Unilateral Sanctions With a Twist: The Iran and Libya Sanctions Act of 1996

Meghan McCurdy

Follow this and additional works at: http://digitalcommons.wcl.american.edu/auilr

Part of the International Law Commons

Recommended Citation
UNILATERAL SANCTIONS
WITH A TWIST: THE IRAN AND LIBYA
SANCTIONS ACT OF 1996

MEGHAN McCURDY*

Introduction .................................................... 398
I. Background .................................................. 399
   A. The History of Sanctions Against Iran and Libya .......... 399
      1. Iranian Sanctions ............................................. 400
      2. Libyan Sanctions .............................................. 403
   B. The Passage of the Iran and Libya Sanctions Act of 1996. . . . 408
II. Global Reactions to ILSA ..................................... 413
   A. American Trading Partners Claim ILSA Violates United
      States’ International Obligations .............................. 413
      1. Unwarranted Unilateralism .................................... 415
      2. GATT and WTO Obligations .................................. 417
      3. American Implementation of GATT and WTO
         Obligations .................................................... 421
      4. The WTO Dispute Settlement Mechanism .................... 423
      5. The United States Is Not Violating Its Free Trade
         Obligations .................................................... 423
   B. The Europeans Refuse to Support ILSA ...................... 425
III. ILSA is Ineffective ........................................... 428
   A. Foreign Companies Are Still Investing in Iran and Libya 428
   B. United States Policy is Inconsistent ......................... 433
   C. Multilateral Sanctions are More Effective ................... 434
   D. Options for United States Policy ............................... 436
Conclusion .......................................................... 437

* J.D. Candidate, Washington College of Law, American University, 1999; B.A., Cornell University, 1994.
INTRODUCTION

Economic sanctions are the "weapon of choice" in American foreign policy today. Sanctions do not require military force and, therefore, allow lawmakers to display their outrage and take decisive action through relatively peaceful means. Historically, American sanctions primarily have involved prohibitions on domestic companies from conducting business with a targeted country to coerce the target into changing its illicit behavior. In the last year and a half, however, the United States Congress has initiated sanctions with a twist.

The Iran and Libya Sanctions Act of 1996 ("ILSA") empowers the President with the authority to punish foreign companies that invest in or trade with Iran or Libya, two nations the United States believes are sponsors of terrorism and acquirers of weapons of mass destruction. Upon signing ILSA into law, President Clinton challenged all other nations to recognize the sinister nature of the two regimes and understand that although Iran and Libya might provide profitable business ventures in the short term, they are committed to destruction in the long term. The United States issued an ultimatum.

---

1. See Gary G. Yerkey, United States Sanctions Against Other Countries Cost Exporters Up to $19 Billion, Study Says, 14 INT’L TRADE REP. (BNA) 736 (Apr. 23, 1997) (quoting a study by the Institute for International Economics that analyzed the impact of economic sanctions on American companies).
2. See Richard N. Haass, Sanction—With Care, WASH. POST, July 27, 1997, at C9 (stating that “[s]anctions . . . offer U.S. policymakers and members of Congress an attractive compromise between doing nothing and sending in the Marines”). Haass, who served as Special Assistant for National Security Affairs to President George Bush and currently is the Director of Foreign Policy Studies at the Brookings Institution, argues that Congress and the President should “stop using sanctions as a gesture or [an expression of] anger.” Id. Haass believes the United States is using sanctions “cavalierly, with scant regard to their actual impact on American interests.” Id. Further, Haass concludes that treating economic sanctions less seriously than other policy tools will hurt only American businesses and national security interests. See id.
4. See infra notes 17 and 39 and accompanying text (discussing conclusions by the United States government that Iran and Libya sponsor terrorism and seek to acquire weapons of mass destruction).
5. See Alison Mitchell, Clinton Signs Bill Against Investing in Iran and Libya, N.Y. TIMES, Aug. 6, 1996, at A1 (addressing United States allies, President Clinton stated: “You cannot do business with countries that practice commerce
UNILATERAL SANCTIONS WITH A TWIST

Part I of this Comment reviews the legacy of sanctions levied against Iran and Libya. Part II analyzes the issues raised by America's trading partners, including accusations of violations of the United States' obligations to facilitate free trade and unwarranted unilateralism in a supposedly increasingly multilateral world. Part III investigates the actual enforcement of the sanctions, discusses reasons why unilateral American sanctions may not be working as designed, and presents options for United States policy.

I. BACKGROUND

A. THE HISTORY OF SANCTIONS AGAINST IRAN AND LIBYA

The imposition of economic sanctions against Iran and Libya by the United States is not a new phenomenon. Iran and Libya long

6. See MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND UNITED STATES TRADE 11-13 (1990) (discussing the basics of economic sanctions). The term "economic sanctions" is defined differently among scholars as either "the deliberate government-inspired withdrawal, or threat of withdrawal, of 'customary' trade or financial relations," or "coercive economic measures taken against one or more countries to force a change in policies, or at least to demonstrate a country's opinion about the other's policies." Id. at 12. Malloy describes economic sanctions as "any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions with respect to the specified target, in the service of specified foreign policy purposes." Id. at 13.

7. See, e.g., MALLOY, supra note 6, at 202-12, 217-18, 499-530 (setting forth the financial and trade restrictions imposed against Iran and Libya and discussing the scope and impact of sanctions, licensing policies, and interpretive problems related to Libya); Anne Q. Connaughton, Exporting to Special Destinations: Terrorist-Supporting and Embargoed Countries, 748 PRACTICING L. INST. 353, 376-92 (1996) (outlining the background, current controls, and licensing policy of
have been considered rogue nations, known as "renegade[s] [who] spurn international norms." As a result, other nations feel justified in taking action to reform their conduct. For nearly twenty years, American foreign policy has included economic sanctions as a means to proscribe the activities of rogue nations, but despite this continuing effort, many such nations continue to flout international law. ILSA is the latest endeavor to pressure Iran and Libya to conform their conduct to the international community's standards.

I. Iranian Sanctions

The United States first instituted sanctions against Iran in November of 1979, when Iranian militants seized the American embassy in Tehran and took 66 hostages. President Jimmy Carter responded by halting all Iranian crude oil imports. Ten days after the seizure, he declared a national emergency under the International Emergency Economic Powers Act ("IEEPA") and froze all Iranian assets in comprehensive embargoes imposed on Libya and Iran).


9. See, e.g., MALLOY, supra note 6 (discussing the history of sanctions, current sanction programs, and general issues related to sanctions, including scope, policy, and authority); Connaughton, supra note 7 (discussing embargoes and countries subject to them); GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (2d ed. 1990) (presenting the Institute for International Economics' analysis of the use of economic sanctions for foreign policy purposes).

10. See MALLOY, supra note 6, at 202-03.

11. See id. at 204 & n.6; see also 44 Fed. Reg. 67,602 (1979).

12. See 50 U.S.C. § 1701 (1994 & Supp. 1995) (providing the President with the authority to act in a "national emergency," which is any "unusual and extraordinary threat which has its source in whole or substantial part outside the United States to the national security, foreign policy, or economy of the United States"). See also MALLOY, supra note 6, at 205-07. To use the power granted by IEEPA, the President has to declare a national emergency in response to a specific threat. See id. at 165. IEEPA also requires the President to consult with Congress. See 50 U.S.C. § 1703(a). The Iranian hostage crisis marked the first time the President invoked powers granted by IEEPA. See MALLOY, supra note 6, at 172, 202-03.

13. See MALLOY, supra note 6, at 293 n.18. Freezing assets is also known as "blocking." See id. The Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1996), defines a "blocked account" as "an account in which any designated national has an interest, with respect to which account payments, transfers or withdrawals of[r] other dealings may not be made or effected except pursuant to an authorization or license authorizing such action." See 31 C.F.R. § 500.319; see
UNILATERAL SANCTIONS WITH A TWIST

the United States.¹⁴ When these actions did not cause the Iranians to release the hostages, in April of 1980, Carter increased the pressure on the Khomeni regime by implementing two executive orders¹⁵ and expanding the blocking regulations into a trade embargo.¹⁶ Four years later, when it determined that Iran had been involved in the 1983 bombing of the United States Marines barracks in Beirut, the Reagan Administration placed Iran on a list of state sponsors of terrorism.¹⁷ The Iranian Transactions Regulations,¹⁸ issued in 1987 by the Commerce Department, further prohibited the importation of goods and services of Iranian origin.¹⁹ These regulations included products with potential military application.²⁰

In May of 1995, the Clinton Administration instituted its own economic sanctions against Iran.²¹ Citing as motivating factors “Iran’s


¹⁶ See 31 C.F.R. § 535.207 (1996); see also MALLOY, supra note 6, at 209. After an intense 444 days in captivity, the Iranians released the American hostages. See Bernard Gwertzman, Reagan Takes Oath as 40th President; Promises An "Era of National Renewal"—Minutes Later, 52 U.S. Hostages in Iran Fly to Freedom After 444-day Ordeal, N.Y. TIMES, Jan. 21, 1981, at A1. Fulfilling its part of the negotiated settlement, the United States unfroze the Iranian assets held by twelve American banks. See id.; see also MALLOY, supra note 6, at 209-10.

¹⁷ See H.R. REP. No. 104-523(I), supra note 14, at 9. Being on the list prevents Iran from receiving “U.S. foreign aid, sales of items on the U.S. munitions list, Eximbank credits, and U.S. support for foreign loans,” as well as “requires strict licensing requirements for any U.S. exports of controlled goods or technology.” Id; see also Connaughton, supra note 7, at 384-92 (setting forth the background, current controls, and licensing policy of Iran embargo).


¹⁹ See id. § 560.201 ("Prohibited Importation of Goods and Services from Iran"); see also MALLOY, supra note 6, at 210-12, & n.45.

²⁰ See 52 Fed. Reg. 45,309 (1987); see also Connaughton, supra note 7, at 387 (detailing the Presidential Statement of October 26, 1987)

appetite for acquiring and developing nuclear weapons" as well as "its role as inspiration and paymaster to terrorists," President Clinton signed an executive order prohibiting American trade and investment with Iran. The proclamation banned United States companies from purchasing oil from Iranian corporations. Not incidentally, the executive order dealt with the same subject matter as legislation introduced earlier in the year by Senator Alphonse D'Amato of New York. The Clinton Administration opposed Senator D'Amato's law as an overly broad extension of United States law because the legislation targeted foreign, rather than American, companies.

In the year following the imposition of sanctions, government officials expressed differing opinions regarding the effectiveness of the

Certain Transactions with Iran’); see also Gary G. Yerkey, United States to Ban Trade, Investment with Iran, President Clinton Says, 12 INT’L TRADE REP. (BNA) 781 (May 3, 1995) (noting that this executive order marked the second time President Clinton instituted prohibitions). In March 1995, the President banned American companies from developing oil resources in Iran. See id. A $1 billion agreement between Iran and Conoco, Inc. to develop two Persian Gulf oil fields instigated the executive order. See id.

22. Yerkey, supra note 21, at 781.
23. Id.
24. See Exec. Order No. 12,959, 60 Fed. Reg. 22,757 (1995); see also Yerkey, supra note 21, at 781 (explaining that the order prohibited all exports to Iran except those intended for humanitarian purposes, such as food and medicine).
25. See id.
26. See S. 277, 104th Cong. (1995) (The Comprehensive Iran Sanctions Act); see also S. 630, 104th Cong. (1995) (The Iran Foreign Sanctions Act of 1995). Senator D'Amato drafted these two pieces of legislation regarding sanctions toward Iran, however, the Senate did not take any floor action on either of these bills. After President Clinton announced his embargo, D'Amato proposed the third iteration of his bill, the Iran Foreign Sanctions Act, which would impose sanctions on any foreign company which exported petroleum products, natural gas and related technology to Iran. See S. 1228, 104th Cong. (1995).
27. See Yerkey, supra note 21, at 781 (noting the Administration’s hesitancy regarding the proposal’s “‘overextending extraterritorial jurisdiction’ of U.S. law”).
28. See id. The Administration worried that United States trading partners would vehemently oppose the foreign company feature of the legislation and that such a reaction would shift attention away from the overall purpose of the proposed bill, pressuring Iran to stop sponsoring terrorism and acquiring weapons of mass destruction by hampering its economy and denying it needed revenue. See id.
Clinton Administration embargo. A senior Central Intelligence Agency ("CIA") official, John C. Gannon, argued that the sanctions would only have a minimal impact on Iran because it had “alternative suppliers,” allowing development projects, maintenance, and repairs to proceed once foreign companies took the place of American businesses. Furthermore, without the full force of the international community behind the measures, the United States sanctions would not compel Iran to change its behavior. On the other hand, Undersecretary of State for Political Affairs Peter Tarnoff disagreed with Gannon's assessment and believed that, in only six months time, the embargo had impacted Iran. Nonetheless, the Undersecretary testified that the impact of the sanctions would increase significantly if Western Europe and Japan joined the embargo.

2. Libyan Sanctions.

Both the United States and the United Nations have imposed sanctions on Libya. Like those against Iran, the Libyan sanctions resulted from the conclusion that Libya's government, led by Colonel Muammar el-Qaddafi, sponsored acts of terrorism. Prior to the

---

29. See United States Sanctions Against Iran Will Have Little Impact Over Long Term, CIA Says, 12 INT'L TRADE REP. (BNA) 1739 (Oct. 18, 1995) [hereinafter Little Impact Over Long Term].
30. See id. Gannon testified that Iran had developed relationships with “hundreds” of non-United States firms that would take over the roles of the American companies. See id.
31. See id. The side effects of the embargo would include, according to Gannon, higher oil prices in the short term, “disrupt[ions to] individual Iranian businesses, and . . . delay [of] some infrastructure projects.” Id.
32. See Little Impact Over Long Term, supra note 29, at 1739.
33. See id.
34. See id. (stating that Tarnoff cited the decrease of Iran’s hard currency reserves as evidence of the embargo’s impact on Iran).
35. See id.
36. See Little Impact Over Long Term, supra note 29, at 1739. The Undersecretary believed that the international community's common interest in proscribing Iran’s threatening behavior outweighed the “narrow economic benefits” of trade with Iran. See id.
37. See discussion infra notes 40-54 and accompanying text (detailing United States sanctions against Libya).
38. See discussion infra notes 55-68 and accompanying text (describing United Nations sanctions against Libya).
39. See Connaughton, supra note 7, at 376 n.33 (noting that on December 29, 1979, the United States placed Libya on the list of nations which have “repeatedly
United Nation’s international sanctions against Libya, the United States had taken its own actions.\textsuperscript{40} In the early 1980s, the American government sought to curb Libya’s rogue activities by restricting the issuance of export licenses.\textsuperscript{41} Attempting to exploit Libya’s reliance on oil as its major source of revenue, President Reagan issued a Presidential Proclamation on March 10, 1982, banning the importation of Libyan oil or petroleum products.\textsuperscript{42} In early 1986, President Reagan announced a new round of sanctions\textsuperscript{43} after learning that

\begin{footnotesize}
\begin{enumerate}
\footnotesize
\item Provided support for acts of international terrorism”). Pursuant to § 6 of the Export Administration Act, 50 U.S.C. § 2401 (1994), the Secretary of State presently lists the following countries as supporters of international terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. See \textit{id.} at 357 n.1; see also Bernard Weinraub, \textit{Terrorists Train at 15 Libyan Sites, United States Official Says}, \textit{N.Y. TIMES}, Jan. 7, 1986, at A1 (reporting that American intelligence sources revealed camps in Libya where Palestinian guerrillas and other terrorists were training). A State Department spokesman noted that “the links between international terrorism and Libya are clear.” \textit{id.}
\item See \textit{generally} Connaughton, \textit{supra} note 7, at 376-82 (outlining the history of United States actions against Libya from 1979 to 1993).
\item See \textit{id.} at 377-78. One month after the United States shot down two Libyan fighter planes that had fired upon American maneuvers in the Gulf of Sidra, the Commerce Department issued an order restricting the use of parts of United States origin for servicing Libyan aircraft. See \textit{id.} at 377. The order also prohibited the use of bulk licenses for exports of aircraft parts for aircraft owned or operated by the Libyan government or Libyan nationals. See \textit{id.}; see also 46 Fed. Reg. 47,066 (1981). The Commerce Department revised these controls one month later to include the export of aircraft and aircraft parts to Libya. See Connaughton, \textit{supra} note 7, at 378; see also 46 Fed. Reg. 47066 (1981). Through these regulations the United States attempted to monitor the maintenance of all aircraft that Libya could use in support of its military intervention in neighboring countries. See Connaughton, \textit{supra} note 7, at 378. On March 12, 1982, the United States expanded its restrictions against Libya by widening its licensing policy into one of “general denial.” See Connaughton, \textit{supra} note 7, at 378; 47 Fed. Reg. 11,247 (1982). As a result, a license was required for every export except food; medicine and medical supplies; items permitted under certain special purpose general licenses; and non-strategic foreign-produced direct product of United States-origin technical data. See Connaughton, \textit{supra} note 7, at 378.
\item See Presidential Proclamation 4907, 1982 PUB. PAPERS 271-72 (1982) (prohibiting the importation of Libyan crude oil because revenues received by Libya from the sale of oil threatened United States national security); see also Weinraub, \textit{supra} note 39, at A1 (noting that the United States spent an average of five to seven billion dollars a year on imported Libyan crude oil prior to the 1981 ban).
\item See 22 \textit{WEEKLY COMP. PRES. DOC.} 21 (Jan. 7, 1986) (declaring a national emergency and announcing sanctions against Libya); see also Weinraub, \textit{supra} note 39, at A1 (characterizing the additional economic sanctions as retaliation for Libya’s support of international terrorism).
\end{enumerate}
\end{footnotesize}
Libya played a role in the 1985 bomb attacks at the Rome and Vienna airports. Invoking the national emergency authority of IEEPA, the Reagan Administration imposed trade sanctions that prohibited the importation of Libyan goods and services as well as the export of American goods, technology, and services. The following day, the Administration announced finance-related sanctions freezing Libyan assets in the United States and banning American firms from extending credits or loans to the Libyan government. The Libyan Sanctions Regulations remain in effect today.

Whereas the 1982 and 1986 sanctions were unilateral acts on the part of the United States, the sanctions instituted this decade claim

44. See Weinraub, supra note 39, at A1. The two attacks on December 27, 1985 killed nineteen people, including five Americans. See id.
45. See supra note 12 (discussing the powers granted to the President under IEEPA).
47. See 31 C.F.R. § 550.201 (1996) (declaring that all imports of Libyan origin, except publications and news materials, were prohibited); see also MALLOY, supra note 6, at 503-04.
48. See 31 C.F.R. § 550.202 (1996) (describing prohibited exports). The ban does not include publications or donated humanitarian items such as food, clothing, medicine or medical supplies. See id; see also MALLOY, supra note 6, at 505-06.
51. See 31 C.F.R. § 550.206 (1996) (mandating that United States individuals may not grant or extend credit or loans to Libya).
53. See Connaughton, supra note 7, at 382-83 (discussing current controls over all exports and transshipments to Libya from the United States). Under the Libyan Sanctions Regulations, all exports and transshipments are subject to a presumption of denial and, therefore, require prior written permission of the Treasury Department. See id. at 381-82. Transshipments are exports that are transferred to an intermediary prior to its ultimate destination. See id. at 380. Both exports and transshipments are subject to the current controls when the exporter knows, or has reason to know, that the exported goods are intended for Libya directly, or are specifically intended to be incorporated into a product to be purchased by or used in Libya. See id.
54. See Allies Are Cool to Reagan's Sanctions, N.Y. TIMES, Jan. 9, 1986, at A8 (noting the "tepid response" of European governments and Japan, as well as the
the force of the United Nations Security Council behind them. In March 1992, after Libya refused to hand over suspects implicated in the bombings of both Pan Am flight 103 and the French airliner U.T.A. flight 772, the Security Council imposed a ban on air travel and arms sales to Libya. The sanctions, however, did not include the export of oil. Over a year later, as the Libyan govern-


56. See Paul Lewis, Security Council Votes to Prohibit Arms Exports and Flights to Libya, N.Y. TIMES, Apr. 1, 1992, at A1 (discussing the Security Council's vote to impose sanctions unless Libya surrenders agents from recent terrorist attacks). The Security Council wanted Libya to turn over, either to the United States or Britain, the two Libyan citizens accused of executing the Pan Am explosion over Lockerbie in 1988, as well as the four Libyans implicated in the bombing of U.T.A. flight 772 over the Sahara Desert in 1989. See id. Four hundred and forty people, from thirty countries, died in the two explosions. See id.

57. See U.N. Security Council Resolution 748, U.N. SCOR, 47th Sess., 3063rd mtg., at 1, U.N. Doc. S/RES 1748 (1992) [hereinafter Resolution 748] (reaffirming that, in accordance with Article 2, paragraph 4 of the United Nations charter, "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts [of] another State or acquiescing in organized activities within its territory directed towards the commission of such acts"). The Security Council concluded that Libya had failed to renounce terrorism and to respond to Resolution 731 and, thus, determined that Libya "constituted a threat to international peace and security." Id. at 2.

58. See id. Paragraph 4 of Resolution 748 provides that all states shall:
(a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya . . . ;
(b) Prohibit . . . the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of air-worthiness for Libyan aircraft, the payment of new claims against existing insurance contracts and the provision of new direct insurance for Libyan aircraft.
Id. ¶ 4.

59. See Resolution 748, supra note 57, ¶ 5 (stating that all states shall prohibit the sale or transfer of any weapon, ammunition, or military equipment, as well as supplies for the manufacture or maintenance of such items).

60. See Lewis, supra note 56, at A1 (emphasizing that oil is Libya's main eco-
ment still refused to surrender the two men indicted in connection with Pan Am 103, the Security Council issued a new set of sanctions.\textsuperscript{61} This second round of sanctions froze all of Libya’s overseas assets,\textsuperscript{62} banned the sale of oil-refining and pipeline equipment,\textsuperscript{63} and tightened the 1992 United Nations sanctions.\textsuperscript{64} The resolution again did not establish a total prohibition on Libyan oil exports.\textsuperscript{65} Furthermore, the provision blocking Libyan assets did not apply to funds “derived from the sale or supply of any petroleum or petroleum products” after the effective date of the resolution, provided that the funds were paid into a separate bank account set up solely for the purpose of holding such funds.\textsuperscript{66} Thus, although designed to coerce Libyan compliance with the substance of the resolutions, the United Nations’ measures did not absolutely cripple Libya’s most valuable asset—the sale of oil.\textsuperscript{67} As a result, the Libyan government has yet to
\begin{footnotes}
\item[62] See Resolution 883, supra note 61. Paragraph 3 directs that all states:

\begin{quote}
shall freeze such funds and financial resources [owned or controlled, directly or indirectly by the government of Libya or any Libyan undertaking] and ensure that neither they nor any other funds and financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of the Government or public authorities of Libya or any Libyan undertakings.
\end{quote}
\item[63] Resolution 883, supra note 61, ¶ 5, Annex. Resolution 883 sets forth a list of items that United Nations member states are not permitted to sell or provide to Libya. See id. The list includes: pumps; equipment designed for use in crude oil export terminals; equipment “not specially designed for use in crude oil export terminals but which because of their large capacity can be used for this purpose;” refinery equipment; and spare parts for the aforementioned equipment. \textit{Id.}
\item[64] See \textit{id.} ¶ 6-7; see also Lewis, \textit{supra} note 60, at A10.
\item[65] See Lewis, \textit{supra} note 62, at A10 (reporting that representatives of the families of the victims of Pan Am 103 cautioned that only a full oil embargo would force Qaddafi to surrender the suspects).
\item[66] See Resolution 883, \textit{supra} note 61. Thus, Libya will be able to obtain the benefits of its oil contracts, provided that those funds are explicitly separate from any other funds. \textit{See id.}
\end{footnotes}
meet the Security Council’s demands.\(^6\)

**B. The Passage of the Iran and Libya Sanctions Act of 1996.**

Senator Alphonse D’Amato’s brainchild—a law punishing Iran for its sponsorship of terrorism and its drive to acquire weapons of mass destruction—lay dormant in the Senate\(^6\) until it received renewed interest following three incidents that occurred within a span of three months. The bombing of the United States military apartment complex in Saudi Arabia, the explosion of TWA flight 800, and the Centennial Olympic Park bombing in Atlanta awakened American fears of terrorist attacks.\(^7\) With these incidents in the background, congressional policymakers resolved to hold the parties accountable for their terrorist acts. The rationale for the sanctions is simple—if the regimes do not have any money, they cannot provide the terrorists with the supplies necessary to accomplish their goals.\(^7\) In theory,  

---

\(^6\) See Security Council Extends Libya Sanctions, N.Y. TIMES, Mar. 31, 1995, at A3 (stating that the United States urged other nations to participate in the oil embargo to help toughen sanctions).


\(^7\) See Mitchell, supra note 5, at A1. Secretary of Defense William J. Perry suggested a few days later that there may have been an “international connection” to the bombing in Saudi Arabia, perhaps an Iranian linkage. See id. Furthermore, in the initial hours following the explosion of Flight 800, there were rumors that the plane had been shot down by a terrorist’s bomb. See Matthew Purdy, Explosion Aboard TWA Flight 800, N.Y. TIMES, July 19, 1996, at A1. Presently, the investigation into the cause of the explosion has not produced a definitive answer, although a criminal act has been ruled out. See Robert Suro, Crime All But Ruled Out in TWO Crash; FBI Details Exhaustive Probe; Focus Now on Mechanical Failure, WASH. POST, Nov. 19, 1997, at A1 (reporting that officials believe that mechanical failure was the most likely cause).

\(^7\) See H.R. REP. No. 104-523(I), supra note 14, at 9 (quoting Undersecretary of State Peter Tarnoff’s October 1995 testimony: “By pressuring Iran’s economy, we seek to limit the government’s finances and thereby constrict Tehran’s ability to fund rogue activities”); see also H.R. REP. No. 104-523, pt. 2, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 1311, 1316-17 [hereinafter H.R. REP. No. 104-
by limiting foreign access to Iran’s and Libya’s economies—in partic-

ular each country’s oil and gas industries—revenue should de-
crease significantly. In essence, “fewer barrels means fewer dol-

Iars” and fewer dollars means less state-sponsored terrorism and

fewer weapons of mass destruction. In addition, Libya’s long-

standing refusal to relinquish custody of two individuals facing
criminal indictment for allegedly blowing up Pan Am flight 103 fur-

ther motivated the law’s drafters. Congress decided that it could

neither ignore nor condone such blatant disregard of the international

community’s demands.

Senator D’Amato’s proposed legislation was drastically altered by
the time President Clinton signed ILSA into law on August 5, 1996. Initially, Iran was the sole focus of the bill, and sanctions would be
levied against foreign companies that traded with the country. Senator D’Amato sought to penalize companies that traded with Iran
by preventing them from selling their products in the United States. The Clinton Administration was opposed to banning non-United
States trade with Iran. In fact, Acting Assistant Secretary of State C. David Welch cautioned that such a ban would be ineffective and
counterproductive, since the cost of unilaterally enforcing the ban

523(II).
and absorbing the retaliatory measures by other governments would be far too high. Welch further testified that it would be pointless to attempt to prevent foreign investment in Libya since there is a considerable foreign presence in the Libyan economy. Finally, the Administration successfully fought to remove from the legislation sanctions on financial institutions that provide loans for parties involved in Iranian investment deals.

In its final form, the Iran and Libya Sanctions Act of 1996 ("ILSA") severely restricted foreign corporations from investing in the Iranian and Libyan petroleum industries, and banned trade with

---

82. See id.
83. See id. Libya has contracts with over two dozen foreign corporations to produce and develop Libya's oil resources. See id. Welch postulated that various nations might move to protect their nationals' interests. See id. Despite the Assistant Secretary's warning, lawmakers did not heed this advice. See ILSA supra note 3, § 5(b)(2).
84. See Welch Statement, supra note 72. Such a provision could damage United States lending institutions, be disruptive to financial markets, "reduce the attractiveness" of the United States as a financial center, and invite retaliation. See id; see also Clyde Mitchell, The New Sanctions Act, N.Y.L.J., Aug. 21, 1996, at 1 (commenting on ILSA's potential effect on the American banking community).
85. See ILSA, supra note 3.
86. See id. § 5(b)(2) (providing that, subject to certain exceptions, sanctions shall be imposed upon any person that has, with actual knowledge, made an investment of $40 million or more that significantly contributed to the enhancement of Libya's ability to develop its petroleum resources). Investment is defined to include the following activities:

(A) The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya (as the case may be), or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract; (B) The purchase of a share of ownership, including an equity interest, in that development; or (C) The entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation.

Id. § 14(9). Investment "does not include the entry into, performance, or financing of a contract to sell or purchase goods, services, or technology." Id. In addition, development is "the exploration for or the extraction, refining, or transportation by pipeline, of petroleum resources." Id. § 14(4). On December 16, 1996, the State Department issued a release in the Federal Register clarifying some of the terminology in ILSA. See 61 Fed. Reg. 66,067 (Dec. 16, 1996); see also State Department Issues Guidance Clarifying Iran-Libya Sanctions Law, 13 INT'L TRADE REP. (BNA) 1967 (1996) [hereinafter State Department Issues Guidance]. This "guidance" is not a set of criterion for enforcement. See State Dept. Has Targeted 12 Foreign Firms for Possible Boycott Action Under ILSA, BOYCOTT L. BULL., Feb. 10, 1997, at 1 [hereinafter 12 Foreign Firms] (reporting that the State Department
Libya in goods already prohibited by United Nations Security Council Resolutions. The United States will impose sanctions only when an offender possesses actual knowledge of a prohibited activity. For corporate parents, subsidiaries, or affiliates to be liable for the conduct, they must engage in the prohibited activity. If the President determines that a foreign company has violated the law, he must impose two or more of the following sanctions: the denial of Export-Import Bank assistance for exports; the denial of export licenses; the prohibition on United States financial institutions from extending loans to the sanctioned person totaling more than $10 million; the prohibition on being designated a primary dealer of United States government debt instruments or serving as a repository for United States government funds, if the sanctioned person is a financial in-

87. See ILSA, supra note 3, § 5(b)(1). The President must impose sanctions against any person who has, with actual knowledge, exported, transferred, or otherwise provided Libya with "any goods, services, technology, or other items the provision of which is prohibited" under paragraphs 4(b) or 5 of United Nations Security Council Resolution 748 or paragraphs 5 or 6 of United Nations Security Council Resolution 883 "if the provision of such items significantly or materially" contributed to Libya's ability to acquire specific weapons, develop its petroleum resources, or maintain its aviation capabilities. Id.

88. See id. § 5(c).

89. See id. This provision is aimed at limiting the liability of parent companies, subsidiaries, and affiliates that are unaware of the banned activity. The State Department-issued guidance indicates that the term "engaged" refers to the "facilitation and authorization of the entry into a prohibited contract." See State Department Issues Guidance, supra note 86, at 1967. Furthermore, only activity occurring after the effective date of ILSA, August 5, 1996, will trigger sanctions. See ILSA, supra note 3, § 13(a).

90. See ILSA, supra note 3, § 5(b). There are several exceptions to the imposition of sanctions. See id. § 5(f). For example, the President does not have to issue sanctions if "the President determines in writing that the person to which the sanctions would otherwise be applied is a sole source supplier of the defense articles or services, that the defense articles or services are essential [to national security], and that alternative sources are not readily or reasonably available." Id. § 5(f)(1)(B).

91. See id. § 6(1). The assistance could include the "issuance of any guarantee, insurance, [or] extension of credit . . . [regarding] the export of any goods or services to any sanctioned person." Id.

92. See ILSA, supra note 3, § 6(2).

93. See id. § 6(3).
stitution;\textsuperscript{94} the prohibition on entering into a procurement contract with the United States government;\textsuperscript{95} and any other restrictions the President sees fit to impose in accordance with IEEPA.\textsuperscript{96} Contracts executed prior to ILSA's effective date are not subject to sanctions.\textsuperscript{97}

The President must impose sanctions for a period of at least two years.\textsuperscript{98} The chief executive may revoke the sanctions after the first year, however, if he determines that the sanctioned person no longer engages in the prohibited activity.\textsuperscript{99} The President, furthermore, may terminate sanctions with regard to Iranian investment when Iran has ceased its efforts to manufacture or acquire weapons of mass destruction, and the United States has removed it from the list of states who sponsor international terrorism.\textsuperscript{100} With regard to Libyan investment and trade, Libya must comply with United Nations Security Council Resolutions 731, 748, and 883 before the United States will lift the sanctions.\textsuperscript{101}

Critics, who view the law an impermissible unilateral action,\textsuperscript{102} often have overlooked the provision urging the President to pursue a multilateral sanctions regime to accomplish the legislation's goals.\textsuperscript{103} The language in §4(a),\textsuperscript{104} however, does not include the mandatory compulsion the other sections of the legislation do, and therefore this section does

\begin{itemize}
  \item \textsuperscript{94} See id. § 6(4).
  \item \textsuperscript{95} See id. § 6(5).
  \item \textsuperscript{96} See id. § 6(6). For a discussion of IEEPA, see supra note 12.
  \item \textsuperscript{97} See H.R. REP. NO. 104-523(II), supra note 71, at 20.
  \item \textsuperscript{98} See ILSA, supra note 3, § 9(b)(1).
  \item \textsuperscript{99} See id. § 9(b)(2).
  \item \textsuperscript{100} See id. § 8(a)(1)-(2).
  \item \textsuperscript{101} See id. § 8(b).
  \item \textsuperscript{102} See discussion infra Part II A-B (analyzing global reaction to ILSA).
  \item \textsuperscript{103} See ILSA, supra note 3, § 4.
  \item \textsuperscript{104} See id. § 4. The President must report to Congress regarding the success of his efforts to establish multilateral sanctions. See id. § 4(b). The report must include: (1) a list of the countries that have agreed to take such measures and a description of the sanctions; and (2) a list of those countries that have not agreed to impose sanctions, with a description of any measures that the President recommends, with respect to those countries, to further the objective of limiting the ability of Iran to support international acts of terrorism. See id. § 4(b)(1)-(2).
  \item \textsuperscript{105} See id. § 4(a) (providing that "Congress urges").
\end{itemize}
not require the President to pursue multilateral sanctions. In addition, the President is given the authority to waive the application of sanctions on a country's nationals if the country agrees to institute its own "substantial measures," such as economic sanctions of a comparable quality to those of ILSA.105

II. GLOBAL REACTION TO ILSA

A. AMERICAN TRADING PARTNERS CLAIM ILSA VIOLATES UNITED STATES' INTERNATIONAL OBLIGATIONS

Very few people support ILSA.107 Coming on the heels of the Cu-

---

106. See id. § 4(c)(1).
107. Perhaps the only domestic supporters of the law are Congress, President Clinton, and the families of the victims of Pan Am 103, for whom the Libyan sanctions were added to the original core of the sanctions, and who were present at the signing of the bill. See Remarks by President Clinton, Iran-Libya Sanctions Act Signing Ceremony, 7 DEP'T ST. DISPATCH 32 (Aug. 5, 1996). The American business community opposes the law because it opposes any economic sanctions that decrease market accessibility and cost American jobs. See Louis Uchitelle, Who's Punishing Whom?, N.Y. TIMES, Sept. 11, 1996, at D1 (reviewing corporate America's position on unilateral sanctions). One executive argued that American policymakers are not considering the totality of the consequences: "What the politicians forget is that these foreign companies are our customers and suppliers, or they invest in America. We are cutting off our nose to spite our face, presenting ourselves as capricious and unreliable." Id.; see also Countries Targeted by U.S., 14 INT'L TRADE REP. (BNA) 421 (Mar. 5, 1997) (quoting the National Association of Manufacturers official position that "unilateral sanctions are little more than postage stamps we send to other countries at the cost of thousands of American jobs"). In addition to industry representatives, many policymakers find fault with ILSA. See Martin Walker, Master of the Universe, THE GUARDIAN, Aug. 7, 1996, at 13 (reporting that former Secretary of State Lawrence Eagleburger was "bothered by our attempt at enforced implementation"). A member of the House Committee on International Relations, Representative Lee Hamilton (D-IN), asserted that ILSA and Helms-Burton pose several risks to American interests. See Lee Hamilton, America's Risky Sanctions, J. COM., Aug. 20, 1996, at 6A. First, sanctions could reduce multilateral cooperation among United States trading partners. See id. Second, the sanctions could jeopardize American investments. See id. Third, enacting these laws in the name of national security might encourage other countries to do the same thing. See id. Finally, "imposing sanctions could undermine longstanding U.S. leadership on international trade issues." Id. That could result in the decreased ability to set the agenda in trade talks. See id. Representative Toby Roth (R-WI) argued that ILSA would actually benefit Iran and Libya. See Toby Roth, New Iranian-Libyan Sanctions Will Only Hurt U.S., WALL ST. J., Aug. 6, 1996, at A14 (asserting that the United States is ignoring Europe's close
ban Liberty and Democratic Solidarity (LIBERTAD) Act, or Helms-Burton, the passage of ILSA marked the second time in six months that the United States enacted secondary boycott legislation against foreign companies. Allies and trading partners view ILSA as the latest incident in the alarming trend of the United States to act unilaterally in imposing its policies on other countries.


110. See Fairey, supra note 8, at 1312-13 (discussing secondary boycotts); see also Andreas Lowenfeld, Congress and Cuba: The Helms-Burton Act, 90 AM. J. INT’L L. 419, 429-30 (1996) (concluding that Helms-Burton is a classic secondary boycott). Lowenfeld restates the definition of a secondary boycott in the following way: “[S]tate A says that if X, a national of state C, trades with state B, X may not trade with or invest in A. In other words, X is required to make a choice between doing business with or in A, the boycotting state, and doing business with or in B, the target state . . . .” Id. There are three principles of extraterritorial jurisdiction—territorial, nationality and effects. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (setting forth the bases of jurisdiction to prescribe law). The territorial principle—jurisdiction based on conduct that takes place within a state’s territory—is the most common basis of jurisdiction and engenders little controversy. See id. cmt. c. The nationality principle—based on the status of the person or entity—is an “exceptional” basis for jurisdiction. See id. at cmt. b, e. The main jurisdictional premise behind laws such as Helms-Burton and ILSA is the theory of substantial effects, under which jurisdiction is permitted regarding activities that occur outside the country, but have a substantial effect within the country. See Bradford T. Hammock, Note, The Extraterritorial Application of the National Labor Relations Act: A Union Perspective, 22 SYRACUSE J. INT’L L. & COM. 127, 131 (1996) (citing the jurisdiction discussion of United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d. Cir. 1945)). In Alcoa, the Second Circuit held that conduct that had “intended or actual” or “substantial or foreseeable” effects within a country provided sufficient contacts to exert jurisdiction based on the substantial effects doctrine. See id.


112. See id. at 1316 (quoting Canadian International Trade Minister Art Eggleton as saying “[t]he extraterritorial effects of this latest act represent once again an
1. Unwarranted Unilateralism

Although they do not dispute that terrorism is a threat to our common interests, American trading partners do object to the manner in which the United States attempts to eradicate that threat. The end of the Cold War left the United States as the world's only superpower—one that no longer feels it is necessary to consult with its North Atlantic Treaty Organization ("NATO") allies, who helped provide a bulwark against the Soviet Union. This open field allows the United States to conduct its affairs with policies such as ILSA that, in the words of European Union trade commissioner Sir Leon Brittan, "establish the unwelcome principle that one country can dictate the foreign policy of others." The United States is pur-

attempt by the United States to dictate trade policy to its allies"); see also Sherle R. Schwenniger, The Rift Over Rogues: Europeans are Dismayed by Washington's Growing Contempt for Multilateralism, THE NATION, Oct. 7, 1996, at 21-22 (stating that in the immediate post-Cold War era, the United States government usually consulted its allies, even if it did not act on their suggestions, but "[n]ow even the pretense of coordination is gone"); United States Urges Congress to Rework Bill to Punish Foreign Firms in Iran, Libya, 13 INT'L TRADE REP. (BNA) 903 (May 29, 1996) (quoting European Union Ambassador to the United States Hugo Paemen's May 21, 1996 letter to congressional leaders explaining that: “What causes deep concern in the European Union is the proposal that the United States should attempt to impose its terms on the rest of the world by adopting secondary boycott legislation with extraterritorial effect . . . .").

113. See Welch Statement, supra note 72, at 6 (stating that "there is little disagreement about the threat such behavior poses to our common interests"); see also Canada Criticizes, supra note 111, at 1316 (quoting Canadian Foreign Affairs Minister Lloyd Axworthy as saying: "We have as strong an objection to any terrorist activity as any United States congressman has. We will work with the Americans, the Europeans and anybody else . . . [but] it should be done in concert, in cooperation and in coordination, not unilaterally."); see also United States Urges Congress to Rework Bill to Punish Foreign Firms in Iran, Libya, supra note 112, at 903 (reporting Hugo Paemen's comment that the American tactics—which he characterized as "unilateral measures against Europe," not Iran or Libya—serve to distract attention from the targeted regimes).

114. See Nelan, supra note 69, at 26 (quoting France's Foreign Ministry spokesman, Yves Doutriaux's remarks that characterized ILSA as "one nation telling the rest on earth what they can and can't do. Is that right?"). Furthermore, French Foreign Minister Herve de Charette suggested that the law "ha[s] nothing to do with terrorism" and is just a means of the United States to wield its unchecked power. Id.

115. See Schwenniger, supra note 112, at 22 (explaining that now Washington acts before consulting its allies).

116. See id.

117. See Nelan, supra note 69, at 26.
suing its own path, without substantive consultations, and is expect-
ing the world to follow.

International concern about American unilateralism amounts to
more than complaints about "lex Americana"118 or "political gang-
sterism."119 Indeed, American trading partners argue that the United
States is destroying the integrity of international organizations120 and
agreements121 to which it is a party.122 The cornerstone of the organi-
zations and agreements is multilateralism, and other nations contend
that such unilateral action runs counter to this principle.123 In taking
unilateral steps to deal with perceived or actual threats, the United
States implies that it does not need to consider other countries’ poli-
cies or concern itself with the collateral consequences of its own ap-

118. Id.
119. Id. at 27 (quoting two North Atlantic Treaty Organization (NATO) ambas-
sadors’ reaction to the imposition of sanctions).
120. Such organizations include the United Nations (UN) and the World Trade
Organization (WTO).
121. These agreements include the General Agreement on Tariffs and Trade
(GATT) and the North American Free Trade Agreement (NAFTA). General
122. In a letter to congressional leaders written several months before ILSA’s
passage, Hugo Paemen, the European Union’s ambassador to the United States,
and Ferdinando Salleo, the Italian ambassador to the United States, argued that the
various sanction proposals both violated international law and “depreciated[d] the
standing of international organizations such as the United Nations.” See United
States Legislation on Iran, Libya Would Violate WTO Rules, EU Says, 13 INT’L
TRADE REP. (BNA) 219 (Feb. 7, 1996) (noting that “[a]ny unilateral action which
aims at imposing further measures outside that context can only undermine the
authority of the economic sanctions . . . . If the United States government wishes
further measures to be implemented by the international community, it should in-
troduce them for discussion in the relevant international body . . . This way of
unilaterally attempting to impose penalties on third parties disturbs international
trade and investment relations and depreciates the standing of internationally ac-
cepted fora for any such measures”). In another instance of unilateral action by the
United States, European allies warned of the “depreciation” of international or-

ganizations when President Clinton ordered cruise missile strikes against Iraq
stating, for example, that: “[w]hatever its human and material cost, the crisis in
Iraq has already claimed an important institutional casualty”: the United Nations
Security Council.” See Schwenninger, supra note 112, at 22 (quoting a Financial
Times editorial).
123. See Schwenninger, supra note 112, at 22.
Allies believe that the United States has certain obligations resulting from its memberships, just as the United States believes the allies have the same duties and responsibilities—reciprocity is the bedrock of these multilateral organizations. Consequently, when the world’s most powerful nation and economy seems to flout, if not ignore, its obligations, our trading partners worry about the impact on the legitimacy of the international organizations.

2. **GATT and WTO Obligations**

The United States emerged from World War II with an unprecedented level of power and authority and, as a result, the country was instrumental in establishing the political and economic organizations and agreements that would form the structure of the post-war world. The General Agreement on Tariffs and Trade (GATT),

---

124. See Nelan, supra note 69, at 27 (quoting Harvard University political scientist Samuel Huntington’s summary of the American viewpoint: “We have historically thought of American values as being universal and ones we have the responsibility and obligation to induce other societies to accept.”).

125. See BERNAUD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 66-67 (1995) (hereinafter HOEKMAN & KOSTECKI) (defining reciprocity as “the practice of making an action conditional upon action by a counterpart” and stating that reciprocity has been “a fundamental element in virtually all assaults on barriers to trade, [since] governments generally [are] unwilling to liberalize unilaterally on a [Most Favored Nation] basis”).

126. See United States Legislation on Iran, Libya Would Violate WTO Rules, EU Says, supra note 122, at 129 (stating that the United States should use the forums of international organizations rather than acting unilaterally).

127. See JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 9-10 (1990) (explaining the role of the United States in GATT formation). The Allies designed the post-war structures with the political and economic mistakes of the previous twenty-five years fresh in their minds. See id. Historians argue that the Great Depression was one of the causes of World War II, along with the reparations imposed on Germany after the first World War. See id. at 9. Although the third point of President Woodrow Wilson’s Fourteen Points advocated “[t]he removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance,” the United States, in the post World War I years, did exactly the opposite. See VI ANDREAS F. LOVENFELD, INTERNATIONAL ECONOMIC LAW: PUBLIC CONTROLS ON INTERNATIONAL TRADE 12-13 (2d ed. 1983). First, Congress enacted the Fordney-McCumber Tariff Act of 1922, and then eight years later, instituted the highest levels of tariffs in American history with the passage of the Smoot-Hawley Tariff Act of 1930, increasing rates from 38 to 52 percent. See
which its creators envisioned not as an organization to which nations would belong, but as a multilateral agreement or treaty to which countries would adhere,\(^{129}\) is the main trade mechanism that emerged from the post-war negotiations. Now GATT is administered by the World Trade Organization ("WTO"),\(^{130}\) the international body formed in 1995 to oversee and implement multilateral trade agreements.\(^{131}\) Three major principles of international free trade are set

\[\text{id. at 13; see also HOEKMAN \\& KOSTECKI, supra note 125, at 3. Such measures were not limited to the United States, however, as many nations "took many protectionist measures, including quota restrictions, which choked international trade." LOWENFELD, supra, at 12; see also JACKSON, supra, at 10. Reflecting on the events leading to World War II, world leaders created institutions to prevent history from repeating itself. See JACKSON, supra, at 9-10. The 1944 Bretton Woods Conference established the International Monetary Fund (IMF) and the World Bank (International Bank for Reconstruction and Development), both of which were designed to deal with monetary and banking issues. See id. at 10. In late 1945, the United States proposed that certain nations get together to draft a multilateral agreement for the mutual reduction of tariffs; soon thereafter, the United Nations adopted a resolution to charter an "international trade organization." See id.}

\[128. \text{See GATT, supra note 121.}
\]

\[129. \text{In the drafting stage, the language of GATT suggested that GATT would be an organization—an idea to which many United States congressmen objected. See JACKSON, supra note 127, at 11-12. On the orders of Congress, American negotiators redrafted the general GATT clauses to remove the idea or implication of it being an organization. See id. at 12.}
\]

\[130. \text{In contrast to GATT, the World Trade Organization (WTO) is an international organization with "member states," more akin to the United Nations in that nature. See Jeffrey J. Schott, Challenges Facing the World Trade Organization, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 5 (Jeffrey J. Schott ed. 1996). Schott states that this shift in status is significant because it "provides greater legal coherence among its rights and obligations." Id. Despite the shift, the new organization is closely related to GATT. See John H. Jackson, The WTO Dispute Settlement Procedures: A Preliminary Appraisal, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 155 (Jeffrey J. Schott ed. 1996). Article I of the WTO Charter mandates that the WTO shall be "guided by" practice and decisions. See id.}
\]

\[131. \text{The creation of the WTO was the culmination of the Uruguay Round of negotiations that ended in 1994. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs and Trade, Agreement Establishing the World Trade Organization, April 15, 1994, 33 I.L.M. 1140 (1994) [hereinafter WTO Agreement]; see also HOEKMAN \\& KOSTECKI, supra note 125, at 12; see also Raymond Vernon, The World Trade Organization: A New Stage in International Trade and Development, 36 HARV. INT'L L.J. 339, 340 (1995). Another important change in the transformation from GATT to WTO is the "single package" or "single undertaking" idea contained in the WTO Agreement, wherein all WTO members must accept all agreements. See}
\]
forth in GATT: (1) parties should conduct trade on the basis of non-discrimination; (2) parties should maintain government restraints on the movement of goods at a minimum, and if changed, the restraints should be reduced, not increased; and (3) parties should discuss and agree on the conditions of trade, including the level of tariffs and other restrictions, within a multilateral framework. Other principles are vital to GATT as well, including the idea that tariffs are the only restrictions to be implemented by contracting parties. Nonetheless, every principle is qualified by exceptions, grandfather clauses, and special cases.

a. The National Security Exception

Perhaps the most significant exception contained in GATT is the national security exception of Article XXI. The Agreement does not prevent any contracting party—and today, in the terms of WTO, any member state—from “taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.” Arguably, a state could justify any act inconsistent with GATT as one taken in furtherance of its national security. As a result, the idea of national security conceivably can incorporate so much that the obligations of GATT have no real force. In fact, states have cited direct security

Schott, supra note 130, at 3. Previously, the contracting parties of GATT could pick and choose which multilateral agreements they would accept. See id.

132. See GATT, supra note 121, Art. I (setting for the criteria for Most Favored Nation status); see also LOWENFELD, supra note 127, at 23.

133. See GATT, supra note 121, Art. I. The Most Favored Nation Clause of GATT Article I states that countries should apply duties on imports equally, without regard to origin. See LOWENFELD, supra note 127, at 23.

134. See GATT, supra note 121, Art. XXII (setting guidelines for discussions among contracting nations that impose certain restrictions); see also LOWENFELD, supra note 127, at 23.

135. See GATT, supra note 121, Art. XI (prohibiting quantitative restrictions or quotas); see also LOWENFELD, supra note 127, at 23.

136. See LOWENFELD, supra note 127, at 24.

137. See GATT, supra note 121, Art. XXI (setting forth the national security exception to compliance).

138. GATT, supra note 121, Art. XXI (b)(iii) (outlining the exception for action taken in war or emergencies in international relations).

measures, potential dangers, indirect threats, and domestic economic security as rationales for an Article XXI exception. Moreover, member states are free to interpret Article XXI in whichever manner suits them best since GATT and now the WTO have not issued a formal interpretation of Article XXI. It is striking that Article XXI, unlike some other articles, does not caution against misuse of the national security exception. Thus, the article is wide open for abuse.

If the United States were to defend ILSA in front of a WTO panel, an Article XXI defense would be one of the primary rationales behind the American arguments. The drafters of ILSA put national security concerns at the forefront of their findings, stating that

and the lack of protections against misuse). In general, Whitt argues that potential abuse of this broad exception “threatens to undercut the overall stability and good will inherent in the GATT system.” Id. at 605.

140. See id. at 620.
141. See id. at 616-17.
142. See id. (concluding that the provision encourages a unilateral interpretation and fails to provide even a minor penalty for its misuse). In contrast, GATT Article XX, which outlines the Agreement’s general exceptions, states that the exceptions contained in the clause are “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.” Id. at 616 n.86; see GATT, supra note 121, Art. XX.
143. See Whitt, supra note 139, at 621 (concluding that the combination of general language and unilateral interpretation precludes any means of legal enforcement otherwise provided by the provision).
144. See infra at notes 171-178 and accompanying text for a discussion noting that the European Union did not institute a WTO panel.
145. See Rosella Brevetti et al., U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, 14 INT’L TRADE REP. (BNA) 351 (Feb. 26, 1997). When the European Union established a dispute panel for Helms-Burton in early 1997, American officials indicated that they would prefer national security claims as justification for passing the law. See id. Undersecretary of Commerce for International Trade Stuart Eizenstat stated that the panel should not proceed because the law was a matter of American national security and foreign policy. See id. United States officials feared the prospect of a WTO panel “second-guessing” the national security interests of the United States. See id. Additionally, then United States Trade Representative-designate Charlene Barshefsky expressed concerns regarding the impact on the WTO’s reputation if it were to challenge a national security-motivated law: the United States must “prevent the WTO from undermining its own credibility by reaching a decision on a non-trade matter that purports to circumscribe our ability to adopt policies essential to our national security.” Id. The European-American Chamber of Commerce, however, warned that if the American position prevailed, it would set a broad precedent. See id.
Iran's and Libya's support of terrorism and pursuit of weapons of mass destruction "endanger[s] the national security and foreign policy interests of the United States." The statutory language resolves any question of ambiguity regarding intent. While few would argue that terrorism does not pose a threat to national security, there is a lack of consensus regarding ILSA's means of trying to stop terrorism. The American method punishes those foreign companies who invest in Iran and Libya and the ensuing dropoff in investment will decrease the countries' streams of revenue and their abilities to support terrorism. ILSA imposes sanctions on foreign companies, but those entities do not constitute the national security threat. Nevertheless, this indirect causal relationship probably could withstand scrutiny, given the flexible nature of the national security exception discussed above.

3. American Implementation of GATT and WTO Obligations

Despite its unrivaled political and economic might, the United States was a primary proponent of the establishment of the WTO. In fact, American negotiators pushed the idea of "fast track" ratification, whereby countries—perhaps most importantly, the United States Congress—are compelled to accept or reject the agreement without any amendment. The United States felt it was vital to be at the forefront of the creation of the WTO to ensure that the American imprint would be deep. The United States, however, was by no
means willing to give up any power or sovereignty for the success of the WTO.\textsuperscript{152} As such, §102(a) of the WTO implementing legislation states that “[n]o provision of any of the Uruguay Round agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”\textsuperscript{153} There are no indications that restriction is not meant to be prospective as well as reflective.\textsuperscript{154} It is therefore legitimate, in terms of domestic law, to pass an act that is potentially inconsistent with GATT.

\textsuperscript{152} See The Uruguay Round Agreements Act Statement of Administrative Action, Agreement Establishing the World Trade Organization, H.R. REP. NO. 103-316, at 656, 659 (1994) (stating that the United States must agree to any changes in its substantive rights and obligations).


\textsuperscript{154} See Uruguay Round Agreements Act, supra note 153.
4. The WTO Dispute Settlement Mechanism

The dispute settlement mechanism in the WTO will not necessarily serve to restrict United States policy either. Under the previous GATT structure, a contracting party could prevent the establishment of a panel to resolve disputes, thereby protecting its prerogative to follow its own policy. Under the new WTO rules, however, a member cannot "block" the establishment of a dispute settlement panel or the adoption of a panel report. Practically speaking, though, this new development does not pose a threat to any member's laws. If a panel were to make a finding contrary to the United States, for example, the decision is not self-executing—it does not automatically become part of American law. The losing party can choose to bring the offending law into compliance with its obligations under the WTO. Alternatively, other WTO members can choose to ask for compensation or retaliate against the offending party if it does not cease its offensive behavior. Regardless of its obligations in the WTO, the United States ultimately controls its own destiny.

5. The United States Is Not Violating Its Free Trade Obligations

American trading partners found themselves outraged by conduct

155. See SWACKER ET AL., supra note 150, at 153; see also Jackson, supra note 130, at 158 (analyzing the WTO's dispute settlement mechanism after its first eighteen months in existence).
156. See Jackson, supra note 130, at 158. A panel will be established automatically if a member requests it. In addition, a panel report will be adopted unless there is a consensus against it. See id.
157. See Schott, supra note 130, at 6; see also John H. Jackson, The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations, 91 AM. J. INT'L L. 60, 63-64 (1997) (arguing that although a panel report may not be binding in the United States in a "statute like" sense, it is binding in the "traditional international law sense" and thus should significantly affect domestic U.S. jurisprudence).
158. See Schott, supra note 130, at 6. Authors disagree as to whether compliance is really "voluntary." Compare Judith Hippler Bello, The WTO Dispute Settlement Understanding: Less is More, 90 AM. J. INT'L L. 416, 417 (1996) (arguing that the WTO relies on voluntary compliance); with Jackson, supra note 157, at 60-61 (responding to and disagreeing with Bello's conclusion). Jackson argues that an adopted report establishes an international law obligation upon the losing party nation to change its law to conform to WTO rules. See Jackson, supra note 157, at 60-61.
that seemingly ran counter to universally accepted principles of free trade. Moreover, ILSA puzzles other countries because it incorporates a position contrary to what has been the American position with regard to trade and investment in the Third World. Furthermore, opponents of United States trade policy in general view ILSA and Helms-Burton as evidence that the United States is negotiating in bad faith.

Despite those charges, ILSA does not violate the United States’ free trade obligations. That does not mean, however, that the European Union does not have a basis for a challenge; in the WTO framework, such “violations” are not necessary to request adjudication. In fact, a member state must only show that the conduct in question has nullified or impaired the benefits of one’s rights and obligations as a member of the WTO. Since the United States has

159. See Welch Statement, supra note 72, at 11 (noting that Canada, Europe, and Japan believe that sanctions unilaterally imposed by the United States will violate internationally recognized principles of free trade); see also Hillman Statement, supra note 80, at 17 (testifying that United States trading partners believe ILSA is inconsistent with the North American Free Trade Agreement (NAFTA) and the WTO Agreement). While testifying on behalf of the United States Trade Representative, Ambassador Hillman expressed some concern regarding the impact ILSA would have on the multilateral trading system. See id. She further testified, however, that “in cases where we have not been able to obtain sufficient multilateral action, but where our national security and economic interests are at risk, we need to look at alternatives.” Id. Therefore, a balance needs to be forged, weighing the various interests and impacts. See id.

160. See European Union May Not File WTO Case Against United States Over Cuba, Aide Says, 13 INT’L TRADE REP. (BNA) 560 (Apr. 3, 1996) (quoting the comments of Hugo Paemen, the European Union Ambassador to the United States, regarding Helms-Burton). His comments are applicable to ILSA as well: “It does indeed seem strange that a country which is pressing for strong international rules on the facilitation and protection of investments in third countries . . . at the same times removes legal certainty vis-a-vis its major trading partners who may have invested in the United States and in the ‘critical’ country concerned.” Id. Further, Paemen questioned the use of unilateral sanctions in the current trading system, noting that while such sanctions may be justified in times of large-scale war, they are not appropriate in the current global trade structure. See id.

161. See Schwenniger, supra note 112, at 23 (noting that support of dubious trade sanctions has undermined some essential U.S. trade actions). If the United States negotiates agreements with which it never intends to comply, it could be viewed as negotiating in bad faith.

162. See Schott, supra note 130, at 9. Specific violations are not necessary in terms of requesting a WTO panel.

163. See id.
not levied any sanctions to date, the European Union is unable to claim specific instances of concrete injuries or damages.\textsuperscript{164} The European Union could argue that ILSA has impaired its member states' rights because it decreases the incentives to invest in Iran and Libya.\textsuperscript{165} Although ILSA may have a negative impact on a WTO member by nullifying or impairing its benefits, it does not necessarily follow that the United States is violating its WTO obligations.\textsuperscript{166} A nullification or impairment does not equal a violation.\textsuperscript{167} Furthermore, a member state's obligations are waived if the measure is taken pursuant to a national security concern.\textsuperscript{168} If an obligation is waived, there is no violation. The United States may be violating the spirit of its obligations, but it is justified and permitted to do so by the very rules of the organization.

B. THE EUROPEANS REFUSE TO SUPPORT ILSA

America's trading partners voiced their opposition to ILSA prior to its enactment.\textsuperscript{169} Once President Clinton signed the legislation, the European Union announced that it had no intention of supporting the bill, and in fact took steps to see that no one under its aegis would follow the law.\textsuperscript{170} Subsequently, the European Union passed a regulation intended to block American sanctions legislation, specifically Helms-Burton and ILSA, enacted by the United States in 1996.\textsuperscript{171}

\begin{itemize}
\item [\textsuperscript{164}] See discussion \textit{infra} notes 118-24. The State Department has not issued sanctions against any foreign corporation for violating ILSA; therefore, quantifiable damages are impossible to calculate.
\item [\textsuperscript{165}] See ILSA, supra note 3, § 6 (outlining the sanctions that will be imposed on those companies that invest in Iran or Libya).
\item [\textsuperscript{166}] See id. Nonviolation nullification and impairment cases are rare. See id. A nonviolation nullification and impairment finding "does not require that a country modify its practices, since it did not violate WTO obligations, but the country should offer compensation." Id.
\item [\textsuperscript{167}] See id.
\item [\textsuperscript{168}] See supra notes 137-143 and accompanying text (discussing the national security exception).
\item [\textsuperscript{169}] See United States Legislation on Iran, Libya Would Violate WTO Rules, EU Says, supra note 122, at 219; see also United States Urges Congress to Rework Bill to Punish Foreign Firms in Iran, Libya, supra note 112, at 903 (describing the European Union's concerns regarding the proposal for ILSA).
\item [\textsuperscript{170}] See John R. Schmertz, Jr. & Mike Meier, Economic Sanctions, 3 INT'L L. UPDATE 1 (1997) (detailing the action taken by the European Union against ILSA).
\item [\textsuperscript{171}] See id. (quoting Article 4 of the European Union Council regulation). The
The regulation states that "[n]o judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect . . . to [Helms-Burton and ILSA] . . . shall be recognized or be enforceable in any manner." 172 The European Union also instituted a dispute resolution tribunal within the WTO to hear complaints regarding Helms-Burton. 173 No such panel was set up for ILSA. 174 In April 1997, however, the United States and the European Union achieved a settlement suspending the WTO panel for six months to allow for negotiations. 175 Although not the primary focus of the settlement, the agreement did implicate ILSA. 176 The Memorandum of Understanding stated that any action on the part of the United States taken against a European company or individual for a violation of ILSA could destroy the compromise. 177 The Clinton regulation also provided that a European Union person or entity damaged by the American statutes can recover through litigation. See id. (describing Article 6).

172. Id.


174. See id.

175. See United States and European Union Reach 11th Hour Agreement to Avoid WTO Hearing on Validity of the HBA, BOYCOTT L. BULL., Apr. 14, 1997, at 1. In exchange for suspending the WTO panel, President Clinton promised to urge Congress to amend Helms-Burton to allow the President to permanently waive the provision prohibiting executives of companies that invest in or own confiscated property in Cuba from entering the United States. See United States, European Union Approve Plan to Resolve Dispute Over Helms-Burton, Officials Say, 14 INT'L TRADE REP. (BNA) 686 (Apr. 16, 1997). Despite the temporary agreement, Stuart Eizenstat, Undersecretary of Commerce for International Trade, said that the United States would still enforce the law. See id.

176. See Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, 36 I.L.M. 529 (1997) [hereinafter Memorandum of Understanding] (setting forth the agreement between the European Union and the United States to: (1) suspend the WTO panel regarding Helms-Burton in return for the suspension of enforcement of Title III of the law and the President's promise to seek the authority to grant waivers of enforcement of Title IV; and (2) work toward granting waivers under ILSA for European Union member states investing in Iran and Libya).

177. See id. (stating that "[t]he EU reserves all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or individuals under Title III or Title IV of the Libertad Act or if the waivers under ILSA referred to above are not granted or are withdrawn"); see also European Union Suspends Effort to Challenge in WTO Helms-Burton Legislation, 14 INT'L TRADE REP. (BNA) 742 (Apr. 23, 1997) (noting that further action taken against European
Administration, however, did not promise that it would extend waivers to European Union member states regarding the application of ILSA, although it did indicate that it would consider doing so. After the six-month hiatus, the United States and European Union resumed settlement negotiations regarding Helms-Burton and ILSA, but did not come to any definitive resolution.

While the United States has endeavored to pursue a policy of economic coercion against Iran and Libya, the European Union has preferred the "critical dialogue" approach. The European Union policy, which seeks to dissuade Iran from its rogue activities through discussion and continued trade deals, repudiates the American tactic of economic pressure and isolation. This approach, however, was

178. See Memorandum of Understanding, supra note 176; see also United States Launches New Effort to Convince European Union to Tighten Sanctions Against Iran, 14 INT'L TRADE REP. (BNA) 749 (Apr. 23, 1997) (stating that the agreement provides no assurances to the European Union that any waivers would be extended); see also United States, European Union Approve Plan to Resolve Dispute Over Helms-Burton, Officials Say, supra note 175, at 686 (finding that an agreement on definite commitments will require consultations with Congress, in addition to the efforts made by negotiations);

179. See U.S.-EU Helms-Burton Dispute Resolution Unlikely Before December, Official Says, 14 INT'L TRADE REP. (BNA) 1834 (Oct. 22, 1997) (reporting that negotiators did not create a new deadline even though the two sides did not settle the issue).


181. See European Union's Decision to End its "Critical Dialogue" with Iran Cuts No Ice in Halls of Congress, BOYCOTT L. BULL., May 12, 1997, at 3 (stating that the United States does not believe that constructive engagement will work with Iran completely and that the only way to force Iran to change its policies is to isolate Iran from the world community); see also Iran and Proliferation: Hearings on Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations, 105th Cong., (1997) available in LEXIS, Legis Library, Cngtst File (statement of Senator Alphonse D'Amato) [hereinafter D'Amato Statement] (commenting that despite its criticism of the American efforts, Europeans could not offer any evidence that its dialogue with Iran has lessened terrorism);
Irreparably damaged, if not destroyed, in April 1997 when a German court ruled that high-ranking Iranian officials were involved in the assassination of Kurdish political opposition leaders. As a result, the European Union declared that it could no longer continue the critical dialogue with Iran if it "disrespected international norms and engaged in terrorist activities." Although the United States sought to take advantage of the Europeans' potential change of heart, the European Union refused to adopt economic sanctions against Iran. In light of the European Union's recent criticism of the United States and the latter's blatant attempts to force its own policies on other nations, the European Union declined to change its approach and follow the American lead.

III. ILSA IS INEFFECTIVE

A. FOREIGN COMPANIES ARE STILL INVESTING IN IRAN AND LIBYA

Although less than two years has passed since ILSA's approval,
preliminary results indicate that the law is not working. The law seeks to alter Iran’s and Libya’s conduct by choking off their revenue streams, but the nations’ behavior has not changed, at least not to the extent hoped for by the law’s sponsors. In fact, many countries are blatantly ignoring the American law and several companies have finalized deals with Iran. The most glaring example of this defiance is the $2 billion partnership to develop Iran’s South Pars offshore natural gas field announced in September 1997. The partnership includes Total, S.A., a French oil company, Petronas, the Malaysian state oil venture and Gazprom, a large Russian oil company.

187. See generally Amuzegar, supra note 181 (discussing the reasons for the general ineffectiveness of the American scheme of sanctions and concluding that while economic pressure has hurt the Iranian economy, it has not produced the anticipated results nor transformed the Islamic regime). But see D’Amato Statement, supra note 181 (testifying that ILSA is effective: “Even a senior member of the Iranian Parliament was quoted in January as saying the sanctions are working. There is little or no foreign investment in the Iranian petroleum industry.”); State Dept. Is Focusing on Eleven Iranian Oil and Gas Developments Under ILSA, BOYCOTT L. BULL., Feb. 24, 1997, at 3 (quoting Sen. D’Amato’s conclusion that ILSA is effective since Royal Dutch Shell announced it would not proceed with an Iranian project for fear of American repercussions).

188. See id.

189. See id. at 36 (finding that many countries ignored the United States’ request for trade sanctions).


191. See Fleming & Bahree, supra note 190, at A16 (noting that each company’s government supports the deal). The inclusion of Gazprom in the venture particularly upsets ILSA’s congressional proponents. See Iran Libya Sanctions Act: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 105th Cong. (1997) available in LEXIS, Legis Library, Cngtst File (statement of Senator Sam Brownback) [hereinafter Brownback Statement]. In order to finance its participation in the deal, Gazprom (which is partly owned by the Russian government) planned a bond offering that Goldman Sachs, a Wall Street investment bank, would underwrite. See Steven Erlanger, Russian Partner in Iran Deal Postpones Its Bond Offering, N.Y. TIMES, November 12, 1997, at A10. The Russian company, however, delayed its offering due to apparent pressure from the United States government. See id. In addition, back in 1994, the Export-Import Bank agreed to provide up to $750 million in loan guarantees to Gazprom for Russian oil and gas projects. See Brownback Statement, supra; see also Iran Libya Sanctions Act: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 105th Cong. (1997) available in LEXIS, Legis Library, Cngtst File (statement of
ther, Turkey, a key NATO ally in the Middle East, signed two deals with Iran, including a $20 billion, twenty-three year gas supply deal that was finalized soon after the United States implemented ILSA.\(^\text{192}\)

While foreign companies are openly pursuing deals, the State Department’s ILSA enforcement unit is not hunting down those violators.\(^\text{193}\) Rather, it appears to be on the lookout for problematic projects and evaluating them for terms that violate ILSA.\(^\text{194}\) In that regard, the State Department hopes to avert a scenario wherein it is forced to levy sanctions.\(^\text{195}\) Most recently, the Clinton Administration

---

See Jareer Elass, *Sanctions Office Faces Complex Task as Myanmar Joins Targeted Nations*, OIL DAILY, May 22, 1997, at 3; see also 12 Foreign Firms, *supra* note 86, at 2 (reporting that although the projects appear to be violations of ILSA, the State Department has not pursued the investors, using the rationalization that “a project on its face may appear to be an obvious violation [of ILSA], but we want to be sure that ILSA is applied correctly”).

See Elass, *supra* note 192, at 3 (noting that the State Department seems to be seeking out potentially violative projects before the deals are consummated so that it will not have to take the next step of imposing sanctions). At least eleven projects received attention from the State Department: the South Pars Gasfield Development; AMAK Gas Processing Facility; Daroud Oilfield Expansion Project; Salman Field Khuff Gas Reservoir; Bandar Abbas Condensate Refinery; Shrazi Refinery Expansion; the NGL-1200 Facility; the NGL-1300 Facility; Lavan Island LPG Facility; Balal Oilfield Development Project; and Soroush Oilfield Development Project. See also State Dept. Is Focusing on Eleven Iranian Oil and Gas Developments Under ILSA, *supra* note 187, at 3.

See 12 Foreign Firms, *supra* note 86, at 2. The State Department’s ILSA Unit consults with foreign governments and contacts international firms to inform them about the risks of investment deals that could trigger sanctions. See *The Iran and Libya Sanctions Act After One Year: Hearing Before the House Comm. on Int’l Relations*, 105th Cong. (1997) (statement of Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs) (testifying on the implementation and enforcement of ILSA).

See 12 Foreign Firms, *supra* note 86, at 1. Some European officials have reported that American policymakers have indicated to them that the State Department is looking for excuses to extend waivers to the foreign companies that have initiated deals with Iran. See Steven Erlanger, *Standoff with Iraq: the Strat-
tacitly approved a $1.6 billion Turkmenistan-to-Turkey natural gas pipeline project. An official stated that the Administration does not endorse the project but offered that the pipeline "technically" does not violate ILSA. The postponement of Gazprom's Wall Street bond offering is the one tangible "success" the United States can claim. The State Department's lack of enthusiasm for enforcement thus heightens the level of ineffectiveness. That should not, however, overshadow the fact that the United States is not sanctioning violators of ILSA.

Since companies continue to do business in Iran and Libya, it appears that ILSA has not devastated either country's economy. Iran has not acquiesced under the weight of the United States' primary or secondary boycotts. Iran's pre-revolutionary Minister of Finance, Jahangir Amuzegar, argues that even under sanctions, Iran's economy is healthier and more stable than some economies to whom the United States does provide assistance. That is not to say that the Iranian economy has not suffered, but Iran still meets its quota set

---

196. See Dan Morgan & David B. Ottaway, U.S. Won't Bar Pipeline Across Iran, WASH. POST, July 27, 1997, at A1 (reporting that the Clinton Administration chose not to oppose a natural gas pipeline, marking the "first significant easing of the economic isolation of the Tehran regime").

197. See id.

198. See Erlanger, supra note 191, at A10 (reporting that Gazprom may have postponed the bond offering due to pressure from the Clinton Administration).

199. See generally Amuzegar, supra note 181 (concluding the sanctions have not brought about the intended results, although admitting that there is not enough hard data for a complete analysis). See also Zbigniew Brzezinski et al., Differentiated Containment, FOREIGN AFF., May/June 1997, at 20 [hereinafter Differentiated Containment] (criticizing the United States' current "dual containment" policy toward Iran and Iraq). The authors, three foreign policy experts, one from each of the previous three Administrations, criticize the policy of isolating Iran as a "crude and counterproductive attempt to cordon off an entire country." Id. at 20-21. Furthermore, it is forcing the Persian Gulf nations into closer relations with Russia and is driving wedges between the United States and its Group of Seven allies. See id. The authors conclude that the sanctions have been ineffectual and "the attempt to coerce others into following America's lead has been a mistake." See id. at 28. Instead, the former advisors advocate a "nuanced" containment that would include diplomatic contacts and flexibility in relations. See id. at 29-30.

200. See Amuzegar, supra note 181, at 31.

201. See id. at 32 (listing various "difficulties" in the Iranian economy, such as
by OPEC, and daily crude production, oil export receipts, and net foreign assets were higher in 1996-97 than they were in 1993-94. Moreover, although he concedes American pressure has had an impact on Iran, Richard Murphy, an Assistant Secretary of State in the Reagan Administration, asserts that Iran’s problems are due, in large part, to its own corruption and mismanagement.

The picture of post-ILSA Libya is not as clear. Statistics regarding possible difficulties in Libya are negligible, perhaps because multilateral sanctions have already existed against it for over five years. As a result, there is no direct before-and-after comparison with regard to ILSA. Nonetheless, the sparse data indicates that although both United States and United Nations sanctions slowed Libyan petroleum development, Libya still manages to meet its 1.39 million barrels per day quota set by OPEC. Furthermore, the Libyan econ-

---

202. See id. at 32 (demonstrating that sanctions, which were expected to significantly damage the Iranian economy, have had a surprisingly small effect); see also The Iran and Libya Sanctions Act of 1996: Results to Date: Hearings Before the House Comm. on Int’l Relations, 105th Cong. (1997) available in LEXIS, Legis Library, Cngtst File (statement of Jeffrey J. Schott, Senior Fellow, Institute for International Economics) (testifying that Iranian oil revenues grew at a rate of 3.5 to 4 percent in the last two years despite American sanctions).

203. See Richard W. Murphy, It’s Time to Reconsider the Shunning of Iran, WASH. POST, July 20, 1997, at Cl (arguing for a new dialogue with the newly-elected regime in Iran). The author suggests that the United States should propose talks at the level of deputy secretary or undersecretary of state, which “would put our exchanges on a new footing, granting the Islamic regime a legitimacy we have withheld until now.” Id. In advocating a dialogue with Iran, the United States, as the dominant power in the region, “can afford to add the legitimizing carrot of negotiation to the punitive stick of sanctions.” Id.

204. See supra notes 55-68 and accompanying text (discussing the United Nations sanctions against Libya); see also The Iran and Libya Sanctions Act After One Year: Hearing Before the House Comm. on Int’l Relations, 105th Cong. (1997) available in LEXIS, Legis Library, Cngtst File (statement of C. David Welch, Acting Assistant Secretary for Near East Affairs) (testifying that it is too early to evaluate the impact of ILSA on “would-be violators of the U.N. sanctions in place against Libya”).

205. See The Iran and Libya Sanctions Act: One Year Later: Hearing Before the House Comm. on Int’l Relations, 105th Cong. (1997) available in LEXIS, Legis Library, Cngtst File (statement of Sarah Miller, Editor-in-Chief, Petroleum Intelligence Weekly) [hereinafter Miller Statement] (testifying that despite sanctions, Libya’s oil production capacity has been sustained by several ongoing projects, such as the development at the Murzuk field).
omy has long been open to foreign companies and, therefore, there is less need for new development and investment. Plus, the petroleum development contracts already existing at the time of ILSA’s enactment are not subject to sanctions. In reality, American policymakers appear to be less concerned with the conduct of Libya; the on-going debate regarding sanctions and ILSA centers on Iran.

**B. UNITED STATES POLICY IS INCONSISTENT**

The lack of consistency in United States foreign policy throughout the region leaves its trading partners with little to guide their own policies. This erratic behavior damages America’s credibility and is in some ways responsible for the United States allies’ lack of support. Former Secretary of State Henry Kissinger attributes the absence of consensus regarding sanctions against Iran and Libya to the perception that the Clinton Administration is acting as if it is embarrassed by ILSA. Kissinger argues further that the Europeans may question the seriousness of the policy and “fear being left in the lurch” if a crisis develops. As a result, this current round of sanc-

---

206. See Welch Statement, supra note 72. In contrast, the Iranian economy has been closed off to Westerners. See id. Miller testified that only two companies have announced new deals in Libya, but added that these investments would probably not reach the threshold amount for sanctions for some years. See Miller Statement, supra note 205. Another reason for the lack of statistics is the fact that Libya never really was the focus of the various generations of the legislation. See discussion supra note 78.

207. See ILSA, supra note 3, § 13(a); see also H.R. REP. No. 104-523(II), supra note 71, at 20.

208. See Amuzegar, supra note 181, at 36-37 (arguing that United States sanctions have been “selective and arbitrary in their targets, and the United States has frequently breached the policy when it suited its interests”). For example, Syria is on the list of “terrorist states” along with Iran, but high-ranking United States officials engage in negotiations with Syria. See id. Further, North Korea is pursuing weapons of mass destruction in a manner similar to Iran, but North Korea is allowed to develop peaceful uses of nuclear energy, whereas Iran is not. See id. Moreover, the United States vehemently opposed the Arab League’s boycott of Israel and now it has instituted a boycott of its own that is oft compared with that of the Arabs. See id.

209. See Henry Kissinger, The Oil Deal With Iran, N.Y. TIMES, Nov. 10, 1997, at A20 (arguing that the United States should replace the sanctions with diplomatic engagement).

210. Id. (conjecturing that American allies may perceive ILSA as an election-year response to domestic pressures rather than a well-reasoned policy).
tions has isolated Washington more so than Tehran.\(^\text{211}\) Other nations feel uncomfortable making commitments at the request of the United States when the United States may change its mind soon thereafter.\(^\text{212}\) This is especially the case since although the United States has called upon the world to isolate and punish Iran, Americans have continued to deal with the Iranians.\(^\text{213}\) This double dealing is nothing new, however. The most glaring evidence of this "opportunism" is the secret arms deal behind the Reagan Administration's Iran-Contra affair.\(^\text{214}\) In addition, despite the ban on Iranian oil imports imposed in the 1980s, American oil companies accounted for one-third of Iran's oil exports and the United States had become Iran's fourth-largest trading partner.\(^\text{215}\) More recently, in another clandestine operation, President Clinton allowed Iran to send munitions to Bosnia.\(^\text{216}\)

C. MULTILATERAL SANCTIONS ARE MORE EFFECTIVE

Sanctions are most likely to be successful when they are "universal and comprehensive, consistent, and credible."\(^\text{217}\) According to a study by the Institute for International Economics, unilateral American sanctions have been successful only in thirteen percent of the cases in which they have been imposed since 1970.\(^\text{218}\) On the other

---

\(^\text{211}\) See Amuzegar, supra note 181, at 31 (noting that under sanctions, the Iranian military appears stronger and more stable than it did in 1989); see also Differentiated Containment, supra note 199, at 24 (stating that United States' sanctions have somewhat damaged the Iranian economy, but have failed to result in "major achievements and increasingly isolate America rather than their target"); Erlanger, supra note 195, at A10 (quoting a senior European diplomat's conclusion that the United States should revamp its Iran policy because the United States is "isolating itself more successfully than it is isolating Iran").

\(^\text{212}\) See Kissinger, supra note 209, at A20 (discussing the lack of support from other nations).

\(^\text{213}\) See Vahe Petrossian, United States Escalates War of Words Against Iran, MIDDLE EAST ECON. DIG., Aug. 30, 1996, at 2 (noting that despite a ban on Iranian oil imports, United States oil companies handled one third of Iran's oil exports in 1993 and 1994).

\(^\text{214}\) See Amuzegar, supra note 181, at 37 (noting several of the United States' repeated departures from stated principles).

\(^\text{215}\) See id.

\(^\text{216}\) See id. (describing the arms shipments to Bosnia as another flagrant example of the United States' inconsistency).

\(^\text{217}\) Id. at 35. The author notes that the United States containment policy has been unsuccessful because none of the conditions were met. See id.

\(^\text{218}\) See The Use and Effect of Unilateral Trade Sanctions: Hearing Before
hand, there are current examples of where multilateral sanctions have pressured regimes into changing their conduct; for instance, sanctions played a significant role in the end of apartheid in South Africa and the cessation of hostilities in the former Yugoslavia.\(^{219}\) The nature of the prohibited activity in ILSA—the investment practices of foreign corporations—makes the law very difficult to enforce alone. So if the United States does not garner the cooperation of its trading partners willing to impose sanctions, the intended punishing impact of ILSA will be muted. When the United States is the only party instituting sanctions, it simply forces the targeted country to turn its marketing strategies elsewhere.\(^{220}\) Furthermore, it is critical that those who fashion American foreign policy recognize that unilateral sanctions affect parties other than the country whose conduct is objectionable and only produces ill will and friction if a majority of countries do not support the sanctions.\(^{221}\)

\(^{219}\) Subcomm. on Trade of the House Comm. on Ways and Means, 105th Cong. (1997), available in LEXIS, Legis Library, Cngtst File (statement of Kimberly Ann Elliott, Research Fellow, Institute for International Economics) (describing the declining utility of unilateral sanctions as a tool of foreign policy). Sanctions are most likely to work when: the goal is relatively modest; the target country is smaller than the sanctioner; the sanctioner and target are friendly and conduct substantial trade; the sanctions are imposed quickly and decisively; and the sanctioner avoids high costs to itself. See id.


\(^{221}\) See Amuzegar, supra note 181, at 36 (noting that American allies, including Kuwait, Turkey, and the United Arab Emirates have expanded their commercial links with Iran); see also Little Impact Over Long Term, supra note 29, at 1739 (arguing that Iran has found "alternative suppliers" to take the place of American companies); Hamilton Statement, supra note 219 (reasoning that unilateral sanctions rarely work because the world economy is too interdependent).

\(^{221}\) See Differentiated Containment, supra note 199, at 28 (stating that only multilateral policies toward Iran have the potential for success and sustainment); see also Elaine Sciolino, Calling Iran ‘Outlaw State’ Christopher Defends US Trade Ban, N.Y. Times, May 2, 1995, at A6 (concluding that "[t]he United States is so isolated in its anti-Iran campaign that it will not seek a United Nations reso-
D. OPTIONS FOR UNITED STATES POLICY

The tacit approval of the Turkmenistan pipeline project highlights the problems inherent in ILSA. Senator D’Amato and his colleagues designed the law to frighten foreign companies away from doing business in Iran and Libya. Faced with the choice of trading with the United States, the world’s economic superpower, or with Iran or Libya, two Third World economies, Congress thought the choice would be clear.222 As it turns out, though, some foreign corporations are choosing the opposite conclusion. The element Congress did not foresee, perhaps, is the Clinton Administration’s lack of enforcement. Thus, ILSA exists as a law vilified by the United States’ trading partners, but lacking the support of the Administration whose duty it is to execute it. Such an indifferent attitude does not eradicate criticisms of inconsistency and capriciousness in American foreign policy and certainly does not convince allies to expand unilateral American sanctions into multilateral ones.

The United States, therefore, should choose one of three courses of action. First, the State Department could take a harder position vis-a-vis enforcement of ILSA. There are projects in existence that appear to violate ILSA, but the State Department has not moved from the investigation process to the imposition of sanctions. Judging by the European Union’s aversion to ILSA and the terms of the Memorandum of Understanding,223 heightened enforcement would prompt a WTO dispute settlement panel. As discussed above, an adverse decision would not alter ILSA, but could approve retaliatory measures or call for compensation.224 If strictly enforced, ILSA may preclude any easing of the tense relations with Iran, an option that might be a viable one in light of the recent election which installed a relatively moderate president.225 Despite these drawbacks, the executive branch

222. See D’Amato Statement, supra note 181 (testifying that those countries who trade or invest in Iran and Libya are “deal[ing] with the devil”).

223. See Memorandum of Understanding, supra note 176 (discussing the terms of a compromise between the United States and the European Union regarding Helms-Burton and ILSA).

224. See supra notes 157-158 and accompanying text (detailing the consequences of a WTO panel report).

would fulfill its duty to enforce the nation’s laws. Furthermore, strict and consistent enforcement would give the United States’ trading partners a clearer indication of American policy.

Second, the situation can remain as it currently exists. ILSA, with its strong message and consequences, is weakened by the Clinton Administration’s lax enforcement. The dichotomy between words and actions leaves allies and trading partners with no real guiding influence, making it unlikely that allies will enact their own sanctions against Iran and Libya or that foreign companies will be scared off from investment and development deals. This bifurcation is not unique to relations with Iran and Libya and many of the criticisms in this particular circumstance are applicable to American foreign policy in general. Maintaining the status quo does nothing to quiet those criticisms.

Third, Congress can repeal the law. It does not make sense to keep a law on the books that is blatantly contrary to current policy. If the present strategy of isolation proves ineffective, the United States should repeal the law for the sake of appearances. If the United States were to initiate formal contact and develop some sort of engagement with Iran and Libya, forbidding others’ contact with the two regimes would be contradictory and illogical. Furthermore, if Congress repeals ILSA and the United States decides to pursue a new policy, American policymakers and negotiators will not be constrained by a law that the Administration will not enforce.

CONCLUSION

The passage of ILSA accomplished the domestic political goals of American policymakers. Congress and President Clinton took steps to quell the American people’s fears about terrorism. Internationally, however, the sanctions against foreign companies only invoked the wrath of American trading partners—imposing one’s foreign policy on others never wins friends. The European Union resented the American ultimatum to choose between trading with the United States or with Iran and Libya. Despite the European Union’s protests, the United States’ obligations pursuant to its membership in the WTO do not prohibit the sanctions legislation. The obligations will fail to do so as long as the exceptions to GATT and the WTO Agreement dilute them. With the lack of support from the interna-
tional community, and the Clinton Administration's lack of enforcement, the American sanctions will not succeed to the degree that ILSA's sponsors envisioned. Preliminary indications already point to that result. The United States should either heighten its enforcement activity or repeal the law. Either of those options would be controversial, but implementing one of them would demonstrate decisive action. Otherwise, if nothing is done, claims of chronic inconsistency in American policy in the region will have a legitimate basis.