E.O. 13,382 refers to the authority vested in the president by IEEPA and the NEA. E.O. 13,224 also refers to the UN Participation Act (UNPA) because it was preceded by relevant UN Security Council resolutions requiring states to take economic measures to combat terrorism. In the WMD proliferation context, relevant UN Security Council resolutions followed after the issuance of E.O. 13,382. Each of these three statutes—IEEPA, the NEA and the UNPA—forms an important part of the backdrop for analyzing the use of E.O. 13,382.

IEEPA allows the president to take a variety of economic measures in order to deal with "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States" that

53. See U.S. GOV'T ACCOUNTABILITY OFFICE, IRAN SANCTIONS: IMPACT IN FURTHERING U.S. OBJECTIVES IS UNCLEAR AND SHOULD BE REVIEWED 13–14 (2007).

54. Press Release, White House, President Declares National Emergency (Sept. 24, 2003), available at http://avalon.law.yale.edu/sept11/president_024.asp.

55. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, 38,568 (June 28, 2005); Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,080 (Sept. 23, 2001).

56. Exec. Order No. 13,382, 70 Fed. Reg. at 38,568; Exec. Order No. 13,224, 66 Fed. Reg. at 49,081.

“has its source in whole or substantial part outside the United States.”⁵⁷ Under IEEPA, the U.S. government does not take title to the property that is blocked, although there is no limit on the duration of the block or freeze.⁵⁸ Before imposing any economic measures, the president merely needs to declare a national emergency with respect to the threat identified.⁵⁹ The president is encouraged—not required—to consult with Congress before exercising this authority “in every possible instance.”⁶⁰ IEEPA does require regular reporting to Congress after the declaration of a national emergency, including an explanation for finding that an unusual and extraordinary threat exists.⁶¹ Among the available economic measures the president may impose are those used in E.O. 13,382, namely the blocking of property in which any designated foreign country or national has any interest, as well as the prohibition on any dealing in such property by any person subject to U.S. jurisdiction.⁶²

Much has been written about IEEPA, which is understandable given its remarkably broad grant of authority to the executive branch by Congress. Despite some criticism of the manner in which presidents have exercised authority under IEEPA,⁶³ U.S. courts typically decline to question the executive’s invocation of IEEPA to declare a national emergency.⁶⁴

Along with the NEA, IEEPA represented an attempt by the reform-minded Congress of the mid-1970s to constrain executive emergency powers as they had been exercised under the Trading with the Enemy Act (TWEA) of 1917.⁶⁵ Some argue, however, that the seemingly con-

57. 50 U.S.C. § 1701(a) (2000).

58. See John D. Cline, *The President’s Power to Seize Property in the Post-September 11 World: The International Emergency Economic Powers Act*, 27 CHAMPION, Sept./Oct. 2003, at 18, 18 n.2 (commenting that although no title is taken, the effect is much the same as forfeiture).

59. *Id.* at 18.

60. 50 U.S.C. § 1703(a) (2000).

61. *Id.* § 1703(b)–(c).

62. *Id.* § 1702(a).

63. See, e.g., BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 2, 197, 236 (1988) (asserting that the executive branch has declared dubious national emergencies and resorted to IEEPA to avoid the constraints that a legislative branch designed sanctions program would impose); James J. Savage, *Executive Use of the International Emergency Economic Powers Act—Evolution through the Terrorist and Taliban Sanctions*, 10 CURRENTS: INT’L TRADE L.J. 28, 34 (2001).

64. See, e.g., *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) (“[C]ourts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency.”).

65. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4–5 (2005); Savage, *supra* note 63, at 28–32.

straining language, requiring for example that the threat be “unusual and extraordinary,” has not effectively limited the executive.⁶⁶ President Jimmy Carter was the first to exercise the authority under IEEPA when he used it to issue a series of executive orders to deal with the Iran hostage crisis.⁶⁷ President Ronald Reagan used IEEPA against Libya, Panama, and Nicaragua.⁶⁸ President George H.W. Bush issued executive orders under IEEPA relating to Kuwait, Iraq, and Yugoslavia.⁶⁹ President Clinton’s executive orders under IEEPA targeted not only countries, including Haiti and Iran, but also “broke new ground under IEEPA by ordering sanctions targeting not only a state and its citizens but also terrorist organizations and their members.”⁷⁰ President George W. Bush extended the use of IEEPA still further to reach those that abet terrorists and proliferators.⁷¹

It would be hard for anyone to deny that the proliferation of WMD and their means of delivery constitutes an “unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States.” Members of Congress readily accept that proliferation presents a grave threat to the security of the United States.⁷² Numerous experts in the nonproliferation and national security field, and members of both political parties agree on this, particularly when contemplating the combination of this threat with the threat of terrorism.⁷³

IEEPA also states the penalties for violating any order or prohibition issued under its authority. The current maximum civil penalty, applicable for attempted as well as actual violations, is \$250,000 or twice the amount of the prohibited transaction, whichever is greater.⁷⁴ In addition,

66. See generally CARTER, *supra* note 63; Cline, *supra* note 58.

67. Savage, *supra* note 63, at 32–37 (tracing the use of IEEPA by successive administrations).

68. *Id.*

69. *Id.*

70. Chesney, *supra* note 65, at 13–14.

71. Savage, *supra* note 63, at 37.

72. See, e.g., OFAC WMD Hearing, *supra* note 11, at 27 (statement of Sue Kelly, Chairwoman, Subcommittee on Oversight and Investigations) (“The spread of WMD, particularly nuclear weapons, poses the gravest threat to the security of the United States and the peace of the world.”).

73. See, e.g., ALLISON, *supra* note 5, at 129 (finding agreement among national security experts and both political parties that nuclear terrorism is the “focal threat” or “the greatest danger to the United States” today); *id.* at 211 (noting that the two presidential candidates in 2004 agreed that nuclear terrorism was the single most serious threat to U.S. national security); *Iran Sanctions Hearing*, *supra* note 4 (statement of Orde Kittrie) (warning of the grave threat posed by Iran’s nuclear program and that a “nuclear 9/11” is more likely than not according to experts).

74. 50 U.S.C.A. § 1705(a)–(b) (West 2003 & Supp. 2008). These penalties have been amended several times. Attempted violations were added by amendment in 1996. The amount of the civil penalty was increased in 1992 and 2007 amendments.

violations or attempted violations are subject to a criminal penalty of up to one million dollars or twenty years imprisonment.⁷⁵

The NEA stipulates the methods for terminating a national emergency declared by the president under IEEPA.⁷⁶ First, Congress may terminate a national emergency by enacting a joint resolution.⁷⁷ Joint resolutions are themselves rather extraordinary and difficult to enact. Second, the president may issue a proclamation terminating the emergency.⁷⁸ Third, a national emergency will terminate automatically if the president does not publish in the *Federal Register* and transmit to Congress a notice continuing the emergency within ninety days prior to the anniversary of its declaration.⁷⁹ Both President Clinton and President Bush continued the national emergency declared in 1994 regarding proliferation of WMD by annually publishing a notice in the *Federal Register* containing boilerplate language drawn from IEEPA.⁸⁰

The UNPA authorizes the president to take the steps necessary to give effect to decisions of the Security Council to apply measures pursuant to Article 41 of the UN Charter.⁸¹ The UNPA clearly authorizes the actions under E.O. 13,382 of blocking or freezing assets and prohibiting those within the jurisdiction of the United States from dealing in property of blocked persons by authorizing the president to “investigate, regulate or prohibit, in whole or in part, economic relations between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States” and to take these steps “through any agency which he may designate”⁸² The UNPA thus authorizes the kinds of delegations to the Departments of State and Treasury made in E.O. 13,382 and E.O. 13,224. According

75. *Id.* § 1705(b). An amendment in 2006 increased the maximum criminal penalty from ten to twenty years.

76. *See id.* § 1706 (incorporating into IEEPA the termination provisions from the National Emergencies Act, 50 U.S.C. § 1622 (2000)).

77. 50 U.S.C. § 1622(a)(1).

78. *Id.* § 1622(a)(2).

79. *Id.* § 1622(d).

80. *See* Continuation of Emergency Regarding Weapons of Mass Destruction, 60 Fed. Reg. 57,137 (Nov. 8, 1995); 61 Fed. Reg. 58,309 (Nov. 12, 1996); 62 Fed. Reg. 60,993 (Nov. 12, 1997); 63 Fed. Reg. 63,589 (Nov. 12, 1998); 64 Fed. Reg. 61,767 (Nov. 10, 1999); 65 Fed. Reg. 68,063 (Nov. 9, 2000); 66 Fed. Reg. 56,965 (Nov. 9, 2001); 67 Fed. Reg. 68,493 (Nov. 6, 2002); 68 Fed. Reg. 62,209 (Oct. 29, 2003); 69 Fed. Reg. 64,637 (Nov. 4, 2004); 70 Fed. Reg. 62,027 (Oct. 25, 2005); 71 Fed. Reg. 64,109 (Oct. 27, 2006).

81. 22 U.S.C. § 287c (2000). Article 41 pertains to measures short of the use of force, including economic sanctions. U.N. Charter art. 41.

82. 22 U.S.C. § 287c(a) (2000).

to its legislative history, the UNPA was intended to provide the means for implementing international commitments.⁸³ Similar laws exist in other countries, including the United Kingdom.⁸⁴

D. *How Executive Order 13,382 Has Been Used*

The Bush administration deployed E.O. 13,382 very differently from its previous unilateral proliferation-related sanctions programs. In addition to the restraint exercised in selecting targets for sanctions, the Treasury and State Departments have purposefully attempted to make the asset freeze sanctions more multilateral than unilateral by exercising the leverage provided by the U.S. dominance of the international financial system.⁸⁵ This represents a shift from the first term of the administration, particularly vis-à-vis Iran and North Korea, the primary states of proliferation concern. The shift coincided with the departure of John Bolton as Under Secretary of State for International Security and Nonproliferation and the arrival of Condoleezza Rice as Secretary of State. Bolton favored a heavy hand in the use of unilateral sanctions.⁸⁶ Rice persuaded President Bush to offer more carrots along with sticks in pursuing diplomacy with Iran and North Korea.⁸⁷ At the same time, the

83. Michael P. Malloy, *Economic Sanctions and Retention of Counsel*, 9 ADMIN. L.J. AM. U. 515, 526 (1995) (citing H.R. REP. NO. 79-1383 (1945), as reprinted in 1945 U.S. CODE CONG. SERV. 927, 927–28).

84. CARTER, *supra* note 63, at 222 (discussing the United Kingdom's United Nations Act).

85. See Bay Fang, *Treasury wields financial sanctions; U.S. strategy straddles the line between diplomacy, military might*, CHI. TRIB., Apr. 23, 2007, at 1 (“Years ago, people at State would go to Treasury and say, ‘We’ve got a lot of financial muscle, we should use it to pursue political goals.’ But Treasury would always say it didn’t want to mess around with the international financial system.” (quoting Robert Einhorn, former Assistant Secretary of State for nonproliferation)); see also Michael Jacobson, *Sanctions Against Iran: A Promising Struggle*, 31 WASH. Q. 69, 74 (2008) (identifying the leverage the United States exerts on the international financial system due to traditional pricing of the oil market in dollars and the vast number of transactions that are completed through the U.S. financial system); Robert M. Kimmitt, U.S. Deputy Sec’y of the Treasury, Remarks at the Washington Institute for Near East Policy Soref Symposium: The Role of Finance in Combating National Security Threats (May 10, 2007), available at <http://www.treas.gov/press/releases/hp397.htm> (“We are most effective when we proceed multilaterally, either with a coalition or with the consensus of the United Nations.”).

86. See John R. Bolton, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: The Bush Administration's Forward Strategy for Nonproliferation*, 5 CHI. J. INT'L L. 395, 397 (2005) (advocating for more frequent use of sanctions, even if only unilaterally; referring to the debate in the Bush administration about whether proliferation sanctions should be used at all if they were not multilateral; and contrasting the imposition of WMD sanctions twenty-three times in 2003 with the average of eight per year during the Clinton administration).

87. See, e.g., *A countdown to confrontation—Dealing with Iran*, ECONOMIST, Feb. 10, 2007, at 24 (noting that Rice persuaded President Bush to keep diplomacy on track, to accept that Iran

strategy included a gradual tightening of the screws through efforts to constrict the lifeblood of the economies of Iran and North Korea.⁸⁸

With regard to North Korea, the Security Council first condemned its July 2006 test firing of ballistic missiles in Resolution 1695.⁸⁹ After North Korea tested a nuclear weapon in October 2006, the Security Council took stronger action under Article 41 of Chapter VII of the UN Charter in adopting Resolution 1718. Resolution 1718 of October 14, 2006, includes—among other measures such as a ban on exports of luxury goods—a binding asset freeze provision.⁹⁰ The Security Council deferred identifying targets for the asset freeze, providing only the criteria that such targets be “persons or entities designated by the [Sanctions] Committee or by the Security Council as being engaged in or providing support for, including through other illicit means, [North Korea’s] nuclear-related, other weapons of mass destruction-related and ballistic missile-related programmes[.]”⁹¹ Also included as possible targets are individuals “acting on . . . behalf or at the[] direction[of such persons or entities].” Thus the criteria in Resolution 1718 roughly match at least a subset of the criteria for designation under E.O. 13,382. Indeed, in its report on implementation required under paragraph 11 of Resolution 1718, the United States identified E.O. 13,382 as the domestic authority that would allow effective implementation of the asset freeze required by paragraph 8(d) of Resolution 1718.⁹² Although the 1718 Sanctions Committee was established and has promulgated guidelines for designation and implementation of measures,⁹³ no such designations have been made. In its implementation report, the United States referred to the designations of North Korean entities and individuals it had made previously under E.O. 13,382 and stated its intention to propose that those same persons be considered for designation pursuant to Resolution

can have a peaceful nuclear program, and to agree to talks “any time, anywhere”).

88. See, e.g., James Kitfield, *The Money Squeeze on Iran*, NAT’L J., Mar. 3, 2007, at 79.

89. Press Release, Security Council, Security Council Condemns Democratic People’s Republic of Korea’s Missile Launches, Unanimously Adopting Resolution 1695, U.N. Doc. SC/8778 (July 15, 2006).

90. S.C. Res. 1718, ¶ 8(d), U.N. Doc. S/RES/1718 (Oct. 14, 2006).

91. *Id.* The Security Council resolutions use the term “person” to mean an individual, whereas the U.S. executive orders use the term “person” to refer to individuals and entities.

92. Letter from the Permanent Representative of the U.S. to the United Nations addressed to the Chairman of the Comm. 5 (Nov. 13, 2006), U.N. Doc. S/AC.49/2006/11 (Nov. 30, 2006) [hereinafter November 2006 Letter], available at <http://www.un.org/sc/committees/1718/mstaterports.shtml> (follow “United States of America” hyperlink).

93. Sec. Council Comm. established Pursuant to Resolution 1718 (2006), Guidelines of the Comm. for the Conduct of its Work (June 20, 2007), available at http://www.un.org/sc/committees/1718/pdf/guidelines_20_jun_07.pdf.

1718.⁹⁴ However, signs of progress in the Six Party Talks apparently prevented follow through on this intention.

The Security Council took a slightly different approach with respect to Iran, including specific lists of individuals and entities subject to its mandatory asset freeze provisions in annexes to each of three resolutions imposing sanctions in response to Iran's continued refusal to make full disclosures regarding its nuclear program and cease enriching uranium. Resolution 1737, adopted December 23, 2006, pursuant to Article 41 of Chapter VII of the UN Charter, requires in paragraph 12 that all states freeze the assets "owned or controlled by the persons or entities designated in the Annex."⁹⁵ The annex to Resolution 1737 divides the list of ten entities and twelve individuals into categories based on their involvement in either the nuclear program, the ballistic missile program, or both.⁹⁶ The Security Council also left open the possibility in Resolution 1737 that a sanctions committee or the Security Council itself could make additional designations of individuals or entities "engaged in, directly associated with or providing support for Iran's proliferation [of] sensitive nuclear activities or the development of nuclear weapons delivery systems."⁹⁷

Crucial to the United States' interpretation of paragraph 12 are its latter clauses, which arguably provide a basis for acting against individuals and entities not listed in the Annex. In a somewhat ambiguous construction, Paragraph 12 opens the door for countries to extend the asset freeze to "persons or entities acting on their behalf or at their direction," as well as those "owned or controlled by them," with "their" and "them" most likely referring back to those designated in the annex. Another opportunity for expanding the reach of paragraph 12 is the language at the end of the paragraph requiring all states to "ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities." The placement at the end of the paragraph makes possible the interpretation that the antecedent for "these persons and entities" is all of the categories named previously in the paragraph, including those additional targets determined unilaterally by member states as owned or controlled by or acting on behalf of those listed in the annex. Thus, paragraph 12 pro-

94. November 2006 Letter, *supra* note 92, at 5.

95. S.C. Res. 1737, ¶ 12, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

96. *Id.* annex.

97. *Id.* ¶ 10.

vides rough analogues for at least three of the categories for designation under E.O. 13,382: first, the primary persons of proliferation concern listed in an annex; second, those subsequently identified as primary proliferators; third, those owned or controlled by, or acting for or on behalf of those primary designees. The final sentence in Paragraph 12 even suggests that those who provide financial support for any designees should also be prevented from providing such support, coming close to meeting the only other category for designation under E.O. 13,382.

The Security Council subsequently added to the list of targets for the asset freeze provisions in Resolution 1747 of March 24, 2007 and Resolution 1803 of March 3, 2008. Resolution 1747 states that paragraph 12 of Resolution 1737 “shall apply also to the persons and entities listed in Annex I to this resolution.”⁹⁸ Annex I to Resolution 1747 lists ten entities “involved in nuclear or ballistic missile activities,” three entities of the IRGC, eight persons involved in nuclear or ballistic missile activities, and seven key persons of the IRGC. Paragraph 7 of Resolution 1803 similarly extends the application of the asset freeze in paragraph 12 of Resolution 1737 to additional individuals and entities listed in Annexes I and III. Paragraph 7 of Resolution 1803 somewhat redundantly restates the extension of the asset freeze to persons or entities “acting on their behalf or at their direction, and to entities owned or controlled by them.” In an incremental expansion of the scope of the asset freeze, paragraph 7 of Resolution 1803 also authorizes the sanctions committee or the Council to designate additional targets for the asset freeze, namely persons or entities determined to “have assisted” those previously designated in “evading sanctions of, or in violating the provisions of, this resolution, resolution 1737 (2006) or resolution 1747 (2007).” In each of the implementation reports required under Resolutions 1737, 1747, and 1803, the United States has identified E.O. 13,382 and its designations thereunder as the domestic means of implementing its international obligation to impose the asset freeze provisions in each of the resolutions regarding Iran.⁹⁹

98. S.C. Res. 1747, ¶ 4, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

99. See Letter from the Chargé d’Affaires of the U.S. Mission to the United Nations to the Chairman of the Comm. (Feb. 21, 2007), U.N. Doc. S/AC.50/2007/18 (Mar. 5, 2007) [hereinafter February 2007 Letter], available at <http://www.un.org/sc/committees/1737/memberstatesreports.shtml> (follow “S/AC.50/2007/18” hyperlink); Letter from the Permanent Representative of the U.S. to the United Nations to the Chairman of the Comm. (May 24, 2007), U.N. Doc. S/AC.50/2007/88 (June 6, 2007), available at <http://www.un.org/sc/committees/1737/memberstatesreports.shtml> (follow “S/AC.50/2007/88” hyperlink); Letter from the Deputy Permanent Representative of the U.S. to the United Nations to the Chairman of the Comm. (May 2, 2008), U.N. Doc. S/AC.50/2008/34 (May 13, 2008) [hereinafter May 2008 Letter], available at

Although the United States had already designated some of the individuals and entities listed in the annexes to the Iran resolutions even before those annexes appeared,¹⁰⁰ the U.S. designations under E.O. 13,382 to date still do not include every single individual and entity listed in the relevant annexes to the Security Council resolutions on Iran. In its May 2008 implementation report, the United States explained that the lack of adequate identifying information for some of these persons is preventing full implementation: “Identifying information is necessary to avoid confusion and prevent innocent parties from being wrongly penalized.”¹⁰¹ None of the annexes provides such identifying information in listing designated targets for the mandatory asset freeze.

In announcing designations under E.O. 13,382 that postdated relevant Security Council resolutions, the United States has referred to those resolutions as a partial basis for its actions. In announcing the designation of Bank Sepah under E.O. 13,382 in January 2007, the United States cited Resolution 1737.¹⁰² Although Bank Sepah was not listed in the annex to Resolution 1737, the U.S. announcement explained that Bank Sepah had been “the financial linchpin of Iran’s missile procurement network” and had provided support to entities that appeared in the annex, such as Shahid Bakeri Industries Group and Shaheed Hemmat Industries Group (SHIG).¹⁰³ In the October 2007 announcement of both State Department and Treasury Department designations under E.O. 13,382, the explanation for designating IRGC and MODAFL included references to the appearance of elements of those two organizations in the annexes to Resolutions 1737 and 1747.¹⁰⁴ The announcement also explained that the designation of Bank Melli, Iran’s largest bank, was based on its services to entities involved in Iran’s nuclear and ballistic missile programs, including entities listed in the annexes to the Security Council resolutions.¹⁰⁵

The United States has urged its allies both to follow its lead in freezing the assets of the persons designated under E.O. 13,382 and to apply the asset freeze provisions of the Security Council resolutions

<http://www.un.org/sc/committees/1737/memberstatesreports.shtml> (follow “S/AC.50/2008/34” hyperlink).

100. February 2007 Letter, *supra* note 99, at 6 (mentioning that five out of fourteen entities designated under E.O. 13,382 for their involvement in Iranian nuclear or missile activities also appear on the list in the Annex to Resolution 1737).

101. May 2008 Letter, *supra* note 99, at 3.

102. *Financial services: Iran*, ECONOMIST INTELLIGENCE UNIT, Feb. 1, 2007, at 17.

103. *Id.* Bank Sepah was subsequently listed in the annex to Resolution 1747.

104. Press Release, U.S. Dep’t of the Treasury, *supra* note 1, at 1.

105. *Id.*

broadly.¹⁰⁶ One forum for these efforts to multilateralize the U.S. economic measures to counter proliferation is the Financial Action Task Force (FATF), an intergovernmental body that promotes policies to combat money laundering and terrorist financing.¹⁰⁷ Treasury's Office of Terrorism and Financial Intelligence (TFI) leads the U.S. delegation to the FATF and has prompted the body to expand its purview to address the proliferation and financing of WMD.¹⁰⁸ The FATF has issued multiple warnings about Iran's suspect financial practices, calling for "enhanced due diligence" when dealing with Iranian entities.¹⁰⁹

The United States has also advocated an expansive reading of the asset freeze provisions in the Security Council resolutions. As soon as Resolution 1737 was adopted, Under Secretary of State Nicholas Burns characterized the asset freeze provision as the most important part of the resolution, not just in and of itself, but because it would provide a basis for tougher measures by individual countries against Iran.¹¹⁰ Burns specifically advocated that countries take additional measures similar to the U.S. designations under E.O. 13,382.¹¹¹

The United States had laid the groundwork for engendering greater cooperation from its allies, particularly European countries, by backing the incentive package offered to Iran in June 2005.¹¹² Again, this represented a shift from the Bush administration's previous policy of not engaging with Iran at all, a shift attributable to Condoleezza Rice becoming Secretary of State.¹¹³ The incentive package offered with U.S. support in

106. See, e.g., Stuart Levey, U.S. Under Sec'y of the Treasury for Terrorism and Fin. Intelligence, Remarks before the Netherlands' Terrorist Financing Conference (Mar. 16, 2006), *available at* <http://www.treas.gov/press/releases/js4119.htm>.

107. Financial Action Task Force, About the FATF, *at* <http://www.fatf-gafi.org> (last visited Feb. 9, 2009).

108. Kimmitt, *supra* note 85; see also Jacobson, *supra* note 85, at 76 (citing FATF's warnings on Iran in October 2007 and February 2008).

109. See Michael Jacobson, Wash. Inst. For Near East Pol'y, *Iran and the Road Ahead*, POLICYWATCH NO. 1350 (2008), *at* <http://www.washingtoninstitute.org/templateC05.php?CID=2726>.

110. Jennifer Loven, *U.S. Hails U.N. Resolution Against Iran*, ASSOCIATED PRESS, Dec. 24, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/23/AR2006122300382_pf.html; State Department Briefing, Conference Call with Nicholas Burns, Under Sec'y of State for Political Affairs, Subject: United Nations Sanctions Resolution 1737 (Dec. 23, 2006) [hereinafter State Department Briefing], *available at* <http://merln.ndu.edu/archivepdf/iran/State/78246.pdf>.

111. State Department Briefing, *supra* note 110.

112. Farah Stockman, *US, Allies Prepare to Set Sanctions on Iran*, BOSTON GLOBE, Aug. 31, 2006, at A3.

113. *Id.*; see also McCarthy, *supra* note 4 (arguing that the administration of George W. Bush abandoned its "long-settled policy against direct negotiations with the Iranian regime" and made

2005 was more lucrative than previous offers in that it included World Trade Organization (WTO) accession and direct diplomatic engagement with the United States.¹¹⁴ The offer came with a deadline for Iran to stop enriching uranium or face Security Council sanctions.¹¹⁵ When Iran failed to accept even this sweetened deal, the United States had a stronger case to make for sanctions. As Lee Feinstein at the Council on Foreign Relations put it after the Security Council adopted Resolution 1737, “[N]o one expects Iran to suspend enrichment immediately. . . . But it is an opportunity for the US and the [European Union (EU)] to take the lead again in dealing with Iran and to go for tougher sanctions outside the Security Council.”¹¹⁶

The U.S. government began actively reaching out to its counterparts in “tens of countries,” even as the Security Council was still negotiating its first Iran resolution, seeking to broaden the impact of its financial measures to counter proliferation.¹¹⁷ Some U.S. allies willingly implemented the asset freeze measures, both as imposed unilaterally under E.O. 13,382 and as required by the Security Council’s resolutions. On September 19, 2006, before the Security Council had mandated any economic measures against North Korea, the governments of Japan and Australia designated entities and individuals for providing support to North Korean WMD and missile programs, drawing from the designees the United States had identified previously under E.O. 13,382.¹¹⁸ The

“a mockery of the Bush Doctrine’s pledge that rogue states would be made to decide whether they were ‘with us or with the terrorists,’” when the State Department decided to offer incentives for Iran making the “pretense of abandoning its nuclear weapons program”).

114. Stockman, *supra* note 112, at A3; *see also* ALLISON, *supra* note 5, at 163 (arguing that a grand bargain should be offered to Iran, including opportunities for civilian nuclear power, increased trade and investment, and WTO accession, and noting that Iran itself suggested such a bargain through a Swiss intermediary in March 2004 only to be ignored by the Bush administration); *A countdown to confrontation—Dealing with Iran*, *supra* note 87, at 23 (summarizing the process whereby Britain, France, Germany, the United States, Russia, and China offered incentives, including a proper dialogue with the United States, improved trade and political ties, cooperation on producing nuclear power that is less proliferation-prone, and the sanctions in Resolution 1737 that followed after Iran’s rejection of the offer).

115. Helene Cooper, *Iran Is Given More Time to End Uranium Enrichment*, N.Y. TIMES, Sept. 22, 2006, at A12.

116. LaFranchi, *supra* note 4, at 10.

117. *Minimizing Potential Threats from Iran: Assessing the Effectiveness of Current US Sanctions on Iran: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (2007) [hereinafter *Minimizing Potential Threats from Iran Hearing*] (statement of Stuart Levey, Under Secretary for Terrorism and Financial Intelligence), available at <http://www.ustreas.gov/press/releases/hp325.htm>; *see also* Jacobson, *supra* note 85, at 76.

118. Press Release, U.S. Dep’t of State, Actions by Japan and Australia to Implement Resolution 1695 (Sept. 19, 2006), at <http://2001-2009.state.gov/r/pa/prs/ps/2006/72633.htm>.

United States hailed these steps as actions to “help protect the Japanese and Australian financial systems from exploitation by WMD and missile proliferators and their facilitators.”¹¹⁹ The EU took official action on Resolution 1737 at a Council meeting less than one month after the resolution was adopted, calling on all countries to implement it fully, and reached political agreement on a common position to implement the resolution shortly thereafter.¹²⁰ The Japanese government froze the assets of all ten entities and twelve individuals listed in the annex to Resolution 1737 shortly after the EU adopted its common position.¹²¹ However, pressure on European governments to curb their support for exports to Iran and freeze the assets of additional companies beyond those listed in the annexes to the Security Council resolutions continues.¹²² The EU has gone beyond the list of names in the annex to the resolutions, for example, by designating Bank Melli in June 2008 after the United States designated the bank in October 2007.¹²³ Resolution 1803 did not require that the asset freeze be applied to Bank Melli, but rather called upon states to “exercise vigilance” over activities of financial institutions in their territories with Banks Melli and Saderat, as well as all other banks domiciled in Iran.¹²⁴

The United States has also approached international financial institutions directly, without going through governments with jurisdiction over the institutions. Notices of E.O. 13,382 designations are sent directly to financial institutions.¹²⁵ Treasury officials have publicly touted the successes of their outreach efforts to the international private sector. Then Treasury Secretary Henry Paulson described and explained the strategy in remarks made June 14, 2007, to the Council on Foreign Relations. He identified motivating factors for even the non-U.S. banking industry acting on U.S. designations including the desire not to do business with a publicly designated supporter of proliferation, concern for reputation,

119. *Id.*

120. Press Release, Council of the European Union, 2780th Council Meeting, General Affairs and External Relations 14 (Feb. 12, 2007), at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/92758.pdf; Press Release, Council of the European Union, 2776th Council Meeting, General Affairs and External Relations 12 (Jan. 22, 2007), at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/92493.pdf.

121. *US Applauds Japan, EU Steps in Sanctions on Iran*, AGENCE FR. PRESSE, Feb. 16, 2007, available at 2/16/07 AGFRP 22:28:00 (Westlaw).

122. Steven R. Weisman, *Europe Resists U.S. Push to Curb Ties With Iran*, N.Y. TIMES, Jan. 30, 2007, at A1.

123. Najmeh Bozorgmehr, *France and UK Reduce Trade Ties with Iran*, FIN. TIMES, July 18, 2008, at 5.

124. S.C. Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

125. *OFAC WMD Hearing*, *supra* note 11, at 37 (statement of Robert W. Werner).

and the exposure of deceptive practices used in proliferation-related transactions.¹²⁶ Then Deputy Secretary of the Treasury Robert M. Kimmitt similarly described the favorable reception Treasury's outreach efforts receive: "Financial institutions want to identify and avoid dangerous or risky customers who could harm their reputations and business" ¹²⁷ Kimmitt identified Credit Suisse, HSBC, and UBS as among the international financial institutions that had ceased or limited their dealings with Iranian businesses out of concern for the stance the U.S. government has taken.¹²⁸ Matthew Levitt, a former Treasury Department official, stated that "without any official requirement for a bank to do so, they are using [Treasury's proliferation list] and their own due diligence to prevent activity that could harm the bank's reputation."¹²⁹

Stuart Levey, Under Secretary for Terrorism and Financial Intelligence at Treasury, credited previous counter terrorism financing efforts for demonstrating "just how valuable a partner the private sector can be in amplifying the effects of our own financial measures."¹³⁰ He explained that by providing specific examples of deceptive practices used by Iranian banks to disguise the ultimate recipients of funds—such as Bank Saderat, which was designated under E.O. 13,224 for funding Hezbollah, and Bank Sepah, which was designated under E.O. 13,382 for funding Iranian nuclear and missile development organizations—the United States has effectively convinced financial institutions such as Commerzbank, Deutsche Bank, HSBC, Standard Chartered, UBS, and others to curtail or stop handling transactions for Iranian entities.¹³¹

126. Henry Paulson, U.S. Sec'y of the Treasury, Remarks at the Council on Foreign Relations: Targeted Financial Measures to Protect Our National Security (June 14, 2007), available at <http://www.treas.gov/press/releases/hp457.htm>.

127. Kimmitt, *supra* note 85.

128. *Id.*

129. Kitfield, *supra* note 88, at 79.

130. *Id.* at 80.

131. *Id.*; Robin Wright, *Iran Feels Pinch As Major Banks Curtail Business; U.S. Campaign Urges Firms to Cut Ties*, WASH. POST, Mar. 26, 2007, at A10; see also Vernon Silver, *The Bank Behind Iran's Missiles*, BLOOMBERG MARKETS MAG., Oct. 2007, at 83, 96, available at http://www.bloomberg.com/news/marketsmag/mm_1007_story3.html (identifying Commerzbank, Credit Suisse Group, UBS, Deutsche Bank, and Standard Chartered as among those ending or curbing dealings with Iran after the U.S. Treasury designated Bank Sepah); *Behind the Sanctions Against Iran* (NPR radio broadcast Oct. 29, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15721576> (stating that despite the fact that the U.S. designations under E.O. 13,382 in October 2007 are "unilateral," they have "a broader global impact" because "when the United States puts financial sanctions on these major banks, it creates uncertainty among other large banks in terms of possible investment risk, financial risk [T]hese increasing measures on Iranian financial institutions are prompting some of the big

Other Treasury officials likewise hailed the focus on illegal and deceptive conduct by the targets of sanctions—rather than political disfavor—as a reason why the targeted U.S. financial sanctions win broader acceptance.¹³² Levey said, “People go along with you if it’s conduct-based rather than a political gesture.”¹³³ According to Levey, the U.S. outreach in 2006 and 2007 extended to forty non-U.S. banks.¹³⁴ Perhaps Levey’s most alarming call to the international financial sector to join U.S. financial measures came in remarks he made in March 2007 in the Middle East at a conference on trade:

These kinds of measures have several advantages over broad-based sanctions programs. First, by singling out those responsible for engaging in the illicit activity—rather than targeting an entire country—they are more apt to be accepted by a wider number of international actors and governments. Second, targeted financial measures warn innocent people not to deal with the designated target. And third, these measures serve as a deterrent. *Those who are tempted to deal with targeted high risk actors are put on notice: if they continue this relationship, they may be next.*¹³⁵

Indeed, because E.O. 13,382 allows for designations of those who provide financial support for proliferation-related activities or transactions or for other designated entities, the threat to non-U.S. banks who continue to deal with designees like Bank Sepah is not at all hollow. However, the restraint exercised so far by the United States reasonably reduces the likelihood that it would follow through on that threat.

banks in Europe to scale back their investments, their loans, and credits to Iranian institutions”).

132. Fang, *supra* note 85, at 1 (“Our sanctions are now being targeted at specific actors on the basis of certain conduct—not conduct that the U.S. doesn’t like politically but conduct that’s contrary to international law or international standards and norms. And to the extent we can focus our actions against those who are engaged in bad conduct—whether it’s money laundering and counterfeiting like we saw in North Korea or proliferation or sponsorship of terrorism like we see in Iran—there is a very serious response internationally.” (quoting Adam Szubin, Director of OFAC)).

133. Wright, *supra* note 131, at A10.

134. *Minimizing Potential Threats from Iran Hearing*, *supra* note 117 (statement of Stuart Levey); *see also* Fang, *supra* note 85, at 1 (reporting that, in the months prior to August 2007, senior Treasury officials met with more than 40 financial institutions around the world, presenting evidence of deceptive practices and urging them to cease transactions with Iranian banks); Jacobson, *supra* note 85, at 76.

135. Stuart Levey, U.S. Under Sec’y for Terrorism and Fin. Intelligence, Remarks at the 5th Annual Conference on Trade, Treasury, and Cash Management in the Middle East (Mar. 7, 2007), available at <http://www.treas.gov/press/releases/hp297.htm> (emphasis added).

State Department officials have also publicly claimed success in this campaign to mobilize the international private sector to adopt the U.S. designations as their own blacklist. Nicholas Burns, as Under Secretary of State, identified the U.S. campaign to convince international lenders to stop lending to Iran as a tandem to actions in the Security Council, naming as examples of successful persuasion some of the same institutions that Kimmit identified.¹³⁶ Burns also claimed that as a result of the designations under E.O. 13,382, the United States was “increasingly seeing nervousness in the international banking community in terms of doing business with Iran. We’re actively encouraging that trend.”¹³⁷ DeSutter similarly lauded private sector participation in the fight against proliferation and explained that the private sector would act in order to answer concerns of investors, seek market stability, and signal patriotism.¹³⁸ Some financial institutions seem willing to go further than their governments in cutting off financing to identified proliferators and their supporters, whether motivated by fear of running afoul of the U.S. Treasury Department or by standards of good corporate citizenship.¹³⁹ As one manifestation of this response, the number of foreign banks operating in Iran declined from forty-six in 2006 to twenty-two in 2008.¹⁴⁰

The favorable response of the private financial sector to the outreach by the U.S. government has strengthened the negotiating position of the United States and its allies on the Security Council. For example, Treasury’s outreach efforts after the U.S. designation of Bank Sepah under E.O. 13,382 in January 2007 led many non-U.S. banks to curtail dealings with Bank Sepah.¹⁴¹ This, in turn, led to the inclusion of Bank Sepah on the list in the annex to Resolution 1747 in March 2007; earlier proposals to adopt such sanctions during negotiations of Resolution 1737 had met with resistance.¹⁴² In some ways, then, the unilateral U.S. financial sanctions have an even greater impact than the UN sanctions because European and Japanese banks, and even some banks in the United Arab Emirates and Bahrain, have “too much to lose to fall foul of America’s sanctions laws” and so will end business with Iran, espe-

136. State Department Briefing, *supra* note 110.

137. Kitfield, *supra* note 88, at 79.

138. DeSutter, *supra* note 52, at 5.

139. Kitfield, *supra* note 88, at 79; *see also* Weisman, *supra* note 122, at A1 (reporting that private sector firms, especially European banks, are cutting back voluntarily on dealings with Iran, partly because of the actions of the U.S. Treasury Department to freeze assets of Iranian banks and others).

140. Jacobson, *supra* note 109.

141. Fang, *supra* note 85, at 1.

142. Paulson, *supra* note 126.

cially in dollars, even though they do not fall within the jurisdiction of the United States and therefore are not bound to do so by E.O. 13,382.¹⁴³

Financial institutions may also be wary due to some widely publicized enforcement actions taken by the U.S. government against private entities that have attempted to sidestep U.S. sanctions on Iran. Perhaps most notorious is the case of the Dutch bank ABN Amro, in which one of the bank's overseas branches acceded to Bank Melli's request to aid in its deceptive practices by removing the Melli name from transfers ABN Amro made on Melli's behalf through a U.S. branch.¹⁴⁴ ABN Amro wound up paying eighty million dollars in civil penalties.¹⁴⁵ The Department of Justice has investigated Lloyds TSB and Barclays for possible violations of the Iran sanctions regime.¹⁴⁶ Given the relative infrequency of enforcement actions, however, the effectiveness of asset freeze programs like E.O. 13,382 "is much more dependant upon voluntary implementation and compliance with its rules by the regulated community than on the agency's own enforcement actions."¹⁴⁷

The claims of Bush administration officials that this strategy of leveraging unilateral sanctions imposed under E.O. 13,382 was successful have met with criticism.¹⁴⁸ Gauging success depends, of course, on the standard by which sanctions are judged. Nonproliferation sanctions can serve many purposes, ranging from simply making a statement to effectively preventing the development or use of nuclear, chemical, or biological weapons.¹⁴⁹ Sanctions generally are used to influence a change in policies, to punish, or to demonstrate opposition.¹⁵⁰ Sometimes, government actors resort to sanctions because "'something' has to be done" and sanctions are less objectionable than alternatives such as the use of

143. *As the Enrichment Machines Spin On: Iran's Nuclear Programme*, ECONOMIST, Feb. 2, 2008, at 31.

144. Silver, *supra* note 131, at 88.

145. *Id.*

146. Jacobson, *supra* note 109. Lloyds TSB entered an agreement with the U.S. Department of Justice and the Manhattan District Attorney's office in January 2009 that included Lloyds's paying \$350 million in fines and forfeiture for its practice of "stripping," removing identifying information in money transfers to hide the involvement of prohibited participants, including sanctioned entities Bank Melli, Bank Saderat, and Bank Sepah. Chad Bray, *Lloyds TSB Settles with U.S. Officials*, WALL ST. J., Jan. 9, 2009, at B8.

147. Peter L. Fitzgerald, *Managing 'Smart Sanctions' Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 964 (2002).

148. *See, e.g.*, McCarthy, *supra* note 4.

149. DeSutter, *supra* note 52, at 4.

150. *See* CARTER, *supra* note 63, at 12.

force.¹⁵¹ Modest goals for sanctions that recognize the difficulty of actually changing behavior may include impeding the ability of the target to achieve its objectionable policies and paving the way for stronger actions in the future.¹⁵² Furthermore, sanctions might serve the external goal of deterring those other than their targets from similarly objectionable behavior.¹⁵³

There have been occasions when nonproliferation sanctions have succeeded in their highest aspiration, namely, preventing another country from developing a nuclear weapon. In the third edition of their study on economic sanctions, Gary Hufbauer and his colleagues measure the effectiveness of sanctions of various types—including those aimed at hindering a country's efforts to develop WMD—against several criteria.¹⁵⁴ In particular, they score the success of nonproliferation sanctions episodes involving South Africa, Taiwan, Brazil, Argentina, India, Pakistan, South Korea, Iraq, and Libya.¹⁵⁵ The cases of South Korea and Taiwan were deemed “highly successful”; Libya and Iraq were “surprisingly successful” although with lower success scores than South Korea and Taiwan.¹⁵⁶ Sanctions were found not to have a decisive role in the cases of South Africa, Brazil, and Argentina. Sanctions failed altogether in the cases of India and Pakistan, each of which succeeded in developing nuclear weapons. In their empirical study, however, the authors acknowledge that they did not assess sanctions for the “important purposes” served by “declar[ing] the values of the sender country.”¹⁵⁷ Their study classifies as failures even sanctions that succeed in signaling disapproval, demonstrating resolve, or punishing the target.¹⁵⁸ Hufbauer and Schott also counted eight of twenty-one cases involving asset freezes as successful.¹⁵⁹

One immediately apparent criticism of E.O. 13,382 as used against Iranian proliferation activities is that very few assets are actually frozen given the longstanding U.S. ban on almost all trade, investment, or deal-

151. *Id.*; see also GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 44 (3d ed. 2007) (asserting that presidents or prime ministers can use sanctions “to respond to political demands to ‘do something’”).

152. Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 356–59 (2007).

153. *Id.* at 356–58.

154. HUFBAUER ET AL., *supra* note 151, at 2–4.

155. *Id.* at 12.

156. *Id.* at 12, 84–85.

157. *Id.* at 54–55.

158. *Id.* at 160.

159. *Id.* at 96.

ings with Iran.¹⁶⁰ Denying access to the U.S. financial system may not matter to these designees who have little presence in the United States. U.S. officials claim this is not the point, that any disruption to the ability of proliferators and their networks to transact business should be counted as a success.¹⁶¹ The United States can claim that its designations effectively expose the conduct of proliferators and their supporters to the public, and prevent them from claiming legitimacy or having access to the international financial system.¹⁶² But it is unlikely that the designees will find all avenues for transacting business foreclosed. Even after designation, entities can find “workarounds” by transacting in currencies other than U.S. dollars, for example.¹⁶³ After SHIG was designated in Resolution 1737, Bank Sepah issued letters of credit on behalf of a front company for SHIG so that a German supplier was not aware that the designated entity was the true purchaser.¹⁶⁴ In addition, the freezing of assets by the Security Council may be too slow to be effective because targets will have enough time to move their assets after they are publicly identified but before countries move to implement the freeze.¹⁶⁵

Yet outsiders agree with some of the arguments by Treasury and State officials that, because E.O. 13,382 has been used in tandem with successful outreach to allies and the private sector, this sanctions strategy has been more successful than past efforts. The U.S. and global financial systems are so intertwined that designating a foreign bank such as Sepah, Saderat, or Melli can “effectively limit a country’s access to

160. See McCarthy, *supra* note 4 (“[The asset freeze] affects only a handful of persons and entities . . . and . . . matters only if they happen to have assets that can be readily identified inside some country that is willing to pierce through a maze of nominees and seize them.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 53, at 7–10 (referring to existing sanctions on Iran).

161. See, e.g., *OFAC WMD Hearing*, *supra* note 11, at 14 (statement of Robert W. Werner) (“[T]he assets we freeze are only one component of what we do. What we’re really trying to do is disrupt the network. And, frankly, whether they have assets within the United States or not, a designation that disrupts their ability to transact business in the international economy is disruptive and effective.”).

162. See *OFAC WMD Hearing*, *supra* note 11, at 30, 32–33 (statement of Robert W. Werner) (explaining that E.O. 13,382 aims to expose activities publicly to inform third parties; to isolate designees financially and commercially by denying them access to the benefits of trade and transactions with the U.S.; and to disrupt and impede their operations); Levey, *supra* note 106, at 3 (asserting that designees under E.O. 13,382 are “[n]o longer . . . able to claim legitimacy, and no longer should they be able to reap the benefits of access to the international financial system”).

163. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 53, at 20–21.

164. Silver, *supra* note 131, at 84.

165. Kitztrie, *supra* note 152, at 367.

the global ATM.”¹⁶⁶ Many have cited Treasury’s designation of Banco Delta Asia (BDA) as a turning point in causing North Korea to seriously re-engage in the Six Party Talks.¹⁶⁷ While Treasury designated BDA under the money laundering provisions in the USA PATRIOT Act, and not pursuant to E.O. 13,382, the perception that being blacklisted by the U.S. government matters to banks outside the jurisdiction of the United States and carries over to the E.O. 13,382 context. The reputational harm to a designee is demonstrated by the actions of private non-U.S. banks in response to U.S. outreach after designation.¹⁶⁸

Many who have criticized the targeted asset freeze sanctions as a weak approach favor instead sanctions that would have a broader impact on Iran’s economy.¹⁶⁹ In particular, the call for secondary sanctions to prevent investment in Iran’s economy—particularly its petroleum sector—has been sounding more loudly since Iran’s repeated refusal to respond to the carrots and sticks offered thus far by the permanent members of the Security Council.¹⁷⁰ The North Korea example of targeted sanctions’ success may not withstand scrutiny, first because of the differences in Iranian and North Korean relations with their neighbors, and

166. David Ignatius, *U.S. Sanctions with Teeth*, WASH. POST, Feb. 28, 2007, at A19.

167. See, e.g., HUFBAUER ET AL., *supra* note 151, at 139 (asserting that the asset freeze resulting from designation of BDA as a primary money laundering concern was one of most effective uses of targeted sanctions); Kitfield, *supra* note 88, at 80 (arguing that when the Treasury Department accused BDA of involvement in money laundering it led to an informal financial embargo which caused a “pinch” on North Korea and brought the North Koreans back to the table for talks).

168. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 53, at 21 n.38 (indicating that seven of the twenty largest European banks—HSBC, UBS, Barclays, Société Général, ABN Amro, Standard Chartered, and Deutsche Bank—have limited or ceased dealings with Iran).

169. See, e.g., *Iran Sanctions Hearing*, *supra* note 4 (statement of Orde Kittrie) (judging the sanctions imposed by the Security Council in Resolutions 1737, 1747, and 1803 to be “too weak to coerce Iran into compliance” and to be weaker than sanctions that prevented Iraq and Libya from fully developing nuclear programs); Olivier Guitta, *Sanctions Against Iran Would Work; Too bad they won’t be tried*, WKLY. STANDARD, Feb. 19, 2007, at 12, 12 (arguing that Resolution 1737 “imposed limited, almost meaningless, sanctions”); LaFranchi, *supra* note 4, at 10 (citing critics who say too much has been taken off the table in the Security Council so that talk of tougher measures later is meaningless); McCarthy, *supra* note 4 (calling the Security Council’s actions in Resolution 1737 “toothless sanctions on an unfazed regime”); Matthew B. Stannard, *U.N. unlikely to punish Iran—experts; some say even light sanctions wrong way to curb nuclear drive*, SAN FRANCISCO CHRON., Aug. 27, 2006, at A9 (“[T]hese sanctions are perfect for Iran—they don’t take any real bite out of the economy, but they ‘show’ well enough that the president there can. . . point to the evil Satan strangling the defenseless Iranian people.” (quoting George Lopez, then Senior Fellow at the Joan B. Kroc Institute for International Peace Studies)).

170. See, e.g., Guitta, *supra* note 169, at 12 (suggesting that tougher sanctions on Iran’s petroleum sector would work because of the vulnerability of the Iranian economy with eighty-five percent of its revenue coming from the foreign sale of oil and its reliance on imports for forty percent of its petroleum products, including gasoline).

second because of subsequent signs that North Korea is backtracking once again on commitments it made in the Six Party Talks.¹⁷¹

Others observe that targeted sanctions and the isolation of Iran represented by the unanimity at the Security Council have had real consequences.¹⁷² “[T]he nuclear-stand-off is imposing a heavy opportunity cost on Iran’s economic development, slowing down investment in the oil, gas and petrochemical sectors, as well as in critical infrastructure projects, including electricity.”¹⁷³ Some of the actions that failed to win Security Council approval have nonetheless been taken unilaterally by several countries, not just the United States. For example, international endeavors, including Japanese entities, France’s Total, and Royal Dutch Shell, have scaled back their plans to invest in Iran’s oil and gas sector.¹⁷⁴ Many foreign governments have stopped backing credits for investment in Iran.¹⁷⁵ And beyond just the persons targeted by the sanctions, “[e]ven legitimate businesses [in Iran] are suffering, as foreign banks find it hard to be certain that the transactions they handle are not being diverted, for nefarious purposes, through Iran’s network of front companies.”¹⁷⁶ This willing participation by U.S. allies in efforts to tighten the screws on Iran has allowed the United States to ramp up sanctions in a way it could not have done alone. Bruno Pellaud, a former deputy director of the International Atomic Energy Agency (IAEA) said, “In the past, Iran used to ignore U.S. economic sanctions because they could always strike deals with Europe, but I think now this squeeze on capital is beginning to have an impact.”¹⁷⁷ The Iranian economy does

171. See Ian Bremmer, Op-Ed., *The false promise of ‘targeted’ sanctions*, NATION, Apr. 11, 2007, at <http://www.nationmultimedia.com/option/print.php?newsid=30031636> (Thail.) (contending that the analogy between North Korea and Iran is false because North Korea is subject to China’s influence, and no country has similar sway with Iran); Bill Powell, *N. Korea Reneges on Nukes—Again*, TIME, Aug. 27, 2008, at <http://www.time.com/time/world/article/0,8599,1836612,00.html> (referring to the North Korean foreign ministry provision of notice of its decision to discontinue disablement of its nuclear facilities that had been underway in accordance with the agreement reached in the Six Party Talks).

172. See *Behind the Sanctions Against Iran*, *supra* note 131 (“[T]he Bush administration has had amazing success in getting the Security Council . . . to adopt two sanctions measures . . . despite the opposition of Russia and China to broader measures . . .”).

173. *Iran isn’t bothered by the UN resolution*, ECONOMIST, Dec. 28, 2006, at http://www.economist.com/agenda/displaystory.cfm?story_id=8476308.

174. See, e.g., *A countdown to confrontation—Dealing with Iran*, *supra* note 87, at 24 (indicating that the Japanese are cutting back on investment); see also Bozorgmehr, *supra* note 123, at 5 (“France’s Total announced its withdrawal from a multi-billion-dollar gas project [in July 2008], following a similar move [made] by Royal/Dutch Shell [in May 2008]”).

175. *A countdown to confrontation—Dealing with Iran*, *supra* note 87, at 24.

176. *Id.*

177. Kitfield, *supra* note 88, at 80.

appear to be hurting: inflation is at twenty-five percent; importers have to pay in advance because they cannot get lines of credit, increasing their costs; Iranian banks, especially designees like Sepah, are struggling and can no longer enter into correspondent banking relationships; and foreign investors are backing out of planned petroleum sector projects, leading to a fall in Iranian oil production.¹⁷⁸

Moreover, the asset freeze measures were deliberately chosen so as not to have a harsh effect on Iran as a whole. The United Nations has turned increasingly to the use of targeted or smart sanctions, such as freezing assets, as a means for applying pressure while avoiding civilian costs.¹⁷⁹ The United States has agreed with its fellow members of the Security Council that, in keeping with the UN Charter, sanctions such as the asset freeze measures do not aim to punish. After the Council adopted Resolution 1747, U.S. Ambassador to the United Nations Alejandro Wolff acknowledged that the “measures being adopted today were in no way meant to punish Iran’s civilian population.”¹⁸⁰ Russia and China struck the same chord in their statements about Resolution 1747. Vitaly Churkin of Russia stated, “The constraints introduced by the resolution were aimed at eliminating IAEA’s concerns, and were in no way aimed at punishing Iran.”¹⁸¹ Wang Guangya of China said, “The purpose of the new resolution, however, was not to punish Iran, but to urge Iran to return to the negotiations”¹⁸² Harsher measures, such as broader economic sanctions not limited to those involved in Iran’s nuclear or missile programs, would have lost the United States the unanimity it sought in the Security Council.¹⁸³

Iran, of course, claims that the sanctions are meaningless. President Mahmoud Ahmadinejad called Resolution 1737 a “piece of torn paper.”¹⁸⁴ Bank Saderat’s managing director claims that despite U.S. sanctions costing it one-third of its foreign bank partners and most of its correspondent bank relationships, it remains profitable due to its ability to

178. Jacobson, *supra* note 85, at 76–77.

179. HUFBAUER ET AL., *supra* note 151, at 96, 132–33.

180. Press Release, Security Council, Security Council Toughens Sanctions Against Iran, Adds Arms Embargo with Unanimous Adoption of Resolution 1747, U.N. Doc. SC/8980 (Mar. 24, 2007).

181. *Id.*

182. *Id.*

183. See Guitta, *supra* note 169, at 13 (noting further that in order for sanctions on Iran’s petroleum sector to work, the other major nations would need to be joined by Russia and China, who are unwilling).

184. *A countdown to confrontation—Dealing with Iran*, *supra* note 87, at 23.

shift to other customers, particularly in China and the United Arab Emirates.¹⁸⁵

Iran may care more about the impact of sanctions than such public pronouncements suggest. Iran's own Majlis (parliament), in a report prepared by the Foreign Affairs and Defense Commission dated September 2006, prior to the adoption of any sanctions by the Security Council, recommended "making every political effort to prevent the imposition of sanctions, while protecting the interests of the country and the national honor."¹⁸⁶ More recent internal political developments in Iran, such as the election of former President Akbar Hashemi Rafsanjani as speaker of the Experts Assembly and dismissal of the commander of the IRGC after he was designated in the annex to Resolution 1737, may indicate a possible shift away from the influence of hard-liners in the government.¹⁸⁷ In addition, Iran demonstrated its concern over FATF warnings regarding its financial practices by enacting legislation ostensibly to combat money laundering and by lobbying against further condemnation by the body.¹⁸⁸ The National Intelligence Estimate (NIE) on Iran released at the end of 2007 included among its key judgments two findings relevant to the effectiveness of sanctions.¹⁸⁹ First, the NIE found that Tehran halted its nuclear weapons program "primarily in response to international pressure" suggesting that Iran is vulnerable to such pressure on the nuclear issue.¹⁹⁰ Second, the NIE also assessed that "Tehran's decisions are guided by a cost-benefit approach rather than a rush to a weapon irrespective of the political, economic, and military costs."¹⁹¹

The current Under Secretary of State for Political Affairs, William J. Burns, has claimed that Iran's nuclear program has been impaired by the designations of key players:

Iran's real nuclear progress has been less than the sum of its boasts. It has not yet perfected enrichment and as a direct result of U.N. sanctions, Iran's ability to procure technology or items of significance for its nuclear and missile programs, even dual-use

185. Najmeh Bozorgmehr & Daniel Dombey, *Iranian bank shrugs off cost of US sanctions*, FIN. TIMES, Jan. 5, 2008, at 4.

186. Guitta, *supra* note 169, at 12.

187. See Jacobson, *supra* note 85, at 79.

188. *Id.* at 77.

189. NAT'L INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES (2007), available at http://www.dni.gov/press_releases/20071203_release.pdf.

190. *Id.* at 6 (Key Judgments A).

191. *Id.* at 7 (Key Judgments E).

items, has been impaired. Key individuals involved in Iran's procurement activities have been barred from travel and cut off from the international financial system.

Iran's front companies and banks are being pushed out of their normal spheres of operation away from the dollar and increasingly away from the euro too.¹⁹²

If the asset freeze sanctions are judged contemporaneously for their effect in changing Iran's policies, they will obviously be deemed a failure. However, if they are assessed for their success in achieving other purposes, namely, isolating Iran, delaying its progress toward developing a nuclear weapon, and fomenting some dissent within Iran, they cannot be so readily dismissed. If the goal is to "administer financial punishment on [Iran's] elites in an effort to delay the day when a bomb is tested, in hopes that less hostile minds will eventually acquire influence in Tehran," then the current sanctions cannot yet be called ineffective.¹⁹³ And, importantly, the sanctions allow the United States to take a stand in unison with allies and the private sector, against providing support for proliferant behavior.

II. CHALLENGES TO U.S. PROLIFERATION SANCTIONS

Given the astounding breadth of executive authority under IEEPA generally and E.O. 13,382 specifically, one may question whether continued use of this powerful tool may be in jeopardy. While there are several potential sources for challenge, both domestically and internationally, the realistic possibility of any successful challenge is slim. Domestically, the U.S. Congress has only a limited statutory basis for ending a declared national emergency and likely lacks the will to end E.O. 13,382 designations in any event. U.S. courts have limited scope to sustain challenges to measures taken pursuant to IEEPA executive orders, minimizing the litigation risk associated with these actions. Internationally, the approach used in the second term of the Bush administration in selectively sanctioning proliferators and their supporters unilaterally while seeking unanimity at the Security Council and voluntary additional measures by foreign countries and companies is less

192. *U.S. Policy Toward Iran: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 10 (2008) (statement of William J. Burns, Under Sec'y of State for Political Affairs).

193. Stannard, *supra* note 169, at A9 (quoting Gary Clyde Hufbauer of the Institute for International Economics); *see also* HUFBAUER ET AL., *supra* note 151, at 145 (indicating that sanctions cannot stop Iran from developing a nuclear weapon but can postpone the achievement).

likely to meet with diplomatic resistance than harsher unilateral sanctions would be. European courts have considered whether the asset freeze sanctions required by the Security Council are implemented in a way that adequately protects fundamental rights. Ultimately, European courts, like those in the United States, have deferred to government efforts to address compelling interests such as combating terrorism and proliferation. No international body or tribunal has yet to inveigh on the legitimacy of the proliferation sanctions applied pursuant to E.O. 13,382, but if they were to have such an opportunity, they would likely also find that relevant exceptions for national security or other compelling national interests applied. Thus, the likelihood of any successful international challenge is also slight.

A. *Domestic Challenges: U.S. Congress*

One possible source for a challenge to the use of E.O. 13,382 is Congress. First, Congress could terminate a national emergency declared under IEEPA by enacting a joint resolution.¹⁹⁴ The president can veto a joint resolution, thus requiring a two-thirds majority to terminate a national emergency against the wishes of the executive.¹⁹⁵ Not surprisingly, no member of Congress has been willing thus far to assert that the threat of WMD proliferation has ended. Indicators suggest that the threat persists, with al Qaeda continuing efforts to develop WMD and North Korea and Iran threatening to export their weapons to willing buyers.¹⁹⁶ Thus, it is hard to envision a supermajority standing up

194. 50 U.S.C. § 1622(a)(1) (2000) (“Any national emergency declared by the President in accordance with this subchapter [including this section and 50 U.S.C. § 1621] shall terminate if— (1) there is enacted into law a joint resolution terminating the emergency”); *see also* CARTER, *supra* note 63, at 204–05 (stating that IEEPA originally allowed termination by concurrent resolution of Congress, but after the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983), invalidated the single-house veto, IEEPA was amended to require a joint resolution).

195. CARTER, *supra* note 63, at 205.

196. *See* Bill Gertz, *N. Korea would sell nukes to terrorists*, WASH. TIMES, Feb. 5, 2008, at A3 (describing a U.S. intelligence report produced in 2006 and made public on February 4, 2008, indicating that: (1) North Korea threatened to export nuclear weapons to terrorists; (2) two tons of uranium hexafluoride, thought to have originated in North Korea, was recovered from Libya by the IAEA in May 2004; and (3) al Qaeda was developing chemical and biological weapons and continues to seek nuclear or radiological bombs); Parisa Hafezi, *Iran ready to share missile systems with others: TV*, REUTERS, Nov. 6, 2006, at <http://www.reuters.com/article/worldNews/idUSBLA62624020061106> (quoting remarks of then commander of the IRGC, Yahya Rahim Safavi, on Iranian television that “[w]e are able to give our missile systems to friendly and neighboring countries”); Josh Meyer, *Al Qaeda said to focus again on WMD*, L.A. TIMES, Feb. 3, 2008, at A1 (indicating that current and former U.S. intelligence officials believe al Qaeda is again trying to develop or obtain chemical, biological, radiological, or even nuclear weapons to use against the U.S. from its reestablished base in mountainous northwest areas of Pakistan).

against the purported fight against proliferation. But it is not unreasonable to assert that IEEPA is being overused or used inappropriately. The legislative history of IEEPA suggests that it was not intended to support prolonged campaigns like the ones against terrorism and proliferation. Rather, IEEPA's drafters envisioned "rare and brief" emergencies.¹⁹⁷ The national emergency declared by President Clinton regarding proliferation of WMD has lasted fourteen years, hardly a brief period, and there is no end in sight to these threats. Congress's permissiveness toward the exercise of executive power under IEEPA could change, however, as it did when IEEPA was enacted to end the perceived abuse of executive power under the TWEA. Congress could also amend IEEPA, as some have advocated, to secure for itself a greater role in deciding when a national emergency should be declared or terminated or who should be designated or what due process rights should be accorded to those who are targeted.¹⁹⁸

Rather than showing any inclination to challenge the executive branch's use of IEEPA to freeze assets in an effort to address proliferation, Congress has repeatedly urged greater use by the Bush administration of its authority under E.O. 13,382 and E.O. 13,224, suggesting particular entities for designation before the administration was ready to do so itself. In March 2008, Senate Democrats sent a letter to President Bush urging that he designate the central bank of Iran, Bank Markazi, under either E.O. 13,224 or E.O. 13,382 because it was increasingly being used to transact proliferation-related business in response to the designations of other Iranian banks.¹⁹⁹ Both the Senate and the House of Representatives enacted "sense of Congress" provisions calling for the

197. CARTER, *supra* note 63, at 197 ("[E]mergencies are by their nature rare and brief, and are not equated with normal, ongoing problems. . . . A state of national emergency should not be a normal state of affairs." (quoting H.R. REP. NO. 459 (1977), at 10–11)).

198. *See, e.g., id.* at 243 (suggesting IEEPA should be amended to make its casual use more difficult); Chesney, *supra* note 65, at 83 (suggesting Congress should amend IEEPA to require advance notice of pending designation to those with presence in the United States and an opportunity to adduce rebuttal evidence, but should make room for introduction of ex parte, in camera application to make no-notice designation based on showing that such notice will harm national security of the United States); Jason Luong, Note, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1211–12 (2000) ("IEEPA and the NEA should be amended to include similar sunset provisions requiring Congress either to pass legislation declaring a national emergency or to enact legislation specifically authorizing the president's action in order to sustain the use of economic regulations after the statutory expiration of the president's initial declaration of a national emergency.").

199. Glenn R. Simpson, *Democrats urge sanctions on Iran's Central Bank*, WALL ST. J., Mar. 5, 2008, at A4; Schumer, *Joined by Leading Senate Democrats, Pressures Bush Administration to Sanction Iran's Central Bank*, FED. INFO. & NEWS DISPATCH, Mar. 5, 2008, available at 2008 WNLN 4394816.

designation of the IRGC in advance of its designation under E.O. 13,382 in October 2007.²⁰⁰

Congress has also made several attempts to legislate harsher unilateral sanctions to address Iran's proliferant behavior and suspected nuclear ambitions. In particular, Congress has repeatedly drafted proposals directed at other countries and companies outside the jurisdiction of the United States. For example, Senate Resolution 970, the Iran Counter-Proliferation Act of 2007, included provisions pressuring Russia to stop conducting business as usual with Iran and other provisions encouraging divestment from companies that invest in Iran's energy sector.²⁰¹ House Resolution 1400, the Iran Counter-Proliferation Act of 2007, as introduced and passed by the House in 2007, contained similar provisions targeted at other countries for their investment in and support of Iran.²⁰² The House has passed several other similar bills to tighten sanctions and promote divestment; the Senate Banking Committee approved its own Iran sanctions bill in June 2008 that takes a similar approach.²⁰³ Legislation has also been introduced that would arguably extend U.S. law extraterritorially to restrict dealings with Iran by independent foreign subsidiaries of U.S. companies, foreign governments' export credit agencies, financial institutions, insurers, underwriters, and guarantors.²⁰⁴ The Bush administration opposed these proposals as interfering with the cooperative stance it has taken with its allies at the United Nations and through its outreach efforts.²⁰⁵

Arguably, such secondary boycotts have not worked in the past in forcing U.S. allies to join in its unilateral sanctions efforts.²⁰⁶ U.S. allies

200. *US Senate brands Iran Guard 'terrorist organization'*, AGENCE FR. PRESSE, Sept. 26, 2007, available at 9/26/07 AGFRP 23:25:00 (Westlaw); see also Bremmer, *supra* note 171 (reporting even earlier draft legislation introduced in Congress that urged the designation of the IRGC).

201. Iran Counter-Proliferation Act, S. 970, 110th Cong. §§ 3, 6 (2007); see also *Iran Sanctions Hearing*, *supra* note 4 (statement of Orde Kittrie) (urging support for Senate Bill 970).

202. Iran Counter-Proliferation Act, H.R. 1400, 110th Cong. §§ 2(b), 301, 405 (2007).

203. Adam Graham-Silverman, *As Administration Line Changes on Iran, Senate Prepares New Sanction Bill*, CONG. Q. TODAY, July 17, 2008, at 3.

204. Bremmer, *supra* note 171.

205. Kimmitt, *supra* note 85 (highlighting the need to maintain as broad an international coalition as possible and noting that going further along lines under consideration in Congress "could have significant counter-productive policy implications," because proposals "may be seen by our allies as extraterritorial").

206. HUFBAUER ET AL., *supra* note 151, at 169 ("[T]he US Congress has repeatedly tried to use US economic leverage to coerce cooperation from . . . allies [to impose sanctions on Iran, but] . . . [t]his approach is extremely costly to US foreign policy and commercial interests and has never been effective. . . . [T]he United States needs to retain the stick and continue to seek the cooperation of its allies in using sanctions in the face of intransigent targets.").

in Europe see sanctions programs such as the Helms-Burton sanctions on Cuba and the Iran Sanctions Act (ISA) as extraterritorial, and they may be right. One of the provisions of the Iran Counter-Proliferation Act expresses the sense of Congress that banks that deal in U.S. dollars should be prohibited from engaging in dollar transactions with Iranian banks.²⁰⁷ But U.S. jurisdiction, and the effect of the blocking orders resulting from designation under E.O. 13,382 do not extend to all transactions in U.S. dollars, only to those that are completed through the U.S. system and cleared by the Federal Reserve.²⁰⁸

B. *Domestic Challenges: U.S. Courts*

No challenge to any designations under E.O. 13,382 has yet been brought before a court in the United States. Courts have had numerous occasions to consider challenges to other IEEPA-based sanctions programs. In particular, E.O. 13,224, upon which E.O. 13,382 was modeled, has been the subject of many U.S. court decisions. These precedents suggest that a challenge to an E.O. 13,382 designation would be unlikely to succeed on any of several possible theories.

1. *Challenges to IEEPA*

Many have taken note of the extreme deference of U.S. courts to the executive branch's implementation of economic sanctions programs under IEEPA.²⁰⁹ This deference stems from both the doctrine that the executive must have the lead in areas of foreign relations and the political question doctrine.

207. Iran Counter-Proliferation Act, S. 970, 110th Cong. § 3(1) (2007).

208. Michael Gruson, *The U.S. Jurisdiction Over Transfers of U.S. Dollars Between Foreigners and Over Ownership of U.S. Dollar Accounts in Foreign Banks*, 2004 COLUM. BUS. L. REV. 721, 726–34 (examining the legal basis for U.S. jurisdiction over U.S. dollar (USD) assets transferred through the international payment system or deposited at banks outside the U.S. and demonstrating that only in one of three possible cases of USD transactions does the United States have jurisdiction: the case where a person with a USD account outside the United States transfers USD to another person with a USD account outside the United States and the transfer is effectuated through U.S. correspondent banks and cleared by the Federal Reserve). In other cases (e.g., where the foreign bank of the payor and the foreign bank of the payee both have correspondent accounts with a third bank outside the United States or the payor and payee both have USD account with the same non-U.S. bank), U.S. law does not apply. *Id.* at 729–30.

209. See, e.g., CARTER, *supra* note 63, at 203; Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 416 (2006); Terence J. Lau, *Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation*, 41 AM. BUS. L.J. 413, 442 (2004); Luong, *supra* note 198, at 1201–02.

Even before IEEPA was enacted, when national emergencies were authorized under the TWEA, courts found that the determination that a national emergency existed was essentially unreviewable by the courts under the political question doctrine.²¹⁰ Courts have subsequently confirmed that whether sufficient grounds exist for declaring a national emergency under IEEPA is a nonjusticiable political question.²¹¹ Even the rare court that would consider whether the declaration of a national emergency was justified is likely to find that there is a basis for considering that the proliferation of WMD, like terrorism, constitutes an unusual and extraordinary threat.²¹²

In the landmark decision in *Dames & Moore v. Regan*, the Supreme Court scrutinized the earliest exercise of presidential power under IEEPA, President Carter's issuance of executive orders in relation to Iran, subsequently confirmed and extended by President Reagan.²¹³ The Supreme Court applied the classifications of the range of executive power from *Youngstown Sheet & Tube v. Sawyer*²¹⁴ and held that President Carter's actions in freezing assets, among other economic measures, were taken pursuant to specific congressional authorization, placing them in the category where the executive enjoys the "widest latitude."²¹⁵ Even the action of suspending claims in U.S. courts, taken pursuant to an executive order but not explicitly mentioned in IEEPA, was upheld due to (1) the need to respect the president's discretion in the area of foreign policy, (2) manifest congressional acquiescence, and (3) lack of contrary legislative intent.²¹⁶

In a more recent case, *United States v. Dhafir*, the assertion that IEEPA represents an unconstitutional delegation of congressional power to define criminal conduct was also rejected.²¹⁷ The Court of Appeals

210. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) ("[C]ourts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency . . .").

211. *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (declining to inquire into whether President Reagan properly invoked his power in imposing sanctions on the basis it would be a "nonjusticiable political question"); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1195 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

212. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 46 (D.D.C. 2005), *aff'd in part, rev'd in part*, 477 F.3d 728, 734 (D.C. Cir. 2007) (stating summarily that there was clearly a basis for finding that terrorism represented an "unusual and extraordinary" threat after September 11).

213. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

214. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

215. *Dames & Moore*, 453 U.S. at 668–74.

216. *Id.* at 675–78.

217. *United States v. Dhafir*, 461 F.3d 211, 215–17 (2d Cir. 2006).

for the Second Circuit upheld the delegation of authority to the executive under IEEPA as reasonable on several grounds. First, it reasoned that Congress had placed meaningful constraints on the president by requiring that he only use the authority to deal with unusual and extraordinary threats for which a national emergency has been declared.²¹⁸ Second, it found a meaningful constraint on the president in the fact that the emergency could be terminated by several methods, including the failure of the president regularly to reaffirm the existence of the declared national emergency.²¹⁹

2. *Challenges under the APA*

Given the administrative nature of determinations under E.O. 13,382 and other IEEPA-based sanctions programs, designations for an asset freeze or blocking order are subject to review under the Administrative Procedure Act (APA).²²⁰ OFAC has responded to administrative complaints and requests for delisting on many occasions, providing an administrative avenue for relief as an alternative to litigation.²²¹ Court challenges under the APA meet with a highly deferential standard of review and thus rarely succeed.²²² Courts reviewing challenges to IEEPA-

218. *Id.* at 216–17.

219. *Id.*

220. 5 U.S.C. § 706 (2000); *see also* JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, FINAL REPORT TO CONGRESS 68 (2001), *available at* <http://justice.law.stetson.edu/JudicialReviewCommission/finalreport.pdf> (“[G]iven the strong presumption that Congress intends judicial review of administrative action” (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986))). While few hard copies of the Judicial Review Commission report were printed, an original can be found in microfiche form at selected Federal Depository Libraries.

221. 31 C.F.R. § 501.807 (2003) (describing the opportunity to seek administrative review); *see, e.g.*, *Aaran Money Wire Serv. v. United States*, Nos. 02-789, 02-790, 2003 U.S. Dist. LEXIS 16190, at *12–15 (D. Minn. Aug. 21, 2003) (holding that plaintiffs’ claims were moot because while they had been designated and their assets blocked pursuant to E.O. 13,224, they had been delisted and had their assets returned after filing their complaint); Press Release, U.S. Dep’t of the Treasury, Treasury Lifts Sanctions on Chinese Firm (June 19, 2008), *at* <http://www.treas.gov/press/releases/hp1042.htm> (announcing the removal of firms previously designated under E.O. 13,382).

222. 5 U.S.C. § 706(2) (2000) (stating that courts can only consider whether the administrative action was arbitrary or capricious; contrary to the Constitution; in excess of jurisdiction; without observance of procedures required; unsupported by substantial evidence; or unwarranted by the facts); *see, e.g.*, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007) (holding that review of designations under executive orders such as E.O. 13,224 is highly deferential under APA and that the judiciary will leave agency action in place unless it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *IPT Co. v. United States*, No. 92 Civ. 5542, 1994 WL 613371, at *4 (S.D.N.Y. Nov. 4, 1994) (applying a deferential standard of review under the APA and concluding after a review of the record that the

based sanctions have consistently found that their implementation is not arbitrary or capricious.²²³

Although no APA challenge has been brought to a designation under E.O. 13,382, several challenges to designations under E.O. 13,224, on which E.O. 13,382 was modeled, have been rejected by U.S. courts, indicating the likely outcome if such a challenge were to be brought. In *Holy Land Foundation v. Ashcroft*, the D.C. Circuit affirmed the dismissal by the U.S. District Court for the District of Columbia of an APA challenge to the designation and resulting freeze of the assets of the Holy Land Foundation (HLF) under E.O. 13,224.²²⁴ The Court of Appeals emphasized the highly deferential standard used in APA review and found there was ample evidence in the massive administrative record supporting the designation.²²⁵ The Court also rejected the argument that the record's reliance on hearsay and intelligence information was improper under the APA.²²⁶ Likewise, in *Islamic American Relief Agency v. Unidentified FBI Agents*, the district court's dismissal of an APA challenge to a designation under E.O. 13,224 was affirmed by the D.C. Circuit where the district court reviewed the administrative record and concluded that the designation was not arbitrary or capricious.²²⁷ Challenges to designations of Foreign Terrorist Organizations (FTO) based on the Antiterrorism and Effective Death Penalty Act (AEDPA) have met the same fate under the APA's deferential standard of review.²²⁸

imposition of an asset freeze on an entity owned or controlled by an arm of the government of Yugoslavia was not arbitrary or capricious).

223. *Islamic Am. Relief Agency*, 477 F.3d at 734 (upholding designation even though "the unclassified record evidence is not overwhelming," because of an "extremely deferential" standard of review in an "area at the intersection of national security, foreign policy, and administrative law"); *Clancy v. OFAC*, No. 05-C-580, 2007 U.S. Dist. LEXIS 29232, at *33-34 (D. Wis. Mar. 31, 2007) (holding that it was reasonable to implement UN-mandated sanctions on Iraq as authorized by both IEEPA and UNPA); *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas "Coopservir Ltda." v. Newcomb*, No. 98-09490-LFO, 1999 U.S. Dist. LEXIS 23168, at *12 (D.D.C. 1999) (upholding a determination that the designee was "owned or controlled by . . . enterprises that are designated traffickers" because it was reasonable).

224. *Holy Land Found. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

225. *Id.* at 162.

226. *Id.*

227. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 45 (D.D.C. 2005), *aff'd in part, rev'd in part*, 477 F.3d 728 (D.C. Cir. 2007).

228. *See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004) (finding that there was an adequate basis for designating NCRI based on its ownership or control by a previously designated FTO); *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) (stating that the court's only

Perhaps someone might mount a challenge based on the APA and OFAC's somewhat inconsistent practice of publishing designations under IEEPA-based sanctions programs in the *Federal Register*, if any injury could be shown from this failure to publish.²²⁹ If a designation were to be made without a sufficient administrative record, it could give rise to a successful challenge. Such an instance has yet to be seen by U.S. courts.

3. *Due Process Challenges*

Another potential ground for challenging an asset freeze pursuant to E.O. 13,382 is the Fifth Amendment's Due Process Clause, ordinarily understood to require notice and an opportunity for a hearing before depriving a person of certain property interests.²³⁰ The notice that designees under E.O. 13,382, or any other IEEPA-based executive order, receive is the publication of the designation in one or more publicly available sources, including agency press releases and fact sheets, the *Federal Register*, Treasury Department and State Department websites, and periodic updates to an annex in the *Code of Federal Regulations* that lists all designees.²³¹ These public announcements provide scant, if any, information about the activities of the designee that justified the imposition of sanctions.²³² The only opportunity for a hearing comes after the designation and consists of a right to make a written submission to OFAC.²³³ The potential grounds for OFAC to reconsider a designation include: a change in the circumstances that resulted in the designation; an insufficient basis for the designation; or the institution by the designee of remedial steps that would negate the basis for the designation.²³⁴ The person seeking reconsideration may request a meeting with OFAC, but such meetings are not required and are only granted at

function under the APA is to decide whether the Secretary of State had enough information "on the face of things" to conclude the organizations were engaged in terrorism).

229. Fitzgerald, *supra* note 147, at 967 (stating that OFAC is not consistent about publication in the *Federal Register* and relies on its website, despite the fact that the APA and Federal Register Act require official publication before legal effectiveness).

230. *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993).

231. *See, e.g.*, Alphabetical Listing of Blocked Persons, 31 C.F.R. Ch. V, App. A (2008); Additional Designation of Entity Pursuant to Exec. Order No. 13,382, 72 Fed. Reg. 15,930 (Mar. 30, 2007) (identifying the Defense Industries Organization of Iran); Press Release, U.S. Dep't of the Treasury, *supra* note 1; Office of Foreign Assets Control, Recent OFAC Actions, at <http://www.treas.gov/offices/enforcement/ofac/actions/> (last visited Feb. 11, 2009).

232. *See* sources cited *supra* note 231.

233. 31 C.F.R. § 501.807(a) (2009).

234. *Id.*

OFAC's discretion.²³⁵ OFAC is required to provide a written decision on the request for reconsideration, but without any time constraint.²³⁶ There is no requirement that a person exhaust this administrative remedy before seeking relief in court.²³⁷ Courts have yet to agree with criticisms of the sufficiency of such post-hoc process in the IEEPA context.²³⁸

A preliminary consideration for any court reviewing such a challenge would be whether the person claiming a due process violation has any constitutional rights. Several courts have held that foreign entities without property or presence in the United States have no constitutional rights.²³⁹ If an entity had no assets to be frozen in the United States it

235. *Id.* § 501.807(c).

236. *Id.* § 501.807(d).

237. *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas "Coopservir Ltda."* v. Newcomb, No. 98-09490-LFO, 1999 U.S. Dist. LEXIS 23168, at *7 n.4 (D.D.C. 1999).

238. See, e.g., Barnett F. Baron, *The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, But They Have Had a Chilling Impact on U.S.-Based Muslim Charities*, 25 PACE L. REV. 307, 317–19 (2005) (“[T]he designation process itself raises substantial civil liberty concerns when applied to U.S. citizens and organizations. . . .” (citing JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES: MONOGRAPH ON TERRORIST FINANCING 4, 122 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf)); Chesney, *supra* note 65, at 83 (recommending that Congress amend IEEPA to require advance notice of pending designation to those with presence in the United States and an opportunity to adduce rebuttal evidence, but should make room for introduction of ex parte, in camera application to make no-notice designation based on showing that such notice will harm the national security of the United States); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 27 (2003) (“[W]hen [IEEPA] is targeted not at countries but at political organizations and individuals, it raises serious constitutional concerns. It allows the President to selectively blacklist disfavored political groups without substantive standards or procedural safeguards”); Peter L. Fitzgerald, *Smarter “Smart” Sanctions*, 26 PENN ST. INT’L L. REV. 37, 46, 52 (2007) (highlighting the fact that a target often has “no express right . . . to know the basis of the blacklisting decision or to have an independent review of the government’s actions and that the U.S. Judicial Review Commission recommended affording more opportunities for review to those who merely deal with primary targets); Daryl Shetterly, *Starving the Terrorists of Funding: How the United States Treasury Is Fighting the War on Terror*, 18 REGENT U. L. REV. 327, 336 (2005–2006) (noting that Lee Hamilton of the 9/11 Commission admitted that “Treasury’s use of the International Emergency Economic Powers Act against United States citizens and organizations raises significant civil liberty concerns”).

239. JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, *supra* note 220, at 69 (arguing that foreign persons may not be able to challenge designations on constitutional grounds unless they have “substantial connections” with the United States (quoting *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000))); Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 130 (2003–2004) (citing Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192 (D.C. Cir. 2001) and *People’s Mojahedin*, 182 F.3d at 22). But see *Coopservir Ltda.*, 1999 U.S. Dist. LEXIS 23168, at *15–16 (finding no authoritative resolution of the question of whether

would be unlikely to bring a claim in any event, so presumably the most likely plaintiff would have U.S. assets and a U.S. presence.

Nevertheless, such a claim would be unlikely to succeed. E.O. 13,382, like E.O. 13,224, dispenses with any need for prior notice based on the finding that such notice “would render these measures ineffectual.”²⁴⁰ The Supreme Court has approved such postponement of due process rights to notice and a hearing in situations where there is a valid governmental interest at stake that might be frustrated by prior notice and a hearing.²⁴¹

Courts have consistently dismissed due process claims brought by persons designated under E.O. 13,224, reasoning that notice at the time of a designation and the opportunity to question a designation after the fact provide all the process that is due given the countervailing concerns for national security. In *Global Relief Foundation v. O’Neill*, the Seventh Circuit held that an entity that had its assets blocked under E.O. 13,224 was not entitled under the Constitution to notice and a hearing in advance, “an opportunity that would allow any enemy to spirit assets out of the United States.”²⁴² The court cited Supreme Court precedent for the notion that postponement of notice and a hearing is “acceptable in emergencies.”²⁴³ And the court balanced the risk of erroneous designation against the potential danger of assets being used for violence, finding the latter countervailing.²⁴⁴

The D.C. Circuit similarly found no due process violation in *Holy Land Foundation*, discussed above, which also involved a designation under E.O. 13,224.²⁴⁵ The *Holy Land Foundation* court emphasized that due process affords only that process which is due under the circumstances and therefore IEEPA’s express authorization of ex parte and in camera review of classified evidence could not be deemed a denial of

Fifth Amendment due process protections apply to nonresident aliens, but assuming that they do).

240. Exec. Order No. 13,382, 70 Fed. Reg. 38,567, 38,567 (June 28, 2005).

241. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (finding that three conditions justify postponement of notice and hearing: (1) significant governmental purposes served; (2) pre-seizure notice and hearing might frustrate the interests served because the property could be removed, destroyed, or concealed if advance warning were given; (3) seizure is not initiated by self-interested private parties, but by government officials acting under statute); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (discussing requirements of due process and requiring that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event”).

242. 315 F.3d 748, 754 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003).

243. *Id.*

244. *Id.*

245. *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003).

due process given the government interests at stake.²⁴⁶ The D.C. Circuit also affirmed the district court's dismissal of a due process challenge to the designation under E.O. 13,224 in *Islamic American Relief Agency v. Unidentified FBI Agents*.²⁴⁷ The district court applied the balancing test from *Mathews v. Eldridge*²⁴⁸ for determining how much process is required, looking at the following factors: first, the private interest affected; second, the risk of error in the procedures used; third, the value of additional procedural safeguards; and fourth, the government interest.²⁴⁹ The district court also cited Supreme Court precedent finding that postponement of notice and hearing in extraordinary situations does not run afoul of the Due Process Clause.²⁵⁰

Other IEEPA-based sanctions have also been reviewed using the balancing test articulated in *Mathews v. Eldridge*. In *Clancy v. OFAC*, a district court in Wisconsin reasoned that in light of the compelling government interest in national security, the very limited rights to receive notice after the fact and to make only a written presentation to OFAC without any opportunity for discovery were sufficient.²⁵¹

Courts reviewing designations of FTOs under AEDPA—a distinct and separate process from IEEPA—have identified due process violations. In *National Council of Resistance of Iran v. Department of State*, the D.C. Circuit remanded to the Secretary of State the designation of certain FTOs after applying the *Mathews v. Eldridge* factors and holding that such organizations with a U.S. presence must be afforded limited due process rights prior to their designation unless there has been a showing of particularized need.²⁵² The court directed that the organizations must receive notice of the action sought, though the notice need not disclose classified information, and that they must be afforded an opportunity to present evidence to rebut the designation in advance.²⁵³ The D.C. Circuit subsequently approved the re-designation of the same entities as compliant with the statute and all constitutional requirements

246. *Id.* at 164.

247. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 54 (D.D.C. 2005), *aff'd in part, rev'd in part*, 477 F.3d 728 (D.C. Cir. 2007).

248. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

249. *Id.* at 332–48.

250. *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974)).

251. *Clancy v. OFAC*, No. 05-C-580, 2007 U.S. Dist. LEXIS 29232, at *22–23 (D. Wis. Mar. 31, 2007).

252. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

253. *Id.* at 208–09.

and rejected the further claim that due process required an adversarial hearing and opportunity to see classified materials.²⁵⁴

These AEDPA cases have been distinguished by courts when reviewing IEEPA-based measures on the basis that IEEPA designations automatically arise in the context of a declared national emergency necessitating postponement of notice and a hearing.²⁵⁵ The finding in E.O. 13,382 itself that prior notice would render the measures ineffectual should address the D.C. Circuit's requirement for a showing of a particularized need to act without prior notice.

4. *Takings Claims*

The Fifth Amendment also requires that no property be taken without just compensation. The Treasury and Justice Departments defend the freezing of assets under IEEPA against takings claims by pointing to the fact that assets are merely blocked, not seized, so the federal government does not take title to the property.²⁵⁶ Courts have recognized the validity of this defense.²⁵⁷ In *D.C. Precision v. United States*, a district court in New York rejected the claim that the blocking of assets under an IEEPA-based executive order sanctioning Yugoslavia constituted an uncompensated taking on the basis that the assets blocked under IEEPA executive orders are not seized or appropriated, but only temporarily frozen.²⁵⁸ An earlier case in the same court, *IPT Co. v. United States*, likewise reasoned that blocking is not a taking because title to the property does not vest.²⁵⁹ Some critics point out that both the Security Coun-

254. *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 160 (D.C. Cir. 2004).

255. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394, F. Supp. 2d 34, 49 (D.D.C. 2005), *aff'd in part, rev'd in part*, 477 F.3d 728 (D.C. Cir. 2007) (distinguishing NCRI because it was an AEDPA case, not an IEEPA case, where designations flow from a declared national emergency).

256. *OFAC WMD Hearing*, *supra* note 11, at 19 (statement of Robert W. Werner); JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, *supra* note 220, at 89 (describing Justice Department view that blocking actions do not constitute unconstitutional takings because they are not forfeitures and they do not vest title in the government).

257. *See Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 748, 754 (7th Cir. 2002) (finding that only the Court of Federal Claims had jurisdiction to hear takings claim and noting that such claims have been consistently rejected in the IEEPA context because they involve only the temporary blocking of assets, not vesting); *Donohue*, *supra* note 209, at 409.

258. *D.C. Precision, Inc. v. United States*, 73 F. Supp. 2d 338, 343 (S.D.N.Y. 1999) (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) and *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1582 (Fed. Cir. 1995)).

259. *IPT v. United States*, No. 92 Civ. 5542, 1994 WL 613371, at *15 (S.D.N.Y. Nov. 4, 1994).

cil asset freeze measures and those imposed by the United States under IEEPA-based executive orders can be of indefinite duration, undercutting somewhat the claimed “temporary” label.²⁶⁰

Some courts have dispensed with takings claims relating to IEEPA-based measures by identifying the Court of Federal Claims as the only court with jurisdiction to hear such claims, in accordance with the Tucker Act.²⁶¹ But the Court of Federal Claims has been no more receptive to such takings claims by foreign persons than other courts. Court of Federal Claims and Federal Circuit precedent consistently sides with the U.S. government in finding that temporary blocking under IEEPA-based executive orders does not represent a compensable taking. In a case decided fairly early in the IEEPA era, *Chang v. United States*, the Federal Circuit affirmed the Claims Court’s dismissal of a takings claim by engineers who were working in Libya at the time President Reagan issued executive orders under IEEPA that resulted in the termination of their work.²⁶² The *Chang* court used three factors articulated by the Supreme Court to assess whether government regulation constitutes a compensable taking: first, the economic impact of the regulation on the claimant; second, the extent of the interference with distinct investment-backed expectations; and third, the character of the governmental action.²⁶³ The court concluded that there had been no taking because of the lack of reasonable investment-backed expectations, essentially telling plaintiffs that they should have known when they entered into their employment contracts that there was a risk that friendly relations might not continue: “When dealing in foreign commerce, the possibility of chang-

260. See Peter Gutherie, Note, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 501–02 (2004); see also JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, *supra* note 220, at 89 (pointing out that to a person whose assets are blocked for years, the effect may seem no different than if they were actually forfeited).

261. See *Dames & Moore v. Regan*, 453 U.S. 654, 688–90 (1981); *Global Relief Found.*, 315 F.3d at 754 (mentioning that for a takings claim the Tucker Act provides remedy of just compensation if appropriate); *Paradissiottis v. United States*, 304 F.3d 1271, 1273–74 (Fed. Cir. 2002) (highlighting the procedural history of a case which had initially been brought in U.S. district court, which rejected the claim that designation under an IEEPA executive order was improper and was affirmed by the Fifth Circuit, which found it lacked jurisdiction to decide the takings claim, because it had to be heard by the Court of Federal Claims); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 51 (D.D.C. 2005), *aff’d in part, rev’d in part*, 477 F.3d 728 (D.C. Cir. 2007) (holding it lacked subject matter jurisdiction for takings claim and that the case should be properly brought before Court of Federal Claims under the Tucker Act).

262. *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988).

263. *Id.* at 895–96 (citing *Connolly*, 475 U.S. at 225).

ing world circumstances and a corresponding response by the United States government can never be completely discounted.”²⁶⁴

Subsequent cases in the Claims Court and Federal Circuit have come down the same way as *Chang*. In *Rockefeller Center Properties v. United States*, the Court of Federal Claims granted summary judgment for the government on a claim by a person who sought compensation for unpaid rent after having leased property to agencies of the government of Yugoslavia whose assets had been frozen pursuant to IEEPA executive orders.²⁶⁵ The court found that the blocking may have interfered with a property right, but not permanently, and that the interference was justified because it was undertaken pursuant to IEEPA and therefore served a public interest of paramount importance.²⁶⁶ Furthermore, the court reasoned that the plaintiff’s reasonable investment-backed expectations should have been adjusted based on the understanding that dealing with foreign entities is always dependent on the continuation of friendly relations with the foreign country.²⁶⁷

Similarly, in *767 Third Avenue Associates v. United States*, both the Claims Court and the Federal Circuit concluded there had been no compensable taking when a lessor to agencies of the government of Yugoslavia sought compensation for unpaid rent after IEEPA executive orders targeted Yugoslavia.²⁶⁸ Both courts reasoned that there were no reasonable investment-backed expectations because of the manifest possibility of relations with Yugoslavia deteriorating to the point where such blocking measures would occur.²⁶⁹ In addition, the Federal Circuit found that no taking occurs when expectations under a contract are merely frustrated by government action directed at someone other than the claimant.²⁷⁰ More recently, in *Paradissiotis v. United States*, the Federal Circuit took note of the “several occasions” on which the Court of Federal Claims had held that asset freeze actions do not violate the takings clause in concluding that there had been no compensable taking in the case before it.²⁷¹ The court in *Paradissiotis v. United States* pronounced that “valid regulatory measures taken to serve substantial na-

264. *Id.* at 897.

265. *Rockefeller Ctr. Props. v. United States*, 32 Fed. Cl. 586, 587 (1995).

266. *Id.* at 591.

267. *Id.* at 592.

268. *767 Third Ave. Assocs. v. United States*, 30 Fed. Cl. 216 (1993); *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995).

269. *767 Third Ave. Assocs.*, 48 F.3d at 1580.

270. *Id.* at 1581.

271. *Paradissiotis v. United States*, 304 F.3d 1271, 1274 (Fed. Cir. 2002).

tional security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for *Fifth Amendment* purposes.”²⁷²

In one case, *E-Systems v. United States*, the Claims Court distinguished cases involving blocking or freezing of assets of foreign nationals from claims relating to freezing of U.S. citizens’ property, finding that even a temporary block or freeze on a U.S. person’s property can be a taking.²⁷³ Thus the litigation risk is heightened when U.S. citizens are designated.

5. *Other Constitutional Claims*

A few other arguments have been made against particular asset freeze measures under IEEPA, none of which has been successful. First, some have asserted that designation under IEEPA executive order is an unconstitutional bill of attainder, imposing punishment without resorting to a judicial body. In *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas “Coopservir Ltda.” v. Newcomb*, the D.C. district court rejected this argument made by a designee under an IEEPA-based executive order aimed at addressing the national emergency related to drug trafficking in Columbia.²⁷⁴ The Fifth Circuit dismissed a bill of attainder claim in *Paradissiotis v. Rubin*, a case challenging asset freeze measures taken pursuant to IEEPA executive orders relating to Libya.²⁷⁵ The Seventh Circuit, in *Global Relief Foundation*, declared broadly that all constitutional theories applicable in the criminal context are not applicable to designations under IEEPA executive orders because such designations do not define a crime.²⁷⁶ In particular, the court in *Global Relief Foundation* found that the designation was not a bill of attainder because that doctrine applies only to improper determinations of guilt by the legislative branch, not the executive branch as under IEEPA.²⁷⁷ Supreme Court precedent supports this interpretation of the scope of the bill of attainder clause as limited to safeguarding against legislative exercise of the judicial function, and not extending to executive branch action.²⁷⁸

272. *Id.* at 1275 (emphasis added).

273. *E-Sys. v. United States*, 2 Cl. Ct. 271, 275 (1983).

274. *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas “Coopservir Ltda.” v. Newcomb*, No. 98-09490-LFO, 1999 U.S. Dist. LEXIS 23168, at *20 (D.D.C. 1999).

275. *Paradissiotis v. Rubin*, 171 F.3d 983, 988–89 (5th Cir. 1999).

276. *Global Relief Found. v. O’Neill*, 315 F.3d 748, 755 (7th Cir. 2002).

277. *Id.*

278. *United States v. Brown*, 381 U.S. 437, 442 (1965).

Second, various First Amendment arguments have been raised and rejected in cases challenging IEEPA-based blocking orders. In *Holy Land Foundation*, the D.C. Circuit affirmed the district court's dismissal of first amendment claims due to the important and substantial governmental interest in combating terrorism that was served by the designation of HLF pursuant to an IEEPA executive order.²⁷⁹ The *Holy Land Foundation* court pronounced the subsequently oft-cited aphorism that there is no constitutional right to fund terrorism.²⁸⁰ In *Islamic American Relief Agency v. Gonzales*, the D.C. Circuit rejected the argument that blocking the assets of the Islamic American Relief Agency (IARA) unconstitutionally limited freedoms of association and religion by preventing those wishing to fulfill religious obligations from doing so by supporting the charity.²⁸¹ The court echoed *Holy Land Foundation* in holding that there can be no constitutional right to support terrorists and added that the blocking order did not represent any restriction on the freedom of association.²⁸² The district court in *Islamic American Relief Agency v. Unidentified FBI Agents* also relied on *Holy Land Foundation* in rejecting First Amendment claims, reasoning that charitable contributions do not involve political expression; that IEEPA and E.O. 13,224 further the important governmental interest in preventing terrorist attacks; that the blocking measure is unrelated to the suppression of free expression; and that any incidental restriction on First Amendment rights is no greater than necessary.²⁸³ In *Farrakhan v. Reagan*, the D.C. district court rejected both free exercise and free speech claims, which asserted that the executive order regarding Libya prevented repayment of a loan received from the charity and improperly constrained the expression of support that donations to the charity would represent.²⁸⁴ The *Farrakhan* court reasoned that any interest in free exercise of religion or freedom of speech did not outweigh the government's legitimate and compelling interest in preventing the flow of money to Libya, where there would be no guarantee the money would not be diverted to fund activities threatening to the security of the United States.²⁸⁵

279. *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 161 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

280. *Id.* at 165.

281. *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 736 (D.C. Cir. 2007).

282. *Id.*

283. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 52–54 (D.D.C. 2005), *aff'd in part, rev'd in part*, 477 F.3d 728 (D.C. Cir. 2007).

284. *Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987).

285. *Id.* at 512.

In one of the few successful challenges to IEEPA executive orders, a district court in California sustained a first amendment challenge to the proscription in E.O. 13,224 on being “otherwise associated with” designated terrorist organizations.²⁸⁶ This success was nonetheless fleeting. The U.S. government sought reconsideration of the decision after it promulgated new regulations more clearly and narrowly defining the phrase “otherwise associated with.”²⁸⁷ The district court found that the regulations remedied any constitutional problems with the “otherwise associated with” provision and reversed its earlier holding.²⁸⁸ E.O. 13,382 does not contain the phrase “otherwise associated with.”

Third, courts have had occasion to review—and reject—equal protection claims leveled against measures taken pursuant to IEEPA executive orders. In *Islamic American Relief Agency v. Gonzales*, the court rejected the equal protection claim due to the failure to show that the IARA and the United Nations Children’s Fund (UNICEF)—the organization it had identified as also funding designated entities—were similarly situated.²⁸⁹ The IARA had tried its equal protection claim previously at the district court in *Islamic American Relief Agency v. Unidentified FBI Agents*, where it had also failed.²⁹⁰ Thus the U.S. government may proceed with designations under E.O. 13,382 without tremendous concern for successful challenges in U.S. courts as long as administrative procedures, such as compiling an adequate evidentiary record, are observed.

C. *International Diplomatic Challenges*

For the most part, as described above, U.S. allies have also expressed sympathy for, and even joined in, U.S. efforts to undercut support for proliferation by applying asset freeze measures to designated proliferators and their supporters. Diplomatic tensions over the asset freeze measures arise primarily in countries with which there is general disagreement about the use of sanctions.

286. Humanitarian Law Project v. United States, 463 F. Supp. 2d 1049, 1067–71 (C.D. Cal. 2006), *reconsideration granted*, 484 F. Supp. 2d 1099 (C.D. Cal. 2007).

287. Humanitarian Law Project v. United States, 484 F. Supp. 2d 1099, 1102 (C.D. Cal. 2007).

288. *Id.* at 1106.

289. *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 736 (D.C. Cir. 2007).

290. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 50 (D.D.C. 2005), *aff’d in part, rev’d in part*, 477 F.3d 728 (D.C. Cir. 2007) (finding no basis for concluding that UNICEF and plaintiff IARA-USA are remotely the same in terms of ties to IARA).

Iran, logically, has voiced the strongest diplomatic objections to the asset freeze measures taken by the United States, the Security Council, and other nations. Iran has repeatedly asserted that its purportedly peaceful nuclear program provides no basis for invoking Chapter 7 of the UN Charter—which permits sanctions only to address threats to international peace and security.²⁹¹ In response to the Security Council's approval of the most recent round of sanctions in Resolution 1803, Iran's Foreign Minister Manouchehr Mottaki sent a letter to UN Secretary-General Ban Ki-Moon, denouncing the resolution as illegal under the UN Charter and international law and arguing that Iran is entitled to compensation for damages, without specifying where Iran might bring such a claim.²⁹² In response to Resolution 1747, an Iranian Member of Parliament, Javad Arianmanesh, said:

The referral of Iran's nuclear dossier to the Council was illegal and was due to pressure from the US aimed at hindering development of the Islamic Republic The IAEA has the obligation to support the rights of member states to develop peaceful nuclear energy, but due to pressure from big powers, including the US and the UK, it is reneging on its obligation.²⁹³

Iran's permanent representative to the IAEA, Ali Asghar Soltaniyeh, provided a similar response to Resolution 1737:

Resolution 1737 is devoid of any legal basis, because this resolution is based on former resolutions passed at the IAEA Board of Governors. Those resolutions, which were introduced by a small number of countries, were never based on the IAEA Statute or any legal evidence indicating that the Islamic Republic of Iran's nuclear programme had diverted from its peaceful goals.²⁹⁴

291. Iran's Minister for Foreign Affairs, Manouchehr Mottaki, said the Security Council was "being abused to take an unlawful, unnecessary and unjustifiable action against the peaceful nuclear programme of the Islamic Republic of Iran, which presents no threat to international peace and security and falls, therefore, outside the Council's Charter-based mandate." Press Release, Security Council, Security Council Toughens Sanctions Against Iran, Adds Arms Embargo with Unanimous Adoption of Resolution 1747, U.N. Doc. SC/8980 (Mar. 25, 2007). *See generally* U.N. Charter arts. 39, 41.

292. *See* Patrick Worsnip, *Iran threatens legal action over U.N. sanctions*, REUTERS, Mar. 26, 2008, at <http://www.reuters.com/articlePrint?articleId=USN2634872320080326>.

293. *UN anti-Iran resolution "illegal"—MP*, BBC WORLDWIDE MONITORING, Apr. 2, 2007 (Westlaw, BBC Monitoring Middle E.) (text of report in English by Iranian news agency IRNA).

294. *Iran Press IAEA Envoy Discusses UN Resolution 1737, Iran's Nuclear Policy*, BBC WORLDWIDE MONITORING, Feb. 25, 2007 (Westlaw, BBC Monitoring Middle E.) (text of interview by Iranian newspaper *Hamshahri* on February 22, 2007).

Iran's most worrisome response has been to stop carrying out the Additional Protocol to its safeguard agreement with the IAEA and limit its cooperation with the IAEA.²⁹⁵ Hardline elements within Iran have called for withdrawal from the Nuclear Nonproliferation Treaty (NPT) in response to Security Council sanctions.²⁹⁶ On the other hand, Iran claims that the sanctions are not having any real impact and are certainly not halting the advance of its nuclear program.²⁹⁷

Despite its outcry, Iran has nothing else to lose and everything to gain in terms of enhancing diplomatic relations with the United States. Even with the EU—with which Iran's president threatened to downgrade relations if it proceeded with the sanctions under consideration at the Security Council in December 2006—Iran has little leverage diplomatically despite its bluster.²⁹⁸ In the summer of 2008, the British and French embassies in Tehran dramatically reduced their trade sections due to decreased dealings with Iran after the imposition of sanctions, including the EU sanctions on Bank Melli and French company Total's withdrawal from a multibillion dollar gas project in Iran.²⁹⁹

Diplomatically, Russia and China present more formidable obstacles due to their permanent membership on the Security Council. They have repeatedly balked at U.S. and European efforts to impose tougher sanctions on Iran at the Security Council, at least in part due to both countries' strong commercial ties to Iran.³⁰⁰ In negotiations over the draft text that was ultimately adopted as Resolution 1737, Russia insisted on removing a proposed travel ban, exempting the billion-dollar Bushehr nu-

295. *See id.*

296. *See From today's Iranian press*, MIDEAST MIRROR, Apr. 3, 2007 (LEXIS) (indicating that hard-line, pro-Khamenei daily paper, *Jomhuri-ye Eslami*, recommended withdrawal from the NPT after Resolution 1747 was issued).

297. *See* Helene Cooper & Warren Hoge, *Europeans Plan Incentives, as Iran Says Sanctions Won't Halt Nuclear Program*, N.Y. TIMES, Feb. 26, 2008, at A10 (quoting the Iranian ambassador to the United Nations, who repeated the position that there is no legal basis for considering Iran's nuclear program at the Security Council but advised that "[n]obody can say that sanctions are not hurting anybody, but the point is we are not concerned with the measures in this resolution. We have learned to live with them").

298. *See* Angela Charlton, *6 world powers make progress, but no accord, in talks on U.N. resolution on Iran*, ASSOCIATED PRESS, Dec. 5, 2006, available at 12/5/06 APWORLD 22:27:31 (Westlaw).

299. *See* Bozorgmehr, *supra* note 123, at 5.

300. *See* Edith M. Lederer, *Security Council agrees to sanctions on Iran over its nuclear program*, ASSOCIATED PRESS, Dec. 24, 2006, available 12/24/06 APWORLD 06:45:39; Kittrie, *supra* note 152, at 382–83 (highlighting the fact that total exports from Russia, China, France, and United Kingdom to Iran was estimated at twenty-two billion dollars in 2006, up from eighteen billion dollars in 2005, and that Russian opposition to strong sanctions is apparently driven by a desire to keep selling Iran weapons, nuclear reactors, and other high-tech machinery).

clear reactor it has been building for Iran, and removing one particular entity, the Aerospace Industries Organization (listed in the annex to E.O. 13,382), from the list of entities subject to the asset freeze.³⁰¹ However, despite stalling the first round of sanctions until months after the deadline for Iran to comply with previous demands, China and Russia eventually came around.³⁰² There were certainly times when such unanimity at the Security Council seemed beyond reach.³⁰³

Similarly, in negotiating Resolution 1747, Russia and China insisted on dropping provisions proposed by the United States and EU including a travel ban, the cutoff of export credits and loan guarantees, the designation of IRGC for the asset freeze, and a prohibition on arms imports by Iran.³⁰⁴ Under U.S. sway, France, Germany, and Japan went forward unilaterally with similar measures capping or reducing credits to Iran.³⁰⁵

301. See Justin Bergman, *Bolton says Russia seeking broad changes to Iran nuclear resolution*, ASSOCIATED PRESS, Nov. 14, 2006, available at 11/16/06 APWORLD 00:30:45 (noting that Moscow rejected a European draft of what became Resolution 1737, insisting sanctions were too broad, too strong, and that all references to Bushehr plant be removed); Charlton, *supra* note 298 (during negotiations on Resolution 1737, Russia opposed wide-ranging sanctions and specifically resisted travel ban and asset freeze proposals); Pyotr Goncharov, *Outside View: Bushehr's nuclear fate*, UNITED PRESS INT'L, Mar. 15, 2007 (LEXIS, UPI) (noting that Russia allegedly resisted Security Council efforts when drafting Resolution 1737 to protect its interests in the Bushehr project); George Jahn, *Moscow presents West with list of watered-down sanctions on Iran*, ASSOCIATED PRESS, Nov. 8, 2006, available at 11/8/06 APWORLD 19:13:58 (noting that Russia crossed out large sections of draft resolution by deleting any reference to Bushehr); Colum Lynch, *Sanctions On Iran Approved By U.N.; Strongest Measures Stripped From Final Resolution*, WASH. POST, Dec. 24, 2006, at A1.

302. See Maggie Farley, *China, Russia near accord on Iran sanctions; Only 'small fixes' in the U.N. resolution are needed, an envoy says*, L.A. TIMES, Dec. 12, 2006, at A12 (describing how Russia and China held up action by the Security Council for months after Iran let the August 31 deadline pass without responding to the call to cease enriching uranium); Maggie Farley, *Security Council Split on Iran Sanctions Draft*, L.A. TIMES, Oct. 27, 2006, at A11 (describing how Russia and China initially rejected a French draft resolution even though they had agreed to impose sanctions if the July 31 resolution was flouted); Warren Hoge, *Europeans Limit Scope of Iran Nuclear Resolution*, N.Y. TIMES, Dec. 9, 2006, at A10 (explaining that Iran ignored the August 31 deadline, leading the United States and EU to press for sanctions, but that China and Russia stalled).

303. See Edith M. Lederer, *China: Security Council so divided over Iran sanctions some differences cannot be bridged*, ASSOCIATED PRESS, Nov. 8, 2006, available at 11/8/06 APWORLD 01:27:03 (Westlaw) (noting that China said five veto-wielding members are too divided to reach agreement and Russia's ambassador Vitaly Churkin also acknowledged a "considerable gap").

304. Edith M. Lederer, *Key Countries Discuss Possible new Iran Sanctions Including an Arms Embargo, Travel Ban and Trade Restrictions*, ASSOCIATED PRESS, Mar. 7, 2007, available at 3/7/07 APWORLD 05:16:21 (Westlaw) [hereinafter Lederer, *Key Countries Discuss Possible new Iran Sanctions*] (noting that China's UN ambassador said there were different views among Security Council members toward curbing loan guarantees for companies doing business with Iran); Edith M. Lederer, *Key U.N. Security Council Members Fail to Agree on new Iran Sanctions*, ASSOCIATED PRESS, Mar. 12, 2007, available at 3/12/07 APDATASTREAM 07:01:24

If Russia and China had refused at any of these junctures, the United States had E.O. 13,382 and its outreach to its allies to fall back on.³⁰⁶ With Russia in particular seeming unlikely to be amenable to additional screw tightening after its war with Georgia put a chill in relations with the West, the fallback option may prove to be the only option going forward.

Other members of the Security Council have expressed misgivings. South Africa insisted that the Security Council provide more in the way of explanations for why individuals and entities were listed for the asset freeze in Resolution 1747.³⁰⁷ Indonesia abstained from Resolution 1803, the most recent resolution imposing sanctions under Chapter 7.³⁰⁸

Looking again to the terrorism asset freeze measures as an indication of where problems with proliferation designations may arise, there are some signs of dissatisfaction among U.S. allies. Diplomatic outcry has prompted delisting by the UN sanctions committee that oversees Security Council asset freezes pursuant to resolutions relating to terrorism. For example, the Swedish government objected to the listing of three of its citizens, giving rise to questions from several European countries about the methodology and reviewability of terrorism-related asset freeze designations.³⁰⁹ The terrorism sanctions committee has since in-

(Westlaw) (explaining that the United States and EU are on the side of tougher sanctions while Russia and China oppose, with China specifically resisting cutbacks on loan guarantees for companies doing business in Iran); Edith M. Lederer, *Six World Powers Try to Bridge Final Differences on new Sanctions Against Iran*, ASSOCIATED PRESS, Mar. 14, 2007, available at 3/14/07 APALERTENG 18:19:12 (Westlaw) (explaining that the West would like more to the new sanctions than the embargo on arms exports, freeze on more individuals and companies assets, and call on governments not to make loans (without a binding prohibition), but need to settle for less to get Russia and China's support); Alexandra Olson, *China, Russia Concerned About Proposed Sanctions Against Iran's Elite Guards, Credit Curbs*, ASSOCIATED PRESS, Mar. 9, 2007, available at 3/9/07 APWORLD 22:47:00 (Westlaw) (describing how Russia raised concerns about the IRGC designation, China warned about reducing credit, and the acting U.S. representative acknowledged that the scope of financial sanctions was a key sticking point in negotiations).

305. Lederer, *Key Countries Discuss Possible new Iran Sanctions*, *supra* note 304.

306. See Maggie Farley, *U.S. May Curb Iran*, L.A. TIMES, Aug. 26, 2006, at A1 (explaining that the United States would have acted without Russia and China if they had not come along, by using its own executive orders and then asking European and Japanese banks to restrict their dealings with Iran).

307. Daniel B. Schneider, *Iranian President Cancels U.N. Trip, Blaming U.S.*, N.Y. TIMES, Mar. 24, 2007, at A7.

308. Press Release, U.S. Dep't of State, UN Security Council Resolution 1803 on Iran's Nuclear Program (Apr. 4, 2008), available at <http://merln.ndu.edu/archivepdf/iran/State/102891.pdf>.

309. Donohue, *supra* note 209, at 420–21 (describing how, in January 2002, the Swedish government petitioned OFAC and the United Nations for removal of some of its citizens from U.S. and UN lists, Canada also petitioned to have a Canadian citizen's name removed from the UN list, and France advocated clearer criteria for listing and a procedure for review); Guthrie,

stituted an evidentiary requirement and an appeals procedure for that asset freeze regime.³¹⁰

D. *European Court Challenges*

European courts lack jurisdiction to hear a direct challenge to a U.S. designation under E.O. 13,382. They could, however, hear a challenge to one of their own member states' parallel actions, either taken to fulfill obligations under Security Council resolutions or as unilateral acts. European views are also instructive on the potential path U.S. courts could take in the future if they decided to weigh individual rights, such as due process, more heavily in the balance against the governmental interest in protecting national security.

Like U.S. courts, the European courts have generally approved the designation of individuals and entities for asset freeze measures to carry out Security Council resolutions directed at stopping the financing and support of terrorism. In *Yusuf v. Council*, the Court of First Instance (CFI) of the European Court of Justice (ECJ) hailed the use of "smart sanctions," targeted at individuals and entities, as a replacement for classic trade embargoes and a means to reduce civilian suffering.³¹¹ Despite the explicit authorization for such measures extending only to countries, rather than to nationals of a member state, the *Yusuf* court held that it was within the competence of the Council of the European Union to direct sanctions at those associated with or controlled by terrorist groups wherever they may be, even in a member state.³¹² In a very similar case, *Kadi v. Council*, the CFI again held that the Council of the European Union was competent to take action against nonstate actors despite its authorities specifically referring only to actions against other countries, reasoning that such actors represent the new threat to international peace and security to which the Council needs to be able to respond.³¹³ The *Kadi* and *Yusuf* decisions along with another decision of the CFI, *Ayadi v. Council*, also found the Council of the European Union within its competence based on the prevailing obligation under the UN Charter to carry out binding resolutions of the Security Council,

supra note 260, at 511–13 (explaining that, after the Swedish government questions the listing by the Resolution 1267 Committee of three of its citizens and the United States joined the request for delisting, questioning about the committee's methodology arose).

310. Donohue, *supra* note 209, at 420–21 (noting that the United Nations created an evidentiary requirement for the list and an appeals procedure in response to criticism).

311. Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, para. 113.

312. *Id.* para. 115.

313. Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649, para. 133.

which, according to the “rule of primacy” found both in customary international law and in Article 103 of the Charter, supersedes any obligations under domestic or international treaty law.³¹⁴

European courts also apply an APA-like standard of review in considering terrorist designations. In *Organisation des Modjahedines du peuple d’Iran (PMOI) v. Council*, the CFI described its responsibilities as checking that the designations had been made in accordance with governing rules of procedure and assuring that there was no manifest error or misuse of power. The court emphasized that it must avoid substituting its own judgment for that of the Council of the European Union.³¹⁵ The *Ayadi* court described its jurisdiction as limited to ensuring that the actions comported with principles of jus cogens.³¹⁶ The CFI has also applied a doctrine resembling the U.S. doctrine of nonjusticiability of political questions, characterizing judgments as to whether a person poses a threat to international peace and security as a “political assessment” that is within the exclusive competence of the authority to which the international community has entrusted responsibility.³¹⁷

European courts have shown discomfort with the lack of notice and opportunity for a hearing afforded to designees only where the designations were not required by Security Council resolution. In *Yusuf, Kadi*, and *Ayadi*, the court rejected assertions that the designation process breached fundamental rights to notice and a fair hearing, in part because the Council of the European Union had not made any independent determination to designate, but had merely implemented designations made by the Security Council.³¹⁸ In *Yusuf*, the court went on to find that there is no guarantee under public international law to a prior hearing and that affording one in such situations would jeopardize the effectiveness of the measures, reasoning that resonates with findings of U.S. courts, discussed above.³¹⁹ The *Yusuf* court also applied a balancing test like that used in the United States, finding that rights to a hearing are not absolute, may be limited in times of emergency, and that, in the terrorism context, any interest in having a court hearing was outweighed

314. Case T-253/02, *Ayadi v. Council*, 2006 E.C.R. II-2139, para. 111 (referring to *Yusuf* and *Kadi*); *Kadi*, 2005 E.C.R. II-3649 paras. 181–84.

315. Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council*, 2006 E.C.R. II-4665, para. 159.

316. *Ayadi*, 2006 E.C.R. II-2139 para. 111.

317. *Kadi*, 2005 E.C.R. II-3649 para. 284.

318. *Ayadi*, 2006 E.C.R. II-2139 para. 150; *Kadi*, 2005 E.C.R. II-3649 para. 258; Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, para. 191.

319. *Yusuf*, 2005 E.C.R. II-3533. paras. 307–08.

by the essential public interest in the maintenance of peace and security.³²⁰ The decisions in *Ayadi* and *Kadi* also point out that the Security Council itself had established a mechanism for review of designations through its sanctions committee, and that this process—although limited to requests for review made through the government of a member state—was adequate.³²¹ The *Kadi* court also found that there was no need to communicate to a designated person the evidence and facts supporting the designation once the United Nations, either through the Security Council or sanctions committee, had made a determination.³²²

In the *PMOI* case, however, despite the CFI's stated deferential standard of review, the outcome was annulment of the designation of PMOI (and its aliases or related entities, the National Council of Resistance of Iran, NCRI, or MEK).³²³ The court distinguished *Yusuf* and *Kadi* on the basis that there was no requirement for a hearing or notice of the basis for the designation because the Council of the European Union was merely transposing into the legal order of the European Community resolutions of the Security Council or decisions of its sanctions committees.³²⁴ The designation of PMOI was made pursuant to Resolution 1373, but that resolution did not actually list any persons, groups, or entities, instead leaving to individual countries to identify persons subject to the asset freeze.³²⁵ Given that difference, the court found that the right to a fair hearing and the obligation to state reasons for the designation were both fully applicable.³²⁶ While agreeing with the court in *Yusuf* that affording an opportunity for a hearing prior to the decision to freeze assets would jeopardize the effectiveness of the freeze by removing the needed element of surprise, it held that either at the time of, or soon after the decision, the designee must receive notice including specific statements of the reasons for the decision.³²⁷ The court allowed that overriding concerns about security might preclude sharing all evidence with the designee.³²⁸

Notably, the same organization, PMOI or NCRI, has prevailed in both the CFI in Europe and the D.C. Circuit in asserting due process

320. *Id.* paras. 342, 344.

321. *Ayadi*, 2006 E.C.R. II-2139 para. 150; *Kadi*, 2005 E.C.R. II-3649 para. 262.

322. *Kadi*, 2005 E.C.R. II-3649 para. 274.

323. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 2006 E.C.R. II-4665, para. 173.

324. *Id.* para. 100.

325. *Id.* paras. 101–02.

326. *Id.* paras. 108–09.

327. *Id.* paras. 128–29.

328. *Id.* para. 133.

claims.³²⁹ Much like the State Department after the D.C. Circuit remanded NCRI's designation as an FTO under AEDPA, the EU responded to the annulment decision in its own PMOI case by changing its procedures to satisfy the court's requirement that it provide statements of reasoning, but did not delist the organization.³³⁰ PMOI is perhaps one of the more sympathetic claimants conceivable because it styles itself as the parliament-in-exile of Iran, with the goal of replacing the current regime in Tehran with a democratic and secular coalition government.³³¹ In 2008, the British Court of Appeal was persuaded by PMOI's argument that its renunciation of violence requires its removal from the list of terrorist organizations under the United Kingdom's Terrorism Act.³³² The group continues to pursue delisting by the EU.³³³

Whether the Council of the European Union will take further steps to remedy perceived defects in its designation process remains to be seen. The Parliamentary Assembly of the Council of Europe received a draft report in November 2007 from the Rapporteur to the Committee on Legal Affairs and Human Rights that asserted that the process contravenes international human rights obligations and needs to be revised further by the addition of internal procedures for notice and an opportunity to be heard in individual member states.³³⁴ The November 2007 report takes the extreme position that the terrorism designations resemble criminal charges because of the association with terrorism, itself a crime.³³⁵ Due process rights are generally greater in the criminal context, but most

329. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001); *Organisation des Modjahedines du peuple d'Iran*, 2006 E.C.R. II-4665; *Iran protests to EU over opposition 'terror' tag removal*, AGENCE FR.-PRESSE, Feb. 5, 2009, available at 2/5/09 AGFRP 07:00:00 (Westlaw) (PMOI was "the armed wing of the France-based National Council of Resistance of Iran (NCRI), but it renounced violence in June 2001").

330. *EU to Tell Groups Reason for Terror Black Listing*, AGENCE FR. PRESSE, Apr. 23, 2007, available at 4/23/07 AGFRP 14:21:00 (Westlaw) (noting that EU foreign ministers agreed to tell those listed the basis for asset freeze in wake of ruling in 2006 by the CFI); Honor Mahony, *EU Court Annuls Assets Freeze for Two Terror List Members*, EUOBSERVER, July 11, 2007, at <http://euobserver.com/9/24463> (explaining that the decision regarding PMOI led to some changes in the way the terror list is run, with all groups on the list now sent statements of reasoning).

331. National Council of Resistance of Iran, Foreign Affairs Committee, Overview—National Council of Resistance of Iran (June 13, 2005), at <http://ncr-iran.org/content/view/27/158>.

332. John F. Burns, *Iranian Exiles Aren't Terrorist Group*, *British Court Says*, N.Y. TIMES, May 8, 2008, at A6.

333. *Id.*

334. DICK MARTY, COMM. ON LEGAL AFFAIRS & HUMAN RIGHTS, PARLIAMENTARY ASSEMBLY, COUNCIL OF EUROPE, PROVISIONAL DRAFT REPORT ON UN SECURITY COUNCIL AND EUROPEAN UNION BLACKLISTS (Nov. 12, 2007), available at <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717> [hereinafter MARTY REPORT].

335. *Id.* para. 32.

agree that asset freeze designations are not criminal in nature.³³⁶ Certainly the *PMOI* decision can be construed as limited to situations where the EU is acting independently of the Security Council, preserving the essential unreviewability of decisions to implement the asset freeze against those named in Security Council resolutions. Thus, the designations in Europe of individuals and entities listed in the annexes to Security Council Resolutions 1737, 1747, and 1803 should be able to withstand court scrutiny. The Council of the European Union may hesitate to make its own designations that go beyond what is explicitly required by the Security Council due to the ruling in the *PMOI* case. Alternatively, the Council of the European Union may simply provide the statement of reasons called for by its own revised procedures and thereby avoid future annulment decisions by the courts. Individual member states, such as Switzerland, have created their own regulations for implementing Security Council resolutions that require notice and an opportunity to address the basis for designation as well as a right to appeal to its federal court, justifying the additional process on the basis of international human rights norms.³³⁷

European courts have also considered whether freezing assets of designated parties violates the fundamental right to possess property. Like U.S. courts, the European courts have deferred to the government's justification for interfering with property rights. In *Kadi*, the court accepted the contention that has prevailed in U.S. courts, namely, that the freeze of assets is a temporary precautionary measure that does not violate fundamental property rights.³³⁸ The court's view in *Yusuf* and *Ayadi* likewise differentiated between freezing and confiscation in that the former does not affect the substance of the right to property.³³⁹ The decisions in *Kadi*, *Ayadi*, and *Yusuf* all noted that the ability of a designee to apply for an exception to obtain funds to cover basic expenses prevented the measure from violating norms of jus cogens.³⁴⁰ And the CFI has repeatedly recognized the importance of the campaign against inter-

336. See, e.g., *Global Relief Found. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002); Gutherie, *supra* note 260, at 505–06 (explaining that many countries freeze assets in administrative, noncriminal proceedings, and courts consider due process protections to be less in noncriminal settings).

337. MARTY REPORT, *supra* note 334, para. 84.

338. Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649, para. 248.

339. Case T-253/02, *Ayadi v. Council*, 2006 E.C.R. II-2139, para.135; Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, para. 299.

340. *Ayadi*, 2006 E.C.R. II-2139 para. 119; *Kadi*, 2005 E.C.R. II-3649 paras. 239–40; *Yusuf*, 2005 E.C.R. II-3533 para. 290.

national terrorism in the balance against the limited impairment to property rights represented by an asset freeze.³⁴¹

Earlier cases of the ECJ considered claims that EU regulations implementing Security Council resolutions regarding Yugoslavia infringed on the fundamental right to property.³⁴² Much like the U.S. takings cases discussed above, which also considered property rights impacted by executive orders directed at Yugoslavia, the European cases found that any impact on property rights was proportionate because of the fundamental objective of the international community in addressing the conflict in Yugoslavia.³⁴³ Thus, the European courts seem likely to find that the interest in countering proliferation, like that in combating terrorism and addressing the Yugoslavia crisis, outweighs any incidental infringements on property rights caused by the implementation of asset freeze measures.

E. Potential Claims Before International Bodies and Tribunals

It is highly unlikely that any challenge to asset freeze sanctions authorized by the Security Council or U.S. law would succeed before an international tribunal like the WTO, or a tribunal established pursuant to a bilateral investment treaty (BIT) or a free trade agreement (FTA). The governing documents for each of these bodies recognize the need of states to take action to protect their security, and some even recognize specifically the compelling government interest in countering proliferation.

It is unlikely that a claim would be brought before the WTO, and, even if brought, it is unlikely that such a claim would succeed. First, countries likely to complain about the asset freeze measures are not members of the WTO. The vast majority of individuals and entities currently designated under E.O. 13,382 are nationals of Iran, Syria, and North Korea, none of which are members of the WTO.³⁴⁴ Only a few designees come from WTO member countries, namely Armenia, Bahrain, China, Switzerland, and the United Kingdom.³⁴⁵

341. *Kadi*, 2005 E.C.R. II-3649 paras. 245–47; *Yusuf*, 2005 E.C.R. II-3533 paras. 294–96.

342. *Guthrie*, *supra* note 260, at 500–01 (discussing Case C-317/00, *Invest Import v. Comm'n*, 2000 E.C.R. I-9541, and Case C-84/95, *Bosphorus v. Minister for Transp., Energy and Commc'ns*, 1996 E.C.R. I-3953).

343. *Id.*

344. OFFICE OF FOREIGN ASSETS CONTROL, *supra* note 20; World Trade Organization, Members and Observers, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 13, 2009) (listing members of the WTO).

345. See sources cited *supra* note 344.

Second, the Security Exceptions in Article XXI of the General Agreement on Tariffs and Trade (GATT) would provide strong grounds for quickly disposing of such a case. Article XXI(b) specifically exempts any action taken by a party to the WTO that it considers necessary for the protection of its essential security interests:

- (i) relating to fissionable materials or the materials from which they are derived;
- (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations³⁴⁶

Article XXI(b)(iii) thus squarely addresses IEEPA in referring to emergencies in international relations. The nonproliferation objective of E.O. 13,382 also fits neatly within the references in Article XXI(b)(i)-(ii) to fissionable materials as well as traffic in other weapons, thus including proliferation of WMD and WMD-capable missiles. In addition, sanctions implemented pursuant to Security Council resolutions adopted under Chapter 7 of the UN Charter are expressly exempt under Article XXI(c), which contains an exception for actions taken “in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.”³⁴⁷

These exceptions are self-judging and have been applied liberally and subjectively in the past.³⁴⁸ WTO members are not required to obtain preclearance from, or even notify fellow members when acting pursuant to the security exceptions, nor are they required to use measures that are the “least trade restrictive.”³⁴⁹

Similarly, the United States has not entered into a BIT or FTA with most of the countries that have jurisdiction over designees under E.O. 13,382, including not only Iran, North Korea, and Syria, but also Switzerland.³⁵⁰ Again, there are a few exceptional designees from countries

346. General Agreement on Tariffs and Trade art. XXI(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

347. *Id.* art. XXI(b).

348. Harvey Oyer, Note, *The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations Under NAFTA*, 11 FLA. J. INT'L L. 429, 464–65 (1997).

349. HUFBAUER ET AL., *supra* note 151, at 93.

350. Trade Compliance Center, *Bilateral Investment Treaties & Free Trade Agreements*, at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (last visited Feb. 14, 2009) (listing U.S. BITs and FTAs by country).

with which the United States has entered into a BIT, namely, Armenia and Bahrain.³⁵¹ The U.S. Model Bilateral Investment Treaty provides a basis for the same types of challenges seen in U.S. and European courts, namely due process and expropriation claims. Article 5 of the U.S. Model Bilateral Investment Treaty guarantees “due process embodied in the principal legal systems of the world.”³⁵² And Article 6 resembles U.S. law in that it requires compensation for takings, or expropriation.³⁵³ FTAs such as NAFTA include similar guarantees that investments be accorded the international minimum standard of treatment, akin to due process, and that they not be taken or impaired except for a public purpose and with payment of compensation.³⁵⁴

But the U.S. Model Bilateral Investment Treaty also includes an “Essential Security Exception” in Article 18:

Nothing in this Treaty shall be construed:

....

... to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.³⁵⁵

NAFTA and other FTAs also contain an exception that resembles Article XXI of the GATT, exempting any actions a party considers necessary for protecting its security interests relating to trafficking in weapons, the implementation of policies or international agreements respecting nuclear nonproliferation, and actions taken in accordance with obligations under the UN Charter for the maintenance of international peace and security.³⁵⁶ Like Article XXI of the GATT, these exceptions unquestionably pertain to U.S. efforts to prevent the financing of proliferation using E.O. 13,382 and their applicability is self-judging.

U.S. measures with extraterritorial effects on its allies and fellow members of the WTO or partners in free trade agreements or bilateral investment treaties would be more likely to provoke a thorny and long-lasting international dispute. The Helms-Burton sanctions directed not

351. *Id.*

352. U.S. DEP'T OF STATE, MODEL BILATERAL INVESTMENT TREATY (2004), available at <http://www.state.gov/documents/organization/38710.pdf>.

353. *Id.*

354. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (Minimum Standard of Treatment); *id.* art. 1110 (Expropriation and Compensation).

355. U.S. DEP'T OF STATE, *supra* note 352.

356. NAFTA, *supra* note 354, art. 2102(b), (c).

at Cuba but at other countries investing in Cuba prompted Canada and Mexico to pursue dispute resolution under Chapter 20 of NAFTA.³⁵⁷ The ISA, formerly the Iran and Libya Sanctions Act, authorizing sanctions against countries that invest in Iran's petroleum sector, caused U.S. allies to threaten action at the WTO if sanctions were ever applied.³⁵⁸ Some of the legislative proposals presented in the 110th Congress, discussed above, including the Iran Counter-Proliferation Act, would expand the applicability of ISA sanctions and remove the ability of the executive branch to waive them on national interest grounds.³⁵⁹ Such proposals that would strong-arm allies into joining U.S. unilateral sanctions are much more likely to provoke the filing of a dispute with the WTO or other international body than the current strategy of seeking their voluntary cooperation.

CONCLUSION

The Bush administration could legitimately claim at least some success for its use of IEEPA and E.O. 13,382 in its efforts to hamstring or delay proliferant activities by countries of concern such as Iran and North Korea. More importantly, the strategy of freezing designees' assets and then reaching out to others to do likewise sent a signal to other countries and the private sector that designated proliferators and their supporters should be shunned by all seeking to disassociate themselves from the business of proliferation. The E.O. 13,382 sanctions campaign has yet to face any legal challenges, either domestically or abroad. And it engendered considerable international support, including, most notably, the successes at the Security Council in adopting resolutions that include freezing the assets of many of the very same individuals and entities targeted by the United States.

Rather than looking at ways to coerce the multilateral tightening of sanctions, the United States should continue along the current track of leading by example and inviting others to follow. In addition, to protect against future court or diplomatic challenge, the U.S. government should consider providing as much public information as possible about the reasons for its designations under E.O. 13,382. If sharing such information directly with large companies and other countries has been

357. Oyer, *supra* note 348, at 456.

358. KENNETH KATZMAN, THE IRAN SANCTIONS ACT (ISA) 2 (Cong. Research Serv., CRS Report for Congress Order Code RS20871, Oct. 12, 2007), available at <http://www.fas.org/sgp/crs/row/RS20871.pdf>.

359. *Id.* at 5.

effective in persuading them to join the sanctions campaign, it may also bring others on board if disseminated to the general public. Furthermore, while no U.S. court has yet required the government to provide a fuller statement of its reasoning for designations under E.O. 13,382, courts have expressed concern about the lack of adequate notice in other designation procedures, such as AEDPA. The European court precedent along with some of the misgivings expressed by allies in Europe relating to terrorism designations serve as a kind of advisory opinion to the U.S. government, suggesting that it could preempt similar outcry against proliferation designations by elaborating more on its grounds for designating a person each time a new designation is announced. This slight adjustment in a generally successful and balanced policy would only enhance its likelihood of continued future success.