NATIONAL SECURITY AND INTERNATIONAL TRADE LAW: WHAT THE GATT SAYS, AND WHAT THE UNITED STATES DOES

RAJ BHALA*

1. INTRODUCTION

State-sponsored terrorists and rogue dictators are the "bad guys" which are the leading threats to the United States' national security and have replaced the old Soviet Union and a China that is no longer "Red." Conceptually, fighting the new "bad guys" is not as easy as fighting the old threats: "nuking" the Soviet Union or China always remained an option. However, the once useful military force was not designed to deal with the unconventional threats now posed by drug dealers and terrorists. Force is often an inappropriate way to contain or crush some dictators. Accordingly, the United States is increasingly inclined to turn to a new weapon, international trade measures, and to use this weapon unilaterally, regardless of opposition from its allies and trading partners. For example, to fight the reputed godfathers of international terrosism, Iran's mullahs and Libya's Muammar Qaddafi, the United States enacted the Iran and Libya Sanctions Act in 1996 ("ILSA").[1]

---

* Professor of Law, The George Washington University School of Law, Washington, D.C. A.B. (Economics, Sociology), Duke; M. Sc. (Economics), London School of Economics; M. Sc. (Industrial Relations), Oxford; J.D., Harvard Law School. Professor Bhala is the author of International Trade Law: Cases and Materials (Michis 1996) and the co-author of World Trade Law (Michie/Lexis Law Publishing 1998), along with Professor Kevin Kennedy, Michigan State University (Detriot College of Law).

I am grateful to the participants at the November 1997 American Society of International Law, Economic International Law Group meeting for their helpful comments on my presentation of an earlier draft of this Article. Portions of this work were originally published in 31 U.C. Davis L. Rev. 1 (1997).

[1] Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (to be codified at 50 U.S.C. § 1701 note). The Department of State has published guidelines on the implementation of the ILSA at 61 Fed. Reg. 66,067 (1996).

The new threats to the United States' national security, and the highly controversial legislation the United States has enacted to preserve national security, raise a fundamental problem for international trade lawyers, who may be inclined to view the boundaries of their field as narrow. These boundaries encompass tariffs, non-tariff barriers, trade remedies such as antidumping, countervailing duty, and escape clause actions. The expansion of international trade has begun to encompass labor and environmental issues. What about national security? Many international trade attorneys have asked themselves what is the relationship between national security and international trade law.

Initially, there may appear to be no relationship between national security and international trade law. "National security" often conjures up images of the military, intelligence operations, and a shadowy world of cloak-and-dagger espionage. On the other hand, "international trade law" triggers thoughts of a highly technical, somewhat arcane set of rules involving an ever-increasing number of economic sectors which are derived from an international bureaucracy in Geneva, the World Trade Organization ("WTO").[2] Our senior policy makers embody these stereo-

---

To be sure, there are other important national security sanctions statutes in effect. Moreover, there are a number of additional recently-enacted controversial sanctions statues. For example, to fight Fidel Castro, in 1996 the United States enacted the Helms-Burton Act (formally known as the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996"). *See* Pub. L. No. 104-114, 110 Stat. 785, (codified at amended at 22 U.S.C. §§ 6021-91). Guidelines and implementing regulations for the Helms-Burton Act have been published. *See Cuban Assets Control Regulations; Indirect Financing in Cuba, Civil Penalties*, 61 Fed. Reg. 37,385 (1996); *Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act*, 61 Fed. Reg. 30,655 (1996); *Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 61 Fed. Reg. 24,955 (1996).

For a fascinating consideration of the Helms-Burton Act in relation to the major tenets of liberal international relations theory (namely, promoting economic interdependence, international law, international institutions, and democracy), see David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory*, 4 IND. GLOBAL L. STUD. J. 297 (1977). For another example of America's use of the trade sanctions weapon for national security purposes, in this case to fight foreign drug kingpins, see the 1986 Narcotics Control Trade Act, Pub. L. No. 99-570 § 9001, 100 Stat. 3207-164 (1986) (codified as amended at 19 U.S.C. §§ 2491-95). For a detailed discussion of the complex statutory scheme, see RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW ch. 12 (1998).

[2] *See generally* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS (1996) (providing comprehensive treatment of international trade law).

types about national security and international trade law. Few, if any, Presidential national security advisors have had much experience with, knowledge of, or even interest in the world trading system and international trade law. We do not imagine U.S national security advisors, such as Henry Kissinger or Zbigniew Brzezinski, as operating in the same arena as our phenomenal international trade negotiators, such as Carla Hills or Mickey Kantor.

In fact, however, national security and international trade law are closely linked, and this link has existed ever since the birth of modern international trade law in 1947. The link between these two arenas is contained in the General Agreement on Tariffs and Trade ("GATT"). Article XXI of GATT establishes a broad framework for imposing international trade measures for national security purposes. Since GATT was enacted in 1947, countries have occasionally implemented trade sanctions, sometimes invoking Article XXI as a justification for such action. During the Reagan, Bush, and Clinton Administrations, the United States has relied on Article XXI to support the unilateral enactment of highly controversial sanctions legislation. The rationale behind such legislation is "national security," but virtually all of our trading partners have balked at this rationale.

This Article assesses GATT Article XXI and the ILSA. It also assesses the extent to which sanctions statutes such as the ILSA actually operate. Section 2 of the Article examines the use of trade sanctions for the purposes of national security under GATT. Furthermore, Section 2 highlights the constraints, or lack thereof, Article XXI places on a WTO Member regarding national security sanctions legislation. Section 3 examines U.S. trade legislation with regard to the preservation of national security. This Section examines the operation of the ILSA and attempts to determine whether the criticisms of the ILSA by our trading partners are justified. Section 4 assesses the effectiveness of U.S. sanctions legislation by examining empirical evidence on the practical effect of national security sanctions. Finally, Section 5 provides a summary of the main points of the Article.

Three themes emerge from this Article. First, GATT Article XXI is a rather weak restraint on the behavior of WTO Members with respect to the enactment of national security sanctions. Second, while some of the criticisms of the ILSA are legitimate, there also are meritorious, or at least defensible, aspects to the ILSA that have not received sufficient attention. Accordingly, neither critics nor supporters of the ILSA are entirely accurate. Finally, the weight of empirical evidence suggests that national security sanctions, whatever their merits, are ineffectual at best, and counterproductive at worst. Thus, in the end, a pragmatic rather than ideological approach to linking national security and international trade law may be prudent.

2. WHAT THE GATT SAYS: AN ASSESSMENT OF ARTICLE XXI

The exception to GATT obligations for national security reasons is set forth in Article XXI of GATT. This exception, while rarely invoked explicitly, is highly significant and allows the Untied States to maintain an arsenal of national security statutes which allow for unilateral trade action. Without Article XXI, inevitable clashes would occur between unilateral measures adopted under these statutes, and GATT obligations, such as most-favored nation treatment,[3] tariff bindings,[4] national treatment,[5] and quantitative restrictions.[6] These clashes could not be managed by Article XXXV(1)(b) of GATT, which allows for non-application of the GATT, and thereby allows the imposition of economic measures such as bans or boycotts.[7] To escape application of the GATT under Article XXXV(1)(b), a ban or boycott must be invoked by a non-Member against a Member at the time the non-Member joins the WTO, or by a Member against a non-Member at the time the non-Member joins the WTO. Nor could these clashes be managed by GATT Article XXV(5), which explains how to obtain a waiver of GATT obligations in "exceptional circumstances not elsewhere provided for in" GATT.[8] To obtain a waiver, Article XXV(5) requires a two-thirds majority vote involving more than half of the WTO Members.[9] There is no ex-

---

[3] *See* General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S 1700, 55 U.N.T.S. 194, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS—DOCUMENTS SUPPLEMENT 59 (1996) [hereinafter GATT].

[4] *See* GATT art. II.

[5] *See id.* art. III.

[6] *See id.* art. IV.

[7] *See id.* art. XXXV.

[8] *See id.* art. XXV(5).

[9] *Id.*

ception to this requirement for unilaterally-imposed national security measures. In sum, Article XXI provides the indispensable textual basis in GATT for unilateral national security measures. Article XXI states that:

> *[n]othing* in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which *it* considers *contrary to its essential security interests*; or (b) to prevent any contracting party from taking any action which *it* considers *necessary* for the *protection* of its *essential security interests* (i) *relating to fissionable materials* or the materials from which they are derived; (ii) *relating to* the *traffic in arms, ammunition and implements of war* and to such *traffic in other goods and materials* as is carried on directly or indirectly *for the purpose of supplying a military establishment*; (iii) taken in time of war or other *emergency in international relations*; or to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[10]

A careful reading of Article XXI, particularly the italicized terms, coupled with a consideration of the small body of GATT jurisprudence on the Article, reveals four key points. First, it is an all-embracing exception. Second, Article XXI(b) is the most important and controversial portion of this exception. Third, in contrast, there are some provisions of Article XXI, such as sections (a), (c), and possibly (b)(I), which are not, or at least ought not to be, particularly controversial. Fourth, while a non-sanctioning and, in particular, a target member can challenge the invocation of Article XXI by a sanctioning member, this right has no practical importance. Each of these points is discussed below.

[10] *Id.* art. XXI (emphasis added). For a discussion of Article 86, see 1 WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 609-10 (6th ed. 1995) [hereinafter 1 WTO].

2.1. *A Comprehensive Assessment*

The first feature of GATT Article XXI evident from a careful reading of its language is that it is an all-embracing exception to GATT obligations. This point is evident from the first word of the Article, "[n]othing." Once a WTO Member relies on Article XXI to implement a measure against another Member, there is no GATT obligation to which the sanctioning member must adhere with respect to the target member. This point is further reinforced by a 1949 decision of the Contracting Parties in a case brought under Article XXIII of GATT by Czechoslovakia against the United States.[11] Czechoslovakia argued that the United States breached its obligations under Articles I and XIII by its administration of export licensing and short-supply controls.[12] These controls, instituted in 1948, discriminated among destination countries. The United States justified the controls under Article XXI(b)(ii), arguing they were necessary for "security reasons [and] applied to a narrow group of exports of goods which could be used for military purposes."[13] The Contracting Parties rejected the Czech claim by a vote of seventeen to one, with three abstentions.[14] In so doing, "the Chairman indicated that Article XXI 'embodied exceptions to the general rule contained in Article I.'"[15] While most of the other fundamental GATT obligations were not at issue in this case, it is not unreasonable to infer from the Chairman's statement that if the most-favored nation rule of Article I is excepted by Article XXI, the other obligations imposed by the GATT would also be excepted under Article XXI.

2.2. *Why Article XXI(b) is Important and Controversial*

By far the most important and controversial portion of GATT Article XXI is Article XXI(b). In this provision, the word "it" allows the WTO Member invoking sanction measures sole discretion to determine whether an action conforms to the requirements set forth in Article XXI(b). Thus, the implication of the word "it" indicates that no WTO Member nor group of Members, and no WTO panel or other adjudicatory body, has

---

[11] *See* 1 WTO, *supra* note 10, at 602, 606.

[12] *See id.*

[13] *Id.* at 602.

[14] *See id.*

[15] *Id.* at 606.

any right to determine whether a measure taken by a sanctioning member satisfies the requirements. This interpretation is evident, for example, in the confident statement of the representative from Ghana concerning Ghana's boycott of Portuguese goods when Portugal acceded to GATT in 1961: "each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests."[16]

Based on the interpretation of Article XXI(b) as meaning that each WTO Member decides for itself what its "essential security interests" are, four corollary principles may be developed. These corollaries placed Article XXI(b) among the GATT provisions that come closest to allowing a member to be a "cowboy."

First, a sanctioning member need not give any prior notice of impending national security sanctions, nor need it give notice upon or after the imposition of sanctions.[17] In contrast, the Reagan Administration informed the contracting parties of its May 1985 prohibition on imports of Nicaraguan goods and services, and its ban on exports to Nicaragua of all U.S. goods and services other than those destined for the organized democratic resistance.[18] Second, the sanctioning member need not justify its determination to the WTO or its Members. Third, the sanctioning member need not obtain the prior approval or subsequent ratification its measures from the WTO or its members. These three implications of Article XXI are manifested in a GATT Council discussion about trade restrictions imposed between April and June 1982 as a result of the Falklands Islands War.[19] The EEC representative stated that the exercise of Article XXI rights "required neither notification, justification nor approval [sic], a procedure confirmed by thirty-five years of implementation of the General Agreement."[20] The U.S. representative made the point in even bolder terms: "[t]he General Agreement left *to each contracting party* the judgment as to what *it* considered to be nec-

---

16 *Id.* at 600.

17 For example, Cuba, not the United States, informed the contracting parties of the trade embargo imposed on Cuba in February 1962 by the Kennedy Administration. Thereafter the Kennedy Administration invoked Article XXI as its justification. *See id.* at 605.

18 *See id.* at 603.

19 *See id.* at 600.

20 *Id.*

essary to protect its security interests. The [Contracting Parties] had *no power* to question that judgment."[21]

The fourth corollary principle concerns threatened versus actual dangers. A sanctioning member may determine its essential security interests. In the words of the Ghana representative at the 1961 debate discussing Ghana's boycott of Portuguese goods, there is a "threatened by a *potential* as well as an actual danger."[22] As discussed more fully below, nothing in Article XXI(b) requires that a sanctioning member face a danger that has manifested itself in a concrete sense, such as a physical invasion or armed attack, before imposing a national security measure.

Do these four corollaries, in fact, mean that Article XXI(b) is a license for a sanctioning member to behave like a "cowboy?" Although the four corollaries may appear to be such a license, there are, in fact, two checks that might restrain cowboy behavior. First, it is usually politically prudent for a sanctioning member to give prior notice to other WTO Members and to attempt to garner a critical mass of multilateral acquiescence, if not *de facto* support, before using Article XXI. Thus, on November 30, 1982, after discussing the Falklands Islands crisis, the Contracting Parties adopted a *Decision Concerning Article XXI of the General Agreement* setting forth two points about the invocation of Article XXI:

> 1. Subject to the exception in Article XXI:a [concerning the right to withhold sensitive information], contracting parties should be informed *to the fullest extent possible* of trade measures taken under Article XXI.
>
> 2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.[23]

The phrase "to the fullest extent possible" in the first paragraph does not indicate an obligation on the part of the sanctioning member to give notice to the WTO or its Members; rather the sanctioning member decides whether notice is "possible."

---

[21] *Id.* at 601 (emphasis added).

[22] *Id.* at 600 (emphasis added).

[23] *Id.* at 606 (emphasis added).

Moreover, there is no preference expressed as between *a priori* or *post hoc* notice. However, the first paragraph of the *Decision* reflects a consensus view that giving prior notice is not just a matter of courtesy and respect for trading partners, but also a way to reduce friction. Presenting the international community *fait accompli* with national security sanctions inevitably leads to quarrels among political allies, with countries that oppose the sanctions typically arguing that they share the same end as the sanctioning country, but disagree with sanctions as a means to achieving that end. These quarrels have exploded into major trade disputes since the United States used secondary boycotts, thereby penalizing third party countries (including allied) that trade with or invest in the target.[24] Although notice is not mandated by Article XXI nor the *Decision*, it could take on an increasingly important *de facto* role in reducing trade friction if the United States continues to use ever-more aggressive, innovative, but also extraterritorial, unilateral sanctions.

The second restraint on "cowboy behavior" is contained in the introductory chapeau to Article XXI(b). A sanctioning member is supposed to make sure that its measures are "necessary" for

[24] To be sure, the United States is not the first WTO Member to resort to the use of a secondary boycott. Countries in the Arab League have maintained a secondary boycott against firms that have relations with Israel. (The signatories to the Pact of the League of Arab States, entered into on March 22, 1945 at Cairo, are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine Liberation Organization, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen Arab Republic, and People's Democratic Republic of Yemen). *See* II FRANK W. SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS 586-87 (1996). Regarding the last two signatories, on May 22, 1990, Yemen became a single sovereign state known as the "Republic of Yemen," which is a member of the Arab League. The Arab League has maintained the boycott for many years, though some League members do not adhere to it. This boycott is discussed in the 1970 GATT Working Party Report on the Accession of the United Arab Republic. In defense of the secondary boycott of Israel, the representative from the United Arab Republic stated it was political, not commercial, in nature, and resulted from the "extraordinary circumstances to which the Middle East area had been exposed," including "[t]he state of war which had long prevailed in that area." Accordingly, the representative concluded, "[i]t would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country." 1 WTO, *supra* note 10, at 602. Interestingly, and perhaps somewhat hypocritically in view of the recent use of secondary boycotts by the United States, the United States enacted blocking legislation making it illegal for American companies to comply with the Arab League boycott.

the "protection" of that member's "essential security interests."[25] For the most part, GATT Contracting Parties exercised restraint in interpreting these terms, and most WTO Members have also been cautious. Overall, the number of express or implicit invocations of Article XXI remains relatively small. Nevertheless, the potential for abuse exists, and the considerable criticism of recent U.S. sanction laws would lead some observers to doubt the power of these terms to continue to act as a restraint on "cowboy behavior." After all, these terms are broad enough to encompass a variety of circumstances, and their application to a particular set of facts is subjective. At the same time, these terms are a gauge by which the world trading community can examine a sanctioning member's use of Article XXI(b). In other words, the world trading community can help shape world opinion as to whether a sanctioning member is "crying wolf."

Consider Sweden's global import quota system for certain footwear which was in effect between November 1975 and July 1977. Sweden argued that the:

> decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence [sic] as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[26]

In fairness to the Swedish argument, it is true that, as one Contracting Party said during the discussion of the 1949 action brought by Czechoslovakia against the United States, Article XXI covers "goods which were of a nature that *could contribute to war potential*."[27] In other words, for instance, it would be reasonable to include within an export control measure a software program or hardware device that is not itself used for a military purpose, but which can be converted to that purpose.

---

[25] *See* GATT art. XXI(b).

[26] 1 WTO, *supra* note 10, at 603.

[27] *Id.* at 602 (emphasis added).

However, upon further reflection, the gauge suggested above illustrates why Sweden's argument is outrageous and causes a slippery slope. Would buttons for military uniforms be "necessary" for the "protection" of Sweden's "essential security interests" on the grounds that troops are disadvantaged if they lack the appropriate attire? More generally, is Article XXI(b) designed for potential non-military (i.e. economic) threats? If so, then the United States' three big car manufacturer's (General Motors, Ford, and Chrysler) could argue that Japanese auto imports should be banned or severely restricted because of the threat they pose to market share in the vital passenger car industry. Likewise, India could argue that it must enact extraordinary measures against imported food to ensure it maintains self-sufficiency in the food industry, especially given its long- standing border conflicts. These arguments, however, would stretch beyond the scope of Article XXI(b), making it a commercial, as well as, a national security exception. In terms of the above arguments, the central thrust behind Article XXI(b) is the requisite showing of a link between the U.S. passenger car industry and a national security threat, or between India's food needs and its traditional nemeses, Pakistan and China. But, these arguments pre-suppose such a link and thus become self-fulfilling. There are cases in which commercial and national security interests are so intertwined that a bright line between the two interests cannot be drawn. Nonetheless, it must be remembered that regular trade remedies condoned under other articles of GATT, most notably the escape clause permitted by Article XIX, exist to deal with non-military threats posed by fair foreign competition.

As another example of how the gauge can be helpful in deliminting Article XXI(b), consider an argument made by Nicaragua in a complaint against the United States relating to a Nicaraguan trade embargo imposed by the Reagan Administration in May 1985.[28] Nicaragua urged that the key terms in the Article XXI(b) chapeau amounted to a self-defense requirement; that is, a Member could only invoke Article XXI(b) after it has been subjected to aggression.[29] In the unadopted 1986 report, the GATT panel felt its strict terms of reference prevented it from ruling on

[28] *See id.* at 603 (discussing Executive Order which prohibited all imports of goods and services from Nicaragua and all exports from the U.S. of goods destined for Nicaragua).

[29] *See id.*

this argument.[30] However Nicaragua's argument cannot be right. If the drafters of GATT meant to include only self-defense cases, then they would have said so expressly and, perhaps even referenced the language in Article 51 of the U.N. Charter.[31] Instead, they used terms that would balance competing interests. This is evident from the statement of one of the drafters of the original Draft Charter about the meaning of "essential security interests:"

> We have a good deal of though to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. . . . [sic] [T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.[32]

Moreover, the content of clauses (i), (ii), and (iii) that follow the chapeau to Article XXI(b) indicates that actual aggression is not a prerequisite.[33] Rather, these clauses allow the invocation of Article XXI(b) to deal with nuclear weapons material, arms traf-

[30] *See id.* at 607.

[31] Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

[32] 1 WTO, *supra* note 10, at 600.

[33] *See supra* note 16 and accompanying text.

ficking, or an international relations emergency. If a sanctioning member had to wait until a hostile power acquires nuclear weapons, a destabilizing number or type of non-nuclear arms, or a physical invasion, then it would be too late for trade sanctions to have any protective effect. In addition, the threat may be orchestrated by a "military establishment," a term broad enough to include not just sovereign governments, but also major terrorist organizations or drug cartels.

At the same time, however, implicit in clauses (i), (ii), and (iii), and in the words "necessary," "protection," and "essential security interests," must be the concept of a *credible* threat from these dangers. Simply "crying wolf" will not do, because Article XXI could not have been designed to protect a hyper-sensitive government any more than many standards of care in tort law do not protect the hyper-sensitive plaintiff. Rather, the test should be an objective one, namely, whether a "reasonable" government faced with the same circumstances would invoke Article XXI. In sum, it is the implicit concept of a credible threat judged from the objective standpoint of a reasonable, similarly-situated government, coupled with the articulation of specific types of dangers that track one or more of the three clauses, and not Nicaragua's unduly restrictive self-defense argument, that can be a restraint on "cowboy behavior."

2.3. *Preventing Abusive Invocations of Article XXI(b)*

The two restraints discussed in the previous section, giving prior notice in the hope of engendering support, or at least minimizing opposition, to national security sanctions, and using the critical terms in the introductory chapeau to Article XXI(b) as a gauge of the reasonableness of such sanctions are not fail safe devices against "cowboy behavior." The world community has yet to produce fail safe devices and until it does so, the risk of a corrosive effect on the multilateral trading system from abusive invocations of Article XXI(b) is real.

One observer suggests the risk for abuses of Article XXI(b) cannot be hedged, writing that "there may be little that can be done about" the "dangerous loophole to the obligations of GATT."[34] This statement is unduly pessimistic. To ensure the

[34] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748 (1969). *But see id.* at 752 (referring to GATT loopholes found throughout Article XXI exceptions).

proper use of Article XXI(b) the WTO and the United Nations Security Council may attempt to increase coordination.[35] For example, a joint WTO-Security Council Committee on National Security Sanctions could be established to render at least a non-binding, non-precedential opinion in each case that addresses two questions: (1) Does the use of such sanctions comport with the terms of Article XXI(b)?; (2) Are the sanctions reasonable in relation to the threat or actual danger posed?

Another, more ambitious, step would be to encourage the use of national security sanctions only after an appropriate Security Council resolution has been adopted.[36] In addition, if the answer to either of the above two questions is negative, then the joint Committee could render an advisory opinion on the use of counter-retaliatory measures by the sanctioned and adversely affected third countries. In sum, it does not seem impossible, and indeed may be necessary, to develop checks that preserve the sovereign national security prerogative of individual WTO Members, while simultaneously highlighting threats to the multilateral trading system posed by abusive assertions of this prerogative.

2.4. *The Non-Controversial Parts of Article XXI*

GATT Article XXI contains three parts that are, or at least ought not to be, particularly controversial: Article XXI(a), XXI(b)(i), and XXI(c). Article XXI(a) assures a sanctioning member that it has no obligation to furnish information to the WTO or other Members that "it considers contrary to its essential national security interests."[37] No sovereign country would be willing, or should be expected, to surrender its ability to keep information secret, particularly when such information is of a sensitive nature and its disclosure might compromise intelligence sources.[38] This prerogative does, and must, remain in the discretion of each country. The use of the word "it" makes it clear that deciding

[35] Indeed, Article 86 of the Havana Charter, which was not incorporated into GATT, attempted to sort out jurisdiction between the International Trade Organization and the United Nations by granting the latter jurisdiction not only over political matters, but also over economic measures adopted for political reasons. For a discussion of Article 86, see 1 WTO, *supra* note 10, at 609-10.

[36] *See id.* at 603 (mentioning Security Council Resolution 502). This situation did in fact occur at the Falklands crisis.

[37] GATT art. XXI(a).

[38] *See id.*

what information is inappropriate for disclosure rests with each individual Member.[39] In the 1949 Czech case, for instance, U.S. representative to the GATT invoked Article XXI(a), stating that "[t]he United States does consider it contrary to its security interest—and to the security interest of other friendly countries—to reveal the names of the commodities that it considers to be most strategic."[40] At the same time, invoking Article XXI(a) without disclosing any credible evidence of a national security threat may be politically unacceptable.[41] That is, to preclude the criticism that a sanctioning member is "crying wolf," there seems to be a *de facto* requirement on that Member to present at least a *prima facie* case that a real threat exists.

Article XXI(b)(i) concerns national security sanctions necessary to protect against a threat from "fissionable materials" or their parent materials.[42] Notwithstanding the introductory chapeau to Article XXI(b), which does raise interpretive issues,[43] the particular exception in clause (i) is quite understandable. Under XXI(b)(i) no sovereign country should have to concern itself with trade obligations under GATT when it faces a nuclear weapons threat.[44] Clause (i) simply states the obvious: protecting oneself against a nuclear weapons threat, and more generally, deterring nuclear weapons proliferation, is more important than adhering to the GATT.[45]

Article XXI(c) ensures proper prioritization between the WTO and the United Nations, particularly the Security Council.[46] Maintaining international peace and security by performing obligations under the U.N. Charter is more important than adhering to GATT rules.[47] Accordingly, the fact that trade embargoes or other sanctions imposed by the Security Council on rogue countries might violate GATT obligations to those countries is, and should be, irrelevant.

---

39 *See id.*

40 1 WTO, *supra* note 10, at 602.

41 The United States encountered this problem with respect to the Iran and Libya Sanctions Act of 1996. *See infra* notes 50-52 and accompanying text.

42 *See* GATT art. XXI(b).

43 *See supra* notes 19-25 and accompanying text.

44 *See* GATT art. XXI(b)(i).

45 *See id.*

46 *See* GATT art. XXI(c).

47 *See id.*

It is noteworthy that Article XXI(c) does not expressly give WTO Members the right to determine whether its terms are met because, in contrast to Article XXI(a) and (b), Article XXI(c) does not contain the words "which it considers."[48] This omission is not, however, surprising. In practice, Charter obligations concerning international peace and security will be agreed to by the Security Council, and the problem of unilateral action is unlikely to arise in this context. For example, in 1966 the Security Council adopted Resolution 232, requiring a trade embargo against Rhodesia (now Zimbabwe),[49] and the resolution was followed by most, if not all, GATT Contracting Parties.[50]

2.5. *Suing a Sanctioning Member*

The relationship between GATT Articles XXI and XXIII is not evident from the language of either of these Articles.[51] Since Article XXI does not require notice, approval, or ratification,[52] it would seem to follow that it creates no right for a non-sanctioning member to sue a sanctioning member. On the other hand, the 1949 Czechoslovak complaint against the United States regarding American export controls did lead to a decision in favor of the United States under Article XXIII(2) as to "whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses."[53] The Contracting Parties appear to have thought that mere invocation of Article XXI did not immunize a sanctioning member from an Article XXIII action. Similarly, in the discussion of the restrictions imposed on Argentina during the Falklands crisis, one view expressed was that Argentina "reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI," and, more generally, that "the provisions of Article XXI were subject to those of Article XXIII(2)."[54] Not surprisingly, paragraph two of the above-quoted November 1982 "Decision Con-

[48] *Compare id.* arts. XXI(a), (b), (c).

[49] *See* Jackson, *supra* note 27, at 751.

[50] *See id.*

[51] *See* GATT arts. XXI, XXIII.

[52] *See* 1 WTO, *supra* note 10, at 600.

[53] *Id.* at 606.

[54] *Id.* at 606.

cerning Article XXI of the General Agreement" specifies that "when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement."[55]

It is safe to conclude that a non-sanctioning member has a right to bring an Article XXIII action and invoke the *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*[56] against a sanctioning member. This action could be brought on the ground that a particular national security sanction nullifies or impairs benefits under the GATT that otherwise would accrue to the non-sanctioning member. The action, moreover, may be one involving nullification or impairment that results either because the disputed sanction is an outright violation of a GATT obligation (i.e., violation nullification or impairment under Article XXIII(1)(a)) or because of the way in which the sanction is applied (i.e., non-violation nullification or impairment under Article XXIII(1)(b)). Indeed, in virtually every case, a non-violation nullification or impairment claim is likely to be credible because if the disputed sanction is at all effective, the existence of trade damage would not be in doubt.

The next obvious question is whether the right to bring an Article XXIII action means anything in practice. In other words, is a WTO panel or appellate body likely to adjudicate the merits of a non-sanctioning member's attack on the invocation of Article XXI? The answer is almost assuredly no. As the textual analysis of Article XXI(b) above indicates,[57] invocation of the national security exception is a matter left to the discretion of a sanctioning member. Moreover, *realpolitik* demands that Members retain this sovereign prerogative even if additional multilateral checks against abuse are adopted in the future. National legislators believe that one of the surest ways to damage the WTO would be for it to attempt to encroach on this prerogative. Accordingly, as a practical matter, it is likely that a WTO panel, like the GATT panel in the United States-Nicaragua case, would interpret its terms of reference narrowly to exclude a ruling on the substantive Article XXI arguments. Inevitably, this interpretation will leave the complaining non-sanctioning member unhappy, as it did in the Nica-

---

[55] *Id.* at 606. *See supra* note 23 and accompanying text.
[56] *Id.* at 607.
[57] *See supra* notes 8-13 and accompanying text.

ragua case: Nicaragua blocked adoption of the October 1986 report in part because of its failure to make recommendations.[58] To a U.S. litigator, however, this interpretation ought not to be a surprise: U.S. courts, including and perhaps especially the Supreme Court, routinely seek to base a decision on less controversial procedural grounds and thereby avoid harder and more controversial substantive issues. In short, the 1949 Czechoslovakian decision of the Contracting Parties may prove to be the first *and last* major substantive ruling on the invocation of Article XXI rendered under GATT-WTO adjudication procedures.

3. WHAT THE UNITED STATES DOES: ASSESSING THE IRAN AND LIBYA SANCTIONS ACT OF 1996

3.1. What Purpose Could New Sanctions Possibly Serve?

National security is the stated purpose of the ILSA.[59] As President Clinton summed up when signing the legislation, Iran and Libya are "two of the most dangerous sponsors of terrorism in the world."[60] Moreover, each country is widely reputed to seek the acquisition of nuclear, biological, and chemical weapons. Sections 2 and 3 of the ILSA amplify the perceived national security threats by using aggressive language (again resembling the Helms-Burton Act), noting Congressional findings, and declaring policy, with respect to Iran and Libya:

---

[58] *See* 1 WTO, *supra* note 10, at 608.

[59] *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (to be codified at 50 U.S.C. § 1701 note). The Department of State has published guidelines on the implementation of the "ILSA." *See* 61 Fed. Reg. 66,067 (1996).

The ILSA is sometimes referred to as the "D'Amato Act," after Senator Alphonse D'Amato of New York, who introduced the original bill. Because the entire ILSA is codified as a note to Section 1701 of Title 50, references below to provisions in the ILSA are to the sections in the ILSA as set forth in the note. The legislative history to the ILSA is contained in two House Reports. *See* H.R. REP. NO. 104-523(I) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296 (accompanying the original version of H.R. 3107); H.R. REP. NO. 104-523(II) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311 (accompanying the bill as enacted). In general, these House Reports offer few insights beyond what is already obvious from the language of the ILSA.

[60] Gary G. Yerkey, *President Clinton Signs into Law Legislation to Punish Foreign Firms Investing in Iran, Libya*, 13 Int'l Trade Rep. (BNA) 1273 (Aug. 7, 1996) [hereinafter *Clinton Signs into Law*].

Sec. 2. Findings
The Congress makes the following findings:
(1) The efforts of the Government of Iran to acquire weapons of mass destruction and the means to deliver them and its support of acts of international terrorism *endanger the national security* and foreign policy interests of the United States . . . .

. . . .

(4) The failure of the Government of Libya to comply with Resolutions 731 [adopted January 21, 1992, concerning the handover for prosecution of two Libyan nationals suspected of being responsible for the bombing of Pan Am 103], 748 [adopted March 31, 1992, prohibiting exports to Libya of goods, services, and technology relating to petroleum resource development or nuclear, biological, and chemical weapons], and 883 [adopted November 11, 1993, prohibiting exports to Libya of equipment for transporting or refining petroleum] of the Security Council of the United Nations, its support of international terrorism, and its efforts to acquire weapons of mass destruction constitute a threat to international peace and security that *endangers the national security* and foreign policy interests of the United States . . . .

Sec. 3. Declaration of Policy.
(a) Policy with Respect to Iran.
The Congress declares that it is the policy of the United States to *deny Iran the ability to support acts of international terrorism* and to fund the development and acquisition of weapons of mass destruction and the means to deliver them *by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.*

(b) Policy with respect to Libya.
The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including *ending all*

> *support for acts of international terrorism* and efforts to develop or acquire weapons of mass destruction.[61]

The italicized language bespeaks the theory of the ILSA: a direct connection exists between (1) the threat to the United States' national security arising from terrorism sponsored by Iran and Libya and from their efforts to obtain certain weapons and (2) profits earned by the Iranian and Libyan governments made possible by foreign investment in the development of the petroleum resources of these countries. Peter Tarnoff, Secretary of State, testified with respect to the purpose of the ILSA, "[a] straight line links Iran's [and, for that matter, Libya's] oil income and its ability to sponsor terrorism, build weapons of mass destruction, and acquire sophisticated armaments."[62] In brief, these rogue governments use some of the profits from the development of their petroleum industry to fund terrorists activities and buy materials for nuclear, chemical, and biological weapons. Hence, the ILSA aims to constrict Iran and Libya's key funding source and thereby contain their threatening terrorist activities.[63]

To facilitate the application and enforcement of sanctions in support of the United States' national security interests, the ILSA carefully defines the terms "act of international terrorism," "petroleum resources," "develop," and "investment."[64] An "act of international terrorism" is an act that (1) is "violent or dangerous to human life," (2) violates federal or state criminal laws (or would violate these laws if committed within federal or state jurisdictions), and (3) "appears to be intended" to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by assassination or kidnapping."[65] "Petroleum resources," the heart of the target of the sanctions against Iran and Libya, re-

[61] Iran and Libya Sanctions Act §§ 2-3 (emphasis added).

[62] H.R. REP. NO. 104-523(I) at 9.

[63] *See id.* at 8. On the other hand, some argue that the ILSA should focus more narrowly on the quest for nuclear weapons capability. Two prominent former national security advisors, Zbigniew Brzezinski and Brent Scowcroft, argue that Iran's nuclear weapons capability, is "[t]he single most worrisome aspect of Iran's behavior." Zbigniew Brzezinski et al., *Differentiated Containment*, 76 FOREIGN AFF., May/June 1997, at 20, 27; *see also* Edward Mortimer, *The Satanic Dialogue*, FIN. TIMES, May 21, 1997, at 28.

[64] Iran and Libya Sanctions Act § 14.

[65] *Id.* § 14(1).

fer to "petroleum and natural gas resources."[66] The term "develop" or "development" is used only in the context of petroleum resources and refers to exploring, extracting, refining, or transporting these resources.[67] As discussed in greater detail below,[68] "investment" is defined in a manner that focuses on the petroleum industry. An investment includes three specific activities undertaken pursuant to an agreement entered into after the enactment of the legislation between the governments of Iran or Libya and a non-governmental entity in Iran and Libya. The three covered activities are: (1) developing Iranian or Libyan petroleum resources or guaranteeing another person's agreement to develop these resources; (2) acquiring an equity interest (i.e., buying shares) in the development of Iranian or Libyan petroleum resources; and (3) receiving royalties, earnings, or profits from the development of Iranian or Libyan petroleum resources.[69] The definition of investment is further qualified so as to exclude the entry into an agreement to buy or sell goods, services, or technology.[70] However, this narrowing of the definition of investment may be somewhat confusing, because it is unclear how to deal with an inconsistency between the qualification and one of the aforementioned three activities. For example, suppose a company "develops" the Iranian petroleum industry by selling drilling equipment to the government of Iran. The qualification suggests the sale of such equipment is not an investment.

It is, therefore, clear that preservation of national security is the ILSA's stated purpose. What is not so obvious, however, is why Congress and President Clinton thought it necessary to enact new sanctions against Iran and Libya. Pursuant to the International Emergency Economic Power Act of 1977 ("IEEPA"),[71] the United States already has a trade embargo against Iran and Libya. Why enact another statute? To put the question skeptically,

---

[66] *Id.* § 14(15).

[67] *See id.* § 14(4).

[68] *See infra* notes 96-103 and accompanying text.

[69] *See* Iran and Libya Sanctions Act § 14(9).

[70] *See id.*

[71] International Emergency Economic Power Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. §§ 1701-1706). For a discussion of the 1977 Act and the Iranian and Libyan embargoes, see HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 167-70 (Comm. Print 1997) <http://frwebgate.access.gpo.gov/cgi:-bin/multidb.cgi>.

given the existing embargoes, what types of novel sanctions could possibly exist, and what purposes could any further sanctions possibly serve?

An answer to both questions is found in the economic distinction between a primary and secondary boycott. The trade embargoes imposed against Iran and Libya are primary boycotts; that is, with the use of the primary boycott the United States forbids U.S. individuals from importing goods or services from, or exporting goods or services to, the target countries. Therefore, the primary boycott is an act of self-restraint by the boycotting country (or countries). On the other hand, a secondary boycott involves not only the boycotting and target countries, but also third countries. The essence of a secondary boycott is the attempt to limit the extent of economic dealings of third countries with the target country. The ILSA not only reinforces the United States' primary boycott, but more importantly, it imposes a secondary boycott against Iran and Libya. It imposes penalties against non-U.S., as well as U.S. individuals and businesses that invest in the Iranian and Libyan petroleum industries. Thus, the ILSA resembles the Helms-Burton Act measures, discussed above, insofar as the Helms-Burton Act also contains a secondary boycott measure, namely barring non-U.S., as well as U.S. persons from trafficking confiscated property, and bars non-U.S. persons engaged in such trafficking from entry into the United States.

The distinction between a primary and secondary boycott is evident from a petroleum resource development transaction involving the U.S. oil company Conoco, Inc., the French oil giant Total S.A., and Iran. In early 1995 it was reported that Conoco, Inc. initiated a one billion dollar contract with Iran to develop oil fields around Iran's Sirri Island. In response, President Clinton invoked the IEEPA to prohibit U.S. persons from financing, managing, or supervising the development of Iran's petroleum resources.[72] This response was a primary boycott, and it was successful because Conoco, Inc. was forced to withdraw from the contract. However, to the dismay of Congress and Clinton Administration officials, the French oil firm Total S.A. assumed Conoco's abandoned contract by agreeing to develop the Sirri Island oil fields in a deal worth nearly $600 million.[73] In enacting a

---

[72] *See* Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995).

[73] *See* H.R. REP. NO. 104-523(I), at 9-11; Gary G. Yerkey, *EU Files Formal Protest with U.S. over Law Penalizing Foreign Firms with Ties to Iran, Libya*, 13

secondary boycott against Iran and Libya, Congress sought to discourage such opportunistic behavior in disregard of U.S. national security concerns.

In addition to the primary-secondary boycott distinction, Congress also passed the ILSA in reaction to two incidents it perceived to have been orchestrated by Iranian or Libyan-backed terrorists. The first incident was the July 1996 explosion of a Trans World Airlines Boeing 747 jetliner, flying from New York's Kennedy Airport and bound for Paris killing all 230 passengers and crew. After the tragedy, the U.S. press speculated that the explosion was caused by a terrorist bomb.[74] However, to date, there is no evidence to suggest terrorist involvement; thus, in retrospect, Congress may have over-reacted to the incident. Many have indicated that the United States overestimates Iran's involvement in terrorism. Indeed, a *Financial Times* editorial observed that "[a]t the core of the European case is the fact that [U.S.] assertions about Iran's role in terrorism remain unproven."[75] The *Economist* intoned that evidence for the United States' charge that "Iran is the prime suspect when international terrorism is directed against American interests" has "yet to be produced" and that "[w]ithout specific evidence, the Americans have been making do with vague stuff, leaking 'classified' documents that reveal a network of training camps around Iran to prepare terrorists for international operations."[76] In brief, although many will admit the Iranian government has terrorist tendencies, U.S. trading partners do not believe that Iran is the godfather of international terrorism. To be sure, Article XXI(a) of GATT does not require a WTO Member to divulge information that would compromise its essential national security interests.[77] Nonetheless, as the *Financial Times* suggests, the United

---

Int'l Trade Rep. (BNA) 1315, 1316 (Aug. 14, 1996) [hereinafter *EU Files Formal Protest*].

[74] *See, e.g.*, Nancy Dunne & Robert Corzine, *Politics Sets Tone for Trade Barriers*, FIN. TIMES, July 25, 1996, at 4 (noting "the widespread suspicion in the US [sic] that a terrorist bomb, possibly of Iranian or Middle Eastern origin" brought down the TWA jetliner); Laurie Lande, *Congress Seeks End to Libya, Iran Ties by Foreign Firms*, WALL ST. J., July 24, 1996, at A16 (observing that "congressional fears about terrorism . . . only increased" following the TWA explosion and that "[a]uthorities are investigating whether the crash may have been caused by terrorists").

[75] *Handling Iran*, FIN. TIMES, Aug. 8, 1996, at 17.

[76] *Is Iran the Godfather?*, ECONOMIST, Aug. 17, 1996, at 33.

[77] *See* 1 WTO, *supra* note 10, at 601-02.

States must make at least a *prima facie* case if it expects its European allies to sign onto the secondary boycott.[78]

The June 1996 bombing of a Saudi Arabian Apartment building housing U.S. military personnel is the second incident which prompted Congress to enact the ILSA.[79] This bombing killed nineteen U.S. service personnel, and was widely thought to have been orchestrated by Iranian terrorists. However, once again, no credible evidence links Iran nor Libya to the bombing. To the contrary, the perpetrators may well have been Saudi dissidents.

3.2. *Are the New Sanctions Prudent?*

Like the Helms-Burton Act, the ILSA is condemned by many of the United States' closest military allies and most significant trading partners simply because it is a unilateral effort at a secondary boycott.[80] In the eyes of U.S. military allies and trading partners, this type of boycott gives the sanctions an unwarranted, perhaps illegal, and extraterritorial effect. In effect, critics of the ILSA see it as an attempt by the United States to bully other nations into complying with a unilaterally-imposed sanction regime. Furthermore, the United States' secondary boycott is viewed, quite rightly, as hypocritical. The United States balked at the attempt by Arab countries to enforce a secondary boycott against Israel; in fact, the United States enacted blocking legislation making it illegal to comply with the boycott.[81] Now, however, the United States expects compliance with its secondary boycott of Iran and Libya. Finally, critics point out that the secondary boycott is a target around which Iranian nationalists and Colonel Muammar Gadaffi can rally their people against the United States, as Castro has attempted to do with respect to the Helms-Burton Act.[82] Thus, ironically, the boycott may reinforce the behavior

---

[78] *See Handling Iran, supra* note 75.

[79] *See* Bruce Clark, *U.S Split on How to Handle Iran*, FIN. TIMES, Apr. 17, 1997, at 5; Jane M. Freeberg, *US Penalizes Investors in Iran and Libya*, INT'L FIN. L. REV., Oct. 1996, at 23.

[80] *See, e.g., Canada Criticizes U.S. Iran-Libya Law as Unsupportable Extraterritoriality*, 13 Int'l Trade Rep. (BNA) 1316 (Aug. 14, 1996); *EU Files Formal Protest, supra* note 73, at 1315.

[81] *See supra* note 24 and accompanying text.

[82] *See, e.g.*, Roula Khalaf, *US Sanctions Are Gadaffi's Greatest Fear*, FIN. TIMES, Oct. 30, 1996, at 4 (noting that the sanctions are "a convenient tool" for Gadaffi and "have the perverse effect of bolstering the Libyan leader and reinforcing a deep resentment of the US").

of the Iranian and Libyan governments that the United States seeks to alter through the ILSA.

These criticisms raise the practical problem of the efficacy of the ILSA: can the statute achieve its stated purpose of safeguarding national security given the intense opposition from U.S. allies and trading parties? Two Congresspersons, who voted in favor of the ILSA, summarize the argument that a unilaterally-imposed secondary boycott cannot work:

> [W]e are concerned that the bill [H.R. 3107, the initial version of the ILSA] could be counterproductive to the goal of increasing multilateral economic and political pressure on Iran [and Libya]. . . .
>
> Our concern here is not that we may offend our allies, for we object to their unwillingness to adopt tougher measures to isolate Iran [and Libya] economically and politically. Our concern is more practical: The United States cannot adequately pressure Iran's [or Libya's] economy alone. A strong adverse reaction by other governments to a U.S. effort to penalize their firms will put us at odds with some of our closest friends. That could ultimately reduce, rather than increase, multilateral cooperation on Iran [and Libya].
>
> We believe recent history is instructive. Western efforts to confront another dangerous country—the former Soviet Union—were set back in 1982 when the United States tried to sanction firms participating in the development of a Soviet gas pipeline.
>
> The target of U.S. pressure in 1982 was subsidiaries of U.S. firms, yet the reaction in Europe was intense. And U.S. sanctions did not achieve their goal: the sanctions were not sustainable, and the United States ultimately had to lift them. The bill before us today would hit foreign firms. We can expect at least as strong a response.[83]

[83] ADDITIONAL VIEWS OF THE HONORABLE LEE H. HAMILTON AND THE HONORABLE JAMES P. MORAN, *in* H.R. REP. NO. 104-523(I), at 20-21 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1309; *see also* Toby Roth, *New Iranian-Libyan Sanctions Will Only Hurt U.S.*, WALL ST. J., Aug. 6, 1996, at A14 (arguing the ILSA will isolate the United States from other governments whose help the United States needs to contain threats from Iran and Libya).

Some of the critics, particularly those in Europe, are motivated by economic self-interest. As a European Commission spokesperson admitted, "Europe is energy dependent on these nations [Iran and Libya]" and "can't afford to seriously hurt our economies because of a [sanctions] strategy that hasn't proven to be effective."[84] More than twenty percent of the European Union's oil and gas supplies come from Iran and Libya.[85] Iran, in particular, is the world's third largest oil exporter.[86] Business ties between Iran and Germany are close, and Iran's leading trading partner is Germany. About 170 German companies (including Siemens AG and Mannesmann AG) do business in Iran, and Iranian governmental and private entities owe approximately $8.8 billion to German businesses.[87]

Despite these economic facts about Iran, the ILSA might have engendered less opposition in Europe if it had not included Libya. The extent of ties, especially in the petroleum resource industry, between Europe and Libya is greater than between Europe and Iran. Only one European oil company, Total, has significant direct investments in Iran's petroleum resource industry.[88] Moreover, as of this writing, only one European oil company, Total, has challenged the ILSA.[89] In September 1997, Total and its two consortium partners, Malaysia's Petronas and Russia's Gazprom, signed a contract with Iran's National Iranian Oil Company.[90] The contract calls for the consortium to invest two billion dollars to develop part of the South Pars natural gas field, which is near Iran's maritime border with Qatar.[91] Production of the gas field is scheduled to start in 2001.[92] The Clinton Administration has

---

[84] Lande, *supra* note 74, at A16 (discussing a bill that sought to curb investment in Iran and Libya).

[85] *See Clinton Signs into Law*, *supra* note 60, at 1274.

[86] *See* Bruce Clark, *US Applauds European Stand on Iran*, FIN. TIMES, Apr. 12-13, 1997, at 3.

[87] *See* Greg Steinmetz, *EU Unlikely to Impose Embargo on Iran*, WALL ST. J., Apr. 14, 1997, at A12; *Trading with Terrorists*, WALL ST. J., Aug. 27, 1996, at A12.

[88] *See* Clark, *supra* note 86.

[89] *See* David Owen & Guy de Jonquières, *Total to Defy US with $2bn Iran Gas Contract*, FIN. TIMES, Sept. 29, 1997, at 20.

[90] *See id.*

[91] *See id.*

[92] *See id.*

threatened to impose sanctions on Total under the ILSA, and such sanctions remain a "real, live option."[93] However, France has threatened serious actions if sanctions are imposed as a result of the contract, and the EU has said it will resurrect its complaint in the WTO regarding the Helms-Burton Act if sanctions are imposed.[94] If France takes a tougher stance against Iran with respect to terrorism and chemical, biological, and nuclear weapons, the Clinton Administration may waive sanctions.[95] Given Iran has fifteen percent of the world's proven natural gas reserves, which are second only to Russia's reserves, the Total contract should not have come as a surprise to the Administration.[96] Moreover, Total is one of many foreign companies that are anxious to develop Iran's reserves.[97] As the *Financial Times* pointed out, "Total is [fast] developing a reputation for targeting output from 'outlaw' countries such as Iran, Iraq, Libya and Burma - although [Total] chairman Thierry Desmarest has claimed it is just that 'the Lord put the reserves in places that are a bit hot on political grounds.'"[98]

In contrast to the more modest dealings in Iran and aside from the September 1997 Total contract, several European companies, such as Agip of Italy, Repsol of Spain, OMV of Austria, and Petrofina of Belgium, have had dealt in Libya's industry. Additionally, several other European companies, such as Lasmo of the U.K., have explored Libya's potential reserves.[99] For Italy, which buys thirty percent of its oil from Libya, participating in a secondary boycott of Libya's petroleum resource industry would be

---

[93] *Sanctions Against French Firm over Iran Deal Called 'Live Option' by U.S. Official*, 15 Int'l Trade Rep. (BNA) 64 (Jan. 14, 1998), *quoting* Stuart E. Eizenstat, Undersecretary of State for Economics, Business, and Agricultural Affairs.

[94] *See* Gerard Baker et al., *US Condemns Total's $2bn Iran Deal*, FIN. TIMES, Sept. 30, 1997, at 1; Guy de Jonquières et al., *Avoiding Total War*, FIN. TIMES, Oct. 3, 1997, at 8; Guy de Jonquières, *Transatlantic Trade Peace at Risk*, FIN. TIMES, Sept. 30, 1997, at 7.

[95] Hardliners in Congress, most notably Senator Alfonse M. D'Amato (R-N.Y.), argue a waiver is permissible only if the European Union, or at least France, imposes its own sanctions regime against Iran. *See* Gary G. Yerkey, *Gazprom Withdraws from Agreement with Ex-Im Bank Following Hill Criticism*, 14 Int'l Trade Rep. (BNA) 2241 (Dec. 24, 1997).

[96] *See* Virginia Marsh, *Other Investors Watch and Wait*, FIN. TIMES, Sept. 30, 1997, at 7.

[97] *See id.*

[98] Owen & de Jonquières, *supra* note 89, at 20.

[99] *See* Dunne & Corzine, *supra* note 74, at 4.

impossible regardless of the length of the boycott. Thus, notwithstanding the Total contract, the ILSA might have been better received in Europe if it had left out Libya.

Leaving Libya out of the ILSA also might have been in the long-term strategic interest of the United States. At present, the principal access for the United States to Caspian Sea oil is through Russia.[100] However, Russia has yet to demonstrate it will obtain stablitiy in the democratic, market economy. Non-Russian access to Caspian Sea oil could be provided through Iran. Furthermore, if Saudi Arabia were to be overtaken by Islamic extremists, the importance of such access would increase.

In fairness to supporters of the new sanctions against Iran and Libya, it must be acknowledged that the ILSA is not uniformly unilateral in nature. Rather, the ILSA "urges" the President to undertake diplomatic efforts, in international forums such as the United Nations and bilaterally with U.S. allies, and "to establish a multilateral sanctions regime against Iran" to limit the development of its petroleum resources and thereby inhibit its efforts to sponsor acts of international terrorism.[101] Curiously, there is no comparable provision in the ILSA regarding Libya. The President must report periodically to Congress the results of these diplomatic efforts and, in particular, must list the countries that have and have not agreed to sanctions measures which would further the objective of denying Iran the ability to support acts of international terrorism by limiting the development of its petroleum industry.[102]

There is a possible link between diplomatic efforts at establishing a multilateral sanctions regime against Iran, on the one hand, and the unilateral sanctions imposed by the United States, on the other. As discussed below, the President may waive the invest-

[100] *See* Robert D. Kaplan, *Why the U.S. and Iran Will Be Friends Again*, WALL ST. J., Feb. 10, 1997, at A18.

[101] *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 4(a), 110 Stat. 1541 (to be codified at 50 U.S.C. § 1701 note).

[102] *See id.* § 4(b); *see also* § 4(e) (requiring the President to report to Congress 90 days after August 5, 1996 on whether and the extent to which the EU, Korea, Australia, Israel, and Japan have imposed sanctions on Iran and Libya, and the disposition of any GATT or WTO panel decision on such sanctions) § 10 (requiring the President to report to Congress, *inter alia*, on his efforts to persuade other countries to pressure Iran to (1) cease its support for international terrorism and its attempts to acquire nuclear, biological, and chemical weapons and (2) withdraw diplomats who participated in the 1979 takeover of the U.S. embassy in Tehran).

ment-triggered sanction against Iran if a country "has agreed to undertake *substantial measures*, including economic sanctions" that will inhibit Iran's efforts to support international terrorism.[103] Neither the ILSA nor the legislative history thereto explains what might constitute "substantial measures"; rather, it is a matter requiring Presidential discretion. Nonetheless, it is conceivable that substantial measures would include participation in a multilateral sanctions regime arranged as a result of the President's diplomatic efforts. If so, then the nationals (i.e., the individuals and businesses from that country) participating in the regime would be eligible for a sanctions waiver. It would, after all, be unreasonable to target individuals and businesses participating in the sanctions in the secondary boycott pursuant to the ILSA when their country is participating in multilateral sanctions against Iran. Conversely, the enhanced sanction, discussed below, must be imposed on nationals of a country that does not qualify for a sanctions waiver. Thus, failure of a country to participate in a multilateral sanctions regime against Iran, assuming this failure is a failure "to undertake substantial measures," could well mean the nationals of that country will not receive a sanctions waiver. Instead, they would be subject to the enhanced sanction.

Additionally, in fairness to thesupporters of new sanctions against Iran and Libya, European governments failure to react strongly to terrorism is sometimes disconcerting. In 1992, four Kurdish opposition leaders were killed in a Berlin restaurant.[104] In April 1997, a Berlin court convicted four perpetrators for the 1992 assassinations.[105] In the verdict, Judge Frithjof Kubsch declared that "[t]he Iranian political leadership is responsible,"[106] and specifically identified Mr. Ali Fallahian, Iran's chief of foreign in-

---

[103] *Id.* § 4(c)(1) (emphasis added). The President must notify Congress of the waiver at least 30 days before the waiver takes effect. *See id.* § 4(c)(2).

[104] For media accounts of the case and its aftermath, see *EU Ignores U.S. Request to Take Economic Measures Against Iran*, 14 Int'l Trade Rep. (BNA) 787 (Apr. 30, 1997); *EU Suspends 'Critical Dialogue' with Iran; Ending Ties Is Weighed, Dutch Official Says*, 14 Int'l Trade Rep. (BNA) 706 (Apr. 16, 1997); Steinmetz, *supra* note 84; Frederick Stüdemann & Lionel Barber, *Death Case Ruling Leads to Tougher EU Stance over Iran*, FIN. TIMES, Apr. 11, 1997, at 22; Frederick Stüdemann, *New Turn in German Ties with Iran*, FIN. TIMES, Apr. 11, 1997, at 5.

[105] *See* Greg Steinmetz, *Ruling on Killing Spurs EU to Curb Links with Iran*, WALL ST. J., Apr. 11, 1997, at A11.

[106] *Id.*

telligence, as having orchestrated the murders.[107] Following this verdict, the European Union ("EU")suspended its policy of "critical dialog" with Iran, and all EU members, except Greece, recalled their ambassadors from Tehran. However, no European country enacted trade sanctions.[108]

3.3. *What Are the New Sanctions?*

Given the purpose of attacking terrorist activities by limiting the petroleum resource development profits used to fund such activities, the sanction mechanism in the ILSA is predictable. The ILSA seeks to bar new investments above a certain threshold or "trigger"[109] in the Iranian and Libyan petroleum industries. Assuming a person violates the ILSA, thereby triggering sanctions, exactly what sanctions may be imposed? The ILSA lays out six specific sanction measures. The President is required to impose two or more of these sanctions on a person that violates the ILSA, referred to in the ILSA as a "sanctioned person."[110]

First, the President may direct the U.S. Export-Import Bank not to give approval to the issuance of any guarantee, extension of credit, or insurance in connection with the export of goods or services to a sanctioned person.[111] Second, the President may decline to issue to a sanctioned person a specific license to allow the export of sensitive goods or technology, whose export otherwise would require a license.[112] Third, the President may prohibit any

---

[107] *See* Robin Allen, *Khatami Set to Take Reins in Iran*, FIN. TIMES, Aug. 2-3, 1997, at 2; Philip Golup, *Berlin Court Ruling Puts EU's 'Critical Dialogue' with Iran at Risk*, ASIA TIMES, Apr. 14, 1997, at 9; *Kurdish Opposition Radio Welcomes German Arrest Warrant for Minister*, BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS, Mar. 20, 1996, *available in* LEXIS, News Library, Arcnws File. Amazingly, Mr. Fallahian visited Bonn in October 1993 at the official invitation of Mr. Bernd Schmidbauer, the security advisor to Chancellor Helmut Kohl, and even toured the Munich offices of Germany's intelligence services. Later, on April 18, 1996, he was indicted by German prosecutors for having masterminded the murders. He has yet to stand trial on the charge. *See id.*

[108] For an excellent discussion of the strains in the U.S.-German relationship over Iran, see Charles Lane, *Germany's New Ostpolitik*, 74 FOREIGN AFF., Nov./Dec. 1995, at 77.

[109] For a discussion of "triggers" see *infra* notes 130-73 and accompanying text.

[110] *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(c), 110 Stat. 1541, 1544 (to be codified at 50 U.S.C. § 1701 note).

[111] *See id.* § 6(1).

[112] *See id.* § 6(2).

U.S. financial institution, such as a commercial or investment bank, or insurance company,[113] from lending or providing credits to a sanctioned person in excess of ten million dollars in a twelve-month period, unless the funding is to support humanitarian activities by the sanctioned person.[114]

The fourth type of sanction is imposed only if the sanctioned person is a financial institution. The sanctioned financial institution may be denied the ability to serve as a repository of U.S. government funds.[115] In other words, it would not be able to maintain Treasury Tax and Loan ("TT&L") accounts, where tax revenues are deposited and maintained on behalf of the U.S. government. In addition, under this sanction the Federal Reserve may deny the sanctioned financial institution the ability to serve as a primary dealer in U.S. government debt instruments. The sanctioned financial institution may not participate directly in open market operations held through the Federal Reserve Bank of New York in Treasury bills, notes, and bonds, but rather must buy these instruments from a primary dealer.[116] A curious point about this fourth sanction is the relationship between the President and the Federal Reserve. The Federal Reserve is an independent agency of the U.S. government and, in general, does not take orders from the executive branch. Yet, Congress presumably intended the possibility that the President order the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York to deny designation to, or revoke the prior designation of, a financial institution as a primary dealer. Surely, Congress would not have wanted to see the Federal Reserve thwart a sanction the President thought appropriate in the interests of national security.

The fifth sanction is applicable only to persons who currently are, or who are seeking to become, a U.S. government contractor. Under this sanction, the President may bar the government from procuring goods or services from the sanctioned person.[117] If the

---

[113] *See id.* § 14(5) (defining "financial institution").

[114] *See id.* § 6(3).

[115] *See id.* § 6(4)(B).

[116] *See id.* § 6(4)(A). If a financial institution loses its authority to hold TT&L accounts, and its primary dealer status, then for purposes of the President imposing two or more of the six sanctions, the financial institution has received two (not one) of the sanctions.

[117] *See id.* § 6(5).

President chooses to impose this sanction, then the ILSA requires the President to abide by the Uruguay Round Agreement on Government Procurement, which, in practice, means that he will eschew imposition of sanctions on "eligible products" that are defined in U.S. law pursuant to the Agreement.[118] The President may also restrict imports from the sanctioned person into the United States. In doing so, the President must act in accordance with the powers set forth in the International Emergency Economic Powers Act, discussed above.[119]

The fifth and sixth sanctions provided for in the ILSA are potentially draconian to many companies. Rendering a company ineligible for U.S. government procurement contracts,[120] or barring it from exporting to the U.S. market could do irreparable harm to the company.[121] Depending on the facts of each case, each of the six sanctions is unequally fearsome. For example, a company might not be a U.S. government contractor, so barring U.S. government entities from purchasing goods or services from the company may be ineffectual. Furthermore, a sanctioned company might rely on Japanese or European banks for most of its funding. Thus, barring U.S. banks from extending credit to the company would have little effect on its activities developing Iran's or Libya's petroleum resources. Even a company that gets most of its funding from U.S. banks may be able to substitute lenders and rely on Japanese or European financing. If a company is able to make this substitution with little or no increase in the sanctioned company's cost of funds, then the sanction actually hurts the former U.S. bank lenders who involuntarily surrendered the company's business.

Does the differential impact that particular sanctions might have suggest a "disconnect" in the ILSA between (1) the aggressive rhetoric surrounding the purpose of ILSA and (2) the strength of the measures used to combat terrorism and its supporters? Given the strong rhetoric, it is difficult to imagine that Congress intended to implement weak set sanctions. To the contrary, it must be inferred that Congress provided the President with discretion

[118] *See* 19 U.S.C. § 2518(4) (1997) (listing the eligible products pursuant to the Agreement); H.R. REP. NO. 104-523(II) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1316.

[119] *See* Iran and Libya Sanctions Act § 6(6).

[120] *See id.*

[121] *See id.* § 6(5).

to choose two or more sanctions so that the President could exploit or refrain from exploiting the vulnerabilities unique to a sanctioned person. For example, a sanctioned financial institution that is a primary dealer in U.S. government securities might be seriously damaged if the Federal Reserve were to revoke its primary dealer status because buying Treasury securities at New York federal auctions and re-selling them to the investment community may be a highly profitable business. In other cases, a sanctioned company may rely on a license from the U.S. government to export sensitive high-technology equipment to China. Failure to receive the requisite export clearance could mean that the company goes bankrupt if it cannot obtain the equipment from a non-U.S. source. Accordingly, the President could use this sanction against this person by ordering the federal government to revoke its license and thus disrupt its lucrative status. In sum, it seems implicit in the ILSA that Congress expects the President to investigate thoroughly the business situation in which sanctioned persons find themselves, and then choose the most appropriate array of sanctions.

Because of the potentially serious damage that imposed sanctions may have on a company, practitioners should be aware of the availability of official guidance upon which there clients can rely. The ILSA invites companies to seek an advisory opinion from the Secretary of State as to whether a proposed transaction would run afoul to the ILSA and thereby subject the transactor to liability. A company that relies "in good faith" on an advisory opinion from the Secretary of State which characterizes the proposed transaction as lawful is free to engage in the transaction and is thereby immune from sanctions.[122] Of course, the company should be careful not to deviate in practice from the terms of the transaction that it presented to the Secretary of State and upon which the advisory opinion rests, unless the opinion calls for a modification of the deal to qualify for immunity.

[122] *See id.* § 7. With respect to investments in Iran, seeking advice is particularly important. Even though Section 5(e) of the ILSA requires the President to publish in the *Federal Register* a list of all significant publicly tendered Iranian oil and gas projects, "the fact that a project does not appear on the list does *not* indicate that the project is immune from or, . . . any less vulnerable to, sanction. . . ." H.R. REP. NO. 104-523(II), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1317.

3.4. *How Far Do the New Sanctions Reach?*

The secondary boycott imposed by the ILSA against Iran applies to "any person"[123] the President determines has carried out one of the prohibited activities discussed below.[124] The word "any" is particularly noteworthy because it implicates non-U.S. persons, thus, rendering extraterritorial the potential scope of the secondary boycott sanctions under the "ILSA." The extraterritorial scope of the sanctions is expansive since (1) sanctions may be imposed on a parent or subsidiary of a person, if the parent or subsidiary engages in a prohibited transaction with "actual knowledge;"[125] and (2) sanctions may be imposed on an affiliate of a person that is "controlled in fact" by that person and "engage[s] in"[126] a prohibited activity with "actual knowledge."[127] Therefore, the ILSA is an excellent example, along with the Helms-Burton Act, of the long reach of the United States' extraterritorial jurisdiction with respect to unilateral trade actions.

In order to underscore why this long reach is dramatic and controversial, consider the following example. Assume a French corporation, which has a Dutch subsidiary, is owned by a holding company incorporated in Bermuda. The holding company, which is a shell and is controlled by senior managers of the French corporation, also owns a company incorporated in Indonesia. The Indonesian company, in turn, owns a company incorporated in Singapore. Like the Bermuda holding company, the Indonesian and Singaporean companies are controlled in fact by the French corporation. No U.S. citizens work for any of the companies.

---

123 "Any person" includes any individual, corporation, partnership, or other business entity, or a successor entity. *See* Iran and Libya Sanctions Act § 14(14).

124 *See id.* § 5(c)(1).

125 *See id.* § 5(c)(2)(B).

126 The Department of State guidelines on the implementation of the ILSA clarify that for corporate parents, "engages in" refers to the facilitation and authorization of entry into a prohibited contract. For subsidiaries,"engages in" refers to actual participation in the implementation of the contract. *See* Public Notice, 61 Fed. Reg. 66,067 (1996).

127 *See* Iran and Libya Sanctions Act § 5(c)(2)(C).

Accordingly, the organizational structure is as follows:

Bermuda Holding Company
(Parent of French Subsidiary)

French Subsidiary
(Mastermind of Prohibited Activity)

Indonesian Subsidiary
(Affiliate of French Subsidiary)

Dutch Corporation
(Subsidiary of French Subsidiary)

Singaporean Corporation
(Affiliate of French Subsidiary)

Assume the French company engages in a prohibited activity and is therefore sanctioned under the ILSA. Assume further that all of the other entities participate in the prohibited activity, though some in minor respects, with actual knowledge that the activity is in fact prohibited. Because they are affiliates of and controlled by the French corporation, the Indonesian and Singaporean companies also will be sanctioned. As the parent of the French corporation, the Bermuda holding company will be sanctioned as well. As the subsidiary of the French corporation, the Dutch corporation will be sanctioned. The names of all of these sanctioned entities will be published in the *Federal Register*.[128]

The only caveat to sanctioning the parent and subsidiary is the mens rea requirement of "actual knowledge," and the only caveat to sanctioning the other affiliates is the mens rea requirement plus the control-in-fact requirement. In many cases arising under the ILSA, it will be difficult for U.S. authorities to satisfy these requirements. Moreover, it is not clear whether a parent, subsidiary, or affiliate can have actual knowledge imputed to it if its different officials knew "a piece of the puzzle," but no one official had a "bird's eye" view of the entire operation. Nor is it clear whether a parent, subsidiary, or affiliate can be said to have actual knowledge if it is willfully blind to engagement in the prohibited

---

[128] *See id.* § 5(d).

activity.[129] Despite these uncertainties, the possibility of sanctions is real. Hence, it is quite appropriate for foreign corporations and their governments to express concern over the long arm of the ILSA.

3.5. *Assessing the Investment Trigger Against Iran*

What kind of transaction with respect to Iran will trigger United States imposition of two or more of the aforementioned sanctions? The ILSA spells out one prohibited direct foreign investment transaction. The following direct foreign investment transaction is prohibited under the ILSA: (1) making an investment worth forty million dollars or more; (2) on or after August 5, 1996 (the date of enactment of the ILSA); (3) with actual knowledge; and (4) where the investment "directly and significantly" contributes to the enhancement of Iran's ability to develop its petroleum resources.[130] Engaging in the above-mentioned activity triggers sanctions that, absent a waiver, must be imposed.

Examples of direct foreign investment transactions that would likely violate the ILSA follow from the definition of "investment."[131] Three categories of illegal transactions are included in this definition of investment. The first category covers entry into a contract to take responsibility for developing Iranian petroleum resources or a contract to guarantee another company's agreement to develop these resources.[132] Contracting to build an oil rig or pipeline or providing engineering consulting services would surely fall within this category.

The second category concerns acquisition of an equity interest (i.e., buying shares) in a company that develops Iranian petroleum resources.[133] Accordingly, an oil company would violate the ILSA by purchasing shares in another company that, in turn, develops Iranian petroleum resources. An example of this kind of violation is the agreement reported in the fall of 1996 that Petronas, Malaysia's state oil company, would acquire a thirty percent

[129] There is substantial case law on money laundering regarding both of these uncertainties. U.S. authorities or corporate counsel might seek to analogize to this law.

[130] *See* Iran and Libya Sanctions Act § 5(a).

[131] *See id.* § 14(9).

[132] *See id.* § 14(9)(A).

[133] *See id.* § 14(9)(B).

stake in a $600 million project to develop the Sirri A and E oil fields in the Persian Gulf off Iran.[134] However, as of yet, the United States has not imposed sanctions in this case.

Legislative history regarding the second category indicates that portfolio investments are not covered by the sanction mechanism.[135] Thus, for example, absent some other applicable prohibition, nothing in the ILSA bars a mutual fund from investing in the equity or debt securities of an oil company that itself is involved in the development of Iranian petroleum resources and, indeed, runs afoul of the ILSA. What is not clear, however, is the test for distinguishing a direct investment from a portfolio investment. Does the distinction depend on the nature of the investor (e.g., an oil company versus a mutual fund), the extent of control the investor has over the company responsible for developing petroleum resources (e.g., controlling influence over management decisions and the right to appoint members of the board of directors), or the size of the investment (e.g., minority versus majority stake)? As indicated earlier, the safest strategy for dealing with these questions is to seek an advisory opinion from the Secretary of State.[136]

The third class of illegal direct foreign investment transactions deals with the receipt of royalties, earnings, or profits from the development of Iranian petroleum resources.[137] Like the previous category, the precise boundaries of this category are uncertain. Typically, earnings and profits would be received as a result of an equity interest in a petroleum resource development project. Will this interest be characterized as a portfolio investment? Royalty payments are likely to be made as a result of the sale or license of patented technology to a company responsible for a project. Presumably, a patent holder must take care not to sell or license technology to a company for use in the Iranian petroleum resource sector.

---

[134] *See U.S. Embassy Denies Sanctions Are Planned Against Malaysian Oil Firm For Iranian Dealings*, 13 Int'l Trade Rep. (BNA) 1698 (Nov. 6, 1996); James Kynge, *Malaysia Angered by U.S. Sanctions Threat*, FIN. TIMES, Nov. 1, 1996, at 6.

[135] *See* H.R. REP. NO. 104-523(II) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1318 (stating that "the [House Ways and Means] Committee does not intend that the sanctions provided . . . would extend to portfolio investments made by any other person in a sanctioned person").

[136] *See* Iran and Libya Sanctions Act § 7.

[137] *See id.* § 14(9)(C).

Congress anticipated the possibility that businesses might seek to circumvent the forty million dollars investment trigger sanction by structuring a transaction in amounts less than forty million dollars. Accordingly, the prohibited activity also includes any combination of investments of at least ten million dollars each which, in a twelve-month period, add up to or exceed forty million dollars.[138] Congress also anticipated the possibility that the investment trigger sanction might not induce other countries to develop their own sanctions against Iran. Therefore, it included a "stick," namely, the possibility of an enhanced sanction.[139] If a country "has agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran's efforts" to support acts of international terrorism, then the President may waive application of the investment trigger sanction to individuals and businesses from that country.[140] However, if a country has not undertaken "substantial measures" in this regard, then a mandatory "enhanced" sanction will be applied to individuals and businesses from that country. The enhancement consists of lowering the threshold that triggers the sanction. Instead of a forty million dollar aggregate limit on petroleum resource investments, the limit drops to twenty million dollars.[141] Likewise, the ten million dollar limit applicable to combinations of investments drops to five million dollars.[142] Hence, it becomes illegal to make a combination of investments of at least five million dollars each that, in a twelve-month period, equal or exceed twenty million dollars.[143]

The existence of reasonably specific definitions of the terms "investment,"[144] "develop,"[145] and "petroleum resources,"[146] and the fact that Congress anticipated certain problems that might arise, should not suggest that enforcement of the ILSA is me-

---

[138] *See id.* § 5(a).

[139] *See id.* § 4(d). The President is required to report to Congress any country to which the enhanced sanction is applied. *See id.* § 4(d)(2).

[140] *Id.* § 4(c)(1). The President must notify Congress of the waiver at least 30 days before the waiver takes effect. *See id.* § 4(c)(2).

[141] *See id.* §§ 4(d)(1), 5(a).

[142] *See id.*

[143] *See id.*

[144] *Id.* § 14(9).

[145] *Id.* § 14(4).

[146] *Id.* §14(15).

chanical and without problems. To the contrary, there are several unresolved issues.[147] For example, the ILSA does not provide any guidance as to what a "direct and significant" contribution to the development of Iran's petroleum resources would be. Therefore, it would be an overstatement to say the President lacks discretion in imposing the mandatory investment trigger sanctions. In fact, the President must render a case-by-case judgment as to each suspect investment to determine whether it is both "direct" and "significant" in nature. It is inconceivable that political considerations will not play a role in some of the case determinations. For example, in July 1997 the Clinton Administration announced it had no objections under the ILSA to the construction of a $1.6 billion natural gas pipeline linking Turkmenistan and Turkey via Iran.[148] The pipeline, said Secretary of State Madeleine Albright, was "a way to help Turkey and Turkmenistan."[149] Turkey, of course, is an important ally of the United States, and with respect to Turkmenistan, the United States has been "keen to wean the former Soviet Republics away from their economic dependence on Russia."[150] As a legal matter, the decision may be defended on the ground that the pipeline will not help develop Iranian petroleum resources because it will carry Turkmen, not Iranian, natural gas.[151]

As another example, suppose a country bordering Iran builds a natural gas pipeline on its border with Iran, and buys natural gas from Iran that will be transported in the new pipeline. Does the transaction trigger the investment sanction? The issue is not hypothetical, because Turkey is engaging in exactly this sort of transaction.[152] In August 1996, just days after the ILSA took ef-

---

[147] An examination of the ILSA indicates that several terms used throughout the Statute are undefined. *See id.* § 14.

[148] *See* Charles Clover, *Azerbaijan Looks to U.S. to End Sanctions*, FIN. TIMES, July 28, 1997, at 4; Robert Corzine, *U.S. Decision Sparks a New Round of Pipeline Politics*, FIN. TIMES, July 31, 1997, at 4.

[149] Corzine, *supra* note 148.

[150] *Id.*

[151] *See It Will Burn Nicely, Anyway*, THE ECONOMIST, Aug. 2, 1997, at 30. Moreover, the United States appears to have taken the position that the deal is exempt from ILSA because it predates the entry into force of the sanctions. *See* Robin Allen, *Iran Sidesteps the U.S. to Cultivate Its Neighbours*, FIN. TIMES, Dec. 31, 1997, at 3.

[152] *See* Gary G. Yerkey, *U.S. Continues To Study Iran-Turkey Energy Pact To Determine Whether It Violates U.S. Trade Law*, 13 Int'l Trade Rep. (BNA) 1353 (Aug. 21, 1996); Steven Erlanger, *Turkey-Iran Gas Deal: A Test of U.S. Law On*

fect, a newly elected Islamic government in Turkey signed a twenty-three year, twenty-three billion dollar natural gas contract with Iran.[153] Under the contract, Iran agreed to sell roughly 140 billion cubic feet of natural gas a year to Turkey beginning in 1998.[154] The gas is to be delivered in a new pipeline consisting of two parts.[155] A 680-mile portion of the pipeline will run from the Turkish-Iranian border into Turkey and will cost $1.2 billion.[156] A 170-mile portion of the pipeline will run from the border into Iran and cost $300 million.[157] Turkey is responsible for building its portion of the pipeline, while Iran is responsible for building the portion in Iranian territory. The Turkish government asserts it is not providing any assistance to the Iranians to build the pipeline; however, there have been rumors that through Turkish-Iranian counter trade transactions the Turks may be providing some infrastructure assistance. The United States has warned Turkey that the transaction could violate the ILSA, but Turkey has claimed that the contract is nothing more than a trade deal, an exchange of natural gas for money, and trade deals are not prohibited by the ILSA. Nothing in the contract calls for an investment by Turkey in Iran's petroleum resource development. Turkey also has political factors in its favor that may save it from sanctions under the ILSA. The United States values Turkey's participation in the North Atlantic Treaty Organization ("NATO") and the continuation of U.S. military bases in Turkey. Not only did these bases play an important role in the 1991 Gulf War, but also they are used to enforce the "no-fly" zones over Iraq. Furthermore, the United States is wary of provoking anti-American Islamic extremists in Turkey. Thus, it seems quite unlikely that the United States will interpret the Iran investment trigger language in the ILSA in such a way as to reach Turkey's contract.

Terror?, N.Y. TIMES, Aug. 13, 1996, at A7; *Turkey Sets Iran Gas Deal, Says It Doesn't Defy Ban*, WALL ST. J., Aug. 12, 1996, at A7.

[153] *See* Erlanger, *supra* note 152.

[154] There are discrepancies in media accounts of the exact amount of natural gas Turkey will purchase each year. Two reports, for example, state that Iran will supply 105 billion cubic feet beginning in 1999, and the volume will rise to 350 billion cubic feet by 2005. *See* Freeberg, *supra* note 79, at 25; Erlanger, *supra* note 152.

[155] *See Turkey Sets Iran Gas Deal*, *supra* note 152.

[156] *See id.*

[157] *See id.*

How the United States treats the transaction between Turkey and Iran may not matter in the end because the Turkey-Iran pipeline may be difficult to complete. The proposed pipeline route is through difficult terrain and hostile Kurdish territory.[158] Moreover, Turkey has other sources of natural gas supply, including Russia, Algeria, Qatar, and possibly Egypt, if a so-called "peace pipeline" from Egypt through Israel, Lebanon, and Syria is built. Nonetheless, the United States will surely be confronted with several other transactions that fall into the "gray" area between investment and trade. For instance, there are likely to be natural gas supply deals between Iran and India, Iran and Pakistan, and Iran and Turkmenistan.[159] After all, Iran has the second largest natural gas resources after Russia, and it is eager to develop these resources for export purposes. The threat of U.S. sanctions is unlikely to intimidate Iran into halting the development of natural gas contracts.

It is difficult to distinguish between an "investment" contract and a "service" contract. Suppose Turkey had agreed to provide routine maintenance on an Iranian natural gas pipeline. Would this constitute a prohibited "investment"? Guidelines on the implementation of the ILSA published by the Department of State suggest that a five step inquiry should be undertaken to determine if something is an "investment" or "service."[160] First, does the provider of management services put capital at risk?[161] Second, does the provider receive a share of income or profits from the development?[162] Third, does the provider receive an equity stake in the petroleum resources?[163] Fourth, does the provider receive compensation based on investment performance?[164] Finally, does the provider receive a share of the assets upon dissolution of the enterprise?[165] An affirmative answer to these questions suggest

[158] *See* Bhushan Bahree, *Iran Takes Economic Steps in Response to U.S. Curbs*, WALL ST. J., Aug. 14, 1996, at A3.

[159] *See, e.g.*, Robert Corzine, *Turkmenistan Defies U.S. Over Iran Gas*, FIN. TIMES, Jan. 21, 1997, at 4.

[160] *See* 61 Fed. Reg. 66,067 (1996); *State Department Issues Guidance Clarifying Iran-Libya Sanctions Law*, 13 Int'l Trade Rep. (BNA) 1967 (Dec. 18, 1996) [hereinafter *Department Issues Guidance*].

[161] *See Department Issues Guidance*, *supra* note 160.

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.*

that the contract is a prohibited investment. However, it is not entirely clear how the U.S. government might resolve a case where some, but not all, of the above questions are answered in the affirmative.

3.6. Assessing the Investment and Trade Triggers Against Libya

What kind of transactions with respect to Libya will trigger United States imposition of two or more sanctions? The ILSA specifically states two prohibited activities regarding Libya. The first, an investment trigger, is identical in virtually all respects to the investment trigger for Iran. That is, it is illegal for any person to (1) make an investment worth forty million dollars or more; (2) with actual knowledge; (3) after the date of enactment of the statute (August 5, 1995), that; (4) "directly and significantly" contributes to the enhancement of Libya's ability to develop its petroleum resources.[166] When the President determines that such activity has occurred he must impose sanctions. The only difference between the Iranian and Libyan investment triggers is that a waiver is not possible regarding the Libyan trigger. Thus enhanced sanctions are not a threat. That is, the President does not have the authority to waive the Libyan investment trigger if a country agrees to undertake substantial measures, including economic sanctions, to inhibit Libya's efforts to support international terrorism. The waiver applies only to the Iranian investment trigger.[167] As a result, the "stick" to encourage other countries to adopt measures against Libya, namely, the imposition of the enhanced sanction, does not apply. The reason for this difference is not apparent from the statute or legislative history, rather its explanation is most likely found in business reality. As suggested earlier, European companies have far more extensive dealings in the Libyan rather than the Iranian petroleum industry.[168] As a result, Congress probably realized there was little hope of inducing a multilateral sanctions regime against Libya (beyond the measures already adopted in United Nations resolutions), and correspondingly, there was no point in applying the enhanced sanction.

---

[166] *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(b)(2), 110 Stat. 1541, 1543 (to be codified at 50 U.S.C. § 1701 note).

[167] *See id.* § 4(c).

[168] *See supra* notes 72-80 and accompanying text.

The second prohibited activity regarding Libya concerns trade in sensitive, particularly military, items. The President is required to impose two or more sanctions if a person engages in the following transaction: (1) exports or other transfers to Libya, (2) with actual knowledge, (3) goods, services, or technology exported to Libya are prohibited under United Nations Security Council Resolutions 748 (adopted March 31, 1992) or 883 (adopted November 11, 1993),[169] and (4) these exports "significantly and materially" contribute to Libya's ability to develop its petroleum resources, maintain its aviation capabilities, acquire chemical, biological, or nuclear weapons or a destabilizing number of advanced conventional weapons, or enhances Libya's military capabilities.[170] While the prohibited transaction mentions petroleum resources and aviation, the clear thrust concerns weapons. In essence, the trade trigger is a unilateral measure adopted by the United States to reinforce the multilateral arms embargo already implemented by the United Nations. Although neither the ILSA nor its legislative history casts doubt on the sincerity or efficacy of the U.N. Security Council measures, the very existence of the trade trigger sanction must be seen as Congressional skepticism of the willingness of some countries and companies to forsake profits and cease arms dealings with Libya. Essentially, the trade trigger says to the world: "[t]he United States agrees with the multilateral measures against Libya, but just to make sure they are followed, the United States has its own secondary boycott to keep everyone in line."

As with the investment trigger, which contains the flexible but undefined language "directly and significantly contribute[s],"[171] the trade trigger uses the phrase "significantly and materially."[172] This undefined phrase gives the President considerable room to maneuver in deciding whether to impose sanctions. Likewise, both triggers contain the same *mens rea* requirement of actual knowledge; thus the problems noted earlier regarding proof of actual knowledge regarding the investment trigger are sure to be repeated with respect to the trade trigger. An obvious question is why Congress chose to include a trade trigger with respect

[169] The relevant provisions of Resolution 748 are paragraphs 4(b) and 5. The relevant provisions of Resolution 883 are paragraphs 5 and 6.

[170] *See* Iran and Libya Sanctions Act § 5(b)(1).

[171] *See id.* §§ 5(a), 5(b)(2).

[172] *See id.* § 5(b)(1).

to Libya, but not with respect to Iran. After all, this choice means that the secondary boycott with respect to Iran is narrowly tailored to petroleum resource investments, whereas the secondary boycott with respect to Libya includes such investments and exports in a wide array of other goods and services. The legislative history explains the reason for the differential treatment of the two countries:

> In the case of Iran, the [House Ways and Means] Committee believes that it will be more effective to impose sanctions on companies that invest in Iran's oil and gas resources. This includes contracts for the development of petroleum resources, contracts for the supervision and guarantee of such development projects, and the acquisition of an ownership share or participation in the profits of such projects. Without foreign investment, production in Iran's oil and gas sector will fall, which will choke off revenue to the government of Iran and thereby deny it resources it employs to threaten the national security interests of the United States. These provisions do not deal with financing or trade which would be far less effective, create substantial difficulties in monitoring and cause unnecessary adverse economic effects on U.S. businesses and those of our allies. Similarly these provisions would not . . . reach purchases or equity interests in a non-Iranian company subject to this . . . [the ILSA] unless the purchasing party is covered by . . . [the provisions of the ILSA dealing] with parent-subsidiary relationships.
>
> However, the Committee did not believe it was wise to include a requirement in the bill [H.R. 3107, the final version of the ILSA] that the President sanction trade with Iran (the so-called "trade trigger") *because the cost to U.S. interests of imposing such a broadly based secondary boycott would be too high.*
>
> *For example, monitoring international trade with Iran, especially in common goods like drill pipe and drill bits, would be a difficult if not an unworkable task. The number of trade transactions will be significantly higher than the number of investment contracts and the flow of components impossible to trace. The incidence of sanctions required by the trade trig-*

> *ger would be greater. The Committee believes it would be so high as to cause serious damage to our relations with trusted allies.* By contrast an investment trigger is more workable for the President and more potent when applied. Equipped with an investment sanction the President is in a better position to convince countries trading with Iran to join the U.S. in denying Iran the opportunity to earn hard currency from its petroleum resources.
>
> *Libya represents a different case by virtue of multilaterally agreed trade sanctions adopted by the United Nations Security [Council] Resolutions*, which prohibit trade in weapons, aviation equipment, and oil equipment significant to the refining sector. For Libya, the bill establishes a mandatory sanction framework for violations of the internationally agreed trade regime.[173]

In sum, the different economic histories and geopolitical circumstances account for the differential treatment of Iran and Libya.

3.7. The Duration and Termination of Sanctions

Any sanction imposed under the ILSA must remain in effect for a period of at least one year from the date on which it is imposed.[174] In general, the ILSA establishes a minimum two-year duration for sanctions.[175] However, the ILSA allows for the President to determine and certify to Congress that the sanctioned person is no longer engaging in a prohibited transaction and that the person has provided reliable assurances that he or she will not knowingly violate the ILSA in the future.[176] In this event, the President may lift the sanctions, subject to the requirement that they remain in effect for at least a year.[177] In effect, this requirement ensures that a minimum penalty is imposed, and prevents a sanctioned person from skirting sanctions by temporarily ceasing

---

[173] H.R. REP. NO. 104-523(II) (1996), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1317 (emphasis added).

[174] *See* Iran and Libya Sanctions Act § 9(b)(2).

[175] *See id.* § 9(b)(1).

[176] *See id.* § 9(b)(2).

[177] *See id.* § 9(b)(2).

an illegal activity and providing a disingenuous assurance of future compliance.

The ILSA lays out two further justifications for terminating sanctions. Whereas the above justification for termination of sanctions rests on the sanctioned person changing his behavior, the remaining two justifications allow for termination of sanctions if Iran and Libya reform their behavior.[178] First, with respect to Iran, the requirement to impose sanctions will cease to have force or effect if the President determines and certifies to Congress that Iran no longer supports acts of international terrorism, and has abandoned its efforts to obtain nuclear, chemical, and biological weapons, and ballistic missiles and launchers.[179] Second, with regard to Libya, the President need not impose sanctions if he determines and certifies to Congress that Libya has satisfied the requirements of United Nations Security Council Resolutions 731 (adopted January 21, 1992), 748 (adopted March 31, 1992), and 883 (adopted November 11, 1993).[180]

Suppose the President refuses to make any of the three aforementioned determinations and certifications that would allow for termination of sanctions. Then sanctions may remain in place for considerably longer than two years; however, how much longer is not clear. The ILSA contains a sunset provision stating that the ILSA ceases to be effective five years after the date of enactment. Such a provision leads to the logical conclusion that the ILSA would "expire" on August 5, 2001.[181] However, one reading of this sunset provision is that it precludes the imposition of new sanctions after August 5, 2001, but not the continued enforcement of sanctions imposed prior to that date. Thus, at least in theory, there is no fixed termination period on sanctions.

This possibility raises an interesting problem: while "[a] determination to impose sanctions" is not reviewable by any court,[182] could a sanctioned person challenge the continuation of sanctions long after they have been imposed, if there are reasonable grounds to believe their continuation is unwarranted? The answer would seem to depend in part on how a court defines the statutory words "to impose." Do they refer narrowly to the ini-

[178] *See* id. § 8.
[179] *See id.* § 8(a).
[180] *See id.* § 8(b).
[181] *See id.* § 13(b).
[182] *See id.* § 11.

tial Presidential decision to impose sanctions, or do they also encompass a refusal by the President to determine and certify that the criteria for terminating sanctions have been met? The presence of a sunset provision should not give false hope to critics of the ILSA that after August 5, 2001 the ILSA will become legal history. Congress made its reason for the sunset provision clear in the legislative history to the ILSA:

> Because this bill [H.R. 3107, the final version of the ILSA] deals with a difficult policy area, the [House Ways and Means] Committee intends that it should not be permanent. Five years is adequate time to gauge its effectiveness at achieving the Committee's objectives. The Committee believes it will be important for Congress to revisit the issue in five years and to evaluate the behavior of Libya and Iran and the effectiveness of this bill.[183]

In other words, a renewal of the ILSA appears to be just as likely as its termination.

At the same time, the sunset provision should encourage American petroleum companies, since the national security considerations that gave rise to the ILSA are not invariant. At some undetermined point in the future, possibly when new political leaders take power in Iran and Libya, there will be no need for sanctions and they will be abolished. In the meantime, nothing in the ILSA prevents U.S. petroleum companies from keeping their existing, and building new, business contacts in these countries. As long as the ILSA remains in place, a farsighted American company should endeavor, to the extent politically possible, to "network" in Iran and Libya. Indeed, Mobil Oil Corp., Amoco Corp., and Conoco appear to be positioning themselves for the inevitable post-sanctions era.[184]

---

[183] H.R. REP. NO. 104-523(II), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1322.

[184] *See* Daniel Pearl, *U.S. Oil Firms Attend Conference in Iran*, WALL ST. J., May 12, 1997, at 11 (discussing the presence of mid-level officials from American petroleum companies at an Iranian sponsored energy conference held in Isfahan during May 1997).

3.8. *The Waiver and Delay of Sanctions*

The ILSA provides three circumstances under which sanctions may be waived. First, the President can waive the imposition of a sanction if a waiver "is important to the *national interest* of the United States."[185] This waiver authority appears to be quite broad; that is, it can be invoked for any sort of national interest, not simply a national security interest.[186]

> Circumstances in which the President might consider use of this authority would include cases in which imposition of sanctions would threaten U.S. intelligence sources and methods, where a particular sanction would raise significant issues under the international obligations of the U.S., and where international cooperation in pursuit of the goals of the bill could be jeopardized, rather than assisted, through unilateral U.S. action, or where sanctions would lead to unacceptable costs to U.S. economic interests.[187]

The last clause of the above-quoted legislative history indicates that the President could find the imposition of sanctions contrary to the national interest because sanctions would result in an unacceptably high loss of sales or profits to U.S. businesses, or would cost too many Americans their jobs.

The only real constraint on the President's national interest waiver authority is that he must report his waiver determination to Congress at least thirty days before the waiver takes effect.[188] Furthermore, the report given to Congress must discuss certain specifically listed items, such as a description of the illegal transaction, an explanation of America's efforts to cause the government with primary jurisdiction over the sanctioned person to terminate or penalize the illegal transaction, an estimate of the extent to which the transaction helped Iran or Libya, and a discussion of how the President would handle a repeat offense by the sanctioned person.[189]

---

185 Iran and Libya Sanctions Act § 9(c) (emphasis added).

186 *See id.*

187 H.R. REP. NO. 104-523(II), *reprinted in* 1996 U.S.C.C.A.N. 1311, 1320-21.

188 *See* Iran and Libya Sanctions Act § 9(c)(1).

189 *See id.* § 9(c)(2).

Second, the President can waive sanctions if their imposition would harm the ability of the U.S. government to procure critical goods and services.[190] For example, regarding defense procurement, sanctions need not be imposed if the person to which sanctions otherwise would be applied is a "sole source supplier" of an "essential" defense article or service, and there is no "readily or reasonably available" alternative source,[191] or if the defense article or service is being provided under an existing contract[192] or defense co-production agreement[193] and is "essential to the national security" of the United States.[194] Similarly, regarding non-defense related items, the President can waive sanctions for a person supplying spare or component parts,[195] or information technology,[196] that are "essential" to U.S. manufacturing. The President may also waive sanctions for a person providing routine servicing and maintenance on products that cannot be provided by another "readily or reasonably available" person,[197] or offering medicines and humanitarian items[198].[199] In brief, this waiver authority ensures that an American-imposed secondary boycott of Iran or Libya does not wind up doing serious damage to the Pentagon or to U.S. manufacturers.

Finally, as discussed earlier, nationals of a country may escape sanctions if their country has "agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran's efforts to" sponsor acts of international terrorism.[200] This waiver possibility does not apply to Libya.[201]

---

190 *See id.* § 5(f).

191 *See id.* § 5(f)(1)(B).

192 *See id.* § 5(f)(1(A).

193 *See id.* § 5(f)(1)(C).

194 *See id.* § 5(f)(1).

195 *See id.* § 5(f)(4).

196 *See id.* § 5(f)(5).

197 *See id.* § 5(f)(5)(C).

198 *See id.* § 5(f)(7).

199 *See id.* § 5(f)(4)-(7). (Note that the statute incorrectly numbers the items in sub-section (f), omitting an item (5). The correct numbering should finish with item (6), which should cover medicines).

200 *See id.* § 4(c)(1).

201 *See id.* (indicating that the application of the waiver applies only to Iran and not to Libya).

As mentioned earlier, the President's decision to impose sanctions is not reviewable by any court.[202] Consequently, it is impossible for a sanctioned person to delay imposition by attempting to bog down the President in a lawsuit.[203] However, the ILSA sets forth circumstances, which are largely under the control of the President and the government with primary jurisdiction over the sanctioned person, whereby imposition may be delayed for up to 180 days.[204] By allowing for delayed imposition of sanctions, Congress appears to have sought to soften the unilateral blow of the ILSA.

Specifically, Congress "urges" the President to commence consultations with the government that has primary jurisdiction over a person who the President determines to be liable under the ILSA "immediately" after he makes that determination.[205] In order to pursue these consultations, the President can delay implementation of sanctions for up to ninety days.[206] Sanctions need not be imposed if, following the consultations, the President determines and certifies to Congress that "the government has taken specific and effective actions, including . . . the imposition of appropriate penalties, to terminate the involvement of the foreign person" in the illegal transaction.[207] The President can delay implementation of sanctions for an additional ninety days if he determines and certifies to Congress that the government "is in the process of taking" actions to terminate the involvement of the foreign person in the illegal transaction.[208]

4. ARE THE UNITED STATES ACTIONS WORKING?

Clearly, the United States is not shy about enacting legislation authorizing unilateral trade action against another country in the interest of national security. There is, and is likely to continue to be, a large and expanding body of instances where such actions are taken. These invocations of statutory authority to undertake uni-

---

[202] *See id.* § 11; H.R. REP. NO. 523(I), *reprinted in* 1996 U.S.C.C.A.N. 1296, 1306.

[203] *See* H.R. REP. NO. 523(I).

[204] *See* Iran and Libya Sanctions Act §§ 9(a)(2), 9(a)(3).

[205] *See id.* § 9(a)(1).

[206] *See id.* § 9(a)(2).

[207] *See id.*

[208] *See id.* § 9(a)(3). The President is obligated to report to Congress the status of consultations and any additional 90 day delays. *See id.*§ 9(a)(4).

lateral trade action must be judged not simply from the perspective of its appropriateness in the post-Uruguay Round multilateral trading system, and its consistency with the rules of that system. After all, from this perspective, the judgment is rather obvious: the language of GATT Article XXI is not a serious constraint on the use of national security sanctions, and only the good faith of WTO Members to avoid abusive invocation in the interests of the multilateral system provides some measure of a GATT-based constraint.

Rather, a practical issue emerges from the earlier discussions of the use of trade remedies in support of national security aims. The United States, or any WTO Member country's, use of national security sanctions ultimately must be judged on the basis of a bottom line question: does unilateral action in support of national security aims work? The empirical evidence discussed below regarding unilateral action pursuant to statutes other than Section 301 of the Trade Act of 1974, as amended, suggests that such action is not nearly as efficacious as its advocates would hope or believe. Indeed, often it is self-destructive in terms of its effect on the American economy.

One recent study, conducted by the Institute for International Economics, examined the impact of unilateral American sanctions imposed against twenty-six countries, including Cuba, Iran, Libya, and Burma.[209] The results of the study indicated that in 1995, the sanctions cost the United States between fifteen and twenty billion dollars as a result of lost exports and higher priced substitute import sources, and between 200,000 and 250,000 lost export-related jobs.[210] These self-inflicted wounds are sure to worsen with the tightened unilateral ban on new American investment in Burma.

---

[209] *See* Gary Clyde Hufbauer et al., *U.S. Economic Sanctions: Their Impact on Trade, Jobs, and Wages* (Apr. 16, 1997) <http://www.iie.com/sanctnwp.htm.> (available from the Institute for International Economics, Washington, D.C.). For a general discussion of the study see Gary G. Yerkey, *U.S. Sanctions Against Other Countries Cost Exporters Up to $19 Billion, Study Says*, 14 Int'l Trade Rep. (BNA) 736 (Apr. 23, 1997) [hereinafter *U.S. Sanctions Against Other Countries*; Robert Corzine & Nancy Dunne, *U.S. Business Hits at Use of Unilateral Sanctions*, FIN. TIMES, Apr. 16, 1997, at 10; Institute for International Economics News Release, *Economic Sanctions Reduce U.S. Exports by $15 Billion to $20 Billion Annually* (Apr. 16, 1997) <http://www.iie.com.sancprel.htm> (available from the Institute for International Economics, Washington, D.C.).

[210] *See* Hufbauer, *supra* note 209.

> The day after a prohibition on new U.S. investments in Burma was announced, the heads of several [non-American] oil companies operating in the country sat down to dinner at one of Rangoon's new luxury hotels. They were salivating—but not because of the succulent lobster on offer that evening.
>
> Instead, they were discussing how to carve up exploration rights held by U.S. companies, rights the U.S. companies will most likely have to give up under the new rules. . . .
>
> In the absence of the U.S. companies, "it's all there for the taking. No project will not be taken up," says an executive with a Malaysian conglomerate.[211]

Interestingly, the Institute for International Economics study triggered the creation of a coalition of 440 American companies and trade associations called "USAEngage."[212] The mission of USAEngage is to "fight the imposition of unilateral sanctions by the United States,"[213] because, as its chairperson, Donald V. Fites states, "the evidence is clear . . . [that] [t]he proliferation of U.S. unilateral sanctions undermines American leadership and competitiveness, costs U.S. jobs, and results in significant losses to the economy."[214] Recently, USAEngage supported legislation introduced in Congress that would curb America's use of unilateral sanctions.[215] The legislation would require an assessment of the economic impact and likelihood of success of sanctions before they are imposed, and authorize the President to waive sanctions if they are not in America's national interest.[216] Any sanctions imposed would be reviewed annually, and sunset after two years unless renewed by Congress.[217]

A second recent study, conducted by the National Association of Manufacturers, reviewed sixty-one laws and executive actions

---

[211] Ted Bardacke, *Burma—The Sick Man Gets Sicker*, FIN. TIMES, Apr. 29, 1997, at 6.

[212] *See U.S. Sanctions Against Other Countries, supra* note 209, at 736.

[213] *Id.*

[214] *Id.*

[215] *See id.*

[216] *See* Nancy Dunne, *U.S. Companies Plan Attack on Sanctions*, FIN. TIMES, Sept. 15, 1997, at 4.

[217] *See id.*

ordering unilateral American sanctions against thirty foreign countries, including Cuba, Iran, Libya, and Burma that represent forty-two percent of the world's population, or 2.3 billion potential consumers of American goods and services in export markets worth $790 billion annually.[218] The upshot is that while these sanctions may make some Americans feel safe, they are not effective. "[I]n only a handful of cases can it be argued that the sanctions changed the behavior of the targeted governments."[219] Thus, "[u]nilateral sanctions are little more than postage stamps we send to other countries at the cost of thousands of American jobs,"[220] and they "give U.S. companies the 'stigma' of being unreliable trading partners."[221] Unilateral trade actions rarely have positive diplomatic results to offset the costs they impose on the American economy. As of this writing, for instance, there have been no significant, long-term changes in the fundamental policies of the target countries. Libya's Qaddafi remains recalcitrant and unapologetic. Like many sanction targets, he seems to be claiming victim status, using the sanctions to attract both admiration and sympathy from other Third World governments. The ILSA may well prove to push Libya from "mere" recalcitrance to out-

---

[218] *See* NATIONAL ASS'N OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-96 (1997).

[219] Gary G. Yerkey, *Unilateral Sanctions Target $790 Billion Potential Export Market a Year, Study Finds*, 14 Int. Trade Rep. (BNA) 421 (Mar. 5, 1997) [hereinafter *Unilateral Sanctions Target $790 Billion*].

[220] *Id.* (quoting Jerry Jasinowski, President, National Association of Manufacturers). For another study discussing the economic consequences on the United States of unilateral sanctions, see PRESIDENT'S EXPORT COUNCIL, UNILATERAL ECONOMIC SANCTIONS: A REVIEW OF EXISTING SANCTIONS AND THEIR IMPACTS ON U.S. ECONOMIC INTERESTS WITH RECOMMENDATIONS FOR POLICY AND PROCESS IMPROVEMENT (1997) (concluding that the negative economic impact on the United States of unilateral sanctions could be reduced if the United States better designed, implemented, and justified the sanctions, and avoided extraterritorial measures and secondary boycotts).

[221] *Unilateral Sanctions Target $790 Billion*, *supra* note 219, at 422 (paraphrasing Tracy O'Rourke, Chairman and Chief Executive Officer, Varian Associates, Inc.). Yet another study, conducted by the American Chamber of Commerce in Japan, concludes that "[o]nly 13 out of 45 U.S.-Japan trade agreements signed since 1980 have succeeded in helping U.S. businesses penetrate the Japanese markets, while 10 accords were failures." Tashio Aritake & Mark Felsenthal, *Only 13 Of 45 Accords With Japan Succeeded In Market Access, Business Group Reports*, 14 Int'l Trade Rep. (BNA) 76 (Jan. 15, 1997). Many of these accords were negotiated "under the gun" of an actual or threatened Section 301 action.

right defiance. As for Iran, the long-term effects of their 1997 elections on the relationship between Iran and the United States remains to be seen. The call of the new Iranian President, Muhammad Khatami, for a thoughtful dialogue with the United States, and President Clinton's warm response, indicate signs of improvement.[222] However, President Khatami seems to be at odds with Iran's spiritual leader, Ayatollah Ali Khamenei, who insists that "Islam will destroy the satanic sovereignty of the west."[223] Even if Iran changes its behavior and American-Iranian relations improve, it will be difficult if not impossible to argue the ILSA was a primary force behind the improvement. Indeed, there are at least three other pragmatic reasons why Iran could be seeking better dealings with the Great Satan: (1) the need to deal with declining oil revenues;[224] (2) the need to deal with the widening gap between the official exchange rate for its currency (the riyal) and the black market rate[225] and; (3) the hope for support in a possible second war with Iraq.[226]

In sum, unilateral trade action persists despite considerable evidence showing that it is not efficacious, and is often counterproductive. Nevertheless, this evidence has not prodded U.S. trade policy officials or jurists to rethink their fidelity to unilateral trade actions, and is unlikely to do so in the foreseeable future.

5. CONCLUSION

National security and international trade law are inextricably linked. By virtue of GATT Article XXI, the link is written into the constitution of modern international trade law. However,

---

[222] *See* Nancy Dunne, *U.S. Welcomes Iranian Call for Dialogue*, FIN. TIMES, Jan. 9, 1998, at 4; Robin Allen *et al.*, *U.S. Caution Over Call by Iranian President for Better Relations*, FIN. TIMES, Jan. 8, 1998, at 1; *Khatami's Iran*, THE ECONOMIST, Dec. 20, 1997, at 17.

[223] Allen, *supra* note 107, at 3; *see also* Robin Allen, *Khatami Rival Denounces U.S.*, FIN. TIMES, Jan. 19, 1998, at 3 (noting that a speech in the Iranian parliament in favor of Ayatollah Khamenei prompted members of parliament to shout "death to America").

[224] *See* Robin Allen, *Iran Admits Problem as Oil Revenues Fall*, FIN. TIMES, Jan. 12, 1998, at 3.

[225] *See* Robin Allen, *Khatami Builds His Political Authority*, FIN. TIMES, Jan. 15, 1998, at 4.

[226] *See* Anthony E. Mitchell, *Iran May Be Our Best Hope Against Iraq*, WALL ST. J., Jan. 29, 1998, at A18.

this link is not one between two equal forces. Article XXI provides little effective restraint on WTO Members from enacting national security sanctions legislation. Even in the international trade law constitution, international trade law is subordinated to national security.

The United States is exploiting this subordinate relationship. In the post-Soviet Union, post-Red China era, it is threatened by new groups of "bad guys," including state-sponsored terrorists and rogue dictators, who are less monolithic and more diffuse than the "old bad guys." The United States is meeting this threat by deploying international trade law measures, such as secondary boycotts, as a weapon. Unfortunately, America's allies and trade partners are being hit by friendly fire. Neither supporters nor critics of the weapon are entirely on target with their arguments. The weapon is neither outrageous nor splendid. But one thing is for sure, the weapon does not appear particularly effective. Since the operation of secondary boycotts causes so much controversy, and its results are so modest, the burden is on the U.S. trade policy makers to consider modifying, or even scuttling, the weapon.

* * * * * *