

BUILDING BLOCKS: AUSTRALIA'S RESPONSE TO FOREIGN EXTRATERRITORIAL LEGISLATION

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[This paper discusses the nature of extraterritorial legislation and the use of 'blocking' legislation to counter its effects. It examines the history of Australia's blocking legislation and the effects of foreign extraterritorial laws on Australia. It discusses strategies for responding to the use of foreign extraterritorial legislation against Australian nationals and corporations and considers the usefulness of the current Australian blocking legislation. One aspect of globalisation is the interconnectedness of national economies. Extraterritorial legislation is being used to exploit this interdependence to promote foreign policy objectives. While Canada has recently amended its blocking legislation to respond to the new ways in which extraterritorial laws are being used, and the European Union has adopted a far-reaching blocking statute for the same reason, Australian blocking legislation has not been amended since its enactment in 1984. Given the increasing resort to extraterritorial legislation as a means of fostering foreign policy objectives and the inadequacies of the Australian blocking legislation, the authors argue that Australia needs to develop a coherent policy and legislative framework for responding to the effects of foreign extraterritorial legislation.]

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I INTRODUCTION

Extraterritorial legislation is a controversial category of law. The exercise of jurisdiction by a state over activities occurring outside its borders is seen to impinge upon the sovereignty of the country in which the conduct took place, and/or of the country whose nationals are caught by foreign extraterritorial measures.¹ Extraterritorial laws cut across the international, domestic, public and private spheres of law and their effects are amplified by the increasing interdependence of national economies.

The legitimacy of extraterritorial assertions of jurisdiction continues to be the subject of international litigation, scholarly debate and bureaucratic consideration. While courts, scholars and governments generally assume that there are limits to the enforcement of extraterritorial jurisdiction, there is little agreement as to what those limits are. Despite this debate, extraterritorial legislation has increasingly been used. This paper will examine the extraterritoriality issue from the perspective of its impact on Australia.² To date, no general study of the actual and potential liability of Australians under foreign extraterritorial legislation has been conducted. Australia's involvement in the *Westinghouse* antitrust litigation in the late 1970s and early 1980s sparked a

¹ See, eg. Ian Brownlie, *Principles of Public International Law* (5th ed, 1988) 289.

² This paper is part of a larger project on extraterritoriality. Other aspects of the project include an examination of the methods of responding to conflicting claims of jurisdiction and an evaluation of the transformative potential of extraterritorial legislation.

major government inquiry into the extraterritorial application of United States laws,³ and saw a cluster of Australian jurists examine the problem.⁴ However, the implications of foreign extraterritorial laws for Australia have received little attention since that time.⁵ This is despite new and highly contentious forms of extraterritorial legislation.

One aspect of globalisation is the interconnectedness of national economies. Extraterritorial legislation is increasingly being used to exploit this interdependence to promote foreign policy objectives. In 1996 the US adopted two laws with extraterritorial application, both designed to further its foreign policy. The *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996* ('*Helms-Burton Act*')⁶ aims to isolate Cuba and to enforce the US economic embargo on that country. The *Iran and Libya Sanctions Act of 1996* ('*D'Amato Act*')⁷ seeks to enforce US sanctions against Iran and Libya by imposing penalties on persons who invest in the Iranian or Libyan oil or gas industries.

The effects of these US extraterritorial trade controls represent a new source of difficulties and concern for Australia. For instance, there have been claims that Broken Hill Proprietary Company Ltd ('BHP') pulled out of negotiations concerning a lucrative pipeline project in Iran because of the *D'Amato* legislation.⁸ While Canada has recently amended its 'blocking' legislation to respond to the new ways in which extraterritorial legislation is being used,⁹ and the European Union ('EU') has adopted a far-reaching blocking statute for the same reason,¹⁰ Australian blocking legislation has not been amended since its enactment in 1984.

This paper first discusses the nature of extraterritorial legislation and the use of blocking legislation to counter its effects. It examines the history of Australia's blocking legislation and the effects of foreign extraterritorial legislation on Australia. It will then discuss strategies for responding to the use

³ Joint Committee on Foreign Affairs and Defence, Commonwealth of Australia, *Australian–United States Relations: The Extraterritorial Application of United States Laws* (1983) <<http://webpac.ausinfo.gov.au/>> at 18 April 2001 ('*1983 Parliamentary Report on the Extraterritorial Application of United States Laws*').

⁴ See, eg, Laurence Maher, 'Time, Uranium and the Legislative Process' (1978) 9 *Federal Law Review* 399; Gillian Triggs, 'Extraterritorial Reach of United States Anti-Trust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel' (1979) 12 *Melbourne University Law Review* 250; Laurence Maher, 'Antitrust Fall-Out: Tensions in the Australian–American Relationship' (1982) 13 *Federal Law Review* 105; Warren Pengilley, 'Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View From "Down Under"' (1983) 16 *Vanderbilt Journal of Transnational Law* 833; Eugene Khoo, 'The Reach of US Antitrust Law and its Effect on Australia' (1994) 14 *Queensland Lawyer* 134.

⁵ An exception is Warren Pengilley, 'United States Trade and Antitrust Laws: A Study of International Legal Imperialism from Sherman to Helms Burton' (1998) 6 *Competition and Consumer Law Journal* 187.

⁶ 22 USC §§ 6021–91 (2000).

⁷ Public L No 104–172, 110 Stat 1541 (1996).

⁸ See below nn 234–7 and accompanying text.

⁹ See below nn 252–69 and accompanying text.

¹⁰ See below nn 244–50 and accompanying text.

of foreign extraterritorial legislation against Australian nationals and corporations, and consider the usefulness of the current Australian blocking legislation. Given that countries are increasingly resorting to extraterritorial legislation as a means of fostering foreign policy objectives, and the inadequacies of the Australian blocking legislation, we argue that Australia needs to develop a coherent policy and legislative framework for responding to the effects of foreign extraterritorial legislation.

II THE NATURE OF EXTRATERRITORIAL LEGISLATION

The term ‘extraterritoriality’ is generally understood to refer to the exercise of jurisdiction by a state over activities occurring outside its borders. The traditional international legal use of the term ‘extraterritorial legislation’ covers two different types of laws: legislation that regulates the conduct of nationals abroad,¹¹ and laws that apply to conduct by non-nationals outside the territory of the legislating country. This section explores the forms of extraterritorial legislation that have been at the forefront of the debate over the legitimacy of extraterritorial jurisdiction and the major sources of extraterritorial problems for Australia.

A Competition Laws with Extraterritorial Application

Most developed countries have enacted some form of legislation to regulate anti-competitive conduct within the domestic market.¹² The internationalisation of the corporation and the expansion of world trade have created a demand for the extraterritorial application of these laws. States recognise that, since domestic entities trade across multiple international borders through a web of subsidiaries and agents, foreign anti-competitive conduct can affect domestic markets and, as a result, has the capacity to undermine national competition laws. Accordingly,

¹¹ A recent example of this type of extraterritorial legislation is the Australian *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth), which makes it an offence for an Australian citizen or resident to have sexual relations overseas with a child under the age of 16. For a discussion of the application and impact of the legislation, see Tim Macintosh, ‘Exploring the Boundaries: The Impact of the Child Sex Tourism Legislation’ (2000) 74 *Australian Law Journal* 613; Amanda Vanstone, Minister for Family and Community Services, Commonwealth of Australia, *Child Sex Tourism — No Place To Hide*, Press Release, No 106 (30 July 2000); Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (2000). For a brief analysis of the significance of the legislation in relation to the application of Australian criminal jurisdiction to offences committed outside Australia, see Ryszard Piotrowicz, ‘Child Sex Tourism and Extra-Territorial Jurisdiction’ (1997) 71 *Australian Law Journal* 108.

¹² See, eg, the Australian *Trade Practices Act 1974* (Cth); *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 3, arts 85–6 (entered into force 1 January 1959) (‘*Treaty of Rome*’); *Act Against Restraints on Competition 1957* (Federal Republic of Germany); *Monopolies and Mergers Act 1965* (UK) c 50.

states have sought to regulate external, as well as internal, anti-competitive conduct.¹³

While many countries claim jurisdiction in relation to anti-competitive conduct engaged in outside their jurisdiction, the scope varies enormously. For example, Australia and the EU have taken a conservative approach to asserting extraterritorial jurisdiction in competition law matters. In Australia, jurisdiction is only claimed where the entity involved is incorporated in, carrying on business in, or is a citizen or ordinary resident of Australia.¹⁴ The European position is similar.¹⁵ In contrast, the extraterritorial reach of US competition (or antitrust) laws is very wide. The US position is that, provided there are direct, substantial and foreseeable 'effects' upon the US market, and that it is 'reasonable' to exercise jurisdiction, the entity is subject to US antitrust laws,¹⁶ regardless of where the entity was incorporated and where the conduct took place. One of the most controversial extraterritorial aspects of US antitrust laws is the right afforded to private parties to bring treble damages suits against foreign entities that have allegedly engaged in anti-competitive conduct that has adversely

¹³ While there have been attempts by bodies such as the Havana Charter for International Trade Organisation, the Organisation for Economic Co-Operation and Development ('OECD') and the United Nations Conference on Trade and Development to establish an international regulatory regime for antitrust matters, no such regime has come into force. The OECD issued a recommendation regarding this in 1995: OECD, *Revised Recommendation of the Council: Concerning Co-Operation between Member Countries on Anticompetitive Practices Affecting International Trade* (1995) C(95) 130. However, compliance with the OECD recommendation is of course not mandatory. In the absence of an international regulatory regime, states have had to rely upon domestic legislation to regulate foreign anti-competitive activities that have effects within the legislating state: Triggs, 'Extraterritorial Reach', above n 4, 257; Peter Durack, 'Australia: Conflicts and Comity' in John Lacey (ed), *Act of State and Extraterritorial Reach: Problems of Law and Policy* (1983) 47. For a discussion of the likelihood and desirability from an Australian perspective of the introduction of an agreed international competition regime, see Warren Pengilley, 'United States Self Interest: A Major Impediment to Agreement on the Principles of International Competition and its Enforcement' (Paper presented at the Joint Conference of the Australian & New Zealand Society for International Law and the American Society for International Law, *International Legal Challenges for the Twenty-First Century*, Canberra, 26–9 June 2000) <<http://law.anu.edu.au/anzsil/ANZSILASILProceedings.pdf>> (copy on file with author) [37].

¹⁴ Section 5(1) of the *Trade Practices Act 1974* (Cth) extends pt IV, IVA and V of the Act, dealing respectively with restrictive trade practices, unconscionable conduct and consumer protection, to conduct outside Australia by these entities. Section 5(2) of the *Trade Practices Act* provides that ss 47–8, regulating exclusive dealing and resale price maintenance, apply to conduct outside Australia by any persons in relation to their supply of goods and services to persons within Australia. See generally Elizabeth Jardine, 'Extra-Territorial Enforcement of Australian Anti-Trust Legislation: *Australian Meat Holdings Pty Ltd v Trade Practices Commission*' (1990) 12 *Sydney Law Review* 652.

¹⁵ However, Elizabeth Jardine notes that 'Europe has come very close in a number of cases to exceeding its generally restrained methods': Elizabeth Jardine, 'An Agreement between Australia and the European Union on Trade Practices: A Proposal' (1996) 4 *Trade Practices Law Journal* 67, 67.

¹⁶ *Restatement (Third) of the Law: The Foreign Relations Law of the United States* (1987) ss 402, 403, 415. See also below n 56 and accompanying text for a discussion of the evolution of the 'effects' and 'reasonableness' doctrines.

affected the private entity.¹⁷ These different approaches have been a great source of friction between otherwise friendly governments.¹⁸ Further, the expansive outward reach that US courts have granted to domestic antitrust laws has been the dominant catalyst for the enactment of retaliatory blocking legislation by US trading partners.¹⁹

B Extraterritorial Legislative Trade Sanctions

Economic sanctions have been described as ‘trade controls for political ends’.²⁰ In general terms, trade sanctions are coercive economic measures taken against one or more countries to bring about a change in, or merely protest against, another country’s policies.²¹ Viewed as an alternative to the use of force, economic sanctions are, in certain circumstances, considered to be a legitimate and appropriate form of extraterritoriality.²² The use of sanctions, however, can still cause great tension, particularly when they are seen to affect policy-making and the economic sovereignty of non-target nations.²³ US laws imposing economic sanctions, in the form of extended primary boycotts and secondary

¹⁷ The US antitrust legislative regime will be considered in more detail in pt III below.

¹⁸ See Durack, ‘Conflicts and Comity’, above n 13, 41–3.

¹⁹ The seminal case in this area is *United States v Aluminum Co of America*, 148 F 2d 416 (2nd Cir, 1945). See below nn 57–62 and accompanying text for a discussion of the significance of this decision.

²⁰ Andreas Lowenfeld, ‘Economic Sanctions: A Look Back and a Look Ahead’ (1990) 88 *Michigan Law Review* 1930, 1930. See also Andreas Lowenfeld, *Trade Controls For Political Ends* (2nd ed, 1983).

²¹ See generally Michael Malloy, *Economic Sanctions and US Trade* (1990), 3–31; Barry Carter, *International Economic Sanctions* (1988) 4.

²² For example, collective international trade sanctions were employed to pressure the South African government to abandon apartheid: see generally Barry Carter, ‘International Economic Sanctions: Improving the Haphazard US Legal Regime’ (1987) 75 *California Law Review* 1162, 1165; David Santeusano, ‘Extraterritoriality and Secondary Boycotts: A Critical and Legal Analysis of United States Foreign Policy’ (1998) 21 *Suffolk Transnational Law Review* 367, 368. ‘Smart sanctions’ targeting the perpetrators of civil unrest and human rights atrocities, rather than sanctions of broad application that tend to exacerbate the instability and isolation of the target nations, are increasingly favoured by objecting states. A recent example of this trend were the sanctions imposed by the Australian Government on Fiji in the wake of the May 2000 coup lead by George Speight. In an effort to encourage the restoration of democracy in Fiji, the Australian Government imposed a number of sanctions on Fiji including a suspension of joint military exercises. However, the more severe sanction of ending the Import Credit Scheme, which sustains Fiji’s important garment industry, was not imposed on the basis that it would devastate Fiji’s economy: see Louise Dodson, ‘Howard Considers Fiji Sanctions’, *Australian Financial Review* (Sydney, Australia), 29 May 2000, 5; Editorial, ‘Smart Sanctions Against Fiji’, *Sydney Morning Herald* (Sydney, Australia), 19 July 2000, 16; David Lague ‘Downer Takes “Smart” View on Penalties’, *Sydney Morning Herald* (Sydney, Australia), 18 July 2000, 13.

²³ Timothy Dunning, ‘D’Amato in a China Shop: Problems of Extraterritoriality with the Iran and Libya Sanctions Act of 1996’ (1998) 19 *University of Pennsylvania Journal of International Economic Law* 169, 183.

boycotts, have been a great source of disagreement, attracting allegations of illegality and excessive jurisdictional reach.²⁴

1 *Extended Primary Boycotts*

A primary boycott is where a state restrains its nationals and corporations from trading with a state or group of states. Although the policy objectives behind primary boycotts vary considerably, trade restrictions are commonly used either to enhance national security or to foster foreign policy.²⁵ Primary boycotts are generally considered to be consistent with principles of international law; the boycotting state is exercising jurisdiction in its own territory or over its own nationals, a clear exercise of sovereign authority.²⁶ However, the legitimacy of primary boycotts has been called into question when states, such as the US, have sought to apply boycott legislation extraterritorially to further foreign policy.

The nationality principle has been interpreted by US legislators as supporting the proposition that US jurisdiction extends to both the parent of a US incorporated subsidiary and the subsidiary of a US incorporated parent.²⁷ That is, in addition to US citizens and corporations organised under US laws, the US asserts jurisdiction over corporations owned, controlled or organised under the laws of a foreign country where the US shareholding may be as low as 15 per cent.²⁸ This is directly contrary to the common law doctrine that an incorporated

²⁴ However, the difficulties associated with extraterritorial assertions of jurisdiction are not limited to antitrust and trade sanction matters. The recent experience of the Australian corporation CSR Limited with US extraterritorial personal injury claims demonstrates that extraterritorial conflicts can take many forms. CSR was named in approximately 95 000 product liability claims spread throughout 31 US states. It was alleged that CSR had sold asbestos fibre to a US manufacturer and that injury had been caused to US workers by exposure to the asbestos. An application for leave to appeal was filed by CSR in the US Supreme Court (Application No 93-2036, October Term, 1994) against a decision of the West Virginia Supreme Court of Appeal. The Court of Appeal had denied a writ or prohibition against MacQueen J of the Circuit Court, who in turn had refused to uphold a claim by CSR that the Circuit Court lacked personal jurisdiction over CSR. CSR's application for leave to appeal was unsuccessful. Subsequently, CSR filed for summary judgments arguing lack of jurisdiction. The applications were successful in Indiana, Kentucky, Maine, Michigan, Missouri, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia and Mississippi. The summary judgments, combined with a number of settlements, significantly reduced CSR's claims burden. For a detailed discussion of the background to the CSR case and the outcome of the litigation, see Ian Mutton, 'Extra-Territoriality: A Case Study' (Paper presented at the 23rd International Trade Law Conference, Canberra, Australia, 29 May 1997).

²⁵ L J Kutten and Brian Murphy, *An Overview of United States Export Controls* (1988) 6-7; Malloy, above n 21, 3-31.

²⁶ Santeusanio, above n 22, 375.

²⁷ See, eg, Vaughan Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 *International and Comparative Law Quarterly* 724, 726; Pengilly, 'United States Trade', above n 5, 89. See below n 55 and accompanying text for a brief discussion of international jurisdictional principles, including the nationality principle.

²⁸ Dunning, above n 23, 183; *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 5. Section 414 of the *Restatement (Third) of the Law: The Foreign Relations Law of the United States* (1987) provides that at international law a nation's control over foreign branches of corporations is now limited to 'exceptional cases'.

body is a separate entity from either its subsidiaries or its parent.²⁹ Australia has been affected by this extraterritorial application of domestic trade boycott legislation. For example, Utah Developments, an Australian mining subsidiary of a US multinational corporation, was forced to cancel a contract for the supply of coal to Vietnam during the late 1970s and early 1980s due to the US *Trading with the Enemy Act of 1917*.³⁰ Utah Developments lost significant sums of money, even though the Australian Government had actively promoted the contract as part of its export enhancement policy.³¹

In addition to stretching the concept of nationality in relation to corporations, the US has sought to attribute nationality to US goods and technology to give extraterritorial effect to primary boycotts. US laws assert jurisdiction over foreign corporations that employ goods or technology acquired from the US, even when the goods have lawfully passed into the hands of foreign businesses, and even if the corporation has no formal structural links with a US corporation.³² In doing so, the US assumes authority to regulate the eventual use and destination of domestically produced goods and technology, a position that finds no support at international law.³³

Notwithstanding their questionable legitimacy at international law, the extended corporate nationality and the nationality of goods principles have been used in combination by the US to control the re-export of US products and technology by foreign entities to foster US foreign policy initiatives. This is manifested in the *Export Administration Act of 1979*.³⁴ The Act required a 'submission clause' to be included in contracts governing the purchase of US technology by foreign companies whereby the foreign corporation agreed that the US technology would not be used in violation of US laws. The major difficulty surrounding these clauses is that changes in US policy will usually be expressed retrospectively. As a result what is at one time a legitimate use of the

²⁹ *Walker v Wimborne* (1976) 137 CLR 1. See also Pengilly, 'United States Trade', above n 5, 190.

³⁰ 50 USC § 1 (1990). Originally the *Trading with the Enemy Act* allowed the President to impose economic restrictions during war or national emergency. The provisions included authority to control foreign exchange, gold and foreign property. The Act was amended by the *International Emergency Economic Powers Act of 1977*, 50 USC §§ 1701–7 (2000), which removed wartime as a necessary condition for the President to restrict overseas financial transactions or freeze foreign assets: Miles Pomper and Adriel Bettelheim, 'Easing Up on "Rogue" Cuba: New Label, New Policy' (2000) 58 *Congressional Quarterly Weekly* 1508, 1510; United Kingdom, *Cuba and the Helms-Burton Act*, House of Commons Research Paper No 114 (1998) 17 <<http://www.Parliament.uk/commons/lib/research/rp98/rp98-114.pdf>> at 18 April 2001.

³¹ Pengilly, 'United States Trade', above n 5, 190; 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 30.

³² 'Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction' (1985) 98 *Harvard Law Review* 1310, 1317 ('Note on Predictability and Comity').

³³ *Ibid.*

³⁴ 50 USC § 2401 (1991). The *Export Administration Act* expired on 20 August 1994. The export controls under the Act are now administered under the *International Emergency Economic Powers Act of 1977*, 50 USC §§ 1701–7 (2000).

technology according to US laws may later become contrary to US law.³⁵ Although the Australian Government understands the need for export controls in relation to the military application of US technology, it is opposed to the US restricting the non-military, or commercial application of technology.³⁶

The serious consequences flowing from the unpredictable nature of submission clauses are demonstrated by the West Siberian Pipeline dispute. In response to the imprisonment of the leaders of the Polish Solidarity Movement and the imposition of Soviet martial law in Poland in 1982, President Reagan banned the export by US companies, and the re-export by foreign companies, of US technology and oil and gas equipment for use in the construction of a gas pipeline from the Soviet Union to Europe.³⁷ At the time of tendering, the bidding corporations could not have known that the US would subsequently attempt to use extraterritorial sanctions to prevent the construction of the pipeline.³⁸ In effect, the extended primary boycott constituted retrospective legislation aimed at fostering US policies.³⁹

2 *Secondary Boycotts*

A secondary boycott exists when the boycotting country uses trading privileges or sanctions as leverage to deter third party countries from dealing with 'target' nations.⁴⁰ Specifically, a secondary boycott forces a third party

³⁵ Pengilley, 'United States Trade', above n 5, 191; Note on Predictability and Comity, above n 32, 1317–19.

³⁶ *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 6.

³⁷ *Amendment of Oil and Gas Controls to the USSR*, 15 CFR §§ 376, 379, 385 (1982). For a discussion of the issues surrounding this dispute, see 'The Siberian Pipeline Dispute and the Export Administration Act: What's Left of Extraterritorial Limits and the Act of States Doctrine?' (1983) 6 *Houston Journal of International Law* 63.

³⁸ Pengilley, 'United States Trade', above n 5, 191. Ultimately the extended primary boycotts were retracted due to international pressure: *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 6–7. An earlier example of the problems associated with the extraterritorial application of extended primary boycotts is the attempt by the US, in the mid 1960s, to apply US export restrictions to S A Fruehauf-France, a French subsidiary of a US corporation. For a discussion of the issues and outcome of this case see William Dodge, 'The Helms-Burton Act and Transnational Legal Process' (1997) 20 *Hastings International and Comparative Law Review* 713, 721; Gillian Triggs, 'State Jurisdiction over Corporations: The Nationality Principle at International Law' (Paper presented at the Ninth International Trade Law Seminar, Canberra, Australia, 29–30 May 1982) 58–60.

³⁹ Not only can extended primary boycotts have serious and unpredictable effects upon foreign corporations, they can also have incidental or unintended effects. For example, in 1982 the Australian company Santos Ltd was forced to restructure its business activities in relation to the construction of a pipeline in Australia because of US extended primary boycott measures. Even though the Australian pipeline was not the target of the boycott legislation, the complications arose because of a supply contract Santos held with the French company, Dresser France, that was involved in the construction of the Siberian pipeline: see *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 29–30; Pengilley, 'United States Trade', above n 5, 191.

⁴⁰ Santeusanio, above n 22, 375. See also Howard Fenton, 'United States Antiboycott Laws: An Assessment of Their Impact Ten Years after Adoption' (1987) 10 *Hastings International and Comparative Law Review* 211, 215–17.

country to choose between doing business in or with country A (the boycotting state) or country B (the target state).⁴¹ States usually object to secondary boycotts because they infringe upon foreign policy-making in third party countries where trading with the target nation is not prohibited.⁴² However, secondary boycotts do not technically offend international jurisdictional rules. This is because sanctions usually apply only to parties holding contracts with the enacting state and are therefore not extraterritorial in their application.⁴³ Lowe describes the sanctions under the *D'Amato Act* (including the denial of export licences and the right to import) and the provisions of Part IV of the *Helms-Burton Act* (requiring US authorities to exclude from the US any non-US national who has 'trafficked' in confiscated property) as 'frontier' measures.⁴⁴ This term emphasises that the secondary boycotts are imposed at or within the frontiers of US territory, so the objection is not that they exceed the limits of US jurisdiction. Rather, the secondary boycotts are objectionable on the basis that US jurisdiction is used for an inappropriate purpose, namely to subordinate the foreign policy of third party countries.⁴⁵

III THE RATIONALE OF BLOCKING LEGISLATION

A What is 'Blocking' Legislation?

Many countries have enacted retaliatory legislation to foreign extraterritorial legislation.⁴⁶ Most blocking statutes have been directed towards US laws. The term 'blocking' legislation is often used generically to describe the four legislative mechanisms countries have employed to counter the effects of US assertions of extraterritorial jurisdiction that are considered to be contrary to international law: legislation that prohibits the giving of evidence and the production of documents in foreign proceedings; legislation that aims to block or prevent the enforcement of foreign judgments; laws prohibiting compliance with orders of foreign authorities; and 'claw-back' legislation. The objective of claw-back legislation is to allow an entity that is the subject of a foreign judgment executed against its foreign assets, to recover the judgment sum against assets of the foreign judgment creditor that are situated in the local jurisdiction.⁴⁷

⁴¹ Santeusanio, above n 22, 375.

⁴² Dunning, above n 23, 184.

⁴³ While secondary boycotts may not infringe customary international law principles, they may run counter to treaty obligations of the boycotting state: see below nn 99–102 and accompanying text for a discussion of this point in relation to the *Helms-Burton Act*.

⁴⁴ Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 *International and Comparative Law Quarterly* 378, 386.

⁴⁵ Dunning, above n 23, 184; Lowe, 'US Extraterritorial Jurisdiction', above n 44, 386.

⁴⁶ Countries and regional groupings that have enacted some form of blocking legislation include Belgium, Canada, Denmark, the European Union, Finland, France, Germany, Italy, Mexico, the Netherlands, New Zealand, Norway, the Philippines, South Africa, Sweden, Switzerland, and the United Kingdom: see Lowe, 'The Problems of Extraterritorial Jurisdiction', above n 27, 727; Durack, 'Conflicts and Comity', above n 13, 45.

⁴⁷ Pengilly, 'United States Trade', above n 5, 212–13.

Historically, blocking legislation has been enacted on an ad hoc, reactionary basis to counter specific assertions of extraterritorial jurisdiction by the US over particular industries and in individual cases, usually in relation to antitrust issues. However, since the late 1970s there has been a move towards the use of blocking legislation of a more general, precautionary and comprehensive nature that proscribes, either wholly or in part, compliance with foreign extraterritorial requirements, prohibitions and judgments affecting trade and other interests of the legislating country.⁴⁸ The trend towards the use of general blocking statutes demonstrates that the difficulties associated with extraterritoriality extend outside the antitrust arena. While the extraterritorial application of domestic antitrust legislation has traditionally generated the most controversy, primary and secondary extraterritorial trade sanctions aimed at fostering foreign policy objectives have become the focus of the extraterritoriality debate and recent blocking statutes.

B *Alternatives to Blocking Legislation*

Alternative protective measures to blocking legislation are customary international rules and principles, diplomatic measures and the enforcement of obligations under trade agreements. The extent to which these rules and mechanisms can be relied upon to contain liability under foreign extraterritorial laws will be considered in turn.

1 *Jurisdictional Rules in Customary International Law*

(a) *Extraterritoriality: The Exception to the (Territorial) Rule*

A central tenet of international law is the sovereign equality of states.⁴⁹ Implicit in this principle is state jurisdictional competence.⁵⁰ Thus international law endows states with authority to make and enforce laws within their territory and over their population. Consequently, territory and nationality are the two traditional bases of national jurisdictional competence in international law. The chief corollary of jurisdictional competence is the duty not to encroach on the domestic jurisdiction of other states.⁵¹ As a matter of general principle, a country

⁴⁸ See, eg, the UK's *Protection of Trading Interests Act 1980* (UK) c 11, and Canada's *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29.

⁴⁹ Brownlie, above n 1, 289.

⁵⁰ Jurisdictional competence is commonly thought of as comprising three limbs: jurisdiction to prescribe; jurisdiction to enforce; and jurisdiction to adjudicate (the latter also known as personal jurisdiction). For an outline of the nature of these three facets of jurisdiction, see Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 162-4; M Lennard, 'Weaving Nets to Catch the Wind: Extraterritorial and Supraterritorial Business Regulation in International Law' (Paper presented at the 23rd International Trade Law Conference, Canberra, 29 May 1997).

⁵¹ Brownlie, above n 1, 289; F A Mann, 'The Doctrine of Jurisdiction in International Law Revisited after Twenty Years' in F A Mann (ed), *Further Studies in International Law* (1990) 4.

cannot take measures to enforce its laws on the territory of another without the latter's consent.⁵²

The doctrine of territorial sovereignty emerged during a time when trade and travel were for the most part confined by territorial borders. However, due to continued improvements in technology, communications and transportation during the last century, state interests and responsibilities increasingly transcended national boundaries.⁵³ In recognition that there are occasions when it may be appropriate to permit a nation to assert jurisdiction over activities carried on outside its national borders, several exceptions to the territorial rule have emerged in international law. These exceptions, or bases of legitimate extraterritorial authority, have generally evolved with respect to criminal law and are therefore primarily concerned with physical acts and physical consequences.⁵⁴ They are commonly referred to as 'jurisdictional rules' or the 'principles of jurisdiction'.⁵⁵

(b) *Jurisdictional Conflict Rules in International Law*

While governments, courts and scholars generally assume that there are limits to the enforcement of extraterritorial jurisdiction, there is little agreement on what these limits are. In the *Restatement (Third) of the Law: The Foreign Relations Law of the United States* (1987) ('*Restatement of Foreign Relations Law*') the American Law Institute suggests that, in deciding whether to exercise extraterritorial jurisdiction, courts and governments should consider both the 'effect' of the foreign activities upon the legislating state as well as the

⁵² Brownlie, above n 1, 310. The Permanent Court of International Justice in *S.S. Lotus (France v Turkey)* [1927] PCIJ (ser A), No 10, 18–19 confirmed that 'jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

⁵³ Harold Maier, 'Jurisdictional Rules in Customary International Law' in Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (1996) 65.

⁵⁴ See the speech given by the former Australian Attorney-General, Senator P Durack, 'Extraterritorial Application of United States Law' (Paper presented at the American Bar Association, New Orleans, 12 August 1981) reprinted in Vaughan Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983) 90, 91–2; Brownlie, above n 1, 303–9.

⁵⁵ Specifically, they are known as the objective and subjective territorial principles, the nationality principle, the protective principle, the universality principle and, of more questionable existence, the passive personality principle. The content of these jurisdictional rules are for the most part uncontroversial and are defined in any standard public international law textbook: see, eg, Shearer, above n 50, 165–75; Brownlie, above n 1, 301–10. For a more detailed examination of the principles, see Rosalyn Higgins, 'The Legal Bases of Jurisdiction' in Cecil Olmstead (ed), *Extra-Territorial Application of Laws and Responses Thereto* (1984) 3–31.

'reasonableness' of the exercise of jurisdiction according to the relative weight of the competing interests ('reasonableness doctrine').⁵⁶

The 'effects' doctrine was first introduced in *United States v Aluminum Co of America* ('*Alcoa*').⁵⁷ The central issue before the Court in *Alcoa* was whether US antitrust legislation extended to attach liability to the conduct of foreign nationals outside the US.⁵⁸ Learned Hand J, on behalf of the other members of the Court, asserted that

any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.⁵⁹

On this basis, the Court concluded that Congress intended to apply the antitrust legislation to conduct abroad so long as the intended effect of the conduct is prohibited by the legislation.⁶⁰ The *Alcoa* decision represented a shift of focus in jurisdictional disputes from the location of the conduct to the location of the effect of the conduct; a significant move away from the traditional rule of territorial sovereignty.⁶¹ The effects doctrine has been widely criticised. For example, a former President of the International Court of Justice, Sir Robert Jennings, argued that 'extra-territorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed.'⁶²

In an attempt to respond to the international criticisms of the effects doctrine, and in particular its failure to take account of foreign interests, US courts have

⁵⁶ Section 402(1)(c) of the *Restatement of Foreign Relations Law* provides that a state has jurisdiction to prescribe law with respect to 'conduct outside its territory which has or is intended to have substantial effect within its territory'. Subparagraph (1) of s 403 qualifies s 402 in providing that 'even when one of the bases for jurisdiction under s 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable'. Subparagraph (2) of s 403 asserts that whether the exercise of jurisdiction is reasonable is a function of all relevant factors and lists eight factors that should be evaluated where appropriate. These factors include: the link of the activity to the territory of the regulating state; the connections, such as nationality, between the regulating state and the person principally responsible for the activity to be regulated; and the likelihood of conflict with regulation by another state. In the context of anti-competitive activities, see s 415 of the *Restatement of Foreign Relations Law* which is designed as a particular application of ss 402–3. That is, while s 415 contains principles governing jurisdiction specific to antitrust matters, jurisdiction based on effect under s 415(3) is subject to the principle of reasonableness.

⁵⁷ 148 F 2d 416 (2nd Cir, 1945).

⁵⁸ Briefly, the case involved allegations by the US Government that a Swiss company, Alliance, and its shareholders (companies incorporated in France, Germany, Switzerland, Britain and Canada) agreed to set a quota for the production of aluminium in violation of US antitrust legislation. The agreement was intended to apply to exports to the US. For a more comprehensive disposition of the facts of the case, see Khoo, above n 4, 136–7.

⁵⁹ *Alcoa*, 148 F 2d 416, 423 (2nd Cir, 1945).

⁶⁰ *Ibid* 444 (Learned Hand J); Harry Reicher (ed), *Australian International Law: Cases and Materials* (1995) 292.

⁶¹ Khoo, above n 4, 137.

⁶² Robert Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146, 151.

supplemented the effects doctrine with a ‘balancing of interests’ requirement.⁶³ Once a court has found that the foreign conduct has had an effect on domestic commerce, the ‘balancing of interests’ doctrine, also known as the ‘jurisdictional rule of reason’, requires a court, in deciding whether or not to exercise jurisdiction, to consider the interests of all stakeholders, be they domestic, foreign, private or governmental. The balancing of interests doctrine was first formulated in *Timberlane Lumber Co v Bank of America*.⁶⁴ In *Timberlane*, Choy J asserted that extraterritorial jurisdiction should only be exercised if ‘the interests of, and links to, the US — including the magnitude of the effect on American foreign commerce — ... [are] sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extra-territorial authority’.⁶⁵ The Court identified seven factors to guide the decision-making process.⁶⁶ Just over two years later the Court of Appeals for the Third Circuit in *Mannington Mills v Congoleum Corp*⁶⁷ also adopted an interest-balancing approach to the resolution of jurisdictional conflict but formulated a slightly different methodology. The Court stated that when individual interests and policies of foreign nations differ, they ‘must be balanced against our nation’s legitimate interest in regulating anticompetitive activity’.⁶⁸

The reasonableness doctrine is unsatisfactory for at least four reasons. First, states are aware that in practice, the balancing analysis underpinning the doctrine of reasonableness often operates as a means of ‘assert[ing] ... the primacy of United States interests in the guise of applying an international jurisdictional rule of reason’, with foreign interests receiving only perfunctory consideration.⁶⁹

⁶³ *Timberlane Lumber Co v Bank of America*, 549 F 2d 597 (9th Cir, 1976); *Mannington Mills v Congoleum Corp*, 595 F 2d 1287 (3rd Cir, 1979); below n 64, 67 and accompanying text.

⁶⁴ 549 F 2d 597 (9th Cir, 1976) (*‘Timberlane’*).

⁶⁵ *Ibid* 614.

⁶⁶ *Ibid*. The factors are:

- 1 the degree of conflict with foreign law or policy;
- 2 the nationality of allegiance of the parties and the locations or principal places of business of corporations;
- 3 the extent to which enforcement by either state can be expected to achieve compliance;
- 4 the relative significance of the effects on the United States as compared with those elsewhere;
- 5 the extent to which there is explicit purpose to harm or affect American commerce;
- 6 the foreseeability of such effects; and
- 7 the relative importance of the violations of conduct within the United States as compared with that abroad.

⁶⁷ 595 F 2d 1287 (3rd Cir, 1979) (*‘Mannington Mills’*).

⁶⁸ *Ibid* 1298. The court enumerated 10 factors to be considered when balancing competing interests. The most notable difference from the *Timberlane* factors is the inclusion of a consideration of the ‘possible effect upon foreign relations if the court exercises jurisdiction and grants relief’: at 1297. See also Eleanor Fox, ‘Extraterritoriality, Antitrust, and the New Restatement: Is “Reasonableness” the Answer?’ (1987) 19 *New York Journal of International Law and Politics* 565, 573.

⁶⁹ Harold Maier, ‘Interest Balancing and Extraterritorial Jurisdiction’ (1983) 31 *American Journal of Comparative Law* 579, 589–90. See also Note on Predictability and Comity, above n 32, 1324–5; 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 18–20.

Indeed, there are no reported extraterritorial antitrust cases in which a US appellate court has found US jurisdiction wanting.⁷⁰ Second, a municipal court is widely considered to be an inappropriate forum for interest-balancing.⁷¹ Even Justice Marshall of the US District Court has expressed concern over the lack of experience and expertise of judges faced with evaluating the economic and social policies of foreign governments.⁷² The fact that the *Timberlane* and *Mannington Mills* judgments have not been applied throughout the US judicial system suggests that other members of the US judiciary may also be critical of the reasonableness doctrine. Third, the reasonableness approach has been criticised for the unpredictable results it generates and the uncertainty this creates for foreign entities.⁷³ Fourth, some jurists consider that the reasonableness doctrine diverts attention away from, and hinders the development of, a universally acceptable and coherent doctrine of extraterritoriality.⁷⁴ This is primarily because domestic courts engaged in interest-balancing tend to focus on the specific short-term interests involved in any case, rather than on the more general long-term interests of developing objective criteria designed to facilitate the resolution of future jurisdictional disputes.⁷⁵ By purporting to apply principles of international law, while in fact arriving at results based primarily on judicial evaluations of short-term local goals, these 'reasonableness' decisions weaken rather than strengthen the international system.⁷⁶

The reasonableness doctrine advocated by the American Law Institute closely mirrors the US doctrine governing the exercise of extraterritorial jurisdiction in antitrust matters. Since the interest-balancing approach has been rejected by a significant proportion of US trading partners in the antitrust context, the reasonableness doctrine is unlikely to evolve into a generally accepted rule of international law.⁷⁷

2 *The Principle of Comity*

In the context of extraterritorial jurisdiction, comity has been described as a 'pragmatic principle of reciprocal expectation' which counsels judicial or governmental restraint when enforcing extraterritorial legislation.⁷⁸ Former US Attorney-General Griffin Bell defined comity as 'a word signifying a concern for

⁷⁰ Note on Predictability and Comity, above n 32, 1325.

⁷¹ See, eg, Harold Maier, 'Resolving Extraterritorial Conflicts, or "There and Back Again"' (1984) 25 *Virginia Journal of International Law* 7, 23; Lowe, 'The Problems of Extraterritorial Jurisdiction', above n 27, 730; Durack, 'Extraterritorial Application of United States Law', above n 54, 94.

⁷² *Re Uranium Antitrust Litigation*, 480 F Supp 1138, 1148 (9th Cir, 1979).

⁷³ See, eg, Lowe, 'The Problems of Extraterritorial Jurisdiction', above n 27, 730-1.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* 731.

⁷⁶ Maier, 'Interest Balancing', above n 69, 594.

⁷⁷ Fox, above n 68, 593.

⁷⁸ Maier, above n 53, 70-1.

common decency in conduct towards others.⁷⁹ Protests against excessive jurisdictional reach have been made on the basis that the state enforcing jurisdiction has failed to observe the international principle of comity.⁸⁰

Comity is a discretionary behavioural principle, not an obligatory rule of international law. As a result, it is often abandoned when prejudicial to state interests or policies.⁸¹ Comity is at best an overarching principle that counsels the exercise of extraterritorial jurisdiction and informs the shaping of substantive rules rather than representing a shield against the effects of extraterritorial legislation.

3 Diplomatic Measures

Other potential means of addressing the difficulties posed by excessive assertions of extraterritorial jurisdiction are diplomatic measures, including international consultations, negotiations and agreements. These options have found support primarily on the basis that the extraterritorial application of a law or policy is a political, rather than a judicial, issue.⁸² One of the most attractive features of negotiated bilateral agreements is their potential to facilitate the circumvention of jurisdictional disputes. An example of this is the *Agreement between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters* ('*Antitrust Cooperation Agreement*'),⁸³ establishing a notification and consultation procedure. The result of several years of negotiations, the *Antitrust Cooperation Agreement* was aimed at alleviating the serious tensions in interstate relations that had arisen since the *Westinghouse* litigation.⁸⁴ Additionally, the *Antitrust Cooperation Agreement* sought to avoid possible conflict between the two nations' 'laws, policies and national interests and for the purpose to give due regard to each other's

⁷⁹ As quoted with approval by the former Australian Attorney-General, Senator Peter Durack, 'Conflicts and Comity', above n 13, 43.

⁸⁰ For instance, in the amicus curiae briefs presented by several of the governments whose nationals were involved in the *Westinghouse* litigation (see below nn 103–10 and accompanying text), including Australia, it was argued that the defendants' refusals to submit to US jurisdiction and comply with US discovery orders was justified on the basis that the US assertion of jurisdiction failed to observe the international comity principle: *Re Uranium Antitrust Litigation*, 480 F Supp 1138, 1149 (9th Cir, 1979); *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980). Similarly, several of the Attorney-General's powers under Australian blocking legislation are activated where the Attorney-General is satisfied that the foreign assertion of jurisdiction is contrary to international law or inconsistent with international comity. See, eg, *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) s 9(1)(b) in relation to the enforceability of judgments given in foreign antitrust proceedings.

⁸¹ Durack, 'Conflicts and Comity', above n 13, 43; Triggs, 'Extraterritorial Reach', above n 4, 272.

⁸² Durack, 'Extraterritorial Application of United States Law', above n 54, 94.

⁸³ 1369 UNTS 43, 21 ILM 702 (signed and entered into force 29 June 1982). The agreement is administered by the Commonwealth of Australia Treasury Department.

⁸⁴ Pengilly, 'Extraterritorial Effects', above n 4, 879–85. For a discussion of the *Westinghouse* litigation, see below n 103 and accompanying text.

sovereignty and to considerations of comity'.⁸⁵ Under the *Antitrust Cooperation Agreement*, Australia may notify the US of governmental policies that may have antitrust implications in the US.⁸⁶ In turn, the US is to notify Australia if the Department of Justice or the Federal Trade Commission 'undertake[s] an antitrust investigation that may have implications for Australian laws, policies or national interests.'⁸⁷ After notification, either country may request consultation if the other country's antitrust policies adversely affect the requesting country.⁸⁸

However, such agreements cannot be relied upon to safeguard national laws, interests or policies when threatened by competing foreign jurisdictional claims. This is largely because in practice states are rarely able to reach agreement over extraterritorial jurisdiction.⁸⁹ Negotiated agreements also do not take account of the power imbalances that are common to jurisdictional combatants.⁹⁰ The efficacy of bilateral agreements is also undermined by their failure to address adequately the problems posed by suits brought by private parties under extraterritorial legislation.

Article 6 of the *Antitrust Cooperation Agreement* provides:

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations.

This gives no recourse to the Australian Government in situations where the private suit involves conduct that has not been the subject of inter-governmental consultation. Also, it only pertains to proceedings concerning private conduct that is mandated by government policy, leaving exposed Australian defendants in US antitrust proceedings whose alleged anti-competitive conduct is not engaged in pursuant to an overt governmental objective. Even where the US is obliged to provide a written statement of the outcome of their consultations with Australia to a court presiding over private antitrust proceedings, there is no guarantee that the US will provide a candid account of the outcomes of the

⁸⁵ *Antitrust Cooperation Agreement*, above n 83, art 2(5).

⁸⁶ *Ibid* art 1(1).

⁸⁷ *Ibid* art 1(2).

⁸⁸ *Ibid* art 2. However, it is not only the *Antitrust Cooperation Agreement* that is mentioned in these US–Australia notifications and requests. The 1999 *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, opened for signature 27 April 1999, 1999 ATS 22 (entered into force 5 November 1999) and the 1995 *OECD Revised Recommendation Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade*, above n 13, are also mentioned. Similar notifications are received from other countries under the latter recommendation.

⁸⁹ Lowe, 'The Problems of Extraterritorial Jurisdiction', above n 27, 732.

⁹⁰ Maier, above n 53, 82.

consultation or that the court will not disregard the submission in favour of its own interpretation of the merits of the suit.⁹¹

4 Multilateral Trade Agreements

Another means by which states may reduce the deleterious effects of the enforcement of foreign extraterritorial legislation is the use of multilateral trade agreements. Since its inception in 1947, the *General Agreement on Tariffs and Trade*⁹² ('GATT') has been the principle international multilateral treaty in relation to trade issues.⁹³ The most-favoured-nation principle ('MFN') is at the heart of the GATT.⁹⁴ In broad terms, the MFN principle provides that any treatment, including any 'advantage, favour, privilege or immunity', afforded to any country, whether or not they are a member of the GATT, must be 'immediately and unconditionally' afforded to all contracting parties.⁹⁵ Disputes between WTO members must be settled in accordance with the WTO two-phased dispute resolution process.⁹⁶ First, disputing member states must engage in formal consultations with each other. Second, disputes that are not settled during the formal consultations may be resolved by the WTO.⁹⁷

The GATT and GATS provide for a number of general exceptions to their requirements. For example, the GATT and GATS contain almost identical provisions allowing the MFN principle to be set aside in the interests of national security.⁹⁸

The extent to which the GATT obligations and WTO dispute resolution mechanisms may be relied upon to protect against the effects of extraterritorial trade controls is somewhat uncertain. First, the WTO has not had the opportunity to rule upon whether *Helms-Burton* and *D'Amato* type sanctions⁹⁹ violate GATT obligations and are therefore contrary to international law. In 1996 the EU

⁹¹ Pengilly, 'Extraterritorial Effects', above n 4, 881.

⁹² Opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally 1 January 1948).

⁹³ Following the conclusion of the Uruguay Round of negotiations in 1994, the GATT has been administered by the World Trade Organization ('WTO'). The WTO was established by the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867-9 UNTS 1, 33 ILM 1125 (entered into force 1 January 1995). The more recent *General Agreement on Trade in Services*, opened for signature 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995) ('GATS'), is also a key treaty in relation to issues surrounding trade in services.

⁹⁴ See generally Shane McGee, '... Or I'll Take My Toys and Go Home: The Iran and Libya Sanctions Act of 1996' (1997) 20 *Houston Journal of International Law* 111, 118-25.

⁹⁵ GATT, above n 92, art I(1). Similarly, the GATS prohibits discrimination against services and service suppliers: GATS, above n 93, art II.

⁹⁶ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, opened for signature 15 April 1994, 1869 UNTS 401, 33 ILM 1226 (entered into force 1 January 1995).

⁹⁷ For a more detailed discussion of the procedural aspects of WTO disputes, see Michael Asaro, 'The Iran & Libya Sanctions Act of 1996: A Thorn in the Side of the World Trading System' (1997) 23 *Brooklyn Journal of International Law* 505, 515-27.

⁹⁸ GATT, above n 92, art XXI; GATS, above n 93, art XIV.

⁹⁹ See below nn 181-96, 221-7 and accompanying text for an outline of the *Helms-Burton* and *D'Amato* sanctions respectively.

initiated WTO consultations with the US in retaliation to the *Helms-Burton Act*, and in the context of the Transatlantic Dialogue between the EU and the US, arguing that the sanctions were incompatible with the GATT.¹⁰⁰ The US response, in general terms, was that the sanctions were necessary for the preservation of US national security and thus were a legitimate exception to GATT obligations.¹⁰¹ The US argued that it, and not the WTO, should determine what measures fall within the GATT's national security exception. In March 1997 the WTO nominated a three person panel to hear the EU case against the *Helms-Burton Act*.¹⁰² However, shortly before the hearing, the EU and the US concluded a memorandum of understanding under which the EU agreed to suspend the WTO proceedings in exchange for, among other things, a continued suspension of Title III of the *Helms-Burton Act*.¹⁰³

At present, it seems that neither international rules, international principles, diplomatic measures nor trade agreement obligations represent satisfactory approaches to the problems associated with extraterritorial jurisdiction. This is essentially because of their failure to produce a comprehensive, internationally acceptable set of rules of sufficient certainty and specificity to ensure that national laws are kept within their proper limits. In addition, the current approaches fail to provide those who are affected by excessive jurisdictional claims with sufficient means of defending their sovereign and legal rights and economic interests. In the circumstances, it is perhaps not surprising that states have elected to fight extraterritorial legislation with extraterritorial blocking legislation. The following section examines the scope of protection afforded by the current Australian blocking legislation.

¹⁰⁰ See generally United Kingdom, *Cuba and the Helms-Burton Act*, above n 30. While Canada and Mexico have not initiated formal proceedings under the *North American Free Trade Agreement* ('NAFTA') in response to the *Helms-Burton* and *D'Amato Acts*, they did engage in consultations with the US under ch 20 of NAFTA: 'Sanctions: US Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measures' (1996) 13 *International Trade Reporter* 476. The consultation failed to resolve Canada's and Mexico's complaint: see 'Sanctions: NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20' (1996) 13 *International Trade Reporter* 1093; Dodge, above n 38, 718.

¹⁰¹ Dodge, above n 38, 718.

¹⁰² See the request by the Permanent Delegation of the European Commission, *United States — The Cuban Liberty and Democracy Solidarity Act: Request for the Establishment of a Panel by the European Communities*, WT/DS38/2 (8 October 1996).

¹⁰³ *Memorandum of Understanding Concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act* (European Union–United States) (1997) 36 ILM 529. Title III of the Act allows US citizens to bring private suits against persons who have 'trafficked' in confiscated property and in some situations the plaintiff may be awarded treble damages if successful: see below nn 181–90 and accompanying text. A second understanding between the EU and the US was reached on 18 May 1998. The elements of this agreement are outlined in an EU Unilateral Statement by the European Commission, *Extraterritorial Laws* (18 May 1998) <http://europa.eu.int/comm/external_relations/us/extraterritoriality> at 18 April 2000. For a discussion of the EU–US agreements, see also United Kingdom, *Cuba and the Helms-Burton Act*, above n 30.

IV AUSTRALIAN BLOCKING LEGISLATION

The current Australian legislative measures directed towards reducing the impact of foreign extraterritorial legislation are found in the *Foreign Proceedings (Excess of Jurisdiction) Act* (1984) (Cth) ('FPEJA'). The precursors to the legislation were prompted by the *Westinghouse* litigation.

A *The Westinghouse Litigation*

Following a dramatic fall in the price of uranium in the late 1960s,¹⁰⁴ US uranium producers successfully lobbied the US Government to introduce an embargo on imports of uranium. This caused a two-thirds reduction in demand for uranium in the world market.¹⁰⁵ Also in an effort to stabilise the world price of uranium, foreign suppliers from France, South Africa, Australia, Canada and Great Britain formed a cartel to limit and allocate the production and sale of uranium outside the US. Due to the US embargo and the defensive cartel, the price of uranium rose by approximately 800 per cent in the period from 1972–75.¹⁰⁶

At the time, Westinghouse Electric Corporation ('Westinghouse') was the largest supplier of uranium to US nuclear power plants and was dependent on foreign uranium supplies to fulfil its existing contracts. These contracts were negotiated on a fixed price basis so that Westinghouse could not pass on the increased costs of supply to the consumer.¹⁰⁷ In response to Westinghouse's inability to fulfil its contractual obligations, a significant number of purchasers commenced proceedings for breach of contract claiming an estimated US\$2 billion in damages.¹⁰⁸ In October 1979, to avoid the real possibility of liquidation that the contractual suits presented, Westinghouse filed an antitrust suit claiming treble damages against 29 US and foreign corporations, including four corporations operating principally in Australia.¹⁰⁹ It alleged that the uranium producers' cartel had caused the dramatic price rise and was thus responsible for its inability to fulfil the supply contracts.¹¹⁰ The litigation was multi-phased, continuing into the early 1980s. It has been described as one of the highest

¹⁰⁴ The price fall has been attributed to a number of factors including easing military tensions in the US and the decline in the use of uranium to meet power supply needs: Khoo, above n 4, 141–2; Maher, 'Antitrust Fall-Out', above n 4, 105–7.

¹⁰⁵ Pengilley, 'United States Trade', above n 5, 196.

¹⁰⁶ The formation of the OPEC Oil Cartel and the search for alternative fuel are further factors that may have contributed to the price rise: Pengilley, 'United States Trade', above n 5, 197.

¹⁰⁷ Pengilley, 'United States Trade', above n 5, 197.

¹⁰⁸ See, eg, *Re Westinghouse Uranium Contract* [1978] 1 AC 583.

¹⁰⁹ The Australian defendants were Conzinc Rio Tinto of Australia Ltd, Mary Kathleen Uranium Ltd, Pancontinental Mining Ltd and Queensland Mines Ltd.

¹¹⁰ For a more detailed discussion of the background to the *Westinghouse* litigation, see Pengilley, 'United States Trade', above n 5, 851–60; Paul Joskow, 'Commercial Impossibility, the Uranium Market and the Westinghouse Case' (1977) 6 *Journal of Legal Studies* 119; William Eagan, 'The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters' (1980) 18 *American Business Law Journal* 281.

priced packages of private law suits in US history, with the damages claimed estimated to be close to US\$7 billion.¹¹¹

B *Legislative Basis of the Westinghouse Litigation*

The *Sherman Act*¹¹² is the main US antitrust law. Sections 1–3 deem antitrust activities to be criminal offences punishable by fines and imprisonment. The substantive provisions of the *Sherman Act* explicitly provide for the legislation to be applied extraterritorially. For example, s 1 prohibits ‘every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, *or with foreign nations*’.¹¹³ Similarly, s 2 provides that ‘every person who shall monopolise, or attempt to monopolise ... any part of the trade or commerce among the several states, *or with foreign nations*, shall be deemed guilty of a felony’.¹¹⁴ The potential for the *Sherman Act* to be applied extraterritorially is bolstered by the fact that the statute prohibits activities, rather than being directed at nationals alone.¹¹⁵ The US courts have adopted an extremely expansive interpretation of the intent of Congress in selecting the broad terms of the legislation.¹¹⁶

US antitrust laws provide for both public¹¹⁷ and private¹¹⁸ enforcement. At the federal level, public enforcement of the antitrust laws may be by criminal or civil proceedings brought by either the Attorney-General¹¹⁹ or the Federal Trade Commission.¹²⁰ In public proceedings, where the defendant is a corporation, the court is empowered to impose fines of up to US\$10 million. Where the defendant is a natural person, penalties are a term of imprisonment not exceeding three years and/or a fine of up to US\$350 000.¹²¹ Although private parties cannot

¹¹¹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 November 1976, 2909 (Attorney-General Ellicott); ‘Issues on Trial in the Westinghouse Lawsuits’, *Business Week* (New York, United States of America), 26 September 1977, 125.

¹¹² 15 USC §§ 1–7 (1997).

¹¹³ Emphasis added.

¹¹⁴ Emphasis added. The *Sherman Act* is supplemented by a number of other acts. The two principle ancillary acts are the *Federal Trade Commission Act*, 15 USC §§ 41–58 (1997) (‘*FTCA*’), and the *Clayton Act*, 15 USC §§ 12–27 (1997). The *Clayton Act* prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly (§ 18), price discrimination (§ 13) and exclusive dealing and tying contracts (s 14). Section 45(a)(1) of the *FTCA* prohibits ‘unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.’ Unlike the *Sherman Act*, the *FTCA* and the *Clayton Act* do not create criminal offences. Rather, the Federal Trade Commission is charged with enforcing the prohibitions under the Acts through ‘cease and desist’ orders: *Federal Trade Commission Act*, 15 USC § 45(b) (1997).

¹¹⁵ Cornelis Canenbley (ed), *Enforcing Antitrust against Foreign Enterprises* (1981) 7. With respect to the constitutional power to regulate extraterritorial activities, the *Constitution of the United States* empowers Congress to ‘regulate Commerce with foreign Nations, and among the several States’: art I, s 8, cl 3.

¹¹⁶ See above n 60 and accompanying text.

¹¹⁷ *Sherman Act*, 15 USC §§ 1–3 (1997); *Clayton Act*, 15 USC §§ 15a, 15c (1997).

¹¹⁸ *Clayton Act*, 15 USC § 15 (1997).

¹¹⁹ *Clayton Act*, 15 USC §§ 15a, 15f (1997).

¹²⁰ *Federal Trade Commission Act*, 15 USC § 57b (1997).

¹²¹ *Sherman Act*, 15 USC §§ 1–2 (1997).

seek to have a defendant imprisoned, they are permitted to seek treble damages for losses suffered as the result of alleged antitrust activities.¹²² They are also entitled to seek injunctive relief against any threatened loss or damage caused by a violation of the antitrust laws.¹²³ The majority of actions for alleged violations of US antitrust laws are brought by private parties. Since plaintiffs who are able to prove that they have been adversely affected by the alleged anti-competitive conduct are automatically entitled to punitive treble damages, there exists a strong incentive to bring private antitrust actions without regard to the international and political consequences.¹²⁴ The exercise of this private right of action, combined with the expansive view taken by US courts in relation to the extraterritorial application of the antitrust laws, has been the source of great international conflict. The *Westinghouse* litigation represents the high-water mark of interstate tensions from the Australian perspective.

Relying upon the wide extraterritorial reach of the US antitrust regime, Westinghouse commenced the treble damages suit against foreign as well as domestic uranium producers. The US Justice Department also began its own investigation and empanelled a grand jury to determine whether the cartel allegations were amenable to criminal proceedings under the antitrust regime.¹²⁵ As part of this investigation, attempts were made to obtain documents and evidence from the defendants, including the four Australian corporations. In addition to discovery orders,¹²⁶ letters of request were presented to the Supreme Court of New South Wales seeking its cooperation in the collection of evidence from the Australian defendants.¹²⁷ The Australian Government was neither consulted nor given prior warning by the US Administration about the requests.¹²⁸ In order to avoid subjection to US in personam jurisdiction, the Australian defendant companies barred company officials from entering the US.¹²⁹

C *The Foreign Proceedings (Prohibition of Certain Evidence) Act*

The *Westinghouse* litigation constituted Australia's first real problem with the enforcement of foreign extraterritorial legislation and acted as the catalyst for the introduction of Australia's first retaliatory legislation — the *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth) ('*FPA*'). The *FPA*

¹²² *Clayton Act*, 15 USC § 15 (1997).

¹²³ *Clayton Act*, 15 USC § 26 (1997).

¹²⁴ J G Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared* (1988) 51.

¹²⁵ After the Grand Jury deliberations were finalised, the US Government did not institute proceedings against any foreign producers.

¹²⁶ In relation to one of the Australian defendants, approximately half a million documents were subject to the discovery orders: see generally 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 4.

¹²⁷ See Triggs, 'Extraterritorial Reach', above n 4, 268.

¹²⁸ 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 23–4.

¹²⁹ Triggs, 'Extraterritorial Reach', above n 4, 268.

was passed with extraordinary urgency.¹³⁰ The *FPA* empowered the Attorney-General to make orders prohibiting the production of documents or the giving of evidence in foreign proceedings on the basis that the foreign court had failed to comply with international law or comity, or where it was considered necessary to protect national interests.¹³¹ Orders were made in accordance with the *FPA*¹³² and the attempts to secure both documents and testimony in the *Westinghouse* litigation were evaded.¹³³ However, because the four Australian defendants declined to enter appearances — on the basis that submission to the jurisdiction could be held to constitute a waiver of their jurisdictional objections — the District Court entered default judgments against them and *Westinghouse* obtained injunctive relief to freeze the defendants' US based assets.

D *The Foreign Antitrust Judgment (Restriction of Enforcement) Act*

The default judgments and injunctions triggered the enactment of Australia's second piece of retaliatory legislation — the *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979* (Cth) ('*FAJA*').¹³⁴ Under the *FAJA*, the Attorney-General was empowered to declare by order that certain foreign judgments given under antitrust laws were not enforceable in Australia.¹³⁵ This power could be activated if the Attorney-General was satisfied that the foreign court had exercised jurisdiction in a manner inconsistent with international law or comity, and the recognition of the judgment may be detrimental to, or adversely affect, Australian trade or commerce.¹³⁶ The Attorney-General could also declare a foreign judgment unenforceable if this was in the Australian

¹³⁰ For a detailed account of the circumstances in which the legislation was passed and a critique of both the decision to introduce the legislation and the provisions of the *FPA*, see Maher, 'Time, Uranium and the Legislative Process', above n 4, 399.

¹³¹ *FPA* ss 4(1), 5(a)–(d). The *FPA* was repealed and replaced by the *FPEJA* in 1984: see below n 149 and accompanying text.

¹³² Commonwealth of Australia, *Government Gazette*, Special Gazette S 214 (29 November 1976); Commonwealth of Australia, *Government Gazette*, Special Gazette S 237 (23 December 1976); Commonwealth of Australia, *Government Gazette*, Special Gazette S 239 (24 December 1976).

¹³³ Maher, 'Time, Uranium and the Legislative Process', above n 4, 404. Note that the Orders were the subject of a High Court challenge: Maher, 'Antitrust Fall-Out', above n 4, 107.

¹³⁴ For a summary of the common law and statutory provisions regarding the enforcement of foreign judgments in Australia prior to the introduction of the *FAJA*, see Maher, 'Antitrust Fall-Out', above n 4, 109–11. The *Foreign Judgments Act 1991* (Cth) introduced a uniform registration process for the enforcement of foreign civil judgments in Australia. The Act replaced the state and territory legislation governing the registration and enforcement of foreign civil judgments in state and territory supreme courts: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 29 May 1991, 4218 (Mr Duff, Attorney-General).

¹³⁵ *FAJA* s 3.

¹³⁶ *FAJA* s 3.

national interest.¹³⁷ On 6 June 1979, the Attorney-General made an order under s 3 of the *FAJA* declaring that the judgment on issues of liability given in favour of Westinghouse against the nine foreign defendants, and the preliminary injunctions in favour of Westinghouse, would not be recognised or enforceable in Australia.¹³⁸

The Australian Government objected to the exercise of extraterritorial jurisdiction in the *Westinghouse* litigation on political, economic and legal grounds. In relation to the political objections, the enforcement of the US antitrust laws conflicted directly with the Australian Government's uranium policy. Not only had the Government approved the arrangements that were made by the Australian uranium producers with other foreign producers, it had also actively encouraged them.¹³⁹ The economic basis of the objection to US jurisdiction was essentially that the gravity of the damages claimed, combined with the fact that the Australian defendants collectively occupied a significant position in the national economy, meant that enforcement would have a significant detrimental effect on both the defendants' commercial survival and the Australian economy.¹⁴⁰ More generally, the Australian Government expressed concern over the uncertainty surrounding the scope and application of the US antitrust regime.¹⁴¹ Finally, the legal aspects of the Australian objection to the legitimacy of the exercise of extraterritorial jurisdiction at international law rested upon the claim that 'appropriate deference and weight' was not afforded to considerations of comity and interest-balancing in giving primacy to

¹³⁷ *FAJA* s 3. A further feature of s 3 of the *FAJA* was that it enabled the Attorney-General to declare, in the case of judgments involving a specified amount of money, that for the purposes of enforcement the amount of a judgment could be reduced to a specified amount. The rationale for this section was that it provided for the 'possibility of a judgment for treble damages being unobjectionable to the extent that it provides only compensation for loss suffered': Explanatory Memorandum, *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979* (Cth).

¹³⁸ The 'Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979: Order by the Attorney-General': Commonwealth of Australia, *Government Gazette*, Special Gazette S 105 (8 June 1979).

¹³⁹ See Note 13/78 from the Australian Embassy in Washington to the US State Department, 23 March 1978 cited in Pengilly, 'United States Trade', above n 5, 36. A defence of 'foreign sovereign compulsion' (which operates to deflect liability under US antitrust law where the defendant's activities outside the US are required, but not merely permitted, by foreign law) could not be relied upon in the *Westinghouse* litigation. This was because, in the US, the defence is only applicable where the foreign sovereign has 'compelled' the conduct in question in violation of US antitrust laws. Although the arrangements which were made by the Australian uranium producers were made with the approval of the Australian Government, they were not 'compelled'. In addition, the practical utility of the foreign sovereign compulsion doctrine is limited by the fact that it is a legal defence and thus is not directly relevant to the question of jurisdiction: see Commonwealth of Australia, *Parliamentary Debates*, Senate, 11 June 1981, 3067. In *Hartford Fire Insurance Co v California*, 509 US 764 (1993) the US Supreme Court further reduced the application of the foreign sovereign compulsion defence in holding that it is not applicable where it is possible to obey both the US law and the foreign law: see Andreas Lowenfeld, 'Jurisdictional Issues Before National Courts: The *Insurance Antitrust Case*' in Karl Meessen, above n 53, 1-18.

¹⁴⁰ *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 24.

¹⁴¹ *Ibid* 40.

the enforcement of US antitrust policy over the interests of the foreign defendants. However, Australia's arguments were dismissed with rather derisive comments by the US Appeals Court, leading to considerable diplomatic tension.¹⁴²

In early 1981, the Australian defendants announced that a settlement in excess of A\$11 million dollars had been reached with Westinghouse.¹⁴³ The settlement was conditional upon Government approval. The Attorney-General announced on 18 March 1981 that the terms of the settlement were consistent with the Australian national interest.¹⁴⁴ Although the decision to support the settlement was contradictory to the strong defensive stand taken by the Government in enacting the *FPA* and the *FAJA*, it seems that pragmatic commercial considerations outweighed the political and legal objections to the exercise of jurisdiction. That is, in order to maintain a workable relationship with US trading partners, and in order to protect their US based assets, the defendants really had no other option but to settle the case.¹⁴⁵ The commercial asymmetry that characterises the relationship between Australia and the US was a determinative

¹⁴² *Re Uranium Antitrust Litigation*, 480 F Supp 1138, 1148 (9th Cir, 1979); *Re Uranium Antitrust Litigation*, 617 F 2d 1248, 1255 (7th Cir, 1980), where the Court stated the following:

The amici suggest that the District Court abused its discretion by not considering the factors set out in *Mannington Mills* in reaching this determination. While the considerations recommended in that case certainly provide an adequate framework for such a determination, we can hardly call the failure to employ those precise factors an abuse of discretion. First, the *Mannington Mills* factors are not the law of this Circuit. Second, even assuming their adoption by this Court, the circumstances here are distinct from those found in *Timberlane* and *Mannington Mills*. In those cases the defendants appeared and contested the jurisdiction of the District Court. In the present case, the defaulters have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions (One such subsidiary, Atlas Alloys, Inc, is not even a party in this action) and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. If this Court were to remand the matter for further consideration of the jurisdictional question, the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery. We find little value in such an exercise. We conclude that given the posture of this case, and the circumstances before the District Court, the Judge did not abuse his discretion in proceeding to exercise his jurisdiction. We therefore decline to remand the case.

¹⁴³ See Joint Press Release by CRA Limited and Mary Kathleen Uranium Limited, 18 March 1981; Statement by A J Grey, Chairman of Pancontinental Mining Limited, 18 March 1981; both cited in Maher, 'Antitrust Fall-Out', above n 4, 125. For a break down of the settlement sum among the four defendants, see Pengilly, 'Extraterritorial Effects', above n 4, 857.

¹⁴⁴ Peter Durack, Attorney-General of Australia, Press Release, No 18/81 (18 March 1981). See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3531, 3542; Commonwealth of Australia, *Parliamentary Debates*, Senate, 26 March 1981, 3305.

¹⁴⁵ Maher, 'Antitrust Fall-Out', above n 4, 125-6.

factor in the outcome of the *Westinghouse* litigation for Australia.¹⁴⁶ This asymmetry, and the divergence it creates between Australia's political interests on the one hand, and its economic interests on the other, represents perhaps the greatest obstacle to Australia's ability to influence the outcome of jurisdictional disputes with the US.¹⁴⁷

E *The Foreign Proceedings (Excess of Jurisdiction) Act*

The *FPA* and the *FAJA* were introduced in direct response to the immediate threats posed by the *Westinghouse* litigation to the survival of significant Australian corporations and the political independence of the Australian Government. After the signing of the *Antitrust Cooperation Agreement* in 1982,¹⁴⁸ both the *FPA* and the *FAJA* were repealed and replaced by the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) ('*FPEJA*'). The *FPEJA* was introduced to 'consolidate and expand Australian laws which protect Australian trading interests and policies against the extraterritorial enforcement of foreign laws'.¹⁴⁹ The *FPEJA* was intentionally enacted during a time of relative calm with respect to the enforcement of foreign laws in Australia. As stated by the then Australian Minister for Trade, Lionel Bowen, the rationale for this change in tack was that it 'is better to introduce protective legislation now, during a period of improved relations, than to leave it until some crisis arrives, and so heighten what would be at that time a public perception of conflict between our two countries.'¹⁵⁰

Like the *FPA* and the *FAJA*, the *FPEJA* is predominantly concerned with the extraterritorial application of US antitrust laws.¹⁵¹ Notwithstanding the

¹⁴⁶ The significance of the imbalance between Australian and the US economic power was considered in a Report of the Senate Standing Committee on Foreign Affairs, Defence and Trade, *Implications of United States Policies For Australia* (1992). The Committee inquired into the impact of US policy on Australia on the eve of the 1992 Presidential and Congressional elections.

¹⁴⁷ 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, ix.

¹⁴⁸ Above n 83 and accompanying text.

¹⁴⁹ See the debates over the Foreign Proceedings (Excess of Jurisdiction) Bill 1984 (Cth): Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 253 (Lionel Bowen, Minister for Trade). The *FPEJA* was introduced in response to the recommendations by the Parliamentary Joint Committee on Foreign Affairs and Defence that a further legislative response to the extraterritorial application of foreign laws was necessary: 1983 *Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3.

¹⁵⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 254. During the Senate debate over the *FPEJA*, Senator Durack expressed a contrary view in relation to the timing of the Act. He was concerned about possible US reactions to the Act being passed so close to the signing of the *Antitrust Cooperation Agreement*. Senator Durack feared that the Act may reignite tensions in Australian-US relations: at 49. However, the view that it was better to pass the legislation during a period of improved relations prevailed: 'Extraterritoriality: Australian Limitations on Foreign Judgments and Discovery — *Foreign Proceedings (Excess of Jurisdiction) Act 1984*' (1985) 26 *Harvard International Law Journal* 578, 581.

¹⁵¹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 March 1984, 678.

protection afforded by the *Antitrust Cooperation Agreement*, the Australian Government considered that the underlying jurisdictional threat to Australian sovereignty and to our export and other trading policies remained.¹⁵² Further, although the Government advocated the use of consultation, as opposed to unilateral legal or executive action, as its preferred method of jurisdictional conflict resolution, it took the view that the *Antitrust Cooperation Agreement* should be supplemented with further protective legislation. This was largely because the consultative measures contained in the *Antitrust Cooperation Agreement* do not oblige private plaintiffs, who account for approximately 95 per cent of US antitrust actions, to consider the national interests of other countries.¹⁵³ A decision was made to introduce a 'comprehensive arsenal of defences' to be used when the consultative methods failed to resolve jurisdictional conflict.¹⁵⁴

The 'comprehensive arsenal' consists of five measures. First, Part II, Division 2, of the *FPEJA* incorporates identical measures as those previously contained in the *FPA* in relation to the prohibition of giving evidence to foreign courts.¹⁵⁵ Second, s 9 of the *FPEJA* contains similar provisions to those in the *FAJA* relating to blocking foreign antitrust judgments. Third, s 9 is supplemented by s 14 which enables the Attorney-General to prohibit a person from complying with (non-monetary) foreign judgments requiring an act to be performed in Australia if this act would be contrary to the national interest. Although the language of s 14 is not antitrust specific, the Government envisaged that the provisions could be used to combat divestiture and 'cease and desist' orders made under US antitrust laws.¹⁵⁶

The fourth, and novel, group of antitrust specific defensive measures in the *FPEJA* are the claw-back provisions contained in ss 10–12.¹⁵⁷ Referred to euphemistically by the Australian Government as 'recovery-back' provisions, these sections confer a right of action on an Australian defendant in foreign antitrust proceedings where the Attorney-General has made an order that a judgment against the defendant should not be enforceable in Australia (in whole or in part).¹⁵⁸ Although the United Kingdom ('UK') pioneered the use of

¹⁵² Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 254.

¹⁵³ *Ibid* 255.

¹⁵⁴ *Ibid*.

¹⁵⁵ *FPEJA* ss 6–8.

¹⁵⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 256–7.

¹⁵⁷ The introduction of claw-back provisions into Australian blocking legislation was first attempted in 1981. The Australian Government introduced the Foreign Antitrust Judgments (Restriction of Enforcement) Bill (Cth) in June 1981: Commonwealth of Australia, *Parliamentary Debates*, Senate, 11 June 1981, 3067. Known as the 'Recover Back Bill', it would have enabled an Australian defendant to a foreign antitrust judgment, where an order had been made under the *FAJA*, to recover back from the foreign plaintiff certain amounts which had been recovered under the prohibited judgment in an overseas country. However, the Australian Government did not seek passage of the Recover Back Bill following the signing of the *Antitrust Cooperation Agreement*.

¹⁵⁸ Foreign Antitrust Judgments (Restriction of Enforcement) Bill 1981 (Cth), ss 10(1)–10(2).

defensive claw-back provisions,¹⁵⁹ the Australian provisions were more comprehensive than their UK counterparts.¹⁶⁰ The *FPEJA* allows an Australian defendant to institute an action in Australia for recovery from the foreign plaintiff of an amount equal to the judgment sum.

Section 11 of the *FPEJA* also confers a limited right upon an Australian defendant to recover reasonable costs and expenses incurred by it in defending private antitrust proceedings.¹⁶¹ Section 11 is designed to combat s 12 of the *Clayton Act* which provides for service on a corporation wherever located, and thus enables a US plaintiff to draw an Australian defendant, with no physical ties to the jurisdiction of the US, into US antitrust proceedings. Further, the US antitrust laws do not allow a successful plaintiff to recover his or her costs, which in US antitrust proceedings often amount to millions of dollars.¹⁶²

Section 12 of the *FPEJA* provides for the Australian Government to enter into reciprocal enforcement arrangements with other countries that have similar claw-back provisions. Section 12 was included because the UK had shown considerable interest in developing the concept of reciprocal enforcement with Australia and had made provision for such a system in its blocking legislation, namely the *Protection of Trading Interests Act 1980* ('*UK PTIA*').¹⁶³ Although the reciprocity system was still in an embryonic state, the Government thought it prudent to include the provision in the 1984 legislation.¹⁶⁴ Australia and the UK eventually signed an agreement relating to the reciprocal recognition and enforcement of judgments in 1994.¹⁶⁵

Although the *FPEJA* is primarily concerned with the extraterritorial application of US antitrust laws, the fifth countermeasure, contained in s 13, is directed at combating the effects of extended primary boycott legislation on Australia. Section 13 empowers the Attorney-General, where considered desirable for the protection of the national interest, to make orders blocking actions or decisions of foreign governments under laws relating to trade or

¹⁵⁹ *Protection of Trading Interests Act 1980* (UK) c 11. For a discussion of the background to the Act and an analysis of its provisions, see Vaughan Lowe, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 *American Journal of International Law* 257.

¹⁶⁰ See Khoo, above n 4, 146.

¹⁶¹ See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 256 for the details of the circumstances in which the right to recover costs and expenses will be held to exist.

¹⁶² *Ibid.*

¹⁶³ (UK) c 11, s 7.

¹⁶⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 256.

¹⁶⁵ *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, signed 23 August 1990, ATS 27/1994 (entered into force 1 September 1994).

commerce that impose an obligation upon an Australian person or company that has to be performed in Australia.¹⁶⁶

Section 18 provides that contravention of a *FPEJA* order is an offence punishable by a fine not exceeding AU\$50 000 or imprisonment for a period of up to 12 months for a natural person and a fine not exceeding AU\$250 000 for a corporation.

V UNITED STATES UNILATERAL ECONOMIC SANCTIONS AND THE INEFFECTIVENESS OF AUSTRALIAN BLOCKING LEGISLATION

The controversy surrounding the extraterritorial enforcement of US antitrust legislation diminished during the late 1980s and early 1990s. There have been no protective or blocking orders made by the Attorney-General under the *FPEJA* since its introduction.¹⁶⁷ It is therefore arguable that Australia's legislative and diplomatic measures have contributed to averting further *Westinghouse* type claims. However, concern over the effects of foreign extraterritorial legislation upon Australia revived in 1996 when the US adopted the *Helms-Burton Act*¹⁶⁸ and *D'Amato Act*.¹⁶⁹ The two Acts employ a variety of methods, including secondary boycott sanctions, to affect US foreign policy with respect to Cuba, Iran and Libya. The effects of US extraterritorial trade controls represent a new source of difficulties and concern for Australia. The laws are the first attempt by the US to use secondary boycott sanctions, private treble damages suits and exclusion from the US as a means for pursuing foreign policy objectives.

While Canada has recently amended its blocking legislation to respond to the new ways in which extraterritorial legislation is being used,¹⁷⁰ and the EU has adopted a far-reaching blocking statute for the same reason,¹⁷¹ the *FPEJA* has not been amended since its enactment in 1984. The *FPEJA* is not adequate, however, to respond to actions, or to deter threatened actions, under the *Helms-Burton Act* or the *D'Amato Act*.

A *The Helms-Burton Act*

Since 1959–60, when Fidel Castro's Cuban Government nationalised foreign corporate and individually owned property, the US has maintained some form of

¹⁶⁶ During the Second Reading Speech of *FPEJA* the then Minister for Trade, Lionel Bowen, cited decisions made by the US government under the *Export Administration Act*, above n 34, as an example of the type of decisions to which this section is directed: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 256–7. Bowen highlighted the need for the inclusion of s 13 by noting that the UK equivalent provision had enabled the UK to counter US executive orders, made in accordance with the *Export Administration Act*, directed at UK companies involved in the construction of the Siberian gas pipeline: see above n 37 and accompanying text.

¹⁶⁷ A review by the author of the Annual Indexes to the Australian Commonwealth of Australia Gazettes since the enactment of the *FPEJA* in 1984 revealed that the Attorney-General has not made any orders under the *FPEJA*.

¹⁶⁸ 22 USC §§ 6021–91 (2000).

¹⁶⁹ Public L No 104–72, 110 Stat 1541 (1996).

¹⁷⁰ See below nn 252–69 and accompanying text.

¹⁷¹ See below nn 244–50 and accompanying text.

economic embargo against Cuba.¹⁷² In response to Cuba's failure to pay the US\$1.8 billion compensation claimed by the US for the property seizures,¹⁷³ the US began its efforts to isolate Cuba.¹⁷⁴ Up until 1996, the US employed domestic embargoes and extended primary boycott measures against Cuba.¹⁷⁵ The 1996 legislation was triggered by the shooting down of two civilian aircraft, owned by the Miami based humanitarian organisation known as 'Brothers to the Rescue', by the Cuban Air Force in February 1996.¹⁷⁶ The *Helms-Burton Act*, as the disarmingly titled *Cuban Liberty and Democratic Solidarity (Libertad) Act 1996* is commonly known, includes provisions to increase the economic isolation of Cuba by imposing penalties upon persons who engage in proscribed economic relations with Cuba. More specifically, one of the stated purposes of the *Helms-Burton Act* is to strengthen the existing sanctions against the Cuban Government.¹⁷⁷ To this end, the Act directs the President to instruct the Secretary of the Treasury and the Attorney-General to 'enforce fully' the existing regulations.¹⁷⁸ The Act also entrenches the provisions of earlier legislative embargo devices, such as the *Cuban Democracy Act*,¹⁷⁹ so that Congressional approval is now required for their repeal or modification.¹⁸⁰

¹⁷² For a discussion of the events leading up to the nationalisation of property in Cuba, see United Kingdom, *Cuba and the Helms-Burton Act*, above n 30; Pengilly, 'United States Trade', above n 5, 215–17.

¹⁷³ The US Foreign Claims Settlement Commission established a register for private owners of confiscated property to register their losses. Some, but not all, owners of confiscated property registered their losses. The Commission reviewed the losses claimed and certified the amounts of many of the claimants: see Lowe, 'US Extraterritorial Jurisdiction', above n 44, 380; *Digest of United States Practice in International Law 1979* (1983) 119.

¹⁷⁴ For an analysis of the alternative views in relation to property rights, the jurisprudential basis for awarding compensation and the role of equitable considerations in adjudicating property disputes, see Alan Story, 'Property in International Law: Need Cuba Compensate US Titleholders for Nationalising Their Property?' (1998) 6 *Journal of Political Philosophy* 306.

¹⁷⁵ The US embargo of Cuba was introduced on 3 February 1962 pursuant to s 2370(a) of the *Foreign Assistance Act of 1961*, 22 USC § 2151 (1990), and § 5(b) of the *Trading with the Enemy Act*, 50 USC (1994). The embargo was implemented by the *Cuban Assets Control Regulations*, 31 CFR § 515 (1963) in accordance with the provisions of *Trading with the Enemy Act*. These regulations remain in force, but the embargo has been modified by the *International Emergency Economic Powers Act of 1977*, 50 USC § 1702 (1994), the *Export Administration Act of 1979*, 50 USC App § 2401 (2000), and the *Cuban Democracy Act of 1992*, 22 USC § 6004 (2000): see Lucien Dhooge, 'Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996' (1997) 14 *Arizona Journal of International and Comparative Law* 575, 583.

¹⁷⁶ See, eg, United Nations Security Council Statement on the incident: SC Res 1067, UN SCOR (3683rd mtg), UN Doc S/Res/1067 (1996), 35 ILM 493; United States of America, *Commemorating the Fourth Anniversary of the Brothers To the Rescue Shootdown* (2000) 146 *Congressional Record* S779 (Senator Mack).

¹⁷⁷ *Helms-Burton Act* § 6022(2).

¹⁷⁸ *Helms-Burton Act* § 6032(c).

¹⁷⁹ See above n 175 and accompanying text.

¹⁸⁰ *Helms-Burton Act* § 6032(a)(1).

1 *The Extraterritorial Provisions of the Helms-Burton Act*

Titles III and IV of the *Helms-Burton Act* have caused the greatest controversy.¹⁸¹ Title III gives US citizens the right to sue (and recover legal costs from) non-US nationals who, after 1 November 1996, have 'trafficked' in property confiscated by the Castro Government in which the plaintiff has an interest.¹⁸² The exceptionally broad terms of the definition of 'trafficking'¹⁸³ mean that almost every activity engaged in by an owner, manager or lessee of confiscated property is potentially actionable.¹⁸⁴ Even setting up an office in a hotel room in Cuba may constitute trafficking in confiscated property.¹⁸⁵ Perhaps the most contentious aspect of the right to bring civil actions under the Act is that, in some circumstances, the US courts can impose a treble damages penalty against those who are found to have 'trafficked' in (registered and certified) confiscated property.¹⁸⁶ The Title III provisions have been widely criticised by US treaty and trading partners,¹⁸⁷ jurists¹⁸⁸ and organisations such as the Inter-American Juridical Committee.¹⁸⁹ In response to the international pressure against Title III, the US Government has suspended its operation on nine consecutive occasions since its enactment in 1996.¹⁹⁰

¹⁸¹ For a concise summary of the operative provisions of the *Helms-Burton Act* and the international objections and responses to the Act, see Lowe, 'US Extraterritorial Jurisdiction', above n 44.

¹⁸² Note that §§ 6064 and 6082 of the Act authorise the President to suspend the rights created under Title III for periods of 6 months.

¹⁸³ *Helms-Burton Act* § 6023(13) defines 'trafficking' in the following extraordinarily broad terms:

A person traffics in confiscated property if that person knowingly and intentionally (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking.

¹⁸⁴ Lowe, 'US Extraterritorial Jurisdiction', above n 44, 381.

¹⁸⁵ Pengilly, 'United States Trade', above n 5, 218.

¹⁸⁶ *Helms-Burton Act* § 6082(a)(3)(C)(ii). Section 6082(a)(3) provides that treble damages are only available where the claim has been certified by the Foreign Claims Settlement Commission.

¹⁸⁷ See, eg, United Kingdom, *Cuba and the Helms-Burton Act*, above n 30, 28–37.

¹⁸⁸ See, eg, Lowe, 'US Extraterritorial Jurisdiction', above n 44; Pengilly, 'United States Trade', above n 5.

¹⁸⁹ Inter-American Juridical Committee of the OAS, *Inter-American Juridical Committee Opinion Examining the US Helms-Burton Act*, OAS/Ser.G, CP/doc 2803/96 (1996), 35 ILM 1322.

¹⁹⁰ See, eg, Alan Larson, Under Secretary of State for Economic Affairs, United States of America, *Suspension of Title III Lawsuit Provisions of the Cuban Liberty and Democratic Solidarity (Libertad) Act* (Washington DC), 15 July 2000, and other previous statements at <<http://www.state.gov/www/regions/wha/cuba/helms.html>> at 18 April 2001. Although Title III has been continuously suspended, the extended primary boycott measures under the *Cuban Asset Control Regulations* and the *Cuban Democracy Act* have remained active: Latin American Economic System, *Follow-Up Report on the Application of the Helms-Burton Act*, SP/CL/XXIII.O/Di No 1 (1999) <<http://lanic.utexas.edu/~sela/english.htm>> at 18 April 2001.

Title IV of the *Helms-Burton Act* has also been the subject of significant opposition.¹⁹¹ It requires the Secretary of State to deny entry into, and the Attorney-General to exclude from, the US any non-US national who has confiscated property, trafficked in confiscated property since 12 March 1996, or is a corporate officer or controlling shareholder in an entity involved in trafficking.¹⁹² Further, the bar on entry applies to the spouses, minor children or agents of persons excludable under the Act. Lowe estimates that the key officers (and their families) of up to 1300 foreign corporations with investments in Cuba are potentially subject to the exclusion provisions.¹⁹³ However, the US Government has only enforced Title IV against three corporations: Sherrit International of Canada, Grupo Domos of Mexico and Grupo B M, an Israeli-owned citrus company.¹⁹⁴ Thus, while the US State Department asserted that Title IV would be expeditiously and vigorously implemented,¹⁹⁵ some commentators perceive the issuing of only a limited number of Title IV determination letters as restrained and conclude that the concern over Title IV may be unwarranted.¹⁹⁶

2 *The Effects of the Helms-Burton Act on Australia*

Shortly after the implementation of the *Antitrust Cooperation Agreement*, Australia's then Attorney-General, Senator Durack, commented that the *Antitrust Cooperation Agreement* reflected a recognition of the importance both governments attach to the need for conflicts between national laws and policies to be resolved at the governmental level.¹⁹⁷ However, the introduction of the *Helms-Burton Act* indicated that the US, in signing the *Antitrust Cooperation Agreement*, was not committed to consultation and negotiation with respect to extraterritorial legislation and enforcement.

¹⁹¹ For example, as at November 1997, the EU had sent two demarches to the US Department of State protesting against Title IV of the Act: (1996) 35 ILM 397. Protests were also submitted by the Canadian Government: see, eg, Douglas Forsythe, 'Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the US Helms-Burton Act' (1997) 36 ILM 111, and by the Mexican Government: see, eg, Jorge Vargers 'Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law' (1997) 36 ILM 133.

¹⁹² *Helms-Burton Act* § 6091. See the *Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act*, 61 Federal Register 30655 (1996).

¹⁹³ Lowe, 'US Extraterritorial Jurisdiction', above n 44, 381.

¹⁹⁴ See, eg, US Department of State, *Libertad Act* (2000) <<http://www.state.gov/www/regions/wha/cuba/helms.html>> at 18 April 2001. See also US Department of State, 'Department of State Standard Language Title IV Determination Letter on Denying Visas under the Helms-Burton Act' (1997) 36 ILM 1667.

¹⁹⁵ See the two statements delivered by Nicholas Burns, US Department of State, *Implementation Of Title IV Of The Cuban Liberty And Democratic Solidarity Act Of 1996: Special Unit Established* (20 Spetember 1996 and 23 July 1997) <<http://secretary.state.gov/www/briefings/statements/>> at 18 April 2001.

¹⁹⁶ See, eg, Peter Glossop, 'Recent US Trade Restrictions Affecting Cuba, Iran and Libya — A View from Outside the US' (1997) 15 *Journal of Energy & Natural Resources Law* 212, 214.

¹⁹⁷ See Press Release of Peter Durack (29 June 1982) cited in *1983 Parliamentary Report on the Extraterritorial Application of United States Laws*, above n 3, 32.

The US foreign policy underpinning the *Helms-Burton Act* is in direct conflict with the Australian Government's foreign policy with respect to Cuba; a policy which allows Australians to trade with Cuba¹⁹⁸ and encourages a multilateral international approach to Cuban reform.¹⁹⁹ Australia has stated that it has 'urged the US to step away from extra-territorial measures and to adopt a cooperative approach to shared foreign policy interests rather than going it alone'.²⁰⁰ Although the Australian Government shares US concerns over the pace and depth of economic and political reform in Cuba, it believes that engagement rather than isolation would be a more successful means of bringing about positive change in Cuba.²⁰¹

Unilateral extraterritorial sanctions have been criticised for the indirect effect they have on business decisions within third party nations. The transaction costs of conducting multilateral business activities may become prohibitive due to the delay and expense of investigating the potential impact of a commercial transaction falling foul of either the foreign sanctions or of the domestic laws designed to counter the effects of the foreign sanctions.²⁰² Australia's business interests in Cuba, however, are not extensive. There has only been one reported case where the *Helms-Burton Act* may have had an impact upon the business strategy of an Australian corporation, namely Western Mining Corporation ('WMC'). WMC was considering investing in a Cuban nickel mine but ultimately decided against the investment. It appears that one of the factors in WMC's decision not to proceed was potential liability under the *Helms-Burton Act*.²⁰³ Although the (overt) impact of the Act upon Australian businesses appears to be limited to this case, it is likely that US legislation has made Australian corporations cautious about exploring investment opportunities in Cuba. These covert effects, in particular the extent to which corporations have elected to comply prudentially with the legislation in order to avoid treble damages suits, are almost impossible to quantify.

The publicly available records of the US Department of State and the Australian Department of Foreign Affairs and Trade do not contain information

¹⁹⁸ The Australian Government (as at 2 February 2001) does not have any trade sanctions in place against Cuba.

¹⁹⁹ Tim Fischer, Deputy Prime Minister and Minister for Trade, Commonwealth of Australia, *Australia Welcomes Further Suspension of US Cuba Sanctions Law*, Press Release, 6 January 1997.

²⁰⁰ Department of Foreign Affairs and Trade, Commonwealth of Australia, Internal Document (21 August 1996) (confidential, copy on file with author). This document consolidated the key points of Australia's position on the *Helms-Burton* and *D'Amato Acts*.

²⁰¹ *Ibid.*

²⁰² Dunning, above n 23, 186. The issue of corporations having to navigate around both foreign sanctions and domestic countermeasures is explored below in relation to Canada's response to the *Helms-Burton* and *D'Amato Acts*: see below n 294 and accompanying text.

²⁰³ See 'Extra-Territorial Laws' (1996) 23 *ACCI Review* 11, 11; Fred Brechley, 'Australia Lobbies to Benefit from any Relaxation of US Trade Laws', *Australian Financial Review* (Sydney, Australia), 6 May 1998, 12; Don Greenlees, 'Downer Urges US to Halt Cuban Trade Threat', *The Australian* (Sydney, Australia), 24 June 1996, 3; Fred Brechley, 'Australia Backs Protest Against US Anti-Cuba Trade Laws', *Australian Financial Review* (Sydney, Australia), 23 May 1996, 12.

indicating that any Australian corporations have been investigated for possible breaches of Title IV. Similarly, it seems that no Australian company officials have been the subject of Title IV exclusion orders. But the threat of such action remains and may become more immediate with the new US administration. For this reason it is important to determine the extent to which the *FPEJA* can protect Australian corporations and individuals from the effects of the *Helms-Burton Act*.

3 FPEJA and the Helms-Burton Act

The only provision of the *FPEJA* that can operate to frustrate Title III private suits, and that may therefore create a disincentive for potential US plaintiffs to pursue such actions, is the prohibition on producing documents and the giving of evidence in foreign courts.²⁰⁴ In the event that discovery orders or document requests are made, the *FPEJA* empowers the Attorney-General to order that the Australian defendant refrain from complying with the orders and/or request. However, in the event that a US court nevertheless proceeds to enter judgment against the defendant, the *FPEJA* cannot be relied upon to block the enforcement of the judgment. This is because the blocking provisions in the *FPEJA* only apply to antitrust proceedings.²⁰⁵

The *FPEJA* prohibition on giving effect to certain *non-monetary* judgments, whether they be antitrust based or not, is also not of great assistance. This is because judgments under Title III are likely to involve the award of some amount of monetary damages. The prohibition may be of limited use in circumventing injunction orders aimed at preventing an Australian defendant from disposing of their US based assets that the plaintiff may seek to acquire to satisfy judgment.

Finally, in the event that the US plaintiff fulfils a judgment against the defendant's US based assets, the *FPEJA* claw-back provisions could not be employed to recover the judgment sum (assuming that the US plaintiff held Australian assets) or to recover the costs of defending the claim as the claw-back provisions are limited to antitrust proceedings.²⁰⁶

The only provision of the *FPEJA* that is potentially relevant to responding to a Title IV order is s 13. This enables the Attorney-General to make an order prohibiting the performance of certain obligations imposed by foreign governments upon Australians that adversely affect the Australian national interest. However, these can only be made where the obligation 'could be, or must be, performed in Australia'.²⁰⁷ It may be arguable that a Title IV order issued to an Australian excluding their entry to the US could be characterised as an obligation upon them to stay in Australia, an obligation that 'could be' fulfilled in Australia. However, it is also arguable that the obligation is actually

²⁰⁴ *FPEJA* pt II, div 2.

²⁰⁵ *FPEJA* s 9.

²⁰⁶ *FPEJA* ss 10–12.

²⁰⁷ *FPEJA* s 13(b).

imposed upon US authorities to prevent the person from entering the US if entry is attempted. Even if the obligation were characterised as one to be performed in Australia, any order made under s 13 of the *FPEJA* would be meaningless. This is because, while in theory the Attorney-General may order an Australian (and his or her family) to ignore the action or decision in question, if the Australian national attempted entry into the US, they would simply be refused entry despite the existence of the Australian order.

Australians then can neither invoke the provisions of the *FPEJA* to respond to Title III suits or Title IV orders, nor rely upon the Australian protective legislation as a defensive negotiating tool to thwart proposed enforcement of the *Helms-Burton* provisions. Consequently, Australians contemplating business ventures involving confiscated property in Cuba would be best advised to comply with the *Helms-Burton* provisions and not proceed with the investment. In effect, Australians are forced to comply with US trade policy in relation to Cuba rather than the Australian policy.²⁰⁸

B *The D'Amato Act*

The *Iran and Libya Sanctions Act of 1996*,²⁰⁹ commonly referred to as the *D'Amato Act*,²¹⁰ was introduced less than five months after the *Helms-Burton Act*. The *D'Amato Act* is designed to further US foreign policy with respect to Iran and Libya by imposing sanctions on persons who invest in the Iranian or Libyan oil or gas industries, or sell specified goods, services or technology to Libya. The US has classified Iran and Libya as sponsors of terrorism and acquirers of weapons of mass destruction, and thus considers that the two nations 'endanger the national security and foreign policy interests of the United States' and its allies.²¹¹ The economies of Iran and Libya are primarily supported by income from their oil and gas industries. The rationale is therefore that blocking foreign investment in the oil and gas sectors will have a major impact on the countries' economies and, in turn, upon their governments' revenue and ability to fund terrorist activities.²¹² The specific policy objectives in relation to Iran aim to deny it the ability to support acts of international terrorism and to fund the

²⁰⁸ See above n 198 and accompanying text.

²⁰⁹ Public L No 104-72, 110 Stat 1541 (1996).

²¹⁰ The legislation, in its original form, was initiated by the New York Republican Senator Alfonse D'Amato.

²¹¹ *D'Amato Act* § 2. For a discussion of the policy objectives underpinning the various economic sanctions imposed by the US against Iran and Libya, see Anne Connaughton, 'Exporting to Specialised Destinations: Terrorist-Supporting and Embargoed Countries' (1996) 748 *Practicing Law Institute* 353.

²¹² *D'Amato Act* § 2. See also C David Welch, 'Striking a Balance: Maximum Pressure on Iran and Libya, Minimum Cost to American Interests', *Submissions to the Iran and Libya Sanctions: Hearings on HR 3107 Before the House of Ways and Means Committee, Subcommittee on Trade, 104th Congress* (1996), <<http://www.state.gov/www/regions/nea/960522.html>> at 18 April 2001; Dhooge, above n 175, 24-5; Meghan McCurdy, 'Unilateral Sanctions with a Twist: The Iran and Libya Sanctions Act of 1996' (1997) 13 *American University International Law Review* 397.

development, acquisition and supply of weapons of mass destruction.²¹³ The Libyan sanctions are designed to press Libya to comply with its obligations under several United Nations Security Council Resolutions²¹⁴ to end all support for acts of international terrorism and to impede efforts to develop or acquire weapons of mass destruction.²¹⁵

The US has maintained economic sanctions, in various forms, against Iran and Libya for several decades as a means of exerting pressure to cease their involvement in terrorist activities. The US has also used primary boycott sanctions prohibiting domestic trade and investment with Iran and Libya as a means of pursuing its foreign policy objectives.²¹⁶ During the last decade, the UN has also introduced economic sanctions against Libya in an effort to curb terrorist activities.²¹⁷ The *D'Amato Act* is the first secondary boycott measure adopted by the US against Iran and Libya.

Senator Alfonse D'Amato first introduced the legislation into the US Senate in September 1995. The draft legislation contained sanctions in relation to Iran only. In its original form, the legislation provided that companies who traded with (as opposed to invested in) Iran could not sell their products in the US. The US Government rejected the legislation on the basis that the costs of unilaterally enforcing a ban on non-US trade with Iran and absorbing the retaliatory countermeasures rendered the sanctions ineffective and counterproductive.²¹⁸ However, a series of terrorist attacks in 1996, allegedly with Iranian and Libyan involvement, increased support for the implementation of secondary boycott measures.²¹⁹ The *D'Amato Act* was significantly modified and passed into law on 5 August 1996. Included were Libyan trade and investment sanctions and the Iranian trade ban was replaced with sanctions targeting investment. The US Congress took the view that the existing multilateral and bilateral initiatives aimed at preventing the proliferation of weapons of mass destruction and acts of international terrorism required 'additional efforts' to deny Iran and Libya the

²¹³ *D'Amato Act* §§ 2–3.

²¹⁴ SC Res 731, UN SCOR (3033rd mtg), UN Doc S/Res/731 (1992); SC Res 748, UN SCOR (3063rd mtg), UN Doc S/Res/748 (1992); SC Res 883, UN SCOR (3312th mtg), UN Doc S/Res/883 (1993).

²¹⁵ *D'Amato Act* § 3.

²¹⁶ For a discussion of the history of US sanctions against Iran, see Connaughton, above n 211, 384–92.

²¹⁷ In March 1992, the United Nations Security Council introduced a ban on air travel and arms sales to Libya in response to Libya's refusal to turn over suspects implicated in the bombings of Pan Am Flight 103 and the French Airliner UTA Flight 772: SC Res 748, UN SCOR (3063rd mtg), UN Doc S/Res/748 (1992), 31 ILM 749. The Security Council issued further sanctions in 1993 after the Libyan Government again failed to surrender the two men identified as being involved in the Pan Am bombing: SC Res 883, 48 UN SCOR (3312th mtg), UN Doc S/Res/883 (1993). The sanction froze all Libya's overseas assets, banned the sale of oil-refining and pipeline equipment to Libya and tightened the 1992 United Nations sanctions.

²¹⁸ Welch, above n 212; McCurdy, above n 212, 399–400.

²¹⁹ The alleged terrorist activities that triggered the passing of the *D'Amato Act* were the bombing of the US military apartment complex in Saudi Arabia, the Centennial Olympic Park bombing in Atlanta and the explosion of the TWA Flight 800: McCurdy, above n 212, 399–400; Dhooge, above n 175, 575–6.

financial means to sustain its nuclear, chemical, biological and missile weapons programs.²²⁰

The most contentious provisions of the *D'Amato Act* authorise the President to impose sanctions upon persons (including individuals, companies and corporations) who knowingly invest in the Iranian and Libyan oil or gas industries, or sell specified goods, services or technology to Libya.²²¹ Where a person has knowingly invested more than US\$40 million²²² within a one year period, that 'directly and significantly contributed to the enhancement' of Iran's or Libya's ability to develop their oil or natural gas resources, the President must impose at least two of the following penalties:

- The withdrawal of US Export-Import Bank assistance, thus precluding the issue of guarantees, insurance and the extension of credit by that institution;
- The denial of the right to receive exports from the US (the President can ban the provision of export licences or permission to export by US Government agencies);
- The denial of loans from US financial institutions exceeding US\$10 million;
- If the sanctioned person is a financial institution, it may be prohibited from acting as a primary dealer in US Government debt instruments or as a repository for Government funds;
- A prohibition on US Government procurement of goods or services from the sanctioned person; or
- Restrictions upon the sanctioned person's ability to import into the US in accordance with the US *International Emergency Economic Powers Act*.²²³

²²⁰ *D'Amato Act* § 2.

²²¹ *D'Amato Act* § 5(a)–(b). The legislation is prospective in that it does not apply to investments that predate the Act. In addition to the sanctions, the Act employs two further methods to accomplish its purposes. First, s 4(a) urges the President to engage in diplomatic efforts in both international forums, such as the United Nations, and in bilateral negotiations to establish a multilateral sanctions regime against Iran. Second, s 4(c) provides that where a country agrees to undertake to apply 'substantial measures, including economic sanctions' to inhibit Iran's ability to acquire weapons of mass destruction and to support international terrorism, the President may waive the application of the sanctions. Lowe sees this second measure as a 'variation of the carrot and stick' approach to encouraging the development of a multilateral sanctions regime: Lowe, 'US Extraterritorial Jurisdiction', above n 44, 382. This view is based on Lowe's observation that even where the Iranian sanctions are waived, a country may still 'get hit with the carrot' because they remain bound by the Libyan sanctions: at 382.

²²² While the sanction threshold for Libya has remained at US\$40 million, the sanction threshold for Iran fell to US\$20 million one year after the enactment of the *D'Amato Act* (ie on 5 August 1997): § 4(d). Hence Australian business interests over the US\$20 million threshold could be subject to sanctions under the *D'Amato Act*.

²²³ *D'Amato Act* § 6.

Section 9 of the *D'Amato Act* provides that the President may waive the s 5 requirement to impose at least two of the sanctions, if the President determines waiving the sanctions is important to the national interests of the US.²²⁴

The major difference between the *D'Amato Act* and the *Helms-Burton Act* is that the former does not provide for private actions. Under the *D'Amato Act*, the US Government is exclusively responsible for the enforcement of punitive measures. Further, unlike Title III of the *Helms-Burton Act*, the *D'Amato Act* sanctions are 'frontier measures' and thus not technically extraterritorial in their application.²²⁵ The predominant objection to the *D'Amato Act* is therefore not that the sanctions exceed US jurisdictional competence, but that US jurisdiction is being used for an inappropriate purpose.²²⁶ While the *D'Amato Act* may not be considered as problematic as the *Helms-Burton Act*, its failure to tie the jurisdictional competence to impose penalties upon third parties to any link between the US and the third party makes the *D'Amato* provisions in some ways more provocative than the *Helms-Burton* provisions.²²⁷

1 *The Effects of the D'Amato Act on Australia*

In any event, the *D'Amato Act* is of greater concern than the *Helms-Burton Act* in terms of its adverse impact upon Australia,²²⁸ as Australia's investment interests in Iran are significantly greater than those in Cuba.²²⁹

Since the Iranian Government's decision to open some oil sites to private participation a number of years ago, BHP has been exploring substantial investments in the Iranian petroleum industry.²³⁰ BHP has been considering investing in the proposed pipeline from the Iranian South Pars gas field in the

²²⁴ *D'Amato Act* sanction waivers were granted in 1998 to the French, Russian and Malaysian companies involved in the development of Iran's South Pars gas field: Madeleine Albright, US Department of State, *Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case* (18 May 1998) <<http://www.secretary.state.gov/statements/1998/980518.html>> at 18 April 2001.

²²⁵ For an explanation of the term 'frontier provision', see above n 44 and accompanying text.

²²⁶ Lowe, 'US Extraterritorial Jurisdiction', above n 44, 386.

²²⁷ *Ibid* 385.

²²⁸ The *D'Amato Act* contains a sunset clause stating that the Act 'shall cease to be effective on the date that is 5 years after the date of the enactment of this Act': § 13(b). Therefore, the Act will cease operation on 5 August 2001. However, it is important to note that the US legislature is of course free to re-enact the provisions of the Act once the sunset clause is effective.

²²⁹ This is illustrated by the concern voiced by the Australian Government over the likelihood of Australian corporations complying prudentially with the *D'Amato Act* investment ban in order to avoid the imposition of sanctions: see Fran Kelly, interview with Tim Fischer, Minister for Trade, Commonwealth of Australia (ABC AM Radio, 7 August 1996); Commonwealth of Australia, *Parliamentary Debates, Consideration of Estimates*, Senate Foreign Affairs, Defence and Trade Legislation Committee, 10 June 1998, 201-3; Don Greenlees, 'Fischer Opposes US Embargo on Iran, Libya', *The Australian* (Sydney, Australia), 8 August 1996, 2.

²³⁰ Stewart Oldfield, 'BHP Bids for Iran Gas Project', *Australian Financial Review* (Sydney, Australia), 6 January 2000, 21; Nick Hordern, 'US Thaw Towards Iran to Benefit BHP', *Australian Financial Review* (Sydney, Australia), 4 August 2000, 43.

Persian Gulf to Pakistan, worth an estimated \$4.2 billion.²³¹ In early August 2000 Alexander Downer made the second visit by an Australian Foreign Minister to Tehran since the 1979 Iranian revolution. The *Australian Financial Review* reported that Mr Downer met with Iran's Oil Minister, Mr Bijan Mamdar-Zanaganeh, to discuss Australia's involvement in Iran's petroleum industry.²³² Mr Downer told the Tehran press that Australian companies were investigating substantial investments in the Iranian petroleum industry.²³³

There were a number of reports that BHP was on the brink of securing its involvement in the pipeline project in 1996 but decided not to pursue negotiations with Iran due to the pending introduction of the *D'Amato* sanctions.²³⁴ It has been claimed that BHP's decision to abort the deal in 1996 followed the receipt of a letter from Senator D'Amato (dated 5 February 1996) regarding possible sanctions against BHP.²³⁵ Senator D'Amato, when hearing of the visit by the Australian Senate President Michael Beahan to Iran in January 1996 to facilitate BHP's involvement in the project, is said to have unsuccessfully lobbied for the then pending sanctions to be toughened and made retrospective to dissuade the BHP–Iran deal.²³⁶ The then Chairman of BHP, Mr Brian Loton, was quoted as stating that while BHP objected to the extraterritorial application of the *D'Amato* legislation, BHP would 'abide by US law as applicable'.²³⁷

2 FPEJA and the D'Amato Act

It is apparent that the threat of US sanctions under the *D'Amato Act* has restrained Australian commercial development in Iran to some degree. Australian legislation offers little comfort in these circumstances. The only provision of the *FPEJA* that is potentially relevant to the *D'Amato Act* sanctions is the Attorney-General's power under s 13 to prohibit the performance by Australian nationals

²³¹ Oldfield, above n 230, 21. The significance of the investment opportunities in Iran for BHP, and the Australian economy generally, is highlighted by the governmental and non-governmental delegations Australia has sent to Iran in the recent past to lobby for BHP's involvement in the Iran pipeline project. For instance, in 1998 Sir Malcolm Rifkind, the UK Foreign Secretary and part-time director of BHP, attended discussions in Iran in relation to BHP's involvement in the proposed Iran–Pakistan pipeline project: Frank Frazer, 'Rifkind on Iran gas link mission', *The Scotsman* (Edinburgh, Scotland), 3 March 1998. In 1999, BHP sent another delegation to Iran for the same purpose, this time enlisting the assistance of the Australian Trade Minister, Tim Fischer, in the negotiations: Oldfield, above n 230, 21.

²³² Hordern, above n 230, 43.

²³³ *Ibid.*

²³⁴ See, eg, Fred Brenchley, 'Europe Mobilises for Total War ...', *Australian Financial Review* (Sydney, Australia), 2 October 1997, 13; Michael Stutchbury, 'BHP's Iran Gas Crisis', *Australian Financial Review* (Sydney, Australia), 7 February 1996, 1. However, BHP's decision to withdraw from the pipeline deal in 1996 may also have been due to commercial considerations unrelated to the threat of US sanctions. In particular, gas reserves located in Pakistan may have detracted from the commercial viability of the Iran–Pakistan pipeline.

²³⁵ See Michael Lelyveld, 'Australian Oil Firm Abandons Iran Deal: BHP Pipeline Decision Follows D'Amato Warning', *Journal of Commerce*, 22 February 1996, 1.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

of certain obligations imposed upon them by foreign governments. However, for the same reason that s 13 is impotent against the effects of the *Helms-Burton Act* Title IV orders, it cannot respond to the *D'Amato Act* sanctions, nor can it be used as a defensive negotiating tool to secure waivers under the Act. The sanctions applicable under the *D'Amato Act* — denial of export licences, of export assistance, of the right to import, and so on — do not impose obligations upon Australian nationals. Rather, they create obligations upon US institutions, such as the Export-Import Bank. Accordingly, the s 13 requirement that the obligation 'could be, or must be, performed in Australia' is not satisfied. Additionally, s 13 cannot be used to exert pressure upon the US in any negotiations where attempts are made to secure sanction waivers for investments in Iran or Libya.

Since the *FPEJA* was primarily designed to combat the effects of the enforcement of US extraterritorial antitrust legislation, it is not surprising that the provisions of the *FPEJA* do not adequately respond to the *Helms-Burton Act* or *D'Amato Act* sanctions. Similarly, while s 13 is directed towards countering the effects of foreign extraterritorial legislative trade controls, it was designed with situations such as the Siberian Pipeline case in mind.²³⁸ Section 13 is aimed at minimising the effects of extended primary boycotts and does not contemplate secondary boycott measures.

Given the inability of the *FPEJA* to respond adequately to the new manifestations of foreign extraterritorial legislation, Australia needs to bolster its legislative protection against foreign laws with extraterritorial application.

²³⁸ See above nn 37, 166 and accompanying text.

VI RESPONSES TO UNITED STATES UNILATERAL ECONOMIC SANCTIONS

The US laws have attracted a variety of responses from international organisations, such as the UN,²³⁹ and from US trading partners.²⁴⁰ The EU and Canada, both with major US trading interests, responded swiftly to the introduction of the extraterritorial trade sanctions. Among other measures, the EU and Canada adopted blocking legislation specifically targeting the effects of the US extraterritorial trade sanctions.

A *The European Union's Response*

Although the EU supports the policy objectives behind the *Helms-Burton Act* and *D'Amato Act*,²⁴¹ it has voiced strong reservations about the means by which they have been pursued by the US.²⁴² The major responses by the EU to the US unilateral economic sanctions against Cuba, Iran and Libya have been the introduction of far-reaching legislative blocking measures and the initiation of WTO proceedings challenging the legality of the *Helms-Burton Act*.²⁴³

The EU legislative countermeasures are found in the regulation entitled *Protecting Against the Effects of the Extra-Territorial Application of Legislation*

²³⁹ The General Assembly of the United Nations has condemned the use by states of unilateral economic sanctions: see, eg, General Assembly, United Nations, *Speakers Condemn Unilateral Economic Sanctions in General Assembly*, Press Release, GA/9791 (19 October 2000). According to the same press release, the General Assembly is currently in the process of finalising a Libyan sponsored draft resolution calling for states not to recognise or apply extraterritorial coercive economic measures unilaterally imposed by any state. In relation to the US embargo of Cuba, and particularly the *Helms-Burton Act* sanctions, the Secretary-General issued a report in 1997 calling for an end to the embargo: *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba: Report of the Secretary-General*, UN Doc A/52/342; UN Doc A/52/342/Corr 1. The report documents the support of 41 governments, the Observer Mission of the Holy See and seven UN agencies for General Assembly Resolution 51/17, UN GAOR (57th plen mtg), UN Doc A/Res/51/17 (1996) which urges the US to cease its unilateral economic embargo campaign against Cuba: General Assembly, United Nations, *Assembly Again Seeks Repeal of Extraterritorial Measures like United States Helms-Burton Act Against Cuba*, Press Release, GA/9349 (5 November 1997). See also General Assembly, United Nations, *For Ninth Successive Year, General Assembly Calls for End of United States Embargo Against Cuba*, Press Release, GA/9814 (9 November 2000). The UN has expressed similar condemnation of the *D'Amato* sanctions: see, eg, General Assembly, United Nations, *Assembly Urges Repeal of Unilateral Extraterritorial Laws Imposing Sanctions*, Press Release, GA/9486 (26 October 1998); General Assembly, United Nations, *Assembly Again Seeks Repeal of Extraterritorial Measures Like United States Helms-Burton Act Against Cuba*, Press Release, GA/9349 (5 November 1997).

²⁴⁰ For an overview of the international responses to the *Helms-Burton Act*, see Dodge, above n 38.

²⁴¹ See, eg, European Council, *European Union: Council of Ministers Common Position on Cuba* (1996) OJ (L 322), 36 ILM 213 which states that the EU 'encourages a process of transition to pluralist democracy and respect for human rights and fundamental freedoms, as well as a sustainable recovery and improvement in the living standards of the Cuban people': at 1.

²⁴² See, eg, Demarches to the US Department of State, above n 191; European Union, *European Commission President Jacques Santer Underlines EU's Deep Concern with Helms-Burton Legislation to President Bill Clinton*, Press Release, No 41/96 (12 July 1996).

²⁴³ See above n 103 and accompanying text.

Adopted by a Third Country ('EU Regulation').²⁴⁴ It contains countermeasures aimed at neutralising the effects of the laws listed in the annex to the *EU Regulation*.²⁴⁵ At present, the instruments listed in the annex are the *Helms-Burton Act*, the *Cuban Democracy Act*, the *Cuban Assets Control Regulations* and the *D'Amato Act*. The EU Regulation was modelled on, but is more comprehensive than, the *UK PTIA*.²⁴⁶ The EU Regulation contains four principal countermeasures. First, art 4 prohibits the recognition and enforcement of foreign judgments or administrative decisions giving direct or indirect effect to the sanctions covered by the EU Regulation. Second, the EU Regulation includes claw-back provisions. Article 6 provides that EU persons engaged in commercial activities between the EU and third party nations are authorised to recover any damages, including legal costs, caused to that person by the application of the sanctions listed in the annex.²⁴⁷ Third, art 5 forbids compliance by EU persons with the requirements of the listed instruments, whether it be direct or indirect (through a subsidiary) or by active or deliberate omission. However, the EU Regulation allows some flexibility in the application of its non-compliance provisions; where non-compliance would seriously damage the interests of the affected person, or those of the EU, the person may be authorised to comply fully or partially with the US sanctions.²⁴⁸ Unlike the *FPEJA*, the EU regulation does not contain provisions that specifically authorise the prohibition of compliance with US court orders requesting the production of documents. However, the broad terms of art 5 clearly operate to prevent compliance with foreign orders requesting documents or evidence.²⁴⁹ Fourth, a relatively novel means of resistance to extraterritorial laws, art 2 of the EU Regulation requires EU persons, including directors, managers and other persons with management responsibilities, to report within 30 days to the EU Commission instances in which their economic and/or financial interests are directly or indirectly affected by the sanctions covered by the EU Regulation.²⁵⁰

Article 9 of the EU Regulation provides that each Member State is responsible for determining the counter-sanctions to be imposed 'in the event of breach of any relevant provisions' of the EU Regulation. The only guidance given in s 9 as to what may be an appropriate penalty is that it must be 'effective, proportional and dissuasive'.

²⁴⁴ Council Regulation, 2271/96 EC, (1996) *OJ* (L 309), 36 ILM 125.

²⁴⁵ *Ibid* art 1.

²⁴⁶ Lowe, above n 44, 386.

²⁴⁷ Unlike the *UK PTIA*, the broad language of art 6 does not limit recovery to either the non-compensatory portion of any foreign awards or losses resulting from court judgments.

²⁴⁸ European Council Regulation, 2271/96 EC, art 5, (1996) *OJ* (L 309), 36 ILM 125.

²⁴⁹ Lowe, above n 44, 387.

²⁵⁰ EU Regulation, above n 244, art 3 provides that any information provided in accordance with art 2 shall only be used for the purposes for which it was provided and the confidential status of any information will be maintained.

B *Canada's Response*

Although Canada and Mexico engaged in consultations with the US under the NAFTA in relation to the Cuban sanctions, neither have instigated formal proceedings under the NAFTA's binding dispute resolution mechanism to determine whether the *Helms-Burton* and *D'Amato* sanctions violate US NAFTA obligations.²⁵¹ However, Canada has introduced blocking legislation specifically aimed at reducing the impact of US extraterritorial trade laws.²⁵² Shortly after the introduction of the sanctions by the US in 1996, Canada passed sanction specific amendments to the *Foreign Extraterritorial Measures Act* ('*FEMA*').²⁵³ *FEMA* was first introduced in 1985 largely as a delayed response to the *Westinghouse* litigation and was modelled upon the UK blocking legislation.²⁵⁴ While *FEMA* was originally designed to blunt the impact of US antitrust litigation, even before the introduction of the anti-sanction amendments, it had only ever been used to protect Canadian interests against the (pre-*Helms-Burton Act*) US Cuban embargo laws.²⁵⁵ Notwithstanding its ability to respond to the US extended primary boycott measures, the Canadian Government considered that *FEMA* should be amended in order to respond to the US secondary boycott legislation and acted swiftly in introducing the amendments.²⁵⁶

The *FEMA* amendments came into force on 1 January 1997. In its current form, *FEMA* contains four principal countermeasures. The powers of the Canadian Attorney-General in relation to all of the measures are triggered where he or she considers that the foreign judgment or measures significantly affect Canadian trading interests or infringe Canadian sovereignty. The first countermeasure, contained in s 3, authorises the Attorney-General to order that Canadian records and/or information not be produced or disclosed to a foreign tribunal. This section also allows the Attorney-General to make orders prohibiting or restricting the giving of evidence by a Canadian citizen or resident in foreign proceedings.

In its original form, the second countermeasure, contained in s 8 of the *FEMA*, provided that the Attorney-General may issue orders forbidding the

²⁵¹ For a brief outline of the NAFTA obligations, see Dodge, above n 38, 718. The NAFTA consultations failed to resolve the Canadian and Mexican complaints over the US sanctions: 'Sanctions: US Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measures' (1996) 13 *International Trade Reporter* 476; 'Sanctions: NAFTA Designates Confer on Complaint against Helms-Burton under Chapter 20' (1996) 13 *International Trade Reporter* 1093.

²⁵² In late 1996, Mexico also passed blocking legislation to counter the effects of the US sanctions: *Act to Protect Trade and Investment from Foreign Norms that Contravene International Law* (1997) 36 ILM 133. For a brief analysis of the Mexican blocking legislation and a discussion of Mexico's bilateral and international diplomatic responses to the *Helms-Burton Act*, see Jorge Vargas, 'Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law' (1997) 36 ILM 133.

²⁵³ RSC 1985, c F-29.

²⁵⁴ Douglas Forsythe, above n 191, 111. For a discussion of the legislative background to *FEMA*, see Glossop, above n 196, 226-7.

²⁵⁵ Glossop, above n 196, 227.

²⁵⁶ *Ibid.*

enforcement of foreign antitrust judgments in Canada. As part of the 1997 amendments to *FEMA*, the restriction limiting the application of s 8 to antitrust judgments was removed. The amendments provided for a schedule to *FEMA* listing the foreign trade laws that the Attorney-General considers, with the concurrence of the Canadian Minister of Foreign Affairs, violate international law and comity.²⁵⁷ The only foreign trade law listed in the *FEMA* schedule to date is the *Helms-Burton Act*. It has been suggested that the reason the *D'Amato Act* is not included is that Canada's limited investment interests in the petroleum industries of Iran and Libya do not warrant its inclusion.²⁵⁸ The amended s 8 provides for the blocking of judgments made pursuant to legislation listed in the schedule. The Canadian Government took the additional precautionary measure of including a further section in *FEMA* specifically stating that any judgment under the *Helms-Burton Act* will not be recognised or enforceable in Canada.²⁵⁹ The main advantage of the additional section is that there is no need for the Attorney-General to issue an order to block US judgments made under the *Helms-Burton Act*.²⁶⁰

Third, claw-back measures are included in s 9 of *FEMA*. Originally the claw-back measures were only activated when an antitrust judgment had been blocked under s 8. Since the *FEMA* amendments came into force in 1997, the claw-back measures also apply to judgments made under the *Helms-Burton Act*. Section 9 allows a Canadian defendant in foreign proceedings, brought under an instrument listed in the *FEMA* schedule, to sue in a Canadian court to recover the judgment sum, expenses and consequential loss or damage suffered by reason of the enforcement of the foreign judgment.

The fourth *FEMA* countermeasure permits the Attorney-General, with the concurrence of the Minister of Foreign Affairs, to make orders blocking the application of foreign measures taken by a foreign state or foreign tribunal that adversely affect, or are likely to adversely affect, Canadian interests or infringe upon Canada's sovereignty.²⁶¹ Section 5 authorises the Attorney-General to make orders requiring Canadian citizens or residents to give notice to the Attorney-General of 'any directive, instruction, intimation of policy or other communication relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada.' The terms are sufficiently broad to cover directives issued by a foreign parent company to a Canadian subsidiary to abide by the laws applicable in the country where the foreign parent corporation operates.²⁶² Section 5 also empowers the Attorney-General to prohibit compliance by Canadian nationals with foreign measures or

²⁵⁷ *FEMA* s 2.1.

²⁵⁸ Glossop, above n 196, 227.

²⁵⁹ *FEMA* s 7.1.

²⁶⁰ The power of the Attorney-General to block antitrust judgments was retained and is now contained in *FEMA* s 8(1).

²⁶¹ *FEMA* s 8(1).

²⁶² Glossop, above n 196, 228.

directives, issued by persons in a position to direct or influence the policies of the Canadian person, that are adverse to Canadian trade interests.

The *Foreign Extraterritorial Measures (United States) Order* (1996) ('1996 FEMA Order')²⁶³ was made in accordance with s 5 and contains notification and non-compliance obligations targeting the US Cuban legislative embargo measures. With respect to the notification obligation, the 1996 FEMA Order requires Canadian corporations and their directors and officers to 'forthwith give notice' to the Attorney-General of any policies or communications they receive relating to an extraterritorial measure of the US. The term 'extraterritorial measure' is broadly defined so as to cover the *Helms-Burton Act* and any other instruments designed to enforce the US embargo against Cuba.²⁶⁴

In relation to the non-compliance obligation of the 1996 FEMA Order, ss 5 and 6 of the Order prohibit compliance with an extraterritorial measure of the US by a Canadian corporation, including its directors, officers, managers and employees in a position of authority.²⁶⁵ Perhaps the most striking aspect of the 1996 FEMA Order is s 6 which defines compliance in very broad terms. It provides that the prohibition applies 'in respect of any act or omission constituting compliance' regardless of 'whether or not compliance with the extra-territorial measure or communication is the only purpose of the act or omission'. The broad terms of s 6 are apparently designed to capture situations in which corporations are able to invoke a number of reasons, other than the fear of US sanctions, for electing not to, or to cease, trade with Cuba. The far-reaching nature of the 1996 FEMA Order places those corporations who possess a number of legitimate reasons for not trading with Cuba in a precarious position.²⁶⁶

Section 7 of FEMA authorises the Canadian Government to prosecute violations of FEMA orders (made under ss 3 and 5) either by indictment or by summary convictions. The maximum fine for a corporation for indictable offences is CAN\$1 500 000 and for an individual CAN\$150 000. In relation to summary offences, the maximum fine for a corporation is CAN\$150 000 and

²⁶³ The 1996 FEMA Order amended the *Foreign Extraterritorial Measures (United States) Order*, SOR/92-584 (1992) ('1992 FEMA Order'). The 1992 FEMA Order was introduced in response to US amendments to the *US Cuban Assets Control Regulations*, effected by the *Cuban Democracy Act of 1992*, that prohibit US export control officials from issuing licences for trade between Cuba and foreign subsidiaries of US corporations. The 1992 FEMA Order required Canadian corporations and their officers to notify the Attorney-General of any directives, received from a person who was in a position to direct or influence the policy of the corporation, regarding trade between Canada and Cuba made in relation to the *Cuban Democracy Act*. The order also prohibited compliance by Canadian corporations with any directives relating to the *Cuban Democracy Act*.

²⁶⁴ 1996 FEMA Order s 2. The definition of 'extra-territorial measures' does not specifically refer to the *Helms-Burton Act*. This is because, although the Canadian Government was aware that US secondary boycott measures were forthcoming, they did not know the title of the Act and thus opted to include the phrase 'having a purpose similar to that of the *Cuban Assets Control Regulations*': s 2(b). The dangers involved in this type of definition are discussed by Glossop, above n 196, 238.

²⁶⁵ Note that the non-compliance provisions apply even where there has not been a notifiable communication.

²⁶⁶ Glossop, above n 196, 232, 237.

CAN\$15 000 for an individual and/or a maximum of two years imprisonment.²⁶⁷ Prior to the 1997 amendments, the penalties were considerably less.²⁶⁸ The penalties were increased to balance the US penalties for contravention of certain extraterritorial measures. For instance, breaches of the US Cuban embargo regulations are punishable by fines of up to US\$1 million.²⁶⁹

C *Australia's Reluctance to Amend the FPEJA*

Australia has consistently voiced its objection to the *Helms-Burton Act* and the *D'Amato Act* both bilaterally and in concert with like-minded countries in international fora.²⁷⁰ Despite this, Australia has not pursued a legislative response to the effects of the *Helms-Burton Act* and *D'Amato Act*. The Government concedes that the provisions of the *FPEJA* are tailored specifically towards extraterritorial antitrust legislation and do not 'appear to be immediately applicable to the Helms-Burton or D'Amato ... laws'.²⁷¹

It appears that the Australian Government views a legislative response as unnecessary, partly because of the perception that the US does not have an 'appetite' for enforcing the *D'Amato Act* and *Helms-Burton Act* sanctions and that Australia's interests in Cuba and Iran are not extensive.²⁷² This perception seems to be based primarily upon the continuous suspension of Title III of the *Helms-Burton Act*²⁷³ and the *D'Amato Act* sanction waivers granted to the

²⁶⁷ When determining the sentence for such offences, the FEMA s 7(4) provides that a court must consider a number of factors including the degree of premeditation in the commission of the offence, the size, scale and nature of the offender's operations and whether any economic benefits have directly or indirectly accrued to the offender as a result of having committed the offence.

²⁶⁸ Formerly, the penalty for indictment offences was CAN\$10 000 with an additional or alternative maximum jail term of five years. The pre-amendment penalty for summary offences was CAN\$5000 with an additional or alternative maximum prison term of two years.

²⁶⁹ Forsythe, above n 191, 114.

²⁷⁰ For instance, Australia's concerns over the undesirable nature of unilateral sanctions, and in particular the uncertainty they create for foreign companies trading with or investing in the US, were raised by the Minister for Foreign Affairs, Alexander Downer, and the then Deputy Prime Minister, Tim Fischer, during the Australia-US ministerial consultations in Sydney in July 1996: see Department of Foreign Affairs and Trade, Commonwealth of Australia, *US Extra-Territoriality: Australian Position*, Internal Document (21 August 1996) (confidential, copy on file with author); Department of Foreign Affairs and Trade, Commonwealth of Australia, *Responses to US Extraterritorial Laws*, Internal Document (13 September 1996) (confidential, copy on file with author). According to this document the Australian Embassy in Washington has also made similar representations to the US Congress and Administration on the issue of extraterritoriality. In the international arena, Australia, along with other US trading partners such as Canada, raised the issue of extraterritoriality at the OECD ministerial council meeting in Paris on 22 May 1996.

²⁷¹ Department of Foreign Affairs and Trade, Commonwealth of Australia, 'Responses to US Extraterritorial Laws', Internal Document (13 September 1996) (confidential, copy on file with author).

²⁷² Ibid; Department of Foreign Affairs and Trade, Commonwealth of Australia, 'US Extra-Territoriality: Australian Position', Internal Document (21 August 1996) (confidential, copy on file with author).

²⁷³ See above n 190 and accompanying text.

French, Russian and Malaysian companies involved in the development of Iran's South Pars gas field.²⁷⁴ The apparent laxness with which the Acts are being enforced can be attributed to some extent to both the international backlash against the sanctions and the growing support, internationally and in the US, for smart sanctions.²⁷⁵ The Australian Government perceives that it is possible that the *D'Amato Act* sanctions will not be re-enacted once the current provisions expire in August 2001. The Australian Government's reluctance to amend the *FPEJA* may also be attributed to the view that the problems associated with the *Helms-Burton Act* and the *D'Amato Act* are sui generis. On this analysis, amending the *FPEJA* to take account of the US sanctions against Cuba, Iran and Libya is inappropriate and excessive.

It has been suggested that a Republican Presidency may promote a thawing in US policy towards Iran, clearing the way for BHP to pursue investment opportunities in Iran.²⁷⁶ The Republican Vice-President, Dick Cheney, in his former role as an oil executive, has advocated abandoning the *D'Amato Act* sanctions.²⁷⁷

A further factor that may have contributed to Australia's decision not to enact sanction-specific blocking legislation is the view that the economic and political asymmetry that characterises the relationship between Australia and the US would limit the impact of a legislative response upon US enforcement of the

²⁷⁴ See above n 224 and accompanying text.

²⁷⁵ See above n 22. In early 1999 the Clinton administration announced that prohibitions on trade in medicines and medical equipment, in addition to food, will be exempt from future sanctions and removed from existing sanctions: Stuart Eizenstat and Rick Newcomb, *Economic Sanctions*, Press Release (28 April 1999) <http://www.state.gov/www/policy_remarks/1999/990428_eizenstat_sanctions.html> at 18 April 2001. On 6 October 2000, the Clinton Administration introduced the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act* Public L No 106-387, 114 Stat 1549 (2000). Title IX of the Act, entitled 'Trade Sanctions Reform and Export Enhancement', allows the export of food and medical supplies from the US to sanctioned countries, including Cuba, Iran and Libya on the following basis:

Notwithstanding any other provision of this title (other than section 904), the export of agricultural commodities, medicine, or medical devices to Cuba or to the government of a country that has been determined by the Secretary of State to have repeatedly provided support for acts of international terrorism under section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app 2405(j)(1)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)), or to any other entity in such a country, shall only be made pursuant to one-year licenses issued by the United States Government for contracts entered into during the one-year period of the license and shipped within the 12-month period beginning on the date of the signing of the contract.

Although the move towards smart sanctions has been attributed to the need to prevent sanctions from exacerbating the instability and isolation of target nations, the desire to reduce the adverse impact of US unilateral sanctions on the US has also been a strong motivating factor. The US Institute for International Economics has found that US unilateral sanctions annually cost the US as many as 250 000 high-paying jobs and reduce exports by approximately \$19 billion: 'Unilateral Economic Sanctions: Lessons Learned' (2000) 146 *Congressional Record* S7382-03, S7383.

²⁷⁶ Hordern, above n 230, 43.

²⁷⁷ *Ibid.*

sanctions. It appears that the Australian Government views blocking legislation as effective only where the legislating country has the economic and political clout to enforce the blocking measures. In light of the superpower status of the US, and the fact that Australia has significantly greater economic interests in the US than the US has in Australia,²⁷⁸ Australia appears to believe that the impact Australian blocking measures — such as claw-back proceedings — may have upon private and public enforcement of the US sanctions would be marginal.

In relation to the *D'Amato Act* sanction waivers received by several corporations in the recent past,²⁷⁹ Australia's Minister for Foreign Affairs, Alexander Downer, has been reported as stating that 'the US has taken a benign view of a number of European investments in Iran' and that Australia 'wouldn't expect to have been treated any worse than the Europeans have been treated'.²⁸⁰

The Australian Government also appears to be wary of the attention that enacting further blocking legislation may attract. In particular, it is thought that legislation may spark US suspicion that Australian corporations are intending to pursue investments in the sanctioned countries and attract investigations under the US extraterritorial legislation. It has been suggested that blocking legislation should only be introduced or amended in the face of serious difficulties, not during times of relative extraterritorial peace.

VII A WAY FORWARD: PROPOSALS FOR A NEW AUSTRALIAN RESPONSE

In our view, there are a number of reasons why the *FPEJA* should be amended. First, Australia should not necessarily expect to receive the same leniency from the US in relation to the enforcement of the *D'Amato Act*. Prior to the issuing of the sanction waivers by the US, the EU, for example, had created considerable bargaining power by initiating WTO proceedings and introducing comprehensive blocking legislation. Australia is not in the same position.

Second, although Australian commercial interests in Cuba may be limited, the Iran pipeline project currently being monitored by BHP is estimated to be worth approximately AU\$4.2 billion.²⁸¹ However, notwithstanding the size of Australia's financial interests in Iran or Cuba, it is arguable that to base the decision not to introduce legislative protection, to any extent, on Australia's financial interests in Cuba and Iran is short-sighted. This is because the *Helms-Burton Act* and the *D'Amato Act* demonstrate a preparedness on the part of the US to use unilateral sanctions to pursue foreign policy. It is coincidental that

²⁷⁸ Australian Senate Standing Committee on Foreign Affairs, Defence and Trade, *Implications of United States Policies For Australia* (1992) 83. The report states, among other things, that the US has and 'will continue to have a greater impact on Australia than Australia can expect to have on the US': at 83.

²⁷⁹ See above n 224 and accompanying text.

²⁸⁰ Hordern, above n 230, 43.

²⁸¹ Oldfield, above n 230, 21.

current unilateral sanctions do not target Australia's main trading partners.²⁸² The possible combinations of countries, events, politics and conflict that may attract the wrath of the US legislature in the future is unlimited. To view the problems associated with the sanctions as unique and short-term is arguably inappropriate and not conducive to the development of a coherent and effective policy to combat the effects of extraterritorial legislation.

Third, to rely upon a trend towards smart sanctions, which actually commenced prior to the introduction of the Cuban, Iranian and Libyan sanctions, as a reason for not bolstering Australia's blocking legislation is inappropriate. It is doubtful that the move towards smart sanctions will sway the US Government from using unilateral sanctions in the future. If the strong pressure placed upon the US by its trading partners is not sufficient to convince the US to abandon the sanctions, it is unlikely that the growing use of smart sanctions will. The current *D'Amato Act* sanctions did not find support in the US Congress until the string of terrorists attacks in 1996. It is therefore arguable that, after the *D'Amato Act* sanctions cease operation this year,²⁸³ and if there are further Iranian or Libyan sponsored terrorist attacks, the US would not hesitate to introduce another round of extraterritorial trade sanctions.

It is apparent that Australia has reverted back to its pre-*FPEJA* reactionary policy position in relation to blocking legislation. Rather than implementing precautionary legislation during a time of relative extraterritorial peace, Australia has chosen to rely upon the ability of Parliament to pass legislation overnight if necessary. Such a policy is undesirable as it encourages legislation to be passed in haste, limiting the Government's ability to think through and carefully consider what protection should be included.

Fourth, in response to the concern that Australian-US economic asymmetry is likely to reduce the impact of Australian blocking legislation on the enforcement of US sanctions, it is arguable that blocking legislation actually operates to redress the power imbalance. By taking a strong and consistent legislative stand, Australia can only strengthen its negotiating position in relation to issues such as securing waivers under the *D'Amato Act*. It is not clear why the Australian Government thinks that the asymmetry may render blocking legislation ineffective against trade sanctions but not in relation to antitrust matters. It is possible that further blocking legislation may assist in the development of a forum in which Australia is able to champion and protect domestic interests under threat from the US legislative sanctions. It is only through collective pressure that the resolution of international jurisdictional conflicts will be forced back onto the multilateral agenda.

²⁸² For a break-down of Australia's trade figures, see Department of Foreign Affairs and Trade Commonwealth of Australia, *Composition of Trade Australia 1999*, Internal Document (May 2000) (confidential, copy on file with author); Department of Foreign Affairs and Trade, Commonwealth of Australia, *Australian Trade Outcomes and Objectives Statement 2000*, Internal Document (5 April 2000) (confidential, copy on file with author).

²⁸³ See above n 228.

A *Proposals for Amending the FPEJA*

A coherent, consistent and durable policy foundation is necessary to drive the future direction of Australia's legislative response to foreign extraterritorial legislation.

1 *Remove Restrictions Limiting the Application of the FPEJA Judgment Blocking and Claw-Back Provisions to Antitrust Matters*

Like the Attorney-General's powers under the *FPEJA* with respect to the prohibition on producing documents and giving evidence in foreign proceedings, and the approach taken by both the EU and Canada towards judgment blocking and claw-back provisions, the Attorney-General's ability to block the enforcement of foreign judgments should not be limited to antitrust judgments. The efficacy of claw-back provisions is dependent upon the foreign plaintiff possessing sufficient assets in Australia to offset the judgment sum. Although US investment in Australia may not be as substantial as it is in Canada or Europe, the continual increase in US investment in Australia indicates a growing capacity for claw-back provisions to deter foreign plaintiffs from initiating claims under extraterritorial legislation.

Whether Australia should adopt the EU index or the Canadian schedule methods of determining the scope of application for blocking and claw-back provisions is less clear. It is arguable that the index/schedule approaches are undesirable because they mean that the legislation must be amended every time a new foreign extraterritorial law needs a response. The judgment blocking and claw-back provisions should not be limited to specific problems or legislation. Rather, the provisions should be of a general nature directed towards all foreign extraterritorial legislation that infringes upon Australia's sovereignty and/or affects Australian interests.

Extraterritorial problems are not limited to antitrust and trade sanction matters. For instance, in relation to the difficulties recently experienced by the Australian corporation CSR with US extraterritorial personal injury claims,²⁸⁴ if the US Supreme Court had entered judgment against CSR, the *FPEJA* could not have been relied upon by Australia to block or claw-back the judgment. Not only would expanding the application of the *FPEJA* allow corporations like CSR to block and claw-back judgments, it would also enable them to recoup the cost of defending claims even if they are settled.

The current broad scope of what may be the subject of claw-back proceedings, namely the entire judgment sum (including the non-punitive portion) and reasonable costs and expenses of defending the claim (even if a case is settled), should be maintained.

²⁸⁴ See above n 24.

2 *Expand Prohibition on Compliance with Actions or Decisions of Foreign Governments*

Section 13 of the *FPEJA*, which may be used to block actions or decisions of foreign governments imposing trade related obligations upon an Australian person or company that have to be performed in Australia, is similar in purpose to the EU and Canadian compliance prohibition provisions. The Australian, Canadian and European provisions appear to be directed towards preventing prudential compliance with, and deterring the issuing of, directives made under extended primary boycott measures and secondary boycott legislation. The major differences between s 13 and the EU and Canadian non-compliance provisions are that the latter are not limited to obligations that are to be fulfilled in the EU or Canada. Also, rather than empowering the authorities to order non-compliance, the EU and Canadian provisions impose a blanket prohibition on compliance.²⁸⁵ The EU blanket prohibition is more flexible than its Canadian counterpart in that the EU Commission may waive the prohibition if particular circumstances are satisfied.²⁸⁶

It is recommended that the scope of s 13 of the *FPEJA* be expanded. In particular, the restriction limiting its application to obligations that are to be fulfilled in Australia should be removed. The EU non-compliance provision is perhaps a better model than the Canadian provision. The ambiguous nature of the Canadian provision may actually inhibit corporate planning and create further uncertainty for those businesses that have several reasons, including the threat of sanctions, for electing not to trade with a nation such as Cuba.²⁸⁷

3 *Introduce Notification Provisions*

Both the EU and the Canadian blocking measures contain notification requirements. In effect, notification requirements supplement non-compliance provisions; they keep the government informed of the extraterritorial threats domestic corporations are facing. Only when a government is aware of private or public attempts to enforce foreign extraterritorial measures can it enforce non-compliance obligations. The two main rationales behind notification requirements seem to be that they deter prudential compliance with foreign extraterritorial measures and keep governments informed of the extent to which sanctions are being enforced. Ideally, non-compliance provisions, coupled with notification requirements, should operate to deter public and private enforcement of foreign extraterritorial measures.

The Australian Government has indicated that notification provisions may not be necessary in Australia because, generally speaking, Australian corporations tend to consult and liaise with the Government when faced with problems associated with foreign extraterritorial measures. However, it is arguable that notification provisions, combined with a compliance prohibition, may have

²⁸⁵ See above nn 248, 265 and accompanying text.

²⁸⁶ See above n 248 and accompanying text. See also Glossop, above n 196, 245.

²⁸⁷ See above n 266 and accompanying text.

enabled the Australian Government to intervene and perhaps assist in negotiations to avoid situations such as that faced by Utah Developments.²⁸⁸

The notification provisions of the *EU Regulation* are a preferable model to the Canadian provisions. The EU obligation to notify is only triggered when an EU corporation considers it has been ‘affected’ by an extraterritorial measure.²⁸⁹ As a result, EU corporations that have received a directive but elect to ignore it are not obliged to notify the government. In contrast, the Canadian notification requirement is less direct in that it is activated by the mere receipt of a directive. The EU provision appears to bear a more direct relationship with the US extraterritorial measures and their negative effects than the Canadian provisions.²⁹⁰ Further, the Canadian provision is ambiguous. For example, the types of directives that must be notified are defined to be ‘any directive, instrument, intimation of policy or other communication’.²⁹¹ Although the nature of a ‘directive’ or ‘instruction’ may be straightforward, the meaning of ‘intimation of policy’ and ‘other communication’ is less so.²⁹² Finally, the *EU Regulation* contains an explicit guarantee of confidentiality in relation to any information that is disclosed to the Commission, a feature that is absent from the Canadian provisions.²⁹³

4 Retain Penalty Provisions

In contrast to the vague terms of the EU penalty provision, the *FPEJA*, like *FEMA*, prescribes specific criminal penalties for violations of its provisions. The severity of the Canadian penalties, and the uncertainty it creates for Canadian businesses facing the dilemma of whether to risk incurring criminal investigation and penalties under the *FEMA* or liability under the *Helms-Burton Act*, has been heavily criticised.²⁹⁴

Wal-Mart, a department store, initially removed Cuban pyjamas from its Canadian stores for fear of prosecution under the *Helms-Burton Act*. However, the Canadian Government instructed Wal-Mart to return the pyjamas to the shelves or face criminal penalties under the *FEMA*. Wal-Mart’s experience epitomises the conflict and uncertainty in which Canadian individuals or corporations now find themselves when trading with Cuba.²⁹⁵ John Boscarriol describes the subjection of Canadians to criminal prosecution for perceived compliance with Cuban trade sanctions as ‘over-board, ineffective and placing an unreasonable burden of addressing US extra-territorial measures on

²⁸⁸ See above nn 30–1 and accompanying text.

²⁸⁹ See above n 250 and accompanying text.

²⁹⁰ John Boscarriol, ‘An Anatomy of a Cuban Pyjama Crisis: Reconstructing Blocking Legislation in Response to Extraterritorial Trade Measures of the United States’ (1999) 30 *Law and Policy in International Business* 439, 478.

²⁹¹ *Foreign Extraterritorial Measures (United States) Order*, 1992 SOR/92–584, s 5.

²⁹² Boscarriol, above n 290, 453–6; Glossop, above n 196, 232–3.

²⁹³ See above n 250 and accompanying text.

²⁹⁴ See, eg, Boscarriol, above n 290.

²⁹⁵ *Ibid* 440.

Canadians doing business abroad'.²⁹⁶ Particularly in light of the fact that the Canadian Government is yet to explore and take advantage of the remedies available under the GATT and NAFTA, the imposition of severe penalties appears unnecessarily heavy-handed and even counterproductive.²⁹⁷ The penalties may actually serve to reduce Canadian trade with Cuba because companies may decide that they should avoid engaging in even preliminary inquiries into trade opportunities in Cuba because of the possibility of criminal sanctions if they decide not to proceed.²⁹⁸

However, it is arguable that notification and non-compliance provisions are futile if not reinforced by penalty provisions. The absence of penalty provisions would undoubtedly reduce the incentive for businesses not to comply with foreign measures. On this basis it is recommended that the penalty provisions of the *FPEJA* be retained, but not increased.

²⁹⁶ Ibid 443.

²⁹⁷ Ibid.

²⁹⁸ Ibid 498.