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NOTES

THE IRAN & LIBYA SANCTIONS ACT OF 1996: A THORN IN THE SIDE OF THE WORLD TRADING SYSTEM

I. INTRODUCTION

On August 5, 1996, President Clinton signed the Iran and Libya Sanctions Act of 1996 (ILSA) into law.¹ ILSA was a direct reaction to the increasing emergence of the United States as a prime target for acts of international terrorism² and thus the statute's primary justification is rooted in national security interests.³ Iran and Libya became the focal points of ILSA due to Congressional findings that both of these "rogue" nations⁴ were avid supporters of international terrorism.⁵

ILSA requires the president to impose at least two out of a list of six sanctions on any "person" who enters into certain types of transactions with Iran or Libya.⁶ With respect to both

1. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996).

2. During the congressional debates over the bill that eventually became the Iran and Libya Sanctions Act (ILSA), Representative Benjamin Gilman from New York reflected this concern by stating that "[i]n light of the growing . . . likelihood that state-sponsored terrorism poses an increasing threat to Americans inside and outside of the United States, we should place the strongest possible deterrent to any future acts of terrorism supported by such rogue regimes as Iran and Libya." 142 CONG. REC. H8126 (daily ed. July 23, 1996) (statement of Rep. Gilman).

3. The congressional findings enumerated in Section 2 of ILSA specifically state that Iran and Libya's support of acts of international terrorism poses a threat to the national security interests of the United States. *See* Iran and Libya Sanctions Act § 2(1)-(4).

4. Iran and Libya were categorized as rogue regimes throughout the Congressional debates over ILSA. *See, e.g.* 142 CONG. REC. H8126 (daily ed. July 23, 1996) ("there is no doubt that Iran and Libya are rogue states.") (statement of Rep. Roth); 142 CONG. REC. H8126 (daily ed. July 23, 1996) ("rogue regimes such as Iran and Libya.") (statement of Rep. Gilman).

5. *See* Iran and Libya Sanctions Act § 2(1)-(4).

6. *See id.* § 5(a)-(b). The president has delegated most of his responsibilities

Iran and Libya, sanctions must be imposed on any "person" who makes an "investment"⁷ of \$40 million⁸ or more that "directly and significantly contribute[s] to the enhancement" of the ability of those countries to develop their "petroleum resources."⁹ With respect to Libya only,¹⁰ sanctions must also be imposed on "persons" who engage in other forms of transactions including the transfer of goods, services, or technology that contribute to: (1) Libya's ability to acquire chemical, biological, or nuclear weapons; (2) the development of Libya's petroleum resources; or (3) the ability of Libya to maintain its aviation capabilities.¹¹ The list of sanctions that may be imposed under ILSA includes: (1) the prohibition of the Export-Import Bank of the United States from approving the issuance

under ILSA to the Office of Economic Sanctions Policy at the Secretary of State. See Memorandum, Delegation of Responsibilities Under the Iran and Libya Sanctions Act of 1996, 61 Fed. Reg. 64,249 (1996). For purposes of this Note, however, ILSA's provisions are discussed as if they are performed solely by the president.

7. For purposes of ILSA, the term "investment" has been defined as any of the following activities, if undertaken pursuant to an agreement with Iran or Libya: (1) the entry into a contract involving the development of petroleum resources in Iran or Libya; (2) the purchase of an ownership interest in such a development; (3) the entry into a contract providing for the participation in royalties, earnings, profits in such a development. See Iran and Libya Sanctions Act § 14(9)(A)-(C). Much to the relief of the U.S. banking industry, financing contracts for the sale or purchase of goods, services, or technology have been excluded from the definition of "investment." See *id.* § 14(9); see also Clyde Mitchell, *The New Sanctions Act*, N.Y. L.J., Aug. 21, 1996, at 3. Due to confusion over ILSA's definition of "investment," the term was defined in greater detail by the State Department on December 16, 1996. See Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66,067 (1996).

8. Or any combination of investments of at least \$10 million each that exceed \$40 million in a 12 month period. See Iran and Libya Sanctions Act § 5(a)-(b)(2).

9. See *id.* ILSA's definition of "petroleum resources" includes both petroleum and natural gas resources. See *id.* § 14(15).

10. Iran and Libya are treated differently by ILSA due to "their different economic histories and distinct geopolitical circumstances." HOUSE COMM. ON WAYS AND MEANS, IRAN AND LIBYA SANCTIONS ACT OF 1996, H.R. REP. NO. 104-523, pt. II, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 1311, 1317 [hereinafter WAYS & MEANS REPORT].

11. See Iran and Libya Sanctions Act § 5(b)(1)(A)-(C). In addition to goods, services, and technology, this section applies to the transfer of other items that are prohibited by paragraphs 4(b) or 5 of U.N. Security Resolution 748 and paragraphs 5 or 6 of U.N. Security Resolution 883. The prohibited items in these resolutions primarily involve aircraft equipment, military supplies, and oil refining equipment. See G.A. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg. paras. 5-6, U.N. Doc. S/RES/883 (1993); G.A. Res. 748, U.N. SCOR, 47th Sess., 3063rd mtg. paras. 4(b), 5, U.N. Doc. S/RES/748 (1992).

of any guarantee, insurance or extension of credit to sanctioned parties;¹² (2) U.S. refusal to grant licenses for the export of certain goods to sanctioned parties;¹³ (3) the prohibition of U.S. financial institutions from issuing loans over \$10,000,000 in a 12-month period to sanctioned parties;¹⁴ (4) the prohibition of sanctioned financial institutions from being primary dealers in U.S. government debt instruments;¹⁵ serving as agents of the U.S. government or serving as repositories for U.S. government funds;¹⁶ (5) the prohibition of the U.S. government from entering into procurement contracts with sanctioned parties;¹⁷ and (6) the restriction of imports from sanctioned parties.¹⁸ ILSA's definition of sanctionable "persons" includes foreign individuals, foreign corporations and, under the proper circumstances, even foreign nations.¹⁹

ILSA has been the center of considerable political saber rattling since its inception.²⁰ The controversy surrounding the statute does not stem from the fact that it targets the economies of Iran and Libya. To the contrary, the United States has selectively refused to trade with nations that it has classified as supporters of terrorism since the 1980s.²¹ ILSA, which con-

12. See Iran and Libya Sanctions Act § 6(1).

13. See *id.* § 6(2)(i)-(iv).

14. See *id.* § 6(3).

15. See *id.* § 6(4)(A).

16. See *id.* § 6(4)(B).

17. See *id.* § 6(5).

18. See *id.* § 6(6).

19. Specifically, ILSA's definition of a "person" that may be sanctioned includes natural persons, corporations, business associations, societies, trusts, any non-governmental entities or organizations, and any governmental organizations operating as a business enterprise. See *id.* § 14(14)(A)-(C).

20. Members of the European Union (EU), such as Italy, Germany, and France, immediately condemned ILSA when the statute was ratified by Congress. See Youssef M. Ibrahim, *EU Opens Fire on New Sanctions*, INT'L HERALD TRIB., July 25, 1996, at 6. The United States, in turn, condemned ILSA's critics for dealing with the terrorist regimes of Iran and Libya. See Alison Mitchell, *Clinton Signs Bill Against Investing in Iran and Libya*, N.Y. TIMES, Aug. 6, 1996, at A1. When President Clinton signed ILSA, he gave the following message to those opposing the statute: "you simply can't do business with people by day who are killing your people by night." Remarks on Signing the Iran and Libya Sanctions Act of 1996 and an Exchange With Reporters, 32 WEEKLY COMP. PRES. DOC. 1403, 1404 (Aug. 5, 1996). For a comprehensive and critical discussion of the political tensions that surround ILSA see Toby Roth, *New Iranian-Libyan Sanctions Will Only Hurt U.S.*, WALL ST. J., Aug. 6, 1996, at A14.

21. See 1 GARY CLYDE HUFBAUER ET. AL., *ECONOMIC SANCTIONS RECONSIDERED* 6-7 (2d ed. 1990). The U.S. currently maintains an almost complete prohibi-

stitutes a secondary boycott,²² goes a step further by subjecting foreign persons to sanctions for trading with Iran or Libya. Considering the fact that a number of major U.S. trading partners maintain close continuing economic ties with Iran and Libya, it is no wonder that the statute has caused outrage in the international community.²³

In the first few months after ILSA was enacted, a number of foreign firms and entities entered into transactions with Iran that arguably could have triggered mandatory sanctions under the statute.²⁴ These transactions were either completely ignored or dismissed by the United States as merely violating the spirit but not the letter of the statute.²⁵ Due to the lack of enforcement surrounding ILSA, it has been suggested that the statute was merely election year legislation which will never be applied in any meaningful way.²⁶ In January 1997, howev-

tion against domestic persons trading with Iran. *See generally* Iranian Transactions Regulations, 31 C.F.R. pt. 560 (1996); *see also* Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). A similar embargo is maintained against Libya. *See generally* Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (1996).

22. The U.S. prohibition against domestic persons trading with Iran and Libya constitutes a primary boycott, since it involves one country refusing to trade with another. *See* Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT'L L. 419, 429 (1996); *see also supra* note 21. ILSA, in contrast, is considered a secondary boycott because it involves one country (e.g., the United States) sanctioning other countries for doing business with a third country (e.g., Iran or Libya). *Cf. id.* Lowenfeld, *supra*, at 429-30 (describing concept of "secondary boycott" in context of legislation similar to ILSA).

23. The members of the EU import nearly 20% of their oil from Iran and Libya. *See* Bruce W. Nelan, *Taking on the World*, TIME, Aug. 26, 1996, at 26, 27. In particular, Germany and Italy have strong economic relationships with Iran. *See* Roth, *supra* note 20. It been suggested that Italy's economy would collapse if it complied with ILSA's mandate to stop dealing with Iran. *See id.*

24. ILSA does not operate retroactively so transactions before August 5, 1996 would not be grounds for the imposition of sanctions under the statute. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(a), (b)(2), 110 Stat. 1541, 1543 (1996). Since ILSA has entered into force, however, a number of arguably sanctionable investments have gone unanswered. For example, oil companies from Malaysia and France entered into a \$600 million contract to develop Iranian oil fields two weeks after ILSA was signed without being accused of violating the statute. *See Political Outlook*, MIDDLE E. ECON. DIG. Q. REP., Sept. 1, 1996, available in 1996 WL 11146997. Turkey has also challenged ILSA by entering into a \$40 million a year natural gas deal with Iran. *See* Steven Erlanger, *Turkey-Iran Gas Deal: A Test of U.S. Law on Terror?*, N.Y. TIMES, Aug. 13, 1996, at A7. While the United States issued several public warnings to Turkey regarding this deal, sanctions were never imposed because ILSA's provisions were not technically violated. *See* James M. Dorsey, *Turkish Leader's Islamic Tilt Vexes West*, WALL ST. J., Nov. 30, 1996, at A6.

25. *See supra* note 24.

26. *See* Nelan, *supra* note 23, at 27; *see also* Amy Sorter, *Despite Political*

er, the Department of State published a list of "significant projects" that have been publicly tendered in Iran's oil and gas sectors and could potentially subject foreign investors to sanctions under ILSA.²⁷ While the "significant projects" list does not indicate that any final determinations to impose sanctions have been made, it was a clear warning to firms who might invest in those projects.²⁸

In July 1997, a Canadian firm boldly defied this warning by signing a \$212 million contract to develop the Balal oil field in Iran, which was among the designated "significant projects."²⁹ While no action has been taken as of yet, there are signs that this investment may result in the first imposition of sanctions under ILSA.³⁰ Moreover, based on the behavior of foreign firms after ILSA's enactment,³¹ and due to the fact that many foreign firms are subject to counter-legislation that prohibits compliance with ILSA,³² it seems likely that more

Posturing, Election Shouldn't Effect Trade, DALLAS BUS. J., Sept. 27, 1996, at C9.

27. Significant Projects Which Have Been Tendered in the Oil and Gas Sector in Iran, 62 Fed. Reg. 1141 (1997) [hereinafter Significant Projects]. The "significant projects" listed include the following: (1) South Pars Gasfield Development Project; (2) AMAK Gas Processing Facility; (3) Doroud Oilfield Expansion Project; (3) Salman Field Khuff Gas Reservoir (Dalan Foirmation) Development; (4) Bandar Abbas Condensate Refinery (Number 9 Refinery); (5) Shiraz Refinery Expansion; (6) NGL-1200 Facility; (7) NGL-1300 Facility; (8) Lavan Island LPG Facility; (9) Balal Oilfield Development Project; and (9) Soroush Oilfield Development Project. See *id.*

28. See Maureen Lorenzetti, PLATT'S OILGRAM NEWS, Jan. 8, 1997, available in 1997 WL 887692; see also *U.S. Blacklists Iran Projects*, THE OIL DAILY, Jan. 10, 1997, at 5.

29. See Kimberly Music, *Bow Valley Says It Won't Let Sanctions Law Affect Iranian Efforts Or Initial Stock Offering*, THE OIL DAILY, Aug. 6, 1997, available in 1997 WL 8666536; see also Significant Projects, *supra* note 27.

30. See Music, *supra* note 29.

31. Since ILSA was passed, a number of foreign firms have shown a willingness to carry on with new and existing oil and gas projects with Iran and Libya despite the threat of sanctions. See *Libya: Hydrocarbons Projects Go On In Defiance of US*, MIDDLE E. ECON. DIG. Q. REP., Jan. 1, 1997, available in 1997 WL 9697644. Agip, an Italian firm, has continued to proceed on the \$3 billion West Libya Gas Development Project. See *id.* Similarly, the Red Sea Oil Corporation, a Canadian company, has announced intentions to start work on an oil exploration program in Libya's Sirte basin. See *id.* Finally, Turkey entered into a \$40 million a year gas deal with Iran almost immediately after ILSA came into force, but sanctions were never imposed. See Dorsey, *supra* note 24; see also Erlanger, *supra* note 24.

32. In 1996, the EU enacted a regulation prohibiting its members from complying with ILSA. See Council Regulation 2271/96, arts. 5, 11, 1996 O.J. (L 309) 1, 2-4.

firms will challenge U.S. resolve to enforce the statute in the near future. As such, the president will find it increasingly difficult to abstain from imposing sanctions without undermining ILSA's supposedly "mandatory" character. Since ILSA has a five year sunset provision, the problem is not going to disappear any time soon.³³ It is therefore quite possible that sanctions under ILSA will be imposed in the not so distant future.

Critics have compared ILSA to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996³⁴ (Helms-Burton Act), another piece of recent legislation that has been heavily criticized within the international community.³⁵ The Helms-Burton Act is similar to ILSA in that it also involves the imposition of various sanctions against foreign nationals and corporations that engage in certain forms of trade with Cuba.³⁶ A formal request for dispute settlement was initiated in the World Trade Organization (WTO) by the European Union (EU) concerning the Helms-Burton Act on October 8, 1996, two months after ILSA went into effect.³⁷ This request spurred a heated debate over the legitimacy of trade restrictions imposed for national security reasons,³⁸ an issue that has placed considerable strain on the WTO's dispute resolution mechanism.³⁹ While the Helms-Burton complaint was later

33. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 13(b), 110 Stat. 1541, 1548 (1996).

34. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-6091). For more information on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act) see generally Lowenfeld, *supra* note 22.

35. See Jeffrey L. Snyder, *ILSA Perplexes Foreign Firms*, NAT'L L. J., Oct. 7, 1996, at C1; see also Tom Buerkle, *EU Frames Law to Defy U.S. Bill on Cuban Trade*, INT'L HERALD TRIB., July 31, 1996, at 1.

36. See generally 22 U.S.C. §§ 6082-6091 (1994).

37. See *United States—The Cuban Liberty and Democratic Solidarity Act*, GATT Doc. WT/DS38/12 (Oct. 8, 1996) (request for the establishment of a panel by the European Communities); see also *Panels Established On US' "Helms-Burton" and India's Patent Treatment*, 14 WTO FOCUS 2 (1996).

38. This debate was primarily concerned with the interpretation of Article XXI of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. See generally John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., and the WTO*, ASIL FLASH INSIGHT, March 1997, at 1-2. Article XXI, also known as the security exception, allows WTO Members to derogate from their obligations under the GATT where national security interests are at stake. See GATT, *supra*, art. XXI. For an in depth discussion of the GATT's security exception see *supra* Part IV.E.

39. See Jackson & Lowenfeld, *supra* note 38.

suspended pending further negotiations, there is a strong possibility that a similar challenge will be brought in relation to ILSA if sanctions under the statute are imposed.⁴⁰

This Note will analyze the feasibility and repercussions of such a challenge in the context of the General Agreement on Tariffs and Trade (GATT)⁴¹ and the Agreement on Government Procurement (AGP).⁴² In particular, this Note focuses on three of ILSA's sanction provisions:⁴³ (1) the refusal of licenses for exports of certain goods to sanctioned parties (export sanction);⁴⁴ (2) the prohibition of imports from sanctioned par-

40. See R.W. Apple Jr., *Split Over Cuba Is Eased by U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, at A1; see also *United States—The Cuban Liberty and Democratic Solidarity Act*, GATT Doc. WT/DS38/5 (Apr. 25, 1997) (communication from the chairman of the panel). As part of the agreement that was reached between the EU and the United States regarding the suspension of the Helms-Burton complaint, the EU has reserved the right to resume panel proceedings or initiate additional proceedings if any of its companies are sanctioned under ILSA. See Preston Brown & David A. Baron, *WTO Proceedings on the Helms-Burton Act Suspended*, CURTIS, MALLET-PREVOST, COLT & MOSLE, INT'L REPORT, May 1997, at 6, 7. No commitments to grant waivers under ILSA have been made as of yet. See *id.*

41. GATT, *supra* note 38.

42. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 4, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; Hein's No. KAV 4051 [hereinafter AGP]. The AGP referred to in this Note entered into force on January 1, 1996. See *id.* art. XXIV(1). It superseded the 1979 Agreement on Government Procurement, Apr. 10, 1979, T.I.A.S. No. 10403, 1235 U.N.T.S. 258. See AGP art. XXIV(3)(c). For background on the evolution of the 1996 and 1979 agreements see Joseph F. Dennin & Jamie L. Boucher, *1996 WTO Agreement on Government Procurement*, 2 L. & Prac. World Trade Org. (Oceana), Booklet E, 1, at 1-3 (Dec. 1995).

43. The sanctions that are not discussed in this Note are financial in nature and would fall within the framework of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank) rather than the WTO, which deals primarily with international trade issues. See discussion *infra* Part II; see also Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6(1), (3)-(4), 110 Stat. 1541, 1545 (1996). The one WTO agreement which covers financial measures is the General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, Annex on Financial Services, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28; 33 I.L.M. 1167, 1189 (1994) [hereinafter GATS]. The GATS would not apply to ILSA's financially based sanctions, however, because the United States withdrew the bulk of its commitments in the area of financial services under that agreement on June 29, 1995. See Kristin Leigh Case, *The Daiwa Wake-up Call: The Need For International Standards for Banking Supervision*, 26 GA. J. INT'L & COMP. L. 215, 227-28 (1996).

44. See Iran and Libya Sanctions Act § 6(2)(i)-(iv).

ties (import sanction);⁴⁵ and (3) the prohibition of the U.S. government from entering into procurement contracts with sanctioned parties (procurement sanction).⁴⁶ Part II of this Note provides a brief overview of the GATT legal system and the role of the WTO. Part III presents an illustration of the procedural workings of the WTO's dispute resolution system by examining the procedural aspects of a hypothetical challenge to ILSA in the WTO. Part IV evaluates some of the substantive arguments that may be raised during the course of such a challenge, including the negative repercussions of an invocation of the GATT's security exception by the United States.⁴⁷ Part V analyzes the potential effects of an adverse decision on ILSA in the WTO's dispute resolution mechanism. Finally, Part VI concludes by arguing that ILSA cannot be enforced in any meaningful way unless the United States is willing to invoke the GATT's security exception, an action that is likely to do irreparable harm to the WTO's institutional framework in the long term.

II. OVERVIEW OF THE GATT LEGAL SYSTEM AND THE WTO

The "Bretton Woods System,"⁴⁸ established at the conclusion of World War II in an effort to regulate international economic relations, consisted of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the GATT.⁴⁹ The IMF and the World Bank are institutions that deal primarily with the financial side of international economic relations.⁵⁰ The GATT, in contrast, has been the "the principal international multilateral treaty for trade" since its inception in 1947.⁵¹ While the GATT was never intended to be a true organization,

45. *See id.* § 6(6).

46. *See id.* § 6(5).

47. The GATT's security exception allows Members of the WTO to derogate from their obligations under that agreement in certain situations where national security issues are at stake. *See GATT, supra* note 38, art. XXI.

48. The Bretton Woods System derives its name from Bretton Woods Conference where the agreements that established the IMF and the World Bank were concluded. *See JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS* 278 (3d ed. 1995). The Bretton Woods Conference, in turn, was named for Bretton Woods, New Hampshire, where it was held. *See id.*

49. *See id.*

50. *See id.*

51. *Id.* at 289.

it was treated like one for the first four decades of its existence.⁵² The GATT was originally intended to operate within the broader institutional framework of the International Trade Organization (ITO).⁵³ The ITO never came into being, however, and the GATT eventually became the "third leg" of the Bretton Woods System.⁵⁴ The gap left by the demise of the ITO remained unfilled until 1995, when the WTO was established following a series of trade negotiations known as the Uruguay Round.⁵⁵

The WTO, which has been called the most important result of the Uruguay Round, provides the organizational identity that was previously lacking in the GATT legal system.⁵⁶ While the GATT itself is limited to trade in goods,⁵⁷ a number of related agreements are currently in force that govern international trade in a broad range of other areas.⁵⁸ Some of the covered areas include services, intellectual property rights, and government procurement.⁵⁹ The WTO is charged with the task of facilitating the implementation, administration, and

52. *See id.*; see also John H. Jackson, *Managing the Trading System: The World Trade Organization and the Post Uruguay Round GATT Agenda*, in *MANAGING THE WORLD ECONOMY* 131, 134 (Peter B. Kenen ed., 1994).

53. *See Jackson, supra* note 52, at 134.

54. *Id.*

55. *See JACKSON ET AL., supra* note 48, at 289-90. The Uruguay Round was the eighth and most recent round of broad trade negotiations under the GATT. *See Jackson, supra* note 52, at 131. The negotiations in the Uruguay Round culminated in the signing of the Final Act in Marrakesh on April 15, 1994 which made considerable changes to the entire GATT system. *See id.* at 131-34; *see also* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

56. *See JACKSON ET AL., supra* note 48, at 289; Jackson, *supra* note 52, at 134.

57. *Cf. JACKSON ET AL., supra* note 48, at 893.

58. *See id.* at 302-03. These agreements are either classified as multilateral or plurilateral. *See id.* Multilateral trade agreements are binding on all of the Members of the WTO. *See id.* at 302. Plurilateral trade agreements are only binding on Members of the WTO that specifically consent to be bound. *See id.* at 303.

59. *See id.* at 302-03. Trade in services and intellectual property rights are covered by multilateral agreements that were negotiated during the Uruguay Round. *See id.* at 291. Government procurement, in contrast, was originally covered by a plurilateral treaty that came into force after the earlier Tokyo Round of GATT trade negotiations. *See id.* at 303, 551. The Tokyo Round government procurement treaty was subsequently superseded by an improved government procurement treaty that was also negotiated in the Uruguay Round. *See id.* at 551.

operation of the GATT and any of these related agreements.⁶⁰ Disputes between WTO Members must be settled using the organization's dispute resolution mechanism.⁶¹

The operation of the WTO dispute resolution mechanism involves two basic stages. First, Members must enter into formal consultations with other Members with respect to matters involving the GATT or any other related agreement.⁶² Second, disputes that are not settled during formal consultations may be resolved by the WTO.⁶³ Disputes that proceed to this resolution stage are examined by dispute settlement panels⁶⁴ and an Appellate Body.⁶⁵ Panels are analogous to trial courts in that they make findings of fact in addition to interpreting the law.⁶⁶ In contrast, the Appellate Body is analogous to an appellate court in that it only hears appeals of panel decisions and may only review issues of law.⁶⁷ Panels and the Appellate Body render decisions through reports which, like judicial opinions, are often supported by various forms of authority.⁶⁸ Perhaps the most common source of authority relied upon are prior panel reports which, while not binding within the meaning of *stare decisis*, tend to carry considerable persuasive weight in future cases.⁶⁹

60. See WTO Agreement art. III(1).

61. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, art. 23.1, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1; 33 I.L.M. 1226, 1241 (1994) [hereinafter DSU]; see also Friedl Weiss, *WTO Dispute Settlement and the Economic Order of WTO Member States*, in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 83 (Pitou Van Dijck & Gerrit Faber eds., 1996). The WTO's dispute resolution mechanism involves some significant departures from prior GATT practices regarding the settlement of disputes. Some significant changes are: (1) the creation of the Appellate Body to review panel interpretations of GATT related legal issues; (2) the automatic adoption of panel or Appellate Body reports in absence of a unanimous vote of rejection by the Dispute Settlement Body (DSB); and (3) the automatic power for complaining parties to retaliate if panel recommendations are not implemented or there is no satisfactory solution to the matter. See generally JACKSON ET AL., *supra* note 48, at 340-44.

62. See DSU art. 4; see also *infra* text Part III.B.

63. See generally DSU arts. 6-19; see also *infra* text Part III.C.&D.

64. See *infra* Part III.C.

65. See *infra* Part III.D.

66. See DSU art. 11.

67. See *id.* art. 17(6).

68. See *infra* Part III.C.&D.

69. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 89-90 (4th prtng. 1991). Many of the panel reports discussed in this Note were rendered prior to the Uruguay Round and were never adopted by the CONTRACTING PARTIES.

III. PROCEDURAL ASPECTS OF A CHALLENGE TO ILSA IN THE WTO

To effectively analyze the substantive issues that may be raised if ILSA is challenged in the WTO, it is important to understand the procedural workings of the WTO's dispute resolution mechanism. This Part examines the procedural steps involved in bringing a hypothetical challenge to ILSA in the WTO under provisions of the GATT and the AGP. The major procedural steps would include: (1) a request by the party initiating the challenge to enter into consultations with the United States; (2) the establishment of a panel by the WTO's Dispute Settlement Body (DSB)⁷⁰ for purposes of examining the dispute; (3) if the losing party should decide to appeal the panel's findings, the submission of the panel's decision to the WTO Appellate Body for judicial review; and (4) either compliance with the panel or appellate body's final decision, or the authorization of certain remedial measures for the complaining party by the WTO.

A. *Standing to Bring an Action in the WTO*

The WTO Agreement states, in pertinent part, that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members."⁷¹ Membership in the WTO is limited to either states or separate customs territories.⁷² Non-governmental "persons" that are sanctioned

Because the Uruguay Round results made it almost impossible for the adoption of future panel reports to be blocked, the author takes the position that the mere fact that a pre-Uruguay round report was not adopted does not effect its usefulness as persuasive authority. See JACKSON ET AL., *supra* note 48, at 342-43.

70. The DSB was established to oversee the administration of the rules and procedures that are embodied in the DSU. See DSU art. 2(1). These rules and procedures govern the entire WTO dispute resolution mechanism. See *id.* art. 1. The primary powers of the DSB include the authority to: (1) establish panels; (2) adopt panel and appellate body reports; (3) oversee the implementation of adopted panel reports; and (4) authorize retaliation for violations of WTO covered agreements. See *id.* Although all WTO Members are represented on the DSB, participation in any dispute involving a plurilateral trade agreement, such as the AGP, is limited to those DSB members who are parties to that plurilateral agreement. See *id.*

71. WTO Agreement art. II.

72. See *id.* art. XII. The contracting parties to the GATT when the WTO Agreement entered into force are considered original Members of the WTO. See *id.* art. XI(1).

under ILSA, such as private corporations, will be forced to rely on their respective governments to challenge the statute in the WTO.⁷³ Furthermore, in most cases, ILSA could only be challenged by governments that are "Members"⁷⁴ within the meaning of the WTO Agreement.⁷⁵

B. Consultations

Assuming the party that plans to challenge ILSA in the WTO (the complaining party) has standing to do so, the first step would be for that party to request consultations with the United States under the GATT and the AGP.⁷⁶ The GATT contains two basic consultation provisions. The first of these provisions, contained in Article XXII, requires Members to provide adequate opportunity for consultations regarding such "representations" as may be made by other Members with respect to any matter affecting the operation of the GATT.⁷⁷ The second consultation provision, located in Article XXIII, allows any Member, upon determining that its benefits under the GATT are being "nullified or impaired," to make "written representations or proposals" to any other Members which it

73. It has been suggested that non-governmental organizations should be allowed to participate directly in the WTO dispute resolution system. For a good overview of the debate over participation of non-governmental organizations in the WTO see generally G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996); see also generally G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Phillip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996).

74. The contracting parties to the GATT as of the date that the WTO Agreement entered into force are considered original Members of the WTO. See WTO Agreement art. XI(2). Other states or separate customs territories can become Members through accession under Article XII of the WTO agreement. See *id.* art. XIII.

75. See generally 2 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 644 (6th ed., 1995) [hereinafter ANALYTICAL INDEX]. This requirement also applies to the United States, which is itself a Member of the WTO. See *id.* at 1152. If the United States were not a WTO Member, it would not be subject to the organization's dispute resolution mechanism.

76. Members are required to attempt to settle disputes through consultations in accordance with the provisions of the relevant covered agreements before resorting to further action under the DSU. See DSU art. 4(2).

77. GATT, *supra* note 38, art. XXII(1).

considers to be concerned.⁷⁸ Requests for consultations are included in these written representations or proposals and Members must give "sympathetic consideration" to any such requests.⁷⁹ There are similar consultation provisions in the AGP.⁸⁰

After an appropriate request for consultations has been made, the United States would be obliged to enter into good faith discussions with the complaining party within thirty days.⁸¹ Once the discussions are underway, the parties would have sixty days to resolve the dispute amongst themselves before a panel could be established at the request of the complaining party.⁸² Several of ILSA's provisions are geared towards settling any dispute over the statute during this consultations stage.⁸³ The clearest example of one of ILSA's consultation provisions is found in Section 9(a)(1) which states that, once the president determines that he is obligated to sanction a foreign "person," he is urged to "initiate consultations immediately with the government with primary jurisdiction over that foreign person."⁸⁴ This provision and WTO/GATT practice make it unlikely that the United States will fail to respond to a consultations request.⁸⁵

To further facilitate consultations, ILSA gives the president two opportunities to delay the imposition of sanctions during the consultation process.⁸⁶ First, Section 9(a)(2) of ILSA provides that the president may delay the imposition of sanctions for up to ninety days while consultations are in progress.⁸⁷ This delay would help to relieve some of the pressure during consultations which, as previously discussed, would have to go on for at least sixty days before a panel could be

78. *Id.* art. XXIII(1).

79. *Id.*

80. See AGP art. XXII(2).

81. See DSU art. 4(3).

82. See *id.* art. 4(7).

83. See HOUSE COMM. ON INTERNATIONAL RELATIONS, IRAN OIL SANCTIONS ACT OF 1996, H.R. Rep No. 104-523, pt. I, at 15-16 (1996), reprinted in 1996 U.S.C.C.A.N. 1296, 1304-05 [hereinafter INT'L RELATIONS REPORT]; see also WAYS & MEANS REPORT, *supra* note 10, at 11-12.

84. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 9(a)(1), 110 Stat. 1541, 1546 (1996).

85. Cf. DSU art. 4(3).

86. See WAYS & MEANS REPORT, *supra* note 10, at 11-12, 17-18.

87. See Iran and Libya Sanctions Act § 9(a)(2).

established to examine the dispute.⁸⁸ Second, Section 9(a)(3) of ILSA provides for an additional ninety day delay on sanctions if the president certifies to Congress that the foreign government with primary jurisdiction over the sanctioned "person" is in the process of taking "specific and effective actions" to terminate the activities which triggered the sanctions.⁸⁹ By permitting sanction delays based on "specific and effective actions," Section 9(a)(3) will allow the president to provide relief for nations that have taken specific affirmative steps towards eliminating the underlying sanctionable conduct pursuant to any agreements that are worked out during consultations.⁹⁰

Two other ILSA provisions that are designed to effect the consultation process involve presidential authority to waive sanctions.⁹¹ The importance of these waiver provisions can be stated simply: unless the president has the power to remove sanctions or the threat of sanctions, foreign nations will have no incentive to come to any sort of agreement with the United States during consultations.

The first of the two waiver provisions, located in Section 4(c) of ILSA, allows the president to waive sanctions that have been imposed against nationals of a foreign country for investing in Iran if that country agrees to undertake "substantial measures, including economic sanctions," that will inhibit Iran's efforts to accumulate weapons of mass destruction and support international terrorism.⁹² Since Section 4(c) only refers to sanctions that were imposed for investing in Iran, waiv-

88. See DSU art. 4(7).

89. Iran and Libya Sanctions Act § 9(a)(2), (3).

90. See *id.* § 9(a)(3). Specifically, Section 9(a)(3) of ILSA states that the additional 90 day delay can be granted if "the government with primary jurisdiction over the person concerned is *in the process* of taking the actions described in [Section 9(a)(2)]." *Id.* (emphasis added). Section 9(a)(2), in turn, contains the "specific and effective actions" requirement. *Id.* § 9(a)(2). The phrase "in the process" in Section 9(a)(3), as well as ILSA's legislative history, suggests that a sanction delay cannot be granted unless actual steps are taken, as opposed to merely being agreed to by the sanctioned country. See *id.* § 9(a)(3); see also WAYS & MEANS REPORT, *supra* note 10, at 17-18.

91. See 142 CONG. REC. H8126 (daily ed. July 23, 1996) ("[i]t is my hope that the President will be able to use waivers and the possibility of sanctions to open a window of opportunity for negotiations on multilateral steps that would be more effective than unilateral sanctions in influencing the conduct of Iran and Libya.") (statement of Rep. Hamilton).

92. See Iran and Libya Sanctions Act §§ 2, 4(c)(1).

ers under this section would have no bearing on consultations with nations whose nationals are sanctioned for entering into transactions with Libya.⁹³ With respect to sanctions that are imposed for investing in Iran, however, Section 4(c)'s effectiveness as a consultation tool will fall primarily on how broadly the trigger phrase "substantial measures, including economic sanctions" is interpreted.⁹⁴

ILSA's legislative history indicates that a primary goal of the statute is the establishment of a multilateral approach to containing the Iranian threat.⁹⁵ The United States has responded to this threat unilaterally by imposing a near total embargo against Iran.⁹⁶ From a multilateral perspective, this embargo approach has met with widespread rejection by most of the major U.S. trading partners.⁹⁷ It is therefore not surprising that the House Committee on Ways and Means report on ILSA suggested the term "substantial measures" should not be interpreted as requiring nations to adopt policies that are "modeled precisely on U.S. measures" in order to qualify for a waiver under Section 4(c).⁹⁸ The question still remains, how-

93. See *id.* §§ 4(c), 5(a).

94. *Id.* § 4(c)(1).

95. See WAYS & MEANS REPORT, *supra* note 10, at 12 ("[i]t is the strong view of the Committee that a multilateral approach to containing threats from Iran will prove to be the most effective in the long run."); 142 CONG. REC. H6478 (daily ed. June 18, 1996) (ILSA "puts a priority on supporting the achievement of a multilateral agreement to isolate Iran economically.") (statement of Rep. Archer). Several sections of ILSA describe the Iranian threat in terms of that country's efforts to acquire weapons of mass destruction and support acts of international terrorism. Iran and Libya Sanctions Act §§ 2(1), 3(a). ILSA seeks to contain this threat by inhibiting Iran's ability to develop its petroleum resources, and therefore finance these activities. See WAYS & MEANS REPORT, *supra* note 10, at 10.

96. See generally Iranian Transactions Regulations, 31 C.F.R. pt. 560 (1996); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995); see also INT'L RELATIONS REPORT, *supra* note 83, at 9-10. Also note that the United States employs a similar embargo approach against Libya. See generally Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (1996).

97. For a good discussion of the widely negative international reaction to the U.S. trade embargo against Iran see Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls*, 8 N.Y. INT'L L. REV. 51, 85 (1995).

98. WAYS & MEANS REPORT, *supra* note 10, at 12. There is some evidence that the United States and the EU are working towards an agreement that may result in waivers under ILSA. In April of 1997, as part of the agreement that resulted in the suspension of the Helms-Burton complaint, the EU and the United States pledged to work together towards the goal of granting waivers to EU companies under ILSA. See Brown & Baron, *supra* note 40, at 7. So far, however,

ever, as to when a specific set of measures would justify a waiver under Section 4(c). The language of the section's trigger phrase points to at least two criteria that should be used for making this determination.⁹⁹ First, the phrase "substantial measures" suggests that the measures must be real and not illusory.¹⁰⁰ Second, the term "economic sanctions" suggests that the measures would be required to have at least some economic basis.¹⁰¹ By basing Section 4(c) waivers on these two broad requirements, the president would have the authority to consider a wider range of potential settlement proposals during the consultations stage of a dispute over ILSA.

ILSA's second waiver provision, contained in Section 9(c), gives the president the authority to waive any ILSA sanction if he determines and reports to Congress that "it is important to the national interest of the United States to exercise such waiver authority."¹⁰² Section 9(c) is likely to prove to be a valuable tool during consultations for two reasons. First, unlike Section 4(c), Section 9(c) can be used to waive sanctions that are imposed under any provision of ILSA.¹⁰³ Second, the president is given a large amount of discretion with respect to when sanctions can be waived under Section 9(c).¹⁰⁴ The broad scope of presidential authority to grant waivers under Section 9(c) stems from the trigger phrase, "important to the national interest."¹⁰⁵ While this language is vague on its face, ILSA's legislative history suggests that Section 9(c)'s primary

neither sanctions nor waivers have been invoked. *See id.*

99. *See* Iran and Libya Sanctions Act § 4(c).

100. *See* WAYS & MEANS REPORT, *supra* note 10, at 12.

101. The one category of economic measures that ILSA specifically suggests are measures which limit Iran's ability to develop its petroleum resources. *See* Iran and Libya Sanctions Act §§ 3(a), 4(a). ILSA's legislative history, however, suggests that Section 4(c) only requires that the measures adopted advance ILSA's broader goals of inhibiting Iran's ability to develop weapons of mass destruction and support acts of international terrorism. *See* WAYS & MEANS REPORT, *supra* note 10, at 12. Section 4(c)'s only mandatory requirement with respect to measures restricting Iran's ability to develop its petroleum resources is that a report be submitted to Congress detailing the status of those measures. *See* Iran and Libya Sanctions Act §§ 3(a), 4(b)(1), (c)(1).

102. Iran and Libya Sanctions Act § 9(c)(1).

103. *See id.* § 9(c)(1). Section 4(c) of Iran and Libya Sanctions Act, in contrast, is limited to sanctions imposed against foreign nationals for investing in Iran. *See id.* §§ 4(c), 5(a).

104. *See* WAYS & MEANS REPORT, *supra* note 10, at 18.

105. Iran and Libya Sanctions Act § 9(c)(1).

purpose is to ensure that the president is not forced to impose sanctions under ILSA when doing so would be harmful to the United States.¹⁰⁶ The report by the Committee on Ways and Means on ILSA provided a list of circumstances under which it might be appropriate for the president to waive sanctions under Section 9(c), including cases where: (1) "a particular sanction would raise significant issues under the international obligations of the U.S.;" and (2) "international cooperation in pursuit of [ILSA's] goals . . . could be jeopardized, rather than assisted, through unilateral U.S. action."¹⁰⁷ The first of these circumstances might occur in the context of consultations if the president determines that the consulting nation has made a particularly compelling argument which suggests that the imposition of sanctions would violate U.S. trade obligations. With respect to the second circumstance, Section 9(c) could be exercised where the United States and other consulting nations have settled on measures, other than total trade embargoes, which would still advance ILSA's ultimate goal of containing Iran and Libya's efforts to support international terrorism and accumulate weapons of mass destruction.¹⁰⁸ These scenarios illustrate that Section 9(c) grants the president a broad range of discretion to waive sanctions in order to settle ILSA disputes during consultations. If the president chooses to exercise this discretion, Section 9(c) could prove to be the most useful provision in ILSA in terms of settling disputes over the statute during consultations.

Despite the fact that ILSA was carefully drafted to encourage the settlement of any dispute during consultations, as one member of Congress pointed out during the ILSA debates, "waivers and sanctions are blunt policy instruments."¹⁰⁹ The

106. See 142 CONG. REC. H6478 (daily ed. June 18, 1996) ("[i]n this and all other cases the President has authority to waive sanctions if their application would hurt the national interest.") (statement of Rep. Archer referring to Section 9(c) of ILSA).

107. WAYS & MEANS REPORT, *supra* note 10, at 18. The report also suggests that 9(c) waivers might be appropriate where: (1) the "imposition of sanctions would threaten U.S. intelligence sources and methods;" and (2) "sanctions would lead to unacceptable costs to U.S. economic interests." *Id.*

108. While there are indications that negotiations may take place which could result in waivers being granted under ILSA in relation to the EU, no solid action has been taken. See Brown & Baron, *supra* note 40, at 7.

109. 142 CONG. REC. H8126 (daily ed. July 23, 1996) (statement of Rep. Hamilton).

United States and its trading partners have distinctly competing philosophies with respect to the appropriate approach for dealing with rogue nations such as Iran and Libya.¹¹⁰ The threat of sanctions is likely to make this debate even more heated, rather than encouraging any kind of agreement.¹¹¹ As such, there is a good possibility that even the most consultation friendly ILSA provisions will be unable to prevent a dispute over the statute from being resolved by the WTO. If consultations fail to result in some sort of settlement within the requisite sixty day period, the complaining party can trigger the next step in the WTO's dispute resolution process, the establishment of a DSB panel to examine the ILSA dispute.¹¹²

C. *Establishment of a Panel by the DSB*

Due to the obstacles to the settlement of a dispute over ILSA during consultations, a panel would probably have to be convened in order to examine any challenge to the statute in the WTO.¹¹³ Historically, the authority to establish panels to examine GATT related disputes is derived from Article XXIII.¹¹⁴ The language of Article XXIII, however, provides almost no guidance as to how panels should be established or

110. As previously discussed, the U.S. trade policy with respect to Iran and Libya consists of an almost total embargo. *See generally* Iranian Transactions Regulations, 31 C.F.R. pt. 560 (1996); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). In contrast, the EU trades with Iran while the two entities regularly engage in a series of bilateral negotiations that have been described as "critical dialogue." *See* Gaugh, *supra* note 97, at 85-86. Other nations have totally rejected the U.S. approach and trade with Iran and Libya freely. *See id.*

111. This is reflected in the following statement by EU Vice President Leon Brittan, made shortly after ILSA was signed:

"[ILSA] established the unwelcome principle that one country can dictate the foreign policy of others and disturbs the unity of purpose between allies that is so necessary if we are to stamp out terrorism successfully together" "The EU . . . will act to defend its rights and interests if they are jeopardized by this legislation."

John M. Broder & Mary Williams Walsh, *Clinton Signs Bill Aimed at Foreign Firms in Libya, Iran Sanctions: President sees 'long, hard struggle' against terrorism. EU official vows to defend European interests*, L.A. TIMES, Aug. 6, 1996, available in 1996 WL 11256064.

112. *See* DSU art. 4(7).

113. *See supra* Part III.B.

114. *See* JACKSON, *supra* note 69, at 94-95. Panels have been used to examine GATT related disputes since the mid-1950s. *See id.* at 95.

conducted.¹¹⁵ In substance, Article XXIII provides only, that if the parties to a dispute fail to come to a satisfactory settlement within a reasonable time: (1) the matter may be referred to the Ministerial Conference¹¹⁶ of the WTO; and (2) the Ministerial Conference shall promptly investigate any such matter and make appropriate recommendations or rulings.¹¹⁷ More detailed procedures for the establishment of panels can be found in the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU),¹¹⁸ which contains the bulk of the rules that govern the WTO dispute resolution mechanism.¹¹⁹

Article 6 of the DSU states that "[i]f the complaining party so requests, a panel shall be established . . . unless . . . the DSB decides by consensus not to establish a panel."¹²⁰ The DSU also provides that a consensus can only be reached if none of the eligible DSB members,¹²¹ including the complain-

115. See generally GATT, *supra* note 38, art. XXIII.

116. The Ministerial Conference, which is composed of representatives of all of the Members, meets once every two years to carry out the various functions of the WTO. See WTO Agreement art. IV(1).

117. The original language of Article XXIII provides:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, . . . the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

GATT, *supra* note 38, art. XXIII(2).

In the Uruguay Round, the phrase "contracting party," was replaced with the word "Member" throughout the GATT. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, art. 2(a), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1154, 1155 (1994). Also, for purposes of Article XXIII, the references to "CONTRACTING PARTIES" acting jointly were agreed to refer to the Ministerial Conference. See *id.* art. 2(b).

118. See generally DSU arts. 6-16.

119. See Weiss, *supra* note 61, at 82.

120. DSU art. 6(1).

121. Since the GATT is a multilateral trade agreement, all DSB members, including the complaining party, would be eligible to vote on matters relating to those agreements. See DSU art. 2(1). With respect to disputes involving plurilateral trade agreements, however, voting is limited to DSB members that are also parties to the plurilateral agreement in question. See *id.* While the AGP is a plurilateral agreement, the complaining party would have to be a signatory in order to challenge ILSA under its provisions. Cf. JACKSON ET AL., *supra* note 48, at 303 (plurilateral agreements are optional and only apply between members). Consequently, any WTO Member that challenges ILSA under the AGP would necessarily have the right to vote on DSB matters relating to that agreement.

ing party, formally objects.¹²² Therefore, the establishment of a panel is virtually guaranteed as long as the complaining party officially requests it.¹²³

As a general rule, DSB established panels will only examine claims that are ripe for adjudication. This principle was stated in the first panel report that was issued under the auspices of the WTO, the panel report on the *United States—Standards for Reformulated and Conventional Gasoline*¹²⁴ (*Gasoline Report*). The *Gasoline Report* determined that panels may not usually “rule on measures that, at the time the panel’s terms of reference were fixed, were not and would not become effective.”¹²⁵ The only specifically recognized exception to this rule exists in cases where the offending measures have previously been introduced and the prospect remains they might be reintroduced in the future.¹²⁶ Therefore, a panel could only examine aspects of an ILSA complaint related to sanctions that are either actually being imposed against the complaining party or bear the prospect of being reinstated at the time when the panel’s terms of reference are fixed.

During the panel proceedings, the parties to the dispute will be given the opportunity to argue their positions.¹²⁷ Once the arguments are completed, the panel must issue an “interim report” in order to give the parties a final opportunity to settle

122. See DSU art. 2(4) n.1.

123. This official request must: (1) be made in writing; (2) indicate whether consultations have been held; and (3) provide a brief summary of the grounds for challenging ILSA which is sufficient to present the problem clearly. See *id.* art. 6(2).

124. United States—Standards for Reformulated and Conventional Gasoline, GATT Doc. WT/DS2/R (Jan. 29, 1996) [hereinafter *Gasoline Report*].

125. *Id.* para. 6.19. While the *Gasoline Report* was appealed to the Appellate Body, this was not among the issues that were raised. See generally United States—Standards for Reformulated and Conventional Gasoline, GATT Doc. WT/DS2/AB/R, pt. II, (Apr. 29, 1996). Moreover, this rule is also supported by repeated practice in past panel proceedings. See 2 ANALYTICAL INDEX, *supra* note 75, at 648-50. A panel must have its terms of reference fixed within 20 days after being established. See DSU art. 7(1). A panel’s terms of reference define the scope of the issues it may address. See *id.*

126. See *Gasoline Report*, *supra* note 124, para. 6.19 (citing EEC—Restrictions on Imports of Apples from Chile, Nov. 10, 1980, GATT B.I.S.D. (27th Supp.) at 98 (1981)).

127. See Working Procedures, DSU app. 3, arts. 4-8, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1245-46 (1994).

their dispute in a mutually beneficial manner.¹²⁸ The parties may request the panel to review precise aspects of the interim report.¹²⁹ When these requests have been reviewed or if no requests are made, the interim report becomes the final report of the panel.¹³⁰ The DSB must adopt the final panel report within sixty days unless one of the immediate parties¹³¹ to the dispute notifies the DSB that it will appeal or the DSB decides by consensus to reject the report.¹³² Since a consensus would require the vote of the winning party, a rejection of the final report by the DSB would be virtually impossible.¹³³ If a panel report is appealed, it is reviewed by the Appellate Body.¹³⁴

D. Judicial Review Before the WTO Appellate Body

Article 17 of the DSU provides that "[a] standing Appellate Body shall be established by the DSB."¹³⁵ Unlike panels, which are established for the sole purpose of examining a single dispute, the Appellate Body is a continuously active institution.¹³⁶ In accordance with Article 17, the members of the Appellate Body were appointed by the DSB on November 29, 1995.¹³⁷ While the Appellate Body is composed of seven mem-

128. See DSU art. 15(2); see also Weiss, *supra* note 61, at 85.

129. See DSU art. 15(2).

130. See *id.*

131. Third parties with a "substantial interest" in a dispute may have an opportunity to present their points of view to the panel examining that dispute. *Id.* art. 10(2). Third parties cannot, however, appeal panel decisions, though they may be heard by the Appellate Body once an appeal has been initiated. See *id.* art. 17(4).

132. See *id.* art. 16(4).

133. See *id.* This contrasts sharply with the process that existed prior to the Uruguay Round where the adoption of a panel report could be blocked by the losing party. See JACKSON ET AL., *supra* note 48, at 342-43.

134. See DSU art. 17(1); see also *supra* Part III.D.

135. *Id.* art. 17(1).

136. See *id.*

137. See *Appellate Body Members Appointed*, 6 WTO FOCUS 1 (1995). The members of the first WTO Appellate Body include: (1) Mr. James Bacchus, of the United States, a former U.S. Congressman; (2) Mr. Christopher Beeby, of New Zealand, a retired diplomat; (3) Professor Claus-Dieter Ehlerman, of Germany, former Director-General and Director of General Competition of the European Commission; (4) Dr. Said El-Naggar, of Egypt, Professor Emeritus at Cairo University and former Executive Director of the World Bank representing the Arab countries; (5) Justice Florentino Feliciano, of the Philippines, Senior Associate Justice of the Supreme Court of the Philippines; (6) Mr. Julio Lacarte Muro, of Uruguay, a career diplo-

bers in total, three member divisions are established to hear individual appeals.¹³⁸ Appeals are limited to the issues of law and legal interpretations contained in the panel report under review.¹³⁹

The time limitations for processing appeals are extremely short.¹⁴⁰ This expedited review is a direct consequence of Article 17(5) of the DSU, which states that appellate proceedings generally shall not exceed sixty days, and in no case shall go beyond ninety days, from the date that the appellant initiates the appeal to the date that the Appellate Body report is circulated.¹⁴¹ These time limitations will insure that any appeal of a panel report on ILSA will be decided swiftly.

The Appellate Body has the authority to uphold, modify, or reverse any of the legal findings and conclusions that are made by a panel.¹⁴² Decisions of the Appellate Body are set forth in reports that are circulated to the Members.¹⁴³ Appellate Body reports are automatically adopted thirty days after they are circulated, unless the DSB decides otherwise by consensus.¹⁴⁴ Since a consensus can be blocked through a single vote by the party that wins an appeal, Appellate Body Reports are, as a practical matter, always adopted.¹⁴⁵ Once an Appellate Body Report is adopted, it is unconditionally accepted by the parties to the dispute.¹⁴⁶ As such, the Appellate Body will be the court of last resort in any dispute over ILSA.

mat who has been involved with the GATT/WTO trading system for the last 50 years; and (7) Professor Mitsuo Matsushita, of Japan, one of the most authoritative Japanese scholars in the field of international economic law. *See id.* at 8.

138. The DSU provides that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case." DSU art. 17(1). The Working Procedures for Appellate Review (Appellate Procedures) provide that "[i]n accordance with paragraph 1 of Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal." Working Procedures For Appellate Review, art. 6(1) (last modified June 21, 1997) <<http://www.wto.org/dispute/ab3.html>> [hereinafter Appellate Procedures].

139. *See* DSU art. 17(6).

140. *See generally* Appellate Procedures, *supra* note 138, Annex I.

141. *See* Letter from Julio Lucarte-Muro, Appellate Body Chairman, to Celso Lafer, Dispute Settlement Body Chairman (Feb. 7, 1996) (visited Oct. 1, 1996) <<http://wto.org/wto/Pressrel/ab2.html>>; *see also* DSU art. 17(5).

142. *See* DSU art. 17(13).

143. *See id.* art. 17(14).

144. *See id.*

145. *See* Jackson, *supra* note 52, at 141.

146. *See* DSU art. 17(14).

IV. SUBSTANTIVE ANALYSIS OF A CHALLENGE TO ILSA IN THE WTO

Unless a settlement is reached during consultations, the broad issue of whether ILSA's import, export, or procurement sanctions conflict with any of the U.S. obligations under the GATT and the AGP will be resolved by a DSB established panel, and if the panel's report is appealed, the Appellate Body. In resolving this broad issue, however, the panel and Appellate Body will have to examine a number of narrower issues that will be raised by the parties to the dispute.

This Part explores some of the arguments that could be raised by the complaining party and the United States with respect to these narrower issues and how the panel or Appellate Body division might evaluate each side's position. The first few sections in this Part examine potential conflicts between ILSA's export and import sanctions and the GATT. The next section addresses ILSA's procurement sanction in the context of the AGP.¹⁴⁷ The final section in this Part analyzes the feasibility and repercussions of a claim by the United States that ILSA falls within the security exception embodied in Article XXI of the GATT.

A. *Are ILSA's Export and Import Sanctions Consistent with the Obligations of the United States Under Article XI of the GATT?*

Article XI of the GATT, entitled "General Elimination of Quantitative Restrictions," states that:

No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of

147. ILSA's procurement sanction is not examined in terms of Article I of the GATT since it is generally considered that the most favored nation obligation does not apply to government procurement. See JACKSON ET AL., *supra* note 48, at 550. ILSA's procurement sanction is also not discussed in the context of Article III of the GATT because government procurement is specifically exempted from that article. See GATT, *supra* note 38, art. III(8). Finally, ILSA's procurement sanction is not analyzed in terms of the GATS since government procurement is exempted from the major articles of that agreement. See GATS, *supra* note 43, art. XIII(1).

any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.¹⁴⁸

Since ILSA's export and import sanctions operate independently of each other, the potential Article XI challenges to these provisions are addressed separately.¹⁴⁹

1. Does ILSA's Export Sanction Violate Article XI of the GATT?

ILSA's export sanction, located in Section 6(2) of the statute, permits the president to prohibit the U.S. government from issuing any specific license or granting any other specific permission to export goods or technology to a "sanctioned person" under: (1) the Export Administration Act of 1979 (EAA);¹⁵⁰ (2) the Arms Export Control Act (AECA);¹⁵¹ (3) the

148. GATT, *supra* note 38, art. XI.

149. See WAYS & MEANS REPORT, *supra* note 10, at 16; see also *infra* Part IV.A.1.&2.

150. Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-20 (1994). The Export Administration Act (EAA) expired in 1994 but was extended through an executive order which was issued by President Clinton that same year. See Exec. Order No. 12,924, 59 Fed. Reg. 43,437 (1994). This executive order was continued in effect by notice of the president in 1995 due to lack of alternative measures by Congress. See Continuation of Emergency Regarding Export Control Regulations, 60 Fed. Reg. 42,767 (1995). The EAA grants the president authority to require licenses for the export of a broad range of goods or technology that are either subject to the jurisdiction of the United States or are exported by persons that are subject to the jurisdiction of the United States. See 50 U.S.C. app. §§ 2404(a)(1), 2405(a)(1), 2406(a)(1). The specific licensing requirements for goods or technology that are regulated under the EAA are contained in the Export Administration Regulations, 15 C.F.R. ch. VII, subch. C (1997), which were established in order to implement the EAA. See *id.* § 730.2; see also 50 U.S.C. app. § 2414(b). A listing of items which require export licenses under the Export Administration Regulations (EAR) can be found in the Commerce Control List (CCL). See 15 C.F.R. pt. 774. The EAR provides for various license exceptions that allow the export of items listed in the CCL without a specific license when certain conditions are satisfied. See *id.* § 740.1. These conditions vary depending on the nature, destination, and end use of the exported item. See Export Administration Regulation, Simplification of Export Administration Regulations, 61 Fed. Reg. 12,714, 12,720 (1996) (to be codified at 15 C.F.R. pts. 730-799A). In July of 1996, the House of Representatives passed a bill known as the Export Administration Act of 1996, H.R. 361, 104th Cong. (1996), which is designed to replace the EAA. See *House Passes Reinstatement of Export Controls*, THE WEEK IN CONGRESS, July 19, 1996, at 1-2. If the Export Bill becomes law, it will operate through the year 2001. See H.R. 361 § 120.

151. Arms Export Control Act, 22 U.S.C. §§ 2751-2796d (1994). Export regula-

Atomic Energy Act of 1954 (AEA);¹⁵² or (4) any other statute that requires prior review or approval of the U.S. government as a condition for the export or re-export of goods or services.¹⁵³ Together, the EAA, AECA, and AEA require specific licenses to be issued for the export of a wide variety of items that fall within the jurisdiction of the United States.¹⁵⁴ ILSA's export sanction would permit the president to prevent the issuance of any such "specific license" under the EAA, AECA, AEA or any other similar legislation for items that are to be exported to "sanctioned person[s]."¹⁵⁵

Assuming that the sanctioned persons are within the territory of the complaining party, it could be argued that the denial of export licenses in this manner would be inconsistent with the obligations of the United States under Article XI of the GATT.¹⁵⁶ This rather straightforward interpretation of Article XI is illustrated by the panel report on *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*¹⁵⁷ (*Canada Herring Decision*), which involved a prohibition on the export of salmon from Canada where certain processing requirements had not been satisfied.¹⁵⁸ It was clear to both the panel, and the parties to the dispute, that the export prohibition was contrary to Article XI of the GATT, "according to

tions under the Arms Export Control Act (AECA) are limited to items that have been designated as "defense articles and defense services" by the president. *Id.* § 2778(a)(1). These items are placed on the United States Munitions List, 22 C.F.R. pt. 121 (1996), which is separate from the CCL and does not subject items to regulation under the EAA or EAR. *See* 15 C.F.R. § 734.3(b)(i). The AECA requires a specific license for the export of any item that has been placed on the United States Munitions List. *See* 22 U.S.C. § 2778(a)(1), (b)(2).

152. Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4 (1994). The Atomic Energy Act (AEA) regulates the export of certain nuclear related materials, equipment and technology. *See id.* §§ 2077(a), 2092, 2111, 2156(4). The implementing regulations for the AEA list categories of materials, equipment, and technology that may not be exported from the United States without a specific license. *See generally* Export and Import of Nuclear Equipment and Material, 10 C.F.R. pt. 110 (1997).

153. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6(2)(i)-(iv), 110 Stat. 1541, 1545 (1996).

154. *See supra* notes 150-152.

155. Iran and Libya Sanctions Act § 6(2).

156. *See* GATT, *supra* note 38, art. XI(1).

157. *See* Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989) [hereinafter *Canada Herring Decision*].

158. *See id.* paras. 2.1-2.4.

which contracting parties shall not institute or maintain prohibitions on the exportation of any product destined for the territory of any other contracting party."¹⁵⁹ While ILSA's export sanction, which prohibits exports through the denial of licenses, is somewhat different from the straight export prohibition that was challenged in the *Canada Herring Decision*, the two measures are equally impermissible due to Article XI's specific mandate against "prohibitions . . . made effective through . . . export licenses."¹⁶⁰

The United States could argue, in response, that Article XI should not be interpreted in such a strict manner with respect to ILSA's export sanction since the statute represents an effort to combat the international threat posed by Iran and Libya's continuous efforts to support acts of international terrorism and acquire weapons of mass destruction.¹⁶¹ The underlying theory would be that the contracting parties did not intend to forego the sovereign right to combat such international threats when they ratified Article XI of the GATT. This argument is unlikely to be particularly persuasive, however, since a very similar claim was rejected in the context of import restrictions by the 1994 panel on *United States—Restrictions on Import of Tuna*¹⁶² (*Tuna-Dolphin Decision II*). There, the United States argued that the GATT should not be interpreted as requiring nations to surrender the sovereign right to impose import restrictions for the purpose of protecting the environment.¹⁶³ The panel refused to create an exception where one did not already apply, observing that "the dispute settlement procedures cannot add to or diminish rights of contracting parties under the [GATT]."¹⁶⁴ Since Article XI addresses import and export prohibitions using the same language, this ruling suggests that ILSA's export sanction would be impermissible unless the United States can point to a specific exception elsewhere in the GATT.¹⁶⁵ It is therefore likely that ILSA's ex-

159. *Id.* para. 4.1.

160. GATT, *supra* note 38, art. XI(1).

161. See WAYS & MEANS REPORT, *supra* note 10, at 9.

162. GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) (unadopted) [hereinafter *Tuna-Dolphin Decision II*].

163. See *id.* paras. 3.9-3.10.

164. *Id.* paras. 5.41-5.43.

165. See GATT, *supra* note 38, art. XI(1). It can be argued that Article XXI, which allows contracting parties to derogate from the GATT where national securi-

port sanction would be held inconsistent with the obligations of the United States under Article XI of the GATT if challenged in the WTO's dispute resolution mechanism.

2. Does ILSA's Import Sanction Violate Article XI of the GATT?

ILSA's import sanction, located in Section 6(6) of the statute, allows the president to restrict imports with respect to a sanctioned person in accordance with the International Emergency Economic Powers Act (IEEPA).¹⁶⁶ ILSA's legislative history supports the view that the president can use this sanction to ban the importation of any or all products by a sanctioned person, providing he does so pursuant to established procedures under the IEEPA.¹⁶⁷ This restrictive requirement was adopted in an attempt to minimize the threat of economic retaliation by foreign governments that might arise if ILSA's import sanction is invoked under circumstances where other, less harsh, sanctions might be appropriate.¹⁶⁸

The president may take measures under the IEEPA providing: (1) an "unusual and extraordinary" foreign threat to the "national security, foreign policy, or economy of the United States" exists; and (2) the president declares a "national emergency" with respect to that threat.¹⁶⁹ There are also several categories of imports which generally can not be regulated by the president under the IEEPA, including: (1) personal communications that do not involve the transfer of anything of value; (2) donations of items intended to relieve human suffering; (3) information or informational materials; and (4) transactions

ty issues are at stake, provides such an exception. *See id.*, art XXI. It is not clear, however, whether this argument would succeed in the context of ILSA. *See supra* Part IV.E.

166. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1994); *see also* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6(6), 110 Stat. 1541, 1546 (1996).

167. *See* WAYS & MEANS REPORT, *supra* note 10, at 16.

168. *See id.*

169. 50 U.S.C. § 1701(a). It should be noted that, while these two requirements would have to be satisfied before import sanctions could be imposed, ILSA provides that sanctions determinations by the president are not subject to judicial review. *See* Iran and Libya Sanctions Act § 11. As such, the president is likely to have broad discretion in determining that the requirements of the International Emergency Economic Powers Act (IEEPA) have been satisfied, without interference from the judicial branch.

ordinarily incident to international travel.¹⁷⁰ Based on the relationship between ILSA's import sanction and the IEEPA, it is logical to conclude that imports of items that fall under these four categories would be exempted from any regulation or prohibition imposed under ILSA's import sanction.¹⁷¹

Despite these limitations, ILSA's import sanction would prohibit imports by sanctioned persons through methods other than "duties, taxes or other charges" when imposed.¹⁷² Therefore, the complaining party could argue that the invocation of the statute's import sanction against any of its nationals would be inconsistent with the obligations of the United States under Article XI of the GATT. The United States could respond by arguing that, in light of the policy interests that ILSA seeks to promote, the statute's import sanction should not be subjected to the requirements of Article XI.

ILSA's underlying purpose is the denial of Iran and Libya's abilities to support acts of international terrorism and acquire methods of mass destruction.¹⁷³ The increasing global concern regarding the threat posed by nations that support terrorism is reflected in a series of United Nations Security Council Resolutions (U.N. Resolutions) that were adopted in 1992 and 1993.¹⁷⁴ These U.N. Resolutions, which called for the imposition of certain trade restrictions against Libya, were a largely unsuccessful attempt to deal with that nation's involvement in the bombing of Pan American Flight 103 over Scotland.¹⁷⁵ ILSA attempts to succeed where the U.N. Resolutions have failed by requiring the imposition of sanctions against foreign persons who export certain items to Libya in violation of the 1992 and 1993 U.N. Resolutions.¹⁷⁶ The United States has long recognized that Iran, like Libya, has repeatedly supported acts of international terrorism and that both of these nations threaten the international community as a

170. See 50 U.S.C. § 1702(b)(1)-(4).

171. See generally WAYS & MEANS REPORT, *supra* note 10, at 16.

172. GATT, *supra* note 38, art. XI(1); see also Iran and Libya Sanctions Act § 6(6).

173. See WAYS & MEANS REPORT, *supra* note 10, at 9-10.

174. See generally G.A. Res. 883, *supra* note 11; G.A. Res. 748, *supra* note 11; G.A. Res. 731, U.N. SCOR, 47th Sess., 3033rd mtg., U.N. Doc. S/RES/731 (1992).

175. See G.A. Res. 883, *supra* note 11, at 1-5; G.A. Res. 748, *supra* note 11, at 1-4; G.A. Res. 731, *supra* note 174, at 1-2; see also WAYS & MEANS REPORT, *supra* note 10, at 10-11.

176. See Iran and Libya Sanctions Act § 5(b)(1).

whole.¹⁷⁷ Prior to the enactment of ILSA, measures were taken by the United States to prohibit domestic persons from trading with Iran or Libya in an attempt to undermine the ability of these nations to finance their unlawful activities.¹⁷⁸ The effectiveness of these measures, however, was undermined by the willingness of other nations to invest in Iran and Libya's petroleum sectors.¹⁷⁹ The United States could claim that, in light of these circumstances, ILSA's import sanction should not be treated as a quantitative restriction since the contracting parties could not have intended for Article XI to supersede the right of sovereign nations to respond to the unlawful activities of rogue regimes such as Iran and Libya.

Assuming for a moment that a panel is persuaded by the proposed argument, ILSA's import sanction could be removed from the scope of Article XI if it is treated as a permissible internal regulation under Article III(4) of the GATT.¹⁸⁰ Article III(4) provides that "[t]he products of the territory of any contracting party . . . shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."¹⁸¹ ILSA's import sanction could be

177. See INT'L RELATIONS REPORT, *supra* note 83, at 9-10; WAYS & MEANS REPORT, *supra* note 10, at 9-10.

178. See generally Iranian Transactions Regulations, 31 C.F.R. pt. 560 (1996); Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (1996); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995); see also INT'L RELATIONS REPORT, *supra* note 83, at 9-10.

179. See INT'L RELATIONS REPORT, *supra* note 83, at 9-10. In 1995, Conoco, Inc., a U.S. firm, initialed a contract to develop oil fields in Iran. See *id.* at 10. The transaction was prohibited by an executive order that was issued by President Clinton. See *id.* The Conoco contract and several contracts for the development of Iranian oil fields were entered into by foreign investors later that same year. See *id.* The report by the Committee on Ways & Means described this as the "the most significant setback to U.S. efforts to multilateralize the isolation of Iran." *Id.*

180. In a pre-WTO panel report, it was held that measures subject to the provisions of Article III are not to be examined in the context of Article XI. See Canada—Administration of the Foreign Investment Review Act, Feb. 7, 1984, para. 5.14, GATT B.I.S.D. (30th Supp.) at 140, 162-63 (1984). The United States would have to look to the provisions of the GATT in order to find a justification for removing ILSA's import sanction from Article XI, as opposed to arguing for the creation of an entirely new exception, because prior panel decisions have held that a dispute settlement proceeding "cannot add to or diminish rights of contracting parties under the General Agreement." See Tuna-Dolphin Decision II, *supra* note 162, para. 5.43; see also text accompanying notes 161-165.

181. GATT, *supra* note 38, art. III(4).

considered subject to Article III(4) based on the Note Ad Article III which reads as follows:

Any internal tax or other internal charge, or any law, regulation or requirement . . . which applies to an imported product and to the like domestic product and is collected or enforced in the case of an imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III(1)], and is accordingly subject to the provisions of Article III.¹⁸²

Since ILSA is designed to prevent foreign persons from engaging in certain transactions with Iran or Libya,¹⁸³ the statute's import sanction could be characterized as an enforcement mechanism imposed at "the time or point of importation" within the meaning of the Note Ad Article III.¹⁸⁴ The United States could argue that ILSA's import sanction would be permissible under Article III(4) because domestic persons are prohibited from engaging in the same kinds of transactions that trigger sanctions against foreign persons under ILSA.¹⁸⁵ The underlying theory would be that ILSA's import sanction would effect the "internal sale, offering for sale, purchase, transportation, distribution or use" of foreign products for the purpose of requiring foreign importers and domestic persons

182. *Id.*, Annex 1, ad art. III. Article III(1) generally provides that "[t]he contracting parties recognize that . . . laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products . . . should not be applied . . . so as to afford protection to domestic production." *Id.* art. III(1). ILSA is clearly intended to inhibit Iran and Libya's ability to support international terrorism and acquire weapons of mass destruction and is not designed to protect domestic production. See WAYS & MEANS REPORT, *supra* note 10, at 9-10.

183. See Iran and Libya Sanctions Act § 5(a)-(b).

184. GATT, *supra* note 38, Annex 1, ad art. III.

185. Foreign persons can be sanctioned under ILSA for investing \$40 million or more "that directly and significantly contribute[s] to the enhancement of [Iran or Libya's] ability to develop [its] petroleum resources." Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(a), (b)(2), 110 Stat. 1541, 1543 (1996). Foreign persons can also be subjected to sanctions under ILSA for exporting certain "goods, services, technology, or other items" to Libya. *Id.* § 5(b)(1). Domestic persons are barred from investing in Iran by an executive order that was made pursuant to the IEPA in 1995. See Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (1995). Domestic persons are also barred from performing any government or commercial contract with Libya or exporting any goods, technology or services to Libya under the Libyan Sanctions Regulations, 31 C.F.R. §§ 550.202, 550.205 (1996).

dealing in "like products" to engage in similar trading practices with respect to Iran and Libya.¹⁸⁶ The opposing position would be that Article III requires foreign products to be treated no less favorably than "like products of national origin" irrespective of any policy differences between the countries involved.¹⁸⁷

Two pre-WTO panel decisions, the 1991 report on *United States—Restrictions on Import of Tuna*¹⁸⁸ (*Tuna-Dolphin Decision I*) and the subsequent *Tuna-Dolphin Decision II*,¹⁸⁹ suggest that the proposed position of the United States would not prevail. Both of these cases involved U.S. import bans on tuna products that were harvested in a manner which resulted in the incidental killing of dolphins.¹⁹⁰ The import bans were imposed pursuant to the Marine Mammal Protection Act of 1972 (MMPA),¹⁹¹ which was designed to promote the conservation of certain endangered marine mammals.¹⁹² U.S. vessels were subject to similar standards regarding permissible methods for the harvesting of tuna.¹⁹³ In both disputes, the issue was raised as to whether to treat the MMPA import restriction against Mexico as an internal regulation under Article

186. GATT, *supra* note 38, art. III(4). This interpretation would raise the question of whether, as a matter of customary international law, the United States can hold foreign nationals responsible for activities that have taken place wholly outside of the borders of the United States. The United States could attempt to address this problem by invoking the doctrine of effects jurisdiction, which allows a nation to exercise jurisdiction based on "conduct outside its territory that has . . . substantial effect within its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987). It could be argued that the foreign investments banned by ILSA have a substantial effect on the security of the United States from terrorist acts within its borders that are financed by funds originating from Iran and Libya's petroleum industries. *See Iran and Libya Sanctions Act* § 5(a)-(b); *see also* WAYS & MEANS REPORT, *supra* note 10, at 14.

187. GATT, *supra* note 38, art. III(4).

188. GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) (unadopted) [hereinafter *Tuna-Dolphin Decision I*].

189. *Tuna-Dolphin Decision II*, *supra* note 162.

190. *See Tuna-Dolphin Decision II*, *supra* note 162, paras. 2.9, 2.12; *Tuna-Dolphin Decision I*, *supra* note 188, paras. 2.1-2.2, 5.17.

191. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1994)); *see also Tuna-Dolphin Decision II*, *supra* note 162, paras. 2.9, 2.12; *Tuna-Dolphin Decision I*, *supra* note 188, para. 5.17.

192. *See Tuna-Dolphin Decision II*, *supra* note 162, para. 2.5; *Tuna-Dolphin Decision I*, *supra* note 188, para. 2.3.

193. *See Tuna-Dolphin Decision II*, *supra* note 162, para. 2.6; *Tuna-Dolphin Decision I*, *supra* note 188, para. 3.20.

III or a quantitative restriction under Article XI.¹⁹⁴ The panel in the *Tuna-Dolphin Decision I* approached this issue by engaging in a three part analysis. First, the panel noted that the "Note Ad Article III covers only internal taxes that are borne by products [and] it would be inconsistent to limit the application of this Note to taxes that are borne by products while permitting its application to regulations not applied to the product as such."¹⁹⁵ Second, the panel determined that the MMPA import restrictions "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product."¹⁹⁶ Third, the panel held that Article III "call[ed] for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product."¹⁹⁷ The panel in the *Tuna-Dolphin Decision II*, followed a similar line of reasoning but added that Article III "[does] not [call] for a comparison of the policies or practices of [a product's] country of origin with those of the country of importation."¹⁹⁸ The panels in both the *Tuna-Dolphin Decision I* and *Tuna-Dolphin Decision II* concluded that: (1) the MMPA import prohibitions were not internal regulations within the meaning of Article III; (2) even if the MMPA import prohibitions were subject to Article III, they would not have been justified under that article; and (3) the MMPA import prohibitions were quantitative restrictions in direct violation of Article XI.¹⁹⁹

ILSA's import sanction is analogous to the MMPA's import prohibitions since both laws involve the restriction of imports for the purpose of coercing other nations into complying with the views of the United States on certain international policy issues.²⁰⁰ The only distinction is that the MMPA involved animal conservation issues²⁰¹ while the policy that underlies

194. See *Tuna-Dolphin Decision II*, *supra* note 162, paras. 3.3-3.6; *Tuna-Dolphin Decision I*, *supra* note 188, paras. 3.10-3.11.

195. *Tuna-Dolphin Decision I*, *supra* note 188, para. 5.13.

196. *Id.* para. 5.14.

197. *Id.* para. 5.15.

198. *Tuna-Dolphin Decision II*, *supra* note 162, para. 5.8.

199. See *Tuna-Dolphin Decision II*, *supra* note 162, paras. 5.8, 5.10; *Tuna-Dolphin Decision I*, *supra* note 188, paras. 5.14, 5.15, 5.17-5.18.

200. See *Tuna-Dolphin Decision II*, *supra* note 162, para. 3.8; *Tuna-Dolphin Decision I*, *supra* note 188, para. 2.3.

201. See *Tuna-Dolphin Decision II*, *supra* note 162, para. 3.8; *Tuna-Dolphin Decision I*, *supra* note 188, para. 2.3.

ILSA is the denial of Iran and Libya's ability to support acts of international terrorism and acquire methods of mass destruction.²⁰² The *Tuna-Dolphin Decision I* and *Tuna-Dolphin Decision II* stand for the proposition that the policies underlying an import prohibition have no bearing on its validity under Articles III and XI.²⁰³ Since the treatment of imported products and domestic "like products" under ILSA would be based entirely on policy considerations, the statute's import sanction would not fall within the scope of Article III.²⁰⁴ Furthermore, even if Article III did apply, these panel decisions suggest that ILSA's import sanction would be contrary to Article III(4).²⁰⁵ Therefore, it is likely that a panel would find that ILSA's import sanction violates Article XI of the GATT.

B. Are ILSA's Export and Import Sanctions Consistent With the Obligations of the United States Under Article I of the GATT?

Even if a panel finds that ILSA is consistent with Article XI of the GATT, the complaining party could challenge the statute's import and export sanctions under Article I of that agreement. Article I, entitled "General Most-Favoured-Nation Treatment," has been described as the cornerstone of the international trade rules embodied in the GATT.²⁰⁶ The text of Article I provides:

With respect to . . . all rules and formalities in connection with importation and exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.²⁰⁷

This language sets forth a fundamental principle of non-discrimination—each contracting party must grant every other

202. See WAYS & MEANS REPORT, *supra* note 10, at 9-10.

203. See *supra* text accompanying notes 195-199.

204. See *Tuna-Dolphin Decision II*, *supra* note 162, para. 5.8.

205. See *Tuna-Dolphin Decision I*, *supra* note 188, para. 5.15.

206. GATT, *supra* note 38, art. I; see also JACKSON ET AL., *supra* note 48, at 436.

207. GATT, *supra* note 38, art. I(1).

contracting party the most favorable treatment that it grants to any country with respect to measures affecting imports and exports.²⁰⁸

ILSA's import and export sanctions would fall within the scope of Article I because they are "rules . . . in connection with importation and exportation."²⁰⁹ The complaining party could argue that these sanctions are contrary to Article I since they can be used to ban exports and imports into the United States from certain WTO Members while the trading practices of other countries remain unhindered.²¹⁰ In response, the United States could point out that ILSA's sanctions are imposed based on certain forms of behavior by sanctioned persons and not their national origin.²¹¹ The complaining party's position is supported by 1952 panel report on *Belgian Family Allowances*²¹² (*Belgian Report*), which involved a challenge to a Belgian law that levied different charges on imported goods based on the nature of the exporting nation's tax system.²¹³ While the language of the report was unclear, the panel found that the Belgian law was inconsistent with Article I of the GATT.²¹⁴ At least one scholar has suggested that, with respect to Article I, the *Belgian Report* "can be interpreted to support the proposition that while treatment can differ if the *characteristics of goods* themselves are different, differences in treatment of imports cannot be based on differences in characteristics of the *exporting country* which do not result in differences in the goods themselves."²¹⁵ ILSA's export and import sanctions would be imposed based on the characteristics of the exporting or importing countries since the conduct that triggered those sanctions would be a reflection of the trading policies of those countries. Like all GATT panel decisions, howev-

208. See JACKSON, *supra* note 69, at 133.

209. GATT, *supra* note 38, art. I(1). For a more detailed discussion of ILSA's export and import sanctions see Part IV.A.1.&2.

210. See generally Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §§ 5(a)-(b), 6(2), (6), 110 Stat. 1541, 1543-46 (1996).

211. See *id.* § 5(a)-(b).

212. Belgian Family Allowances (Allocations Familiales), Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59 (1953) [hereinafter *Belgian Report*].

213. See *id.* para. 1. This proposition extends to the treatment of exports since "exports" and "imports" are interchangeable in Article I. See GATT, *supra* note 38, art. I(1).

214. See *Belgian Report*, *supra* note 212, paras. 3, 8.

215. See JACKSON, *supra* note 69, at 138.

er, the *Belgian Report* is not binding precedent, and the United States could downplay its significance because its language is somewhat ambiguous.²¹⁶ As such, Article I would not provide as strong a basis for challenging ILSA as Article XI of the GATT.²¹⁷ Article I would, however, provide the complaining party with an additional argument in case the Article XI argument should fail.

C. Even If ILSA Does Not Violate Any Specific Provisions of the GATT, Does the Statute Nullify or Impair the Benefits and Impede the Attainment of the Objectives of That Agreement?

In the unlikely event that a panel should find ILSA to be consistent with Articles XI and I of the GATT, the complaining party may choose to argue that the statute: (1) nullifies or impairs its benefits under the GATT; and (2) impedes the attainment of the objectives of that agreement.²¹⁸ This argument finds its basis in Article XXIII of the GATT, which allows any Member to seek redress through the WTO dispute resolution mechanism if it "should consider any benefit accruing to it directly or indirectly under [the GATT] is being nullified or impaired or that the attainment of any objective of [the GATT] is being impeded as the result of . . . the application . . . of any measure, whether or not it conflicts with the provisions of [the GATT]."²¹⁹

The first claim can be described as non-violation nullification and impairment.²²⁰ From a historical perspective, non-violation nullification and impairment claims have only been addressed in a handful of disputes.²²¹ The majority of these claims involved the nullification of expected benefits from tariff concessions.²²² Relying on these precedents, the complaining

216. See *id.* Prior panel reports are not binding within the meaning of *stare decisis*. See *id.* at 89. They are, however, a commonly relied upon source of persuasive authority for purposes of subsequent panel decisions. See *id.* at 89-90.

217. See generally *supra* Part IV.A.

218. See GATT, *supra* note 38, art. XXIII.

219. *Id.*

220. See JACKSON ET AL., *supra* note 48, at 357.

221. See *id.*

222. See *id.* at 363; see also 2 ANALYTICAL INDEX, *supra* note 75, at 661. Tariff concessions, which are generally governed by Article II of the GATT, are agreements by contracting parties to set maximum tariff rates for particular goods. See

party could argue that sanctions under ILSA would nullify and impair its expected benefits from any tariff concessions made prior to the statute's enactment. This argument would be based on the assertion that ILSA's effect on trade between the United States and the complaining party could not have been reasonably anticipated when the tariff concessions were being negotiated. A similar argument was addressed in the panel report on *United States—Trade Measures Affecting Nicaragua*²²³ (*Nicaragua Report*). The *Nicaragua Report* involved a non-violation nullification and impairment challenge to an embargo that was imposed against Nicaragua by the United States.²²⁴ The embargo that gave rise to that case is somewhat similar to ILSA in that it was motivated by national security considerations on the part of the United States.²²⁵ While the panel ultimately reserved judgment on the non-violation nullification and impairment claim, its discussion suggested that the embargo frustrated Nicaragua's expected benefits from U.S. tariff concessions.²²⁶ The United States may try and distinguish ILSA from the *Nicaragua Report* embargo by arguing that the latter involved trade barriers that were imposed against an entire nation while the former only provides for sanctions against individual persons or entities.²²⁷ The validity of this distinction is undermined, however, by the panel report on *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseed and Related Animal-Feed Proteins*.²²⁸ This panel decision can be interpreted as stand-

JACKSON ET AL., *supra* note 48, at 384-85; see also GATT, *supra* note 38, art. II. The specific tariff concessions for each contracting party are embodied in a lengthy group of schedules that are appended to the GATT. See JACKSON ET AL., *supra* note 48, at 384.

223. United States—Trade Measures Affecting Nicaragua, GATT Doc. L/6053 (Oct. 13, 1986) (unadopted), available in LEXIS, Intlaw Library, GTTWTO file [hereinafter *Nicaragua Report*].

224. See *id.* para. 4.8.

225. See *id.* para. 4.9.

226. The panel noted that the embargo had "seriously upset the competitive relationship between the embargoed products and other directly competitive products." *Id.* para. 5.6. The panel went on to find, however, that it did not have the authority to recommend an adequate remedy for restoring the competitive relationship that existed prior to when the tariff concessions were made. See *id.* para. 5.10. Ultimately, the panel proposed a series of questions in lieu of a resolution to the dispute. See *id.* paras. 5.17-5.18.

227. See *id.* para. 4.8; see also Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §§ 5(c), 14(14), 110 Stat. 1541, 1544, 1550 (1996).

228. EEC—Payments and Subsidies Paid to Processors and Producers of Oil-

ing for the proposition that a non-violation nullification and impairment claim falls on whether an adverse change in competitive conditions takes place rather than on whether that change actually impacts imports.²²⁹ ILSA would clearly create an adverse change in competitive conditions since the imposition of the statute's import and export sanctions could effectively prevent certain foreign persons from trading with the United States.²³⁰ Therefore, a panel could justify a finding of non-violation nullification and impairment in the context of ILSA, even if there was no specific violation of GATT Articles XI or I.²³¹

Even fewer disputes have arisen involving the second claim, that ILSA impedes the attainment of the objectives of the GATT.²³² Where such claims have been made, they have either not been pursued or not been addressed due to lack of specificity as to exactly what objectives were being impeded.²³³ It therefore follows that the first step in claiming that the objectives of the GATT are being impeded would be to ascertain specifically what those objectives are. Several of the GATT's objectives are discussed in the Preamble to the agreement including "raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods."²³⁴ The Preamble goes on to state that these objectives are to be facilitated by "reciprocal and mutually advantageous arrangements directed to the substantial reduction

seed and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991).

229. See *id.* paras. 151-152.

230. See Iran and Libya Sanctions Act §§ 6(2), (6).

231. It should be noted that the available remedies in non-violation nullification and impairment cases are somewhat different from those cases where a specific GATT provision has been violated. See DSU art. 26(1). The significant differences are: (1) the losing party is not obligated to withdraw the measure that is the subject of the complaint and the panel or appellate body may only recommend that a "mutually satisfactory adjustment" be made; and (2) compensation may be part of the "mutually satisfactory" adjustment in the final settlement. *Id.* art. 26(1)(b), (d). For a discussion of the remedies that would be available if ILSA violated GATT Article XI or I see discussion *infra* Part V.

232. See JACKSON ET AL., *supra* note 48, at 349.

233. See generally 2 ANALYTICAL INDEX, *supra* note 75, at 654-55.

234. GATT, *supra* note 38, preamble.

of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce."²³⁵

The complaining party could argue that ILSA would have a negative impact on any or all of these objectives since it could prevent sanctioned persons from participating in various forms of trade with the United States.²³⁶ The *Nicaragua Report* would provide some support for this claim, since the panel in that case concluded that embargoes imposed for security reasons run counter to several of the aims of the GATT.²³⁷ Among the relevant objectives identified by the panel were the fostering of non-discriminatory trade policies and the reduction of uncertainty in trade relations.²³⁸ As previously discussed, however, ILSA's sanctions can be distinguished from the broad embargo that was imposed in the *Nicaragua Report*.²³⁹ Since ILSA's sanctions are only imposed against individual persons or entities and not entire nations, it could be argued that the relationship between the statute and the objectives in the GATT Preamble is tenuous at best.²⁴⁰ For these reasons, it would be difficult, though not impossible, to successfully argue that ILSA impedes the attainment of the objectives of the GATT.

D. Is ILSA's Procurement Sanction Consistent With the Obligations of the United States Under the AGP?

ILSA's procurement sanction, located in Section 6(5) of the statute, prohibits the United States government from procuring or entering into any contract for the procurement of any goods or services from a sanctioned person.²⁴¹ In order to challenge this sanction under the AGP, the complaining party must first show that certain threshold requirements have been satisfied. Since the AGP is a plurilateral trade agreement, all Members of the WTO are not necessarily parties to the

235. *Id.*

236. See 142 CONG. REC. H6472 (daily ed. June 18, 1996) ("[i]n short, [ILSA] requires foreign companies to choose between investing in our market and those of Iran and Libya") (statement of Rep. Gilman).

237. See *Nicaragua Report*, *supra* note 223, para. 5.16.

238. See *id.*

239. See *supra* text accompanying note 227.

240. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §§ 5(c), 14(14), 110 Stat. 1541, 1544, 1550 (1996); see also GATT, *supra* note 38, preamble.

241. See Iran and Libya Sanctions Act § 6(5).

AGP.²⁴² Of the WTO Member countries, the only nations that are parties to the AGP consist of Austria, Canada, the EU (on behalf of its member states), Finland, Hong Kong, Israel, Japan, Korea, Norway, Sweden, Switzerland, and the United States.²⁴³ The complaining party would have to be one of these party nations in order to challenge ILSA under the provisions of the AGP.²⁴⁴

Furthermore, the application of the AGP in challenging ILSA's procurement sanction would be limited to procurements that fall within the scope of the AGP. The AGP covers: (1) any contract for the procurement of either goods or services;²⁴⁵ (2) by a governmental entity or sub-central governmental entity;²⁴⁶ (3) which is worth more than the required contract value threshold amount;²⁴⁷ (4) subject to the specifications in Appendix I of the AGP.²⁴⁸ Appendix I lists all of the parties to the AGP.²⁴⁹ Under each party's listing in Appendix I, there are five annexes and a section of general notes that define the extent of each party's respective obligations.²⁵⁰ Annex 1 contains covered central governmental entities, Annex 2 contains covered sub-central governmental entities, Annex 3 contains other covered entities, Annex 4 specifies covered services in general, Annex 5 specifies covered construction services, and the general notes set out specific exclusions and derogations from the annexes that apply to specific signatories.²⁵¹ In addition to listing the different governmental entities that are subject to the AGP, the annexes contain the contract value threshold amounts for each covered area.²⁵² The operation of

242. See DSU app. 1(C). Members of the WTO do not have to become parties to any of the plurilateral trade agreements. See JACKSON ET AL., *supra* note 48, at 303. Multilateral trade agreements, in contrast, are mandatory for all WTO Members. See *id.* at 302.

243. See Dennin & Boucher, *supra* note 42, at 2.

244. See AGP art. XXIV(1).

245. See *id.* art. I(2).

246. See *id.* art. I(1) n.1.

247. See *id.* art. I(4).

248. See *id.* art. I(1).

249. See *id.* art. XXIV(1).

250. See Dennin & Boucher, *supra* note 42, at 3-4; see also AGP art. I(1) n.1.

251. See Dennin & Boucher, *supra* note 42, at 4; see also AGP art. I(1) n.1.

252. See AGP art. I(1) n.1. The contract value threshold amounts are expressed in terms of "special drawing rights" (SDR), the international reserve unit of account used by the IMF. See Dennin & Boucher, *supra* note 42, at 5 n.15.

Appendix I illustrates the reciprocity-based approach that underlies the AGP.²⁵³ Pursuant to Appendix I, the procurement areas for which the United States is obligated differ in relation to each of the other parties to the AGP.²⁵⁴ These differences are a direct reflection of the extent that the procurement markets of the respective parties have been opened up to U.S. suppliers.²⁵⁵ It is therefore unlikely that the application of ILSA's procurement sanction will be within the scope of the AGP unless procurements are prohibited in an area where the complaining party has given reciprocal opportunities to U.S. suppliers.²⁵⁶

Assuming the threshold requirements are satisfied, however, the imposition of ILSA's procurement sanction could potentially violate the AGP in at least two ways. Article VIII of the AGP requires that, for purposes of qualifying government suppliers, parties shall limit "any conditions for participation in tendering procedures . . . to those which are essential to ensure the firm's capability to fulfil the contract in question."²⁵⁷ The complaining party could argue that ILSA's procurement sanction prevents persons from becoming qualified suppliers based on business activities that are conducted outside the jurisdiction of the United States and have no relationship whatsoever to the capability of those persons to fulfill any government procurement contract.²⁵⁸

Even if there is no Article VIII violation, the complaining party could claim that ILSA's procurement sanction impedes the attainment of the objectives of the AGP. This argument would be based on Article XII of the AGP which allows any party to resort to the WTO's dispute resolution mechanism if:

253. See Dennin & Boucher, *supra* note 42, at 3-4.

254. See generally AGP app. 1 (United States).

255. See Dennin & Boucher, *supra* note 42, at 4.

256. Cf. *id.* at 3-4.

257. AGP art. VIII(b).

258. Sanctions are triggered under ILSA based on the sanctioned person's engagement in certain kinds of transactions with Iran or Libya. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 5(a)-(b), 110 Stat. 1541, 1543 (1996).

[it] considers that any benefit accruing to it, directly or indirectly, under [the AGP] is being nullified or impaired, or that the *attainment of any objective* of [the AGP] is being impeded . . . [due to] the application by another Party . . . of any measure, whether or not it conflicts with the provisions of [the AGP].²⁵⁹

One of the objectives recognized in the preamble to the AGP is "the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade."²⁶⁰ It could be argued that ILSA's procurement sanction impedes the attainment of this objective since it denies certain foreign persons access to the United States government procurement market in order to advance policy interests that are completely unrelated to the area of government procurement.²⁶¹

There is, however, an exception to ILSA's procurement sanction in Section 5(f)(2) of the statute which is likely to prevent the threshold requirements of the AGP from being satisfied.²⁶² This exception was created for the express purpose of insuring that ILSA's procurement sanction is applied in a manner consistent with the obligations of the United States under the WTO and the AGP.²⁶³ Section 5(f)(2) of ILSA states that, "in the case of procurement," the president is not required to impose sanctions on the "eligible products" of any "designated" foreign country or instrumentality pursuant to Sections 308(4) and 301(b)(1) of the Trade Agreements Act of 1979 (TAA).²⁶⁴ Section 308(4) of the TAA defines the term "eligible product" as any product or service that is covered by the AGP.²⁶⁵ A nation may become a designated country or instru-

259. AGP art. XXII(2) (emphasis added).

260. *Id.* preamble.

261. The policy interest ILSA seeks to advance is the inhibition of Iran and Libya's abilities to support acts of international terrorism and acquire methods of mass destruction. See WAYS & MEANS REPORT, *supra* note 10, at 9-10.

262. See Iran and Libya Sanctions Act § 5(f)(2).

263. See generally WAYS & MEANS REPORT, *supra* note 10, at 13-14.

264. Trade Agreements Act of 1979 §§ 301(b)(1), 308(4), 19 U.S.C. §§ 2511(b)(1), 2518(4) (1994); see also Iran and Libya Sanctions Act § 5(f)(2).

265. See 19 U.S.C. § 2518(1), (4)(A)(i). In order for a product to be from a

mentality under Section 301(b)(1) of the TAA if it is determined, by the U.S. Trade Representative, to be a party to the AGP that will "provide appropriate reciprocal competitive procurement opportunities to [the] United States."²⁶⁶ Nearly all of the party nations to the AGP have been so designated under the TAA and would therefore be exempted from procurement sanctions under Section 5(f)(2) of ILSA.²⁶⁷ This exception would prove to be important in cases where the sanctioned person is from a nation that is a party to the AGP and the nature of that sanctioned person's business is such that ILSA's procurement sanction would be the only way for the statute to have any practical impact.²⁶⁸ Without the exception in Section 5(f)(2), the president might be forced to impose ILSA's procurement sanction in situations like this since the imposition of meaningless sanctions would be contrary to ILSA's legislative intent.²⁶⁹

The exception in Section 5(f)(2) of ILSA makes it unlikely that ILSA's procurement sanction will be imposed against any of the party nations to the AGP. As such, if ILSA's procurement sanction is imposed at all, the sanctioned party probably will not have ratified the AGP and will have no standing to invoke the provisions of that agreement.²⁷⁰ Since the party nations to the AGP are comprised of most of the major U.S. trading partners, however, it is hard to imagine a situation

particular "foreign country or instrumentality" under the Trade Agreements Act of 1979 (TAA): (1) it must be wholly the growth, product, or manufacture of that country or instrumentality; or (2) if it consists partially of materials from another country, it must have been transformed into a new and different article of commerce with a name, character, or use distinct from the articles from which it was formed. *See id.* § 2518(4)(B)(i)-(ii).

266. *Id.* § 2511(b)(1)(A)-(B). The authority to make this determination is vested in the president by the TAA. *See id.* § 2511(b). The president, in turn, delegated this function to the United States Trade Representative in Exec. Order No. 12,260, 46 Fed. Reg. 1653 (1981). A list of the countries or instrumentalities that have been designated under the TAA are contained in the Federal Acquisition Regulations. *See* Federal Acquisition Regulations, 48 C.F.R. § 25.401 (1996).

267. Compare 48 C.F.R. § 25.401, with AGP app. I.

268. Such a case might occur, for example, if the sanctioned person is a foreign corporation that has almost no dealings with the United States other than in the form of government procurement contracts and is the national of a country that is a party to the AGP.

269. *See* 142 CONG. REC. H6476 (daily ed. June 18, 1996) (the "imposition of meaningless sanctions would be inconsistent" with the intent of Congress) (statement of Rep. Gilman).

270. *See generally* Dennin & Boucher, *supra* note 42, at 2.

where the Section 5(f)(2) exception will not apply and the imposition of ILSA's procurement sanction will have any meaningful effect.²⁷¹ Since the party nations to the AGP make up a significant portion of the global procurement market, it is these countries that are likely to have significant procurement contracts with the United States and will be vulnerable to the imposition of ILSA's procurement sanction.²⁷² Therefore, as a practical matter, the effectiveness of ILSA's procurement sanction will ultimately be limited by Section 5(f)(2).

E. Are Sanctions Under ILSA Justified by the Security Exception in Article XXI of the GATT?

Article XXI of the GATT, entitled "Security Exceptions," provides that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."²⁷³ This exception is not limited to any specific provision of the GATT and, if applicable, could exempt ILSA from all of the requirements of that agreement.²⁷⁴

The materials that embody ILSA's legislative history contain numerous references to Iran and Libya's status as "rogue regimes" that threaten the security interests of the United States by supporting acts of international terrorism.²⁷⁵ The United States could argue that sanctions under the statute would be justified by the GATT's security exception because

271. See Gary H. Sampliner & Brian J. O'Shea, *Rules of Origin for Foreign Acquisitions Under the Trade Agreements Act of 1979, NAFTA, and the New GATT Accords*, 23 PUB. CONT. L.J. 207, 239 (1993-1994); see also Dennin & Boucher, *supra* note 42, at 2-3.

272. See Dennin & Boucher, *supra* note 42, at 2-3.

273. GATT, *supra* note 38, art. XXI. There is a similar security exception in Article XXIII of the AGP. See AGP art. XXIII(1). The language of the AGP security exception has been modified somewhat to encompass the area of government procurement. Compare GATT, *supra* note 38, art. XXI, with AGP art. XXIII(1). Since the ILSA will, in all likelihood, not be imposed in violation of the AGP this Note does not address the distinctions between the two exceptions. See Part IV.D.

274. See JACKSON ET AL., *supra* note 48, at 983.

275. See, e.g., INT'L RELATIONS REPORT, *supra* note 83, at 8 ("[i]t is the view of the committee that enactment of . . . [ILSA] will be a key element in United States policy of cutting off sources of funding to *rogue* regimes such as Iran and Libya") (emphasis added).

the conduct of Iran and Libya has created an "emergency in international relations" within the meaning of Article XXI.²⁷⁶ The complaining party could respond by arguing that, irrespective of Iran and Libya's alleged status as "rogue regimes," ILSA does not involve any "essential security interest" for purposes of Article XXI because sanctions under the statute would not have any meaningful impact on those nations.²⁷⁷ Given the ambiguous language of Article XXI, either of these interpretations could apply.²⁷⁸

The plain language of Article XXI, which refers to actions taken by a contracting party that "it considers necessary," suggests that the party relying on the exception has unfettered discretion as to when it may be invoked.²⁷⁹ This interpretation can be supported by the reported disputes involving Article XXI, where there have been signs of extreme deference to the judgment of the party invoking the exception.²⁸⁰ Two cases in particular illustrate this approach. The first case occurred at the Twenty-Second Meeting of the Contracting Parties (Twenty-Second Meeting) where Czechoslovakia complained that certain export controls operated by the United States were contrary to several Articles of the GATT.²⁸¹ During the course of this discussion one contracting party stated that, in the context of Article XXI, "the United States action would seem to be justified because every country must have the last resort on questions relating to its own security."²⁸² The complaint was ultimately rejected by a roll call vote of seventeen to one with

276. See GATT, *supra* note 38, art. XXI(b)(iii); see also generally INT'L RELATIONS REPORT, *supra* note 83, at 8-10.

277. The potential ineffectiveness of ILSA's sanctions was a major point of debate prior to the statute's enactment. This is reflected in the following quote from the Congressional debates over ILSA:

Iran has 65 million people and a \$300 billion economy. Libya has 5 million people and a \$33 billion economy. Neither country can be isolated, geographically or economically. In both countries, exports are growing. From 1988 to 1994, Iran's exports grew nearly 50 percent, to \$19 billion. Libya's exports grew nearly 10 percent to 8 billion.

142 CONG. REC. H8127 (daily ed. July 23, 1996) (statement of Rep. Roth).

278. See JACKSON, *supra* note 69, at 204.

279. GATT, *supra* note 38, art. XXII(b).

280. See JACKSON, *supra* note 69, at 204-05.

281. Summary Record of the Twenty-Second Meeting Contracting Parties, GATT Doc. CP.3/SR22 (June 8, 1949), available in LEXIS, Intlaw Library, GTTWTO file [hereinafter Twenty-Second Meeting].

282. *Id.* at 7 (statement of representative from the United Kingdom).

three abstentions.²⁸³ The second case was the *Nicaragua Report*, where the United States explicitly invoked the security exception to justify the imposition of an embargo against Nicaragua.²⁸⁴ In that case, the terms of reference²⁸⁵ were fixed so as to prohibit the panel from examining the invocation of Article XXI by the United States.²⁸⁶ At first glance these cases suggest that, as the party invoking the exception, the position of the United States should prevail.

A closer examination of prior GATT practice with respect to Article XXI, however, suggests that a panel could come to a radically different conclusion. Regardless of what was done in the reported cases, the contracting parties have been reluctant to formally invoke Article XXI throughout the history of the GATT.²⁸⁷ Certain scholars have interpreted this reluctance as reflecting the view that Article XXI should be used sparingly due to its significant potential for abuse.²⁸⁸ Even in the reported cases, there is some evidence that complete deference to the party invoking the exception is not always warranted. During the Twenty-Second Meeting, the same contracting party that advocated for deference with respect to Article XXI security determinations went on to note that "the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement."²⁸⁹ Moreover, the preparatory work to Article XXI suggests that the phrase "essential security interests" was inserted with the intention of preventing an overbroad interpretation of the security exception.²⁹⁰ In 1982, the contracting parties adopted the *Decision Concerning Article XXI of the General Agreement*²⁹¹ (*Article XXI Decision*), which stated that

283. See *id.* at 10.

284. See *Nicaragua Report*, *supra* note 223, para. 4.4.

285. A panel's terms of reference are instructions that define the issues it may review. See JACKSON ET AL., *supra* note 48, at 342. Under the WTO dispute resolution mechanism, panels automatically have broad terms of reference set unless the parties to the dispute agree otherwise. See DSU art. 7(1).

286. See *Nicaragua Report*, *supra* note 223, paras. 5.2-5.3.

287. See JACKSON, *supra* note 69, at 204-05.

288. See *id.* at 204.

289. Twenty-Second Meeting, *supra* note 281, at 7 (statement of representative from the United Kingdom).

290. See 1 ANALYTICAL INDEX, *supra* note 75, at 600.

291. Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23 (1983) [hereinafter *Article XXI Decision*].

"[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement."²⁹² The language in the *Article XXI Decision* seems broad enough to support the assertion that the "rights" discussed therein include the right of a WTO Member to have a panel rule on matters of nullification and impairment pursuant to GATT Article XXIII and the DSU.²⁹³ It could be argued that a panel would have the authority to review an Article XXI invocation because permitting the security exception to apply where there are no truly "essential security interests" at stake would nullify and impair the benefits of the complaining party. Based on this analysis, a panel would be justified in making an independent determination as to whether ILSA involves "essential security interests" within the meaning of Article XXI.

Due to the lack of any clear precedent, it is uncertain how a panel would evaluate this issue. If the panel chooses to examine the validity of the security interests that ILSA purports to protect, it would be placed in the awkward position of passing judgment on the security interests of a sovereign nation. In the past, the United States expressed extreme discomfort when faced with the possibility of dispute settlement panels making such determinations.²⁹⁴ Recently, there were strong indications that the United States planned on invoking the security exception in response to the EU challenge to the Helms-Burton Act.²⁹⁵ The United States took the position that it would not recognize the panel's jurisdiction over the dispute once Article XXI had been formally invoked.²⁹⁶ While the Helms-Burton complaint was tentatively suspended in April of 1997,²⁹⁷ this situation illustrates the serious political repercussions that would accompany a panel inquiry into the validity of an Article XXI invocation by the United States. Assuming the United States continues to insist that panels are precluded from examining decisions to rely on Article XXI, the panel

292. *Id.* para. 2.

293. See generally GATT, *supra* note 38, art. XXIII; DSU art. 6.

294. See JACKSON ET AL., *supra* note 48, at 986.

295. See David E. Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997, at A1.

296. See *id.*

297. See *United States—The Cuban Liberty and Democratic Solidarity Act*, *supra* note 40, at 1; see also Apple, *supra* note 40.

presiding over a challenge to ILSA will be placed in an extremely precarious position. Irrespective of how that panel rules, its decision is likely to cause irreparable harm to the institutional framework of the WTO. If the panel chooses to reject the U.S. interpretation of Article XXI and exercises jurisdiction over a dispute involving ILSA, it could conceivably escalate matters to the point where Congress reconsiders the continued U.S. participation in the WTO.²⁹⁸ If the panel opts for blind deference to Article XXI, however, the resulting precedent could open the door for future abuses of the security exception.²⁹⁹ Such abuse could seriously undermine the effectiveness of the WTO dispute resolution mechanism in the long term. These dangers lead to two conclusions regarding the use of the security exception to justify ILSA. First, the United States should weigh its options carefully before invoking Article XXI in the context of ILSA. Second, the best course of action would be to voluntarily refrain from using the security exception, even if it would mean accepting an adverse ruling on ILSA by the WTO.

V. REPERCUSSIONS OF AN ADVERSE DECISION ON ILSA IN THE WTO DISPUTE RESOLUTION MECHANISM

A challenge to ILSA in the WTO would be likely to result in the adoption of a panel or Appellate Body report which would conclude that the statute violates several articles of the GATT.³⁰⁰ Such a report would recommend that the United States withdraw the offending sanctions under ILSA in order to come into conformity with the GATT.³⁰¹ In the event that the report is not implemented within a "reasonable period of time,"³⁰² the WTO could authorize the complaining party to suspend its concessions to the United States under the relevant agreements as a result.³⁰³ While the suspension of con-

298. The implementing legislation for the agreements that were concluded in the Uruguay Round provides that a joint resolution by the two Houses of Congress can effect the withdrawal of the United States from the WTO. *See* Uruguay Round Agreements Act § 125(b)-(c), 19 U.S.C. § 3535(b)-(c) (1994).

299. *See* JACKSON, *supra* note 69, at 204.

300. *See* discussion *supra* Part IV.

301. *See* DSU art. 19; *see also* JACKSON ET AL., *supra* note 48, at 343.

302. Generally, a "reasonable period of time" as defined by the DSU is not to exceed 15 months. *See* DSU art. 21(3).

303. *See id.* art. 22(2).

cessions has not been authorized since the 1950s,³⁰⁴ it has been suggested that the Uruguay Round changes will result in more frequent use of such retaliatory measures.³⁰⁵ As an alternative to suspension of concessions, voluntary compensation to the complaining party could be allowed.³⁰⁶

Since ILSA was passed pursuant to an overwhelming majority of votes in Congress, it is unlikely that the statute will be repealed in order to comply with an adverse decision by the WTO.³⁰⁷ It is equally unlikely that compensation would be awarded, since Congressional approval would be required for such an expenditure. As an alternative to Congressional action, the president could waive sanctions pursuant to Section 9(c) of ILSA to the extent necessary for the United States to live up to its obligations under the GATT.³⁰⁸ Providing the GATT's security exception has not been invoked, there is nothing to suggest that the president would refrain from using this waiver authority to comply with an adverse panel decision.³⁰⁹ The problem with relying on Section 9(c), however, is that it only provides a short term solution. As long as ILSA remains in force, the president will have a supposedly "mandatory" obligation to impose sanctions on foreign nationals who engage in impermissible trade with Iran or Libya.³¹⁰ Moreover, Section 9(c) of ILSA can only be invoked after the president makes a detailed report to Congress explaining the reasons for the waiver.³¹¹ While ILSA does not grant Congress the authority to veto decisions to grant waivers, the president may be subjected to political pressures that limit his use of Section

304. See JACKSON ET AL., *supra* note 48, at 344.

305. See *id.* at 369.

306. See DSU art. 22(1)-(2).

307. ILSA was passed by the House of Representatives with 415 favorable votes and 19 abstentions. See 142 CONG. REC. H6528 (daily ed. June 19, 1996).

308. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 9(c)(1), 110 Stat. 1541, 1547 (1996).

309. To the contrary, Congress specifically contemplated that it might be proper to exercise the national interest waiver in Section 9(c) where "a particular sanction would raise significant issues under the international obligations of the U.S." WAYS & MEANS REPORT, *supra* note 10, at 18.

310. ILSA requires that the president "shall" impose sanctions against any foreign "person" that engages in the transactions that are prohibited by the statute. Iran and Libya Sanctions Act § 5(a), (b). The imposition of sanctions is therefore mandatory under ILSA, subject to certain specific exceptions. See *id.* §§ 4(c), 5(f), 9(c)(1).

311. See Iran and Libya Sanctions Act § 9(c)(1)-(2).

9(c).³¹² Therefore, the United States will have difficulty complying with repeated adverse panel decisions on ILSA and retaliatory measures such as suspension of concessions will eventually result.

VI. CONCLUSION

As of yet, sanctions under ILSA have not been imposed. This has not been due to a lack of sanctionable conduct within the international community. Potential violations of ILSA have either been completely ignored or dismissed as violating the spirit but not the letter of the statute.³¹³ The lack of enforcement with respect to ILSA can be attributed, at least in part, to the violations of the GATT and other related agreements that would arise if sanctions were imposed. It is relatively clear that ILSA's import and export sanctions are inconsistent with the obligations of the United States under the GATT.³¹⁴ While ILSA's procurement sanction would not fall within the scope of the GATT, the practical impact of that sanction has been compromised significantly in an effort to avoid similar violations of the AGP.³¹⁵ Despite these considerations, the president will have to face the continuing possibility of imposing "mandatory" sanctions under the statute.³¹⁶ If sanctions are finally imposed, the United States will be forced to defend the statute in the WTO. In the likely event that a panel renders an adverse decision on ILSA, the president will have to resort to the "national interest" waiver provision in Section 9(c) of the statute or be faced with the authorization of retaliatory measures by the WTO.³¹⁷

By the time this process is complete, ILSA's already fragile credibility will be completely shattered. The president could, of course, continue to avoid enforcing ILSA, but the ultimate outcome would be the same. Foreign investors will eventually view the statute as an empty threat and their conduct with

312. Cf. WAYS & MEANS REPORT, *supra* note 10, at 18 (reiterating that the president must provide a "detailed rationale to the Congress" if he chooses to exercise waiver authority) (emphasis added).

313. See discussion *supra* Part I.

314. See discussion *supra* Part IV.A.-C.

315. See discussion *supra* Part IV.D.

316. See discussion *supra* Part I.

317. See discussion *supra* Part V.

respect to Iran and Libya will remain unchanged. If ILSA is to have any credibility at all, the United States will have to enforce the statute more rigorously, relying on the security exception to avoid any challenge in the WTO. This can only be done at the risk of seriously damaging the WTO's dispute resolution mechanism.³¹⁸ In conclusion, ILSA is likely to raise a number of troublesome foreign policy issues for the United States over the next few years without seriously impacting the "rogue" activities of Iran or Libya. In the year 2001, the statute's sunset provision will take effect and, mercifully, the matter will end there.³¹⁹

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318. See discussion *supra* Part IV.E.

319. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 13(b), 110 Stat. 1541, 1548 (1996).