

**. . . OR I'LL TAKE MY TOYS AND GO HOME:  
THE IRAN AND LIBYA SANCTIONS ACT OF  
1996**

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“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”<sup>1</sup> Extraterritorial legislation by its very nature applies to the territory or citizenry of another nation.<sup>2</sup> Thus, the recent increase in legislation aimed at foreign entities has given rise to an international outcry.<sup>3</sup> The United States has been

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1. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). While generally tolerated today, extraterritorial application of most U.S. legislation was considered to be outside of the legislative scope at the beginning of the century. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (construing the Sherman Act as not applying to acts committed in Panama or Costa Rica). Justice Holmes, in his opinion in *American Banana*, wrote that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *Id.* at 356. During this period, the U.S. Supreme Court looked to international law and custom to see whether Congress had the authority to legislate extraterritorially. See Jonathan Turley, “When In Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 604 (1990).

Since the 1930s, the legal doctrine surrounding the extraterritorial application of U.S. law has changed dramatically. See *id.* at 604–05. Today, congressional intent is usually determinative of whether an extraterritorial application of U.S. law will be tolerated, and the power of Congress to make such laws is generally assumed. See Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INTL & COMP. L. REV. 297, 297 (1996).

2. See Gibney, *supra* note 1, at 311. Gibney presents a thorough and compelling discussion of the underlying anti-democratic nature of extraterritorial legislation. See *id.* at 305–07. For example, the Constitution assures that the “governed” will have the right to due process of law, yet many of those governed by U.S. extraterritorial legislation have no such right. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). In *Verdugo-Urquidez*, the majority stated that it was never suggested that the Fourth Amendment “was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” *Id.* at 266. They also “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Id.* at 269.

3. See, e.g., *Europe Heeding Iran’s Revolution by Resisting U.S.: Khamenei*, AGENCE FRANCE PRESSE, Aug. 28, 1996, available in LEXIS, World Library, AFP File [hereinafter *Europe Heeding*] (“The new U.S. law provoked an outcry in the international community with the European[s] threatening to retaliate to protect [their] interests.”); *Germany, Cuba Trade -2-: Suggests Extending Moratorium*, DOW JONES NEWS SERV., Sept. 11, 1996 (“In a statement, the German economics ministry reiterated that the E.U. ‘has criticized and rejected the Helms-Burton Act on Cuba as well as U.S. sanctions against Iran and Libya due to their extraterritorial nature.’”); *Japan Joins ASEAN, Australia, NZ to Slam U.S. Sanctions*, JAPAN ECON. NEWSWIRE, Sept. 13, 1996, available in LEXIS, World Library, JEN File [hereinafter *Japan Joins ASEAN*] (“The U.S. has also been unable to convince its allies in Europe to go along with the legislation and some of them are preparing countermeasures.”); Bruce W. Nelan, *Taking on the World*, TIME, Aug. 26, 1996, at 26, 27 (“What American officials call leadership, many of America’s friends around the world call bullying.”).

accused by a number of nations of violating international law, national sovereignty, and self-imposed conventional-law obligations.<sup>4</sup>

The most recent conflict arising out of this type of legislation surrounds the Iran and Libya Sanctions Act of 1996 (ILSA).<sup>5</sup> This Act, signed by President Clinton on August 5, 1996,<sup>6</sup> provides for sanctions against foreign companies investing in Iran or Libya.<sup>7</sup> The international response to the ILSA has been profoundly negative.<sup>8</sup> Not only are the cries of foul much louder than usual, but they are coming primarily from U.S. allies in the European Community and beyond.<sup>9</sup>

In Part I, this Article introduces the ILSA and the different legal principles and provisions under which it may be scrutinized. Part II analyzes the ILSA in light of the provisions of the World Trade Organization and the General Agreement on Tariffs and Trade. Part III examines economic coercion and its acceptance under international law. Part IV examines the incongruity between the ILSA and traditional U.S. policy towards secondary boycotts. Finally, this Article concludes that the ILSA is a violation of international law and a violation of U.S. international obligations as well as a departure from traditional U.S. policy.

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4. See, e.g., *ASEAN Questions US Sanctions Law Against Libya and Iran*, AGENCE FRANCE PRESSE, Sept. 12, 1996, available in LEXIS, World Library, AFP File ("Malaysia pushed for the sanctions law to be discussed, saying it violated World Trade Organisation (WTO) rules."); *France Drafts Legislation to Defy New U.S. Sanctions*, WALL ST. J. EUR., Aug. 29, 1996 [hereinafter *France Drafts Legislation*] (reporting France's claim that the D'Amato-Kennedy Act violates the rules of the WTO and its threats to impose sanctions on U.S. companies if French companies are hurt by the law); *France/U.S. Sanction-2: Few Details of Proposed Laws*, DOW JONES INT'L NEWS SERV., Aug. 28, 1996 [hereinafter *Few Details*] ("The European Union has already filed a complaint with the WTO protesting the U.S[.] sanctions."); *Implications and Reactions from Mexico*, LATIN AM. L. & BUS. REP., Sept. 30, 1996, available in LEXIS, Market Library, IACNWS File [hereinafter *Reactions from Mexico*] (quoting the administration of Mexican President Ernesto Zedillo as saying that "the text and spirit of the [Helms-Burton Act is] contrary to the principles contained in the United Nations Charter"); *Japan Joins ASEAN*, *supra* note 3 (quoting Japanese Trade Minister Shunpei Tsukahara as saying that the Helms-Burton Act has "a high possibility of harming the sovereignty and interests of third countries").

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

6. See *id.* 110 Stat. at 1543.

7. See *id.* § 5, 110 Stat. at 1543. For a list of sanctions included in the ILSA, see *infra* note 14.

8. See *supra* notes 3-4.

9. See *id.*

## I. BACKGROUND

A. *The History of the ILSA*

House Bill 3107 was introduced on March 19, 1996, as the Iran Oil Sanctions Act of 1996.<sup>10</sup> As the scope of the bill grew, so did its title.<sup>11</sup> Five days before the House of Representatives passed the bill, H.R. 3107 was renamed the Iran and Libya Sanctions Act of 1996.<sup>12</sup>

The goal of the ILSA was twofold: to deter Iran and Libya from aiding international terrorism or obtaining weapons of mass destruction and to influence the President to pursue negotiations to form a multilateral sanctions regime concerning Iran.<sup>13</sup> To achieve these goals, the ILSA requires the President to impose two or more specified sanctions<sup>14</sup> on persons who engage in conduct prohibited by the bill.<sup>15</sup>

The ILSA prohibits two types of conduct.<sup>16</sup> Foremost, it imposes sanctions on persons investing in or contributing to the ability of Iran or Libya to develop their petroleum resources.<sup>17</sup> Additionally, the ILSA imposes mandatory sanctions on persons exporting certain items that enhance Libya's weapons or aviation capabilities.<sup>18</sup> The requirement that all sanctions with respect to Libya be mandatory was a late addition to the bill.<sup>19</sup> In its original form, the bill gave the President discretion on whether to impose sanctions on

10. H.R. 3107, 104th Cong. § 1 (1996) (enacted).

11. The bill originally was intended to include only Iran. See H.R. REP. NO. 104-523, pt. 1, at 1 (1996) (labeling the Act the Iran Oil Sanctions Act of 1996). It was then amended to include Libya. See H.R. REP. NO. 104-523, pt. 2, at 2 (1996).

12. See H.R. REP. NO. 104-523, pt. 2, at 2; 142 CONG. REC. H6528-29 (daily ed. June 19, 1996).

13. See H.R. REP. NO. 104-523, pt. 2, at 9.

14. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §§ 5-6, 110 Stat. 1541, 1543-46 (to be codified at 50 U.S.C. § 1701). Those sanctions are: (1) denial of Export-Import Bank assistance; (2) denial of export licenses; (3) prohibition of any U.S. financial institution from making any loans to a sanctioned person over \$10 million per year; (4) prohibition of a sanctioned financial institution from serving as a primary dealer of U.S. Government bonds, or as a repository of U.S. Government funds; (5) ban on any U.S. Government procurement of any goods or services from a sanctioned person; and (6) restriction of imports imposed by the President in accordance with the International Emergency Economic Powers Act (IEEPA). See *id.* § 6, 110 Stat. at 1545-46.

15. See *id.* § 5, 110 Stat. at 1543-45.

16. See *id.*

17. See *id.* § 5(a), (b)(2), 110 Stat. at 1543.

18. See *id.* § 5(b)(1).

19. See 142 CONG. REC. S7917 (daily ed. July 16, 1996).

parties contributing to the development of Libya's petroleum resources.<sup>20</sup>

The President is responsible for determining whether a party has violated the ILSA's prohibitions.<sup>21</sup> Once that determination has been made, the President must either impose sanctions<sup>22</sup> or exercise a waiver.<sup>23</sup> The President's power of waiver may be used to exempt any offending party from sanctions.<sup>24</sup> The President may also waive sanctions with respect to all nationals of any country that has agreed to undertake substantial measures to inhibit Iran's efforts to support international terrorism or acquire weapons of mass destruction.<sup>25</sup>

A determination by the President to impose sanctions under the ILSA is not reviewable in any court.<sup>26</sup> The purpose of this provision is to ensure that sanctions will be carried out in a timely fashion.<sup>27</sup> The ILSA's authors believed that with the help of congressional consultation, a careful review by the President eliminated the need for judicial accountability.<sup>28</sup>

To understand the international reaction to this seemingly well-intentioned piece of legislation, one must first understand the climate into which it was introduced. The ILSA was passed at a time when the United States was under continuing fire for enacting a similarly controversial piece of legislation—the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.<sup>29</sup> Title III of LIBERTAD created a

20. See H.R. REP. NO. 104-523, pt. 2, at 3 (1996).

21. See Iran and Libya Sanctions Act of 1996 § 5(a), (b), 110 Stat. at 1543.

22. See *id.* § 5, 110 Stat. at 1543-45.

23. See *id.* §§ 4(c), 9(c), 110 Stat. at 1542, 1547-48.

24. See *id.* § 9, 110 Stat. at 1546-48 (granting the President discretion to waive sanctions "30 days or more after the President determines and so reports to the appropriate congressional committees that it is important to the national interest of the United States to exercise such waiver authority[;]" describing the contents of the presidential report supporting the waiver determination; and stating that the President "need not" impose sanctions during the 30-day period).

25. See *id.* §§ 2, 4(c), 110 Stat. at 1541-42. Section 4(c)(1) mentions economic sanctions in the context of the substantial measures a country must take to receive a waiver under that section. See *id.* § 4(c)(1), 110 Stat. at 1542. However, it is not entirely clear from the wording whether economic sanctions are necessary. See *id.* ("The President may waive [sanctions against a] . . . country [that] has agreed to undertake substantial measures, including economic sanctions . . .").

26. See *id.* § 11, 110 Stat. at 1548.

27. See H.R. REP. NO. 104-523, pt. 1, at 17 (1996).

28. See *id.*

29. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (to be codified at 22 U.S.C. §§ 6021-6091).

federal cause of action against any person or government that traffics in property confiscated by the Cuban government which is claimed by U.S. nationals.<sup>30</sup> The section implementing this cause of action was to become effective just four days before President Clinton signed the ILSA.<sup>31</sup> In response to growing international disfavor with LIBERTAD, President Clinton, on July 16, 1996, suspended Title III for six months to rally more support from U.S. allies.<sup>32</sup>

Just twenty days after this attempt at détente, Clinton signed the ILSA into law.<sup>33</sup> A number of nations, already angry about LIBERTAD, immediately took issue with both laws.<sup>34</sup> These nations contended that LIBERTAD and the ILSA infringed upon their sovereign rights.<sup>35</sup> While some considered instituting legal and retaliatory measures against the United States in response to these acts,<sup>36</sup> others have already done so.<sup>37</sup>

Even as President Clinton suspended the harshest portion of LIBERTAD, the European Union (EU) began considering four retaliatory measures.<sup>38</sup> These measures included adopting EU legislation to neutralize the extraterritorial effects of LIBERTAD, submitting a reference to WTO dispute resolution, making changes to the entry conditions into EU countries for U.S. corporate representatives, and monitoring U.S. enterprises that plan to take action under Title III of LIBERTAD.<sup>39</sup> On July 30, 1996, the EU moved beyond the mere contemplation of action by

30. See *id.* § 302(a), 110 Stat. at 815.

31. See *id.* § 306(a), 110 Stat. at 821; Iran and Libya Sanctions Act of 1996, 110 Stat. at 1541.

32. See Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of [1996], 32 WEEKLY COMP. PRES. DOC. 1265 (July 16, 1996).

33. President Clinton signed the ILSA on August 5, 1996. See Iran and Libya Sanctions Act of 1996, 110 Stat. at 1552.

34. See, e.g., *European Union Reiterates Detailed Concerns to Capitol Hill on Iran/Libya Sanctions Legislation*, PR NEWSWIRE, May 21, 1996, available in LEXIS, World Library, PRNews File (reproducing a letter to Congress from Hugo Paemen, Head of the European Commission's Washington Delegation, questioning the legality of the Helms-Burton Act and the Iran Oil Sanctions Act of 1996).

35. See, e.g., *Japan Joins ASEAN*, *supra* note 3 (reporting Japan's position on the impact of the Helms-Burton Act); *Reactions from Mexico*, *supra* note 4.

36. See *Europe Heeding*, *supra* note 3; *Few Details*, *supra* note 4; *France Drafts Legislation*, *supra* note 4.

37. See *Few Details*, *supra* note 4 (reporting that the EU has complained to the WTO about U.S. sanctions); *Japan Joins ASEAN*, *supra* note 3.

38. See *The Arm of US Law Grows Longer*, BUS. L. EUR., Aug. 16, 1996, available in LEXIS, News Library, Iacbus File [hereinafter *Arm of US Law*].

39. See *id.*

drafting antiboycott legislation to counter the effects of LIBERTAD.<sup>40</sup> This legislation was later extended to include the ILSA.<sup>41</sup> If passed, this legislation will forbid EU citizens from complying with the provisions of either LIBERTAD or the ILSA.<sup>42</sup> In addition, the antiboycott legislation will enable EU companies to sue to recover amounts awarded against them by U.S. courts under either of these laws.<sup>43</sup>

The EU has also instituted proceedings against the United States<sup>44</sup> before the World Trade Organization (WTO).<sup>45</sup> While the pending action only concerns the EU's objections over LIBERTAD,<sup>46</sup> a similar proceeding in response to the ILSA is forthcoming.<sup>47</sup>

## B. The GATT

### 1. History and Structure

The General Agreement on Tariffs and Trade (GATT)<sup>48</sup> was signed in 1947 to liberalize and make secure the terms of world trade.<sup>49</sup> Each contracting party has a commitment to

40. *See id.*

41. *See E.U. Steps Up Fight Against America's Anti-Iran and Libyan Measures*, DEUTSCHE PRESSE-AGENTUR, Sept. 16, 1996, available in LEXIS, News Library, DPA File (reporting that on September 16, 1996, the draft antiboycott regulation was extended to include the ILSA).

42. *See Arm of US Law*, *supra* note 38.

43. *See id.*

44. In 1996, the EU requested the WTO Dispute Settlement Body (DSB) to establish a panel to address its challenge to the legality of LIBERTAD. *See Evelyn F. Cohn & Alan D. Berlin, European Community Reacts to Helms-Burton*, N.Y. L.J., Aug. 4, 1997, at S2, S10. For further discussion of the EU's opposition, see Pawel K. Chudzicki, *The European Union's Response to the LIBERTAD Act and the Iran-Libya Act: Extraterritoriality Without Boundaries?*, 28 LOY. U. CHI. L.J. 505, 538 (1997).

45. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1 URUGUAY ROUND TRADE AGREEMENT, H.R. DOC. NO. 103-316; 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

46. *See EU to Move Helms-Burton to WTO Dispute Settlement Panel*, PR NEWswire, Oct. 1, 1996, available in LEXIS, Market Library, Promt File.

47. The EU's Council of Foreign Ministers voted on October 1, 1996, to submit their objections about LIBERTAD and the ILSA to a dispute panel under the authority of the WTO. *See id.*

48. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, amended by Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, 1983-84, 572 U.N.T.S. 320, 330 [hereinafter GATT].

49. *See, e.g., Dale E. McNeil, The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffing Bargain*, 22 YALE J. INT'L L. 345, 350-51 (1997).

expand world trade through international harmonization and the adjustment of national policies.<sup>50</sup> Although the GATT was never intended to be an organization, it functioned much like one until the early 1990s.<sup>51</sup>

Perhaps the most important provision of the GATT is the principle of most-favored-nation (MFN) treatment.<sup>52</sup> MFN treatment embodies the underlying concept of the GATT: that treatment given to any country, whether or not a member of the GATT, must be afforded to all contracting parties.<sup>53</sup> Accordingly, any form of disparate treatment between or among member nations is a per se violation of the GATT.<sup>54</sup>

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50. GATT Article XXXVIII, entitled "Joint Action," states:

1. The contracting parties shall collaborate jointly, within the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.
2. In particular, the CONTRACTING PARTIES shall:
  - . . .
  - (e) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research . . . .

*Id.* art. XXXVIII.

51. The GATT was forced to take on the characteristics of an organization when its "brother" negotiations, which would have established the International Trade Organization (ITO) broke down. See John H. Jackson, *The World Trade Organization, Dispute Settlement, and Codes of Conduct*, in *THE NEW GATT: IMPLICATIONS FOR THE UNITED STATES* 63, 64-65 (Susan M. Collins & Barry P. Bosworth eds., 1994).

52. See GATT art. I(1). Article I(1) states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III, 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.

*Id.* (footnote omitted).

53. 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, 64 (1995).

54. See GATT art. I(1); see also Gaugh, *supra* note 53, at 64.

The GATT provides for a number of general exceptions to its provisions.<sup>55</sup> Among others, these exceptions protect measures by nations to preserve life, health, national treasures, public morals, and natural resources.<sup>56</sup> Each of these exceptions, however, is subject to the condition that the protected measure was not adopted as a means of arbitrary or unjustifiable discrimination or as a disguised restriction on international trade.<sup>57</sup>

The principle of MFN treatment, like the other principles in the GATT, can also be set aside in the interest of national security.<sup>58</sup> Article XXI(b)(iii) exempts from the basic principles of the GATT any action “taken in time of war or other emergency in international relations.”<sup>59</sup> While the validity of the general exceptions to the GATT rely on those exceptions being justifiable,<sup>60</sup> the GATT security exception has no such mandate.<sup>61</sup>

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55. See GATT art. XX.

56. See *id.* art. XX(I)(a), (b), (f), (g).

57. See *id.* art. XX.

58. See *id.* art. XXI.

59. *Id.* art. XXI(b)(iii). Article XXI reads:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

*Id.* art. XXI. (footnote omitted).

60. See *id.* art. XX (providing the general exceptions).

61. See *id.* art. XXI. However, the security exceptions only arise when actions are “necessary” to protect, or when furnishing information would be “contrary to,” “essential security interests,” or when actions are necessary under the U.N. Charter. *Id.*; see also Gaugh, *supra* note 53, at 67 (noting that the drafters chose the term “essential” to prevent the exception from swallowing the entire agreement).

## 2. *The WTO*

Since 1947, there have been eight different multilateral negotiations under the GATT called "rounds."<sup>62</sup> The most recent of these, the Uruguay Round,<sup>63</sup> was the most extensive and successful trade negotiation ever undertaken by the GATT system.<sup>64</sup> One of the major accomplishments of the Uruguay Round, and one essential to the total package, was the establishment of the World Trade Organization (WTO).<sup>65</sup>

The WTO provides a "common institutional framework for the conduct of trade relations among its Members."<sup>66</sup> In reality, the WTO is an "institutional umbrella" which encompasses the agreements finalized during the Uruguay Round.<sup>67</sup> One of these agreements established a "new," superseding GATT<sup>68</sup> (GATT 1994) which incorporates the protocols from the 1947 version.<sup>69</sup>

With the emergence of the WTO, the dispute resolution authority for all of the agreements coming out of the Uruguay round, including the GATT 1994, were vested in one body.<sup>70</sup> This agreement, which is similar to dispute resolution practices under the GATT,<sup>71</sup> uses dispute resolution panels to resolve conflicts between member nations.<sup>72</sup> This panel, made up of three or five diplomats from countries not involved in the dispute, is formed only if all other negotiations between the affected parties are unsuccessful.<sup>73</sup> The Dispute

62. See Jackson, *supra* note 51, at 63.

63. See Gaugh, *supra* note 53, at 63. The Uruguay Round was so dubbed because it was planned during a Conference of Ministers meeting in Punta del Este, Uruguay, on September 20, 1986. See *id.* at 63 n.98; Jackson, *supra* note 51, at 63.

64. See Jackson, *supra* note 51, at 63.

65. See WTO Agreement para. 4; Jackson, *supra* note 51, at 64.

66. WTO Agreement art. II(1).

67. See Gaugh, *supra* note 53, at 64; Jackson, *supra* note 51, at 66-67.

68. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1 URUGUAY ROUND TRADE AGREEMENT H.R. DOC. NO. 103-316; 33 I.L.M. 1144 (1994) [hereinafter GATT 1994].

69. See *id.* para. 1(a).

70. See Gaugh, *supra* note 53, at 71.

71. See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 299 (1997).

72. See Gaugh, *supra* note 53, at 71; Richard Sutherland Whitt, Note, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 607 (1987).

73. See Whitt, *supra* note 72, at 608-09.

Settlement Body (DSB) now has exclusive authority to form dispute panels and adopt the reports from those panels.<sup>74</sup>

These new dispute resolution procedures are different from the old ones in many significant ways. For instance, the DSB agreement now reaffirms the right of a complaining government to have a panel formed.<sup>75</sup> This prevents nations from “blocking” the formation of these panels—a common problem under the old system.<sup>76</sup> Another significant improvement prevents a single nation from “blocking” the adoption of a panel report if it is dissatisfied with its contents.<sup>77</sup> This too was a common event under the original GATT dispute resolution system.<sup>78</sup> Because of these and other improvements, the WTO dispute resolution system is faster, more predictable, and less vulnerable to delays than the old GATT system.<sup>79</sup>

### C. *Economic Coercion & International Law*

Any effort by a nation to influence another nation by conditioning or denying access to its resources, goods, or consumers is an attempt at economic coercion.<sup>80</sup> Whether economic coercion is simply an exercise of a nation’s sovereign rights or a violation of international law is a hotly debated issue.<sup>81</sup> Its resolution involves an analysis of the

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74. See Gaugh, *supra* note 53, at 71.

75. See *id.*; Jackson, *supra* note 51, at 70.

76. See Jackson, *supra* note 51, at 70.

77. See *id.*; Gaugh, *supra* note 53, at 71.

78. See Bhalinder L. Rikhye, *Verdict on World Trade Organization*, N.Y. L.J., Aug. 4, 1997, at S1, S6. Under the GATT 1947, panel reports could only be adopted under a consensus, which frequently created blockage and delay. See *id.*; Jackson, *supra* note 51, at 70; Gaugh, *supra* note 53, at 71.

79. See Frances Williams, *WTO—A New Name Heralds New Powers*, FIN. TIMES, Dec. 16, 1993, at 5.

80. See Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT’L L. 405, 408 (1985). Farer defines economic coercion as “efforts to project influence across frontiers by denying or conditioning access to a country’s resources, raw materials, semi- or finished products, capital, technology, services or consumers.” *Id.*

81. See, e.g., Lee C. Buchheit, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 41, 68–69 (Richard B. Lillich ed., 1976) (contending that “[t]he nations of the world are growing to realize, as indeed they must, that economic and political coercion . . . can impair the target State’s sovereignty and create the kinds of feelings of which international fear and tension are made”); Richard B. Lillich, *Economic Coercion and the International Legal Order*, in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER, *supra*, at 73, 81–82 (stating as a “general principle that serious and sustained economic coercion should be accepted as a form of permissible self-help only when it is also compatible with the overall

relevant sources of international law, which are listed in Article 38 of the Statute of the International Court of Justice.<sup>82</sup> The most relevant sources of international law relating to economic coercion are found in two places: conventional law and customary law.<sup>83</sup>

The obligations of the United States under the GATT, discussed above, are an example of the first type of international law—that found in international convention. International custom becomes international (customary) law when two elements, *opinio juris* and state practice, are satisfied.<sup>84</sup> State practice is a series of actions by a particular nation.<sup>85</sup> *Opinio juris* is a subjective element, which is comprised of a state's opinion that its practice reflects a legal obligation.<sup>86</sup> Therefore, customary international law is evidenced by a general practice accepted as law.<sup>87</sup>

#### D. Secondary Boycott

One type of economic coercion is a boycott. Economic boycotts have traditionally been referred to as primary or secondary.<sup>88</sup> A primary boycott is one in which a nation forbids those under its jurisdiction from engaging in trade with entities of the boycotted nation.<sup>89</sup> In a secondary

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interests of the world community"); Richard B. Lillich, *Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions*, in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER, *supra*, at 107, 112 [hereinafter Lillich, *Second Look*] (agreeing with other commentators' conclusions "that international law now prohibits certain types of economic coercion"); Richard D. Porotsky, Note, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 918–19 (1995) (observing that "customary international law has long permitted nations to conduct their trade relations in any way they see fit," but noting a debate about whether there exists a customary legal norm against economic coercion).

82. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060 [hereinafter I.C.J. Statute]; see also Porotsky, *supra* note 81, at 916 n.84 (affirming the general consensus that Article 38 contains "a complete statement of the sources of international law").

83. See I.C.J. Statute, *supra* note 82, art. 38(1)(a), (b), 59 Stat. at 1060; see also Porotsky, *supra* note 81, at 916 n.84.

84. See Porotsky, *supra* note 81, at 919 n.88.

85. Which actions constitute state practice, however, is debatable. See *id.*

86. See *id.*

87. See I.C.J. Statute, *supra* note 82, art. 38(1)(b), 59 Stat. at 1060.

88. See Howard N. Fenton, III, *United States Antiboycott Laws: An Assessment of Their Impact Ten Years After Adoption*, 10 HASTINGS INT'L & COMP. L. REV. 211, 214 (1987). A third category, tertiary boycotts, can be considered a subset of the secondary boycott. See *id.* at 215.

89. See *id.* at 214.

boycott, the boycotting nation uses its power of trade to discourage third parties from trading with the boycotted nation.<sup>90</sup> In the event that a third party violates the rules of the boycotting nation, the boycotting nation will sanction that party by denying it certain trade privileges or banning trade with that entity all together.<sup>91</sup>

The use of a primary boycott is oftentimes recognized as a legitimate exercise of a nation's sovereign authority,<sup>92</sup> barring a countervailing duty under international law.<sup>93</sup> However, the use of a secondary boycott is generally considered to be a violation of the accepted understanding of international jurisdiction.<sup>94</sup> Those applying a secondary boycott often try to justify it under a number of doctrines.<sup>95</sup> However, the third party in this type of situation is usually so remote from both the boycotting and boycotted countries that jurisdiction cannot attach.<sup>96</sup>

In the early 1950s, the Arab League Council instituted a secondary boycott (Arab boycott) against businesses having branches or general agencies within Israel.<sup>97</sup> While the Arab boycott complicated U.S. trade, it was not initially a serious danger to U.S. interests.<sup>98</sup> It was not until 1973 that the United States would feel the full sting of this boycott.<sup>99</sup>

In 1973 the Organization of Petroleum Exporting Countries (OPEC) instituted an oil embargo aimed at the United States in retaliation for U.S. support of Israel during the Yom Kippur War.<sup>100</sup> This embargo gave the OPEC nations

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90. *See id.* at 215.

91. *See id.*

92. *See id.* at 216.

93. If the boycott amounts to economic coercion it may be invalid under international law. *See supra* Part II(b)-(c).

94. *See* Fenton, *supra* note 88, at 216.

95. *See id.* at 216-17. The territorial effects principle, the nationality principle, and the protective principle are three examples. *See id.* at 217. The territorial effects principle states that actions which have or are intended to have a substantial effect inside the territorial boundaries of a nation give that nation the jurisdiction to address those actions. *See id.* at 217 n.16. The nationality principle states that a nation has jurisdiction over its nationals regardless of their whereabouts. *See id.* at 217 n.17. The protective principle of jurisdiction states that conduct outside a nation's territory may be regulated if such conduct is directed against the security of the state or a limited group of other state interests. *See id.* at 217 n.18. This principle has not traditionally been applied to economic conduct by third-party nations. *See id.*

96. *See id.* at 217 n.19.

97. *See id.* at 224.

98. *See id.* at 224-28.

99. *See id.* at 228.

100. *See id.*

the financial ability to enforce the preexisting, secondary boycott.<sup>101</sup> The effect of this newly reinvigorated boycott on U.S. trade was very serious.<sup>102</sup>

Prior to this reinvigoration of the Arab boycott, the United States had passed watered-down legislation which encouraged U.S. firms not to participate in the boycott.<sup>103</sup> As the effects of the Arab boycott became stronger, so did U.S. resolve to enact blocking legislation.<sup>104</sup> By 1977 the United States had adopted antiboycott amendments to the Export Administration Act (EAA) which prohibited any U.S. entity from participating in or submitting to the Arab boycott.<sup>105</sup>

The U.S. antiboycott legislation was enacted primarily because the Arab boycott was viewed as an infringement on U.S. sovereignty.<sup>106</sup> This alleged interference with sovereignty fell into two categories.<sup>107</sup> First, the United States felt that the boycott coerced its businesses to implement the policy goals of Arab states instead of those of the United States.<sup>108</sup> Second, the United States believed that the boycott coerced U.S. businesses to discriminate against other U.S. businesses or individuals pursuant to these Arab foreign policy goals.<sup>109</sup>

## II. U.S. OBLIGATIONS UNDER THE WTO AND THE GATT

The ILSA is facially violative of the GATT principle of MFN treatment because it advocates disparate treatment, in the form of sanctions, of all “offending” nations, including other signatories to the GATT.<sup>110</sup> The ILSA sanctions call for disparate treatment in the international transfer of import

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101. *See id.*

102. *See id.* at 228–29.

103. *See id.* at 232–33.

104. *See id.* at 240–45.

105. *See* 50 U.S.C. app. § 2407(a) (1994). The major exception to this legislation was that U.S. entities were permitted to recognize the primary boycott provisions of this boycott. *See* Fenton, *supra* note 88, at 246. For example, a U.S. company could refuse to ship goods directly from Israel to an OPEC nation. *See id.* at 217–18.

106. *See* Fenton, *supra* note 88, at 243. The other reason for the legislation was that the OPEC boycott was seen as an attack on Israel, a close ally. *See id.* This reason, however, was not articulated as clearly as the sovereignty issue. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See supra* notes 14–18 and accompanying text.

and export payments,<sup>111</sup> and disparate rules and formalities in connection with importation and exportation,<sup>112</sup> both of which are protected by the GATT.<sup>113</sup> Furthermore, the ILSA allows the President to waive sanctions against any offending nation which has undertaken substantial measures that will inhibit Iran's efforts to carry out international terrorism.<sup>114</sup> This measure, meant to appease some opponents of the ILSA, may in itself be a violation of the GATT. Disparate treatment, regardless of how or why that treatment is applied, is still a violation of MFN treatment.<sup>115</sup>

Although the ILSA facially violates the GATT prohibitions of disparate treatment, the principle of MFN treatment, like all other principles in the GATT, can be set aside in the interest of national security.<sup>116</sup> Any attempt to assert the legality of the ILSA under the GATT must be made under this security exception.<sup>117</sup> To successfully invoke this exception, the United States must satisfy only two requirements.<sup>118</sup> First, the nation invoking it must consider its actions "necessary for the protection of its essential security

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111. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6(1)-(6), 110 Stat. 1541, 1545-46 (to be codified at 50 U.S.C. § 1701) (allowing the President to direct the Export-Import Bank of the United States to refuse the issuance of "any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with" exports and to impose import sanctions "as appropriate").

112. See *id.* § 6(2), (6), 110 Stat. at 1545-46 (providing the denial of export licenses and import restrictions as sanctions).

113. See GATT art. I.

114. See § 4(c), 110 Stat. at 1542. This section states:

(c) WAIVER.—The President may waive the application of section 5(a) with respect to nationals of a country if—

(1) that country has agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran's efforts to carry out activities described in section 2 and information required by subsection (b)(1) has been included in a report submitted under subsection (b); and

(2) the President, at least 30 days before the waiver takes effect, notifies the appropriate congressional committees of his intention to exercise the waiver.

*Id.*

115. See GATT art. I(1). This provision of the GATT states: "[A]ny 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." *Id.*

116. See *id.* art. XXI(b).

117. Other general exceptions would not apply to the ILSA. See *id.* art. XX (listing the GATT's general exceptions).

118. See *id.* art. XXI(b).

interests.”<sup>119</sup> This exception relies primarily on the judgment of the nation in question—the United States.<sup>120</sup> Second, the actions taken must fall within one of three areas of interest: fissionable materials, arms and ammunitions, or wartime and international emergencies.<sup>121</sup> This third area, that the action be “taken in time of war or other emergency in international relations,”<sup>122</sup> again leaves the decision as to what constitutes an “emergency” to the United States.

Many commentators see the security exception as a danger to the entire spirit of the GATT.<sup>123</sup> Indeed, an exception that requires no notification, justification, or approval is prone to arbitrary abuse.<sup>124</sup> However, the most economically powerful nations seem to agree that the GATT should not cover decisions made in the political arena.<sup>125</sup> Consequently, the Uruguay Round left the GATT security exception untouched.<sup>126</sup>

Despite the unchanged language of Article XXI, one GATT entity has addressed the problems inherent in the use of this security exception. In 1985 a GATT dispute resolution panel heard a complaint against the United States for its imposition of an embargo on Nicaragua.<sup>127</sup> In an unprecedented move, the panel questioned the entire reasoning behind the Article

119. *Id.*

120. See Gaugh, *supra* note 53, at 93 (“Even though Article XXI is a self-judging exception to the GATT Agreement, it is not an exception without limits.”); *id.* at 67 n.123 (“This Article is premised on the party judging its own conduct.”).

121. See GATT art. XXI(b)(i)–(iii).

122. *Id.* art. XXI(b)(iii).

123. See, e.g., Whitt, *supra* note 72, at 605, 616. Whitt states that “[t]he ambiguous language of Article XXI, coupled with its unilateral interpretation, creates a broad GATT exception which threatens to undercut the overall stability and goodwill inherent in the GATT system.” *Id.* at 605 (footnotes omitted). He further states: “The application of Article XXI could potentially cause a significant breakdown in the letter and spirit of GATT.” *Id.* at 616; see also Gaugh, *supra* note 53, at 68 (recognizing the dangers of abuse created by Article XXI); Clinton E. Cameron, Note, *Developing a Standard for Politically Related State Economic Action*, 13 MICH. J. INT’L L. 218, 246 (1991) (noting that “[t]he provision has been used numerous times to justify the imposition of a variety of economic actions taken for political purposes”).

124. See Gaugh, *supra* note 53, at 68.

125. See Porotsky, *supra* note 81, at 929. One example is a case in which Argentina’s claim that a nation must be required to state reasons for invoking the national security exception was rebuked by the EEC, Canada, Australia, and the United States, which was not a party to the dispute. See Gaugh, *supra* note 53, at 68–69.

126. See Porotsky, *supra* note 81, at 929.

127. See *U.S. Embargo on Nicaragua Did Not Violate Obligations Under GATT, Dispute Panel Rules*, 3 Int’l Trade Rep. (BNA) at 1368 (Nov. 12, 1986) [hereinafter *GATT Ruling*].

XXI security exception.<sup>128</sup> The panel stated that, irrespective of Article XXI, the U.S. embargo was contrary to the basic aims of the GATT.<sup>129</sup> It went on to say that the United States incorrectly balanced its need for security against the more basic need for stable trade.<sup>130</sup> When the United States attempted to dismiss the matter, the Council refused, leaving open the possibility that the U.S. use of the GATT security exception will be reexamined.<sup>131</sup>

Action taken under the ILSA may also be legitimized under another portion of the GATT security exception. Article XXI(c) creates an additional exception when a nation takes an action pursuant to an obligation under the United Nations.<sup>132</sup> Therefore, if the ILSA were enacted pursuant to a U.N. obligation, it would fall under the GATT security exception.

One of the main justifications for the ILSA's enactment was Libya's alleged failure to comply with U.N. Security Council Resolutions 731, 748, and 883.<sup>133</sup> In fact, all of the ILSA's sanctions pertaining to Libya would be terminated if the President certifies that Libya has fully complied with these resolutions.<sup>134</sup> Whether these goals and justifications were included pursuant to a U.N. obligation, however, deserves further scrutiny.

The ILSA's restrictions are more extensive than those set out in U.N. Resolutions 731, 748, and 883. For example, Resolution 883 calls for a restriction on exports to Libya of

128. *See id.*

129. *See id.* at 1369. Despite its criticism of the reasons behind the U.S. invocation of the GATT security exception, the panel ruled that the United States was within its rights in imposing a trade embargo. *See id.* at 1368. The panel had no other choice, however, because the United States had submitted to the hearing on the condition that the panel accept in advance that Article XXI was enforceable and that national security matters were implicated. *See id.* Had the new WTO dispute resolution procedures been in place, the United States would not have had the opportunity to prevent Article XXI's enforceability from being considered and may have lost the case. *See supra* notes 74-79 and accompanying text (detailing the ability of nations to block dispute resolutions under the prior GATT dispute mechanism).

130. *See GATT Ruling, supra* note 127, at 1369.

131. *See id.* at 1368.

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

133. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 2(4), 110 Stat. 1541, 1541 (to be codified at 50 U.S.C. § 1701) (listing the congressional findings). The other justifications are Libya's alleged attempt to acquire weapons of mass destruction as well as its alleged support for acts of international terrorism. *See id.*

134. *See id.* § 8(b), 110 Stat. at 1546. Libya's compliance with these resolutions was one of the main objectives of the ILSA. *See id.* § 3(b), 110 Stat. at 1542.

goods used in the manufacture of oil.<sup>135</sup> The ILSA, however, authorizes sanctions against a party who either violates the terms of one of these resolutions or invests \$40 million or more in Libya's petroleum sector.<sup>136</sup> This second provision, which is not included in any of the U.N. Resolutions, demonstrates that the ILSA is meant to do more than simply force compliance with the United Nations.

The enactment of the ILSA by the United States cannot easily be viewed as an attempt to enforce the U.N. resolutions at issue since it clearly goes beyond the objectives stated in those resolutions. Therefore, the ILSA is not an act pursuant to a U.N. obligation and cannot be justified under the U.N. provision of the GATT security exception.

Without an exception to protect the ILSA from the various GATT provisions which may invalidate it, the United States may have trouble in the upcoming WTO dispute resolution hearings requested by the EU.<sup>137</sup> In the past, the United States has been able to force GATT dispute resolution panels to accept its invocation of the GATT security exception without question.<sup>138</sup> However, with the enactment of new rules governing dispute resolution under the WTO, the United States can no longer place conditions on the subject matter before the panel.<sup>139</sup>

There is no way to tell whether the panel will reopen its examination of the GATT security exception.<sup>140</sup> Without the threat of blocking, it may decide to apply a broad doctrine of proportionality—a principle hinted at by a previous panel.<sup>141</sup> Whatever the case, a judgment against the United States will

135. See S.C. Res. 883, U.N. SCOR, 3312th mtg. ¶ 5, U.N. Doc. S/Res/883 (1993).

136. See Iran and Libya Sanctions Act of 1996 § 5(b), 110 Stat. at 1543. This section of the ILSA has two main parts. See *id.* Part one calls for two mandatory sanctions against any party who provides goods to Libya in violation of Security Council Resolutions 748 or 883. See *id.* § 5(b)(1), 110 Stat. at 1543. Part two allows the President to impose two or more sanctions on any party who invests, with actual knowledge, \$40 million in any 12 month period toward Libya's ability to develop its petroleum resources. See *id.* § 5(b)(2), 110 Stat. at 1543.

137. See *supra* note 44 and accompanying text.

138. See, e.g., *GATT Ruling*, *supra* note 127, at 1368 (stating that the United States demanded that the GATT panel accept the enforceability of Article XXI in advance).

139. See *supra* notes 70–79 and accompanying text.

140. One panel left open the possibility that the U.S. use of the GATT security exception will be reexamined. See *GATT Ruling*, *supra* note 127, at 1368.

141. See *id.* at 1369 (“Countries using national security provisions of Article XXI must weigh their need to do so against the more basic need for stable trade regulations . . .”).

leave two options: compliance or withdrawal from the GATT.<sup>142</sup>

### III. ECONOMIC COERCION AND INTERNATIONAL LAW

Economic coercion may be defined as any effort by a nation to influence events outside of its borders by restricting access to its resources, services, or consumers.<sup>143</sup> Pursuant to its applicability to the ILSA, this definition is best broken down into two elements: (1) an effort by a nation to influence events outside its borders, (2) by restricting access to its resources, services, or consumers.

The first of these elements is satisfied by looking at the ILSA's primary objective: to deter Iran and Libya from supporting international terrorism or acquiring weapons of mass destruction.<sup>144</sup> By implementing these sanctions, the United States hopes to prevent these events from occurring. Any such attempt is by definition an attempt to influence it. Therefore, the ILSA is an attempt by the United States to influence events outside its territory.

The means by which the United States asserts this influence goes to the second element of the definition of economic coercion. Sanctions imposed under the ILSA may restrict access to U.S. resources by denying a sanctioned party the benefit of export licenses, unlimited loans, government bonds, or government funds.<sup>145</sup> They may also restrict access to U.S. services by denying a sanctioned party assistance in the import or export of goods.<sup>146</sup> Finally, the ILSA's sanctions may restrict access to U.S. consumers by limiting the ability of a sanctioned party to sell goods to the U.S. government.<sup>147</sup> The ILSA, therefore, is clearly an instrument of economic coercion.<sup>148</sup>

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142. See GATT art. XXXI (stating that any party may withdraw from the GATT).

143. See Farer, *supra* note 80, at 408. This definition, with its use of the word "effort," implies that the coercion has not yet produced its desired effect. Thus, technically, this is the definition for *attempted* economic coercion.

144. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 3(a), (b), 110 Stat. 1541, 1541-42 (to be codified at 50 U.S.C. § 1701) (declaring policy).

145. See *id.* § 6(2)-(4), 110 Stat. at 1545.

146. See *id.* § 6(1), 110 Stat. at 1545.

147. See *id.* § 6(5), 110 Stat. at 1545. The ILSA also permits the President to impose additional import sanctions. See *id.* § 6(6), 110 Stat. at 1546.

148. A plain-language argument ends with the same conclusion: the ILSA is primarily coercive in that it is meant to deter behavior. See H.R. REP. NO. 104-523, pt. 2, at 9 (1996) ("The bill . . . is designed . . . to help deter Iran and Libya from supporting international terrorism or acquiring weapons of mass

A. *Economic Coercion Under the Charter of the United Nations*

The Charter of the United Nations embodies the elements of both sources of international law: international conventions and international customary law.<sup>149</sup> This means that certain decisions made by the United Nations may come to represent international law in more than one way. For example, a vote by an overwhelming majority of the General Assembly on a particular resolution may be integrated into international law in two ways. First, the resolution may be considered an interpretation of the Charter.<sup>150</sup> This gives the resolution the strength of international law stemming from an international convention.<sup>151</sup> Second, a strong majority may show sufficient state practice and *opinio juris* to constitute the formation of customary international law.<sup>152</sup>

The U.N. Charter was designed to fill the vacuum created by the lack of viable standards of international conduct and sanctions to enforce those standards.<sup>153</sup> Article 2(4) of the Charter, argued by some to be the principle norm of international law,<sup>154</sup> outlaws the threat or use of force against any state.<sup>155</sup> The question then is whether “force” encompasses economic coercion.

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destruction . . .”). This type of coercion is also wholly economic in nature. See Iran and Libya Sanctions Act of 1996 § 6, 110 Stat. at 1545–46.

149. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT’L L. 1, 3 (1994) (noting that resolutions can gain binding force as interpretations of the U.N. Charter or as pronouncements of customary international law). Given that all signatories are bound by its terms, the U.N. Charter is a clear example of international convention. See Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 194 (1984).

However, to further recognize the U.N. Charter as a source of customary international law, one must read further. For example, in Article 2, paragraph 6, the basic elements of world order are imposed even on states that are not signatories. See U.N. CHARTER art. 2, para. 6. Furthermore, although the General Assembly cannot create binding international obligations, see Porotsky, *supra* note 81, at 922, resolutions adopted by authority of the Charter are considered by many to be a source of customary international law. See Schachter, *supra*, at 3; Blaine Sloan, *The United Nations Charter as a Constitution*, 1989 PACE Y.B. INT’L L. 61, 122 (stating that “resolutions are assertions . . . of general international law”).

150. See Schachter, *supra* note 149, at 3.

151. See *id.*

152. See Porotsky, *supra* note 81, at 922–23.

153. See Buchheit, *supra* note 81, at 42–43.

154. See, e.g., Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544, 544 (1971).

155. See U.N. CHARTER art. 2, para. 4. This provision states:

A proposed amendment to explicitly include economic coercion in the prohibition of Article 2(4) was rejected in 1945 during the U.N. Conference on International Organization.<sup>156</sup> Unfortunately, the reasons for this rejection are unclear.<sup>157</sup> Proponents of an expansive reading of Article 2(4) claim that the amendment was not accepted because of its wording.<sup>158</sup> Others posit that the rejection of this amendment was an implicit limitation of the article to include only armed force.<sup>159</sup>

Commentator Lee C. Buchheit argues that the word “force” was not qualified with an adjective so that the principle of Article 2(4) would remain adaptable to the inevitable sophistication of coercive methods.<sup>160</sup> He compares the text of the Charter to the U.S. Constitution in that they both embrace flexibility to adapt to future circumstances.<sup>161</sup> To support this argument, Buchheit cites Article 46 of the Charter in which the framers refer specifically to “armed force.”<sup>162</sup> According to Buchheit, if the framers of the Charter had meant “force” to mean only armed force, they would have included that language in Article 2(4).<sup>163</sup>

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The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

*Id.*

156. See Buchheit, *supra* note 81, at 52.

157. See *id.*

158. See *id.* at 52–53.

159. See, e.g., D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 148 (1958) (“Taking the words in their plain, common-sense meaning, it is clear that, since the prohibition is of the ‘use or threat of force,’ they will not apply to economic or political pressure but only to physical, armed force.”); Derek W. Bowett, *International Law and Economic Coercion*, in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER*, *supra* note 81, at 89, 89; Lillich, *Second Look*, *supra* note 81, at 109–10 (accepting “conventional wisdom” that in light of the U.N. rejection of a proposed amendment that indicated otherwise, “force” means “armed force”); Porotsky, *supra* note 81, at 920 & n.94.

160. See Buchheit, *supra* note 81, at 55.

161. See *id.* at 57.

162. See U.N. CHARTER art. 46. That article states that “[p]lans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.” *Id.*; see also Buchheit, *supra* note 81, at 55 & n.51 (noting that the word “Force” is used without modification).

163. See Buchheit, *supra* note 81, at 55.

While compelling, Buchheit's interpretation of this language is not controlling.<sup>164</sup> In fact many, if not most, commentators consider the relevance of Article 2(4) "doubtful."<sup>165</sup> Although doubt may be cast on the effectiveness of the language of the U.N. Charter, even many of Buchheit's critics agree that subsequent U.N. Resolutions may create a duty to refrain from the use of economic coercion.<sup>166</sup>

#### B. *Economic Coercion under the U.N. Resolutions*

The General Assembly of the United Nations has thrice, in 1965,<sup>167</sup> 1970,<sup>168</sup> and 1974,<sup>169</sup> set forth the principle that economic coercion has no place in a state's international relations. The wording of these resolutions is almost identical. These resolutions each passed with no more than six dissenting votes and their wording is almost identical. In 1970 the Declaration on Friendly Relations declared that "[n]o state may use or encourage the use of economic, political or any other type of measures to coerce another State to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."<sup>170</sup>

Some commentators posit that U.N. Resolutions do not have the force of law.<sup>171</sup> However, there are three factors which, when examined together, indicate that these

164. *But see supra* note 159.

165. *See, e.g.,* Lillich, *Second Look*, *supra* note 81, at 110.

166. *See id.* at 110–11; Bowett, *supra* note 159, at 90.

167. *See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, 12, U.N. Doc. A/RES/2131(XX)/Rev.1. (1965) [hereinafter *Declaration on the Inadmissibility of Intervention*].

168. *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/RES/2625(XXV) (1970) [hereinafter *Declaration on Friendly Relations*].

169. *See Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, 55, U.N. Doc. A/RES/3281(XXIX) (1974).

170. *Declaration on Friendly Relations*, *supra* note 168, at 121.

171. *See* G. W. Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591, 597 (1975) ("[T]he General Assembly may discuss and make recommendations, but it is not a lawmaking body and its Resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect.").

resolutions may represent binding international law.<sup>172</sup> These factors are: (1) the existence or history of similar resolutions, (2) delegate voting patterns, and (3) the assembly's intent to declare law.<sup>173</sup>

At issue here are multiple resolutions which contain almost identical language.<sup>174</sup> While a single resolution can reflect international expectations,<sup>175</sup> three resolutions enacted over a nine-year period show that these expectations are exceptionally strong. Although expectations of international conduct cannot in themselves create customary international law, they cannot be ignored.<sup>176</sup> Furthermore, these resolutions were sometimes passed by a unanimous

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172. These resolutions, when taken together, may represent customary international law. These three factors coincide roughly with those set out by Richard Porotsky when determining the binding effect of resolutions in relation to the interpretation of existing law. See Porotsky, *supra* note 81, at 923. Porotsky states:

The legal effect of a resolution as an interpretation of existing law is determined by much more than simply whether it passes by a majority vote. It depends on a number of factors, which can broadly be grouped into three categories: 1) the resolution's terms and intent; 2) delegates' voting patterns and support; and 3) state practice.

*Id.*

These resolutions may also be viewed as an interpretation of the U.N. Charter itself, especially in view of the overwhelming majority in favor of them. See Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER*, *supra* note 81, at 121, 132. In this case, the resulting law would not be customary, but international law created by an international convention. See I.C.J. Statute, *supra* note 82, art. 38(1), 59 Stat. at 1060; see also Porotsky, *supra* note 81, at 919 n.88.

173. Delegate voting patterns serve to bolster or weaken the strength of a resolution and therefore its potential as binding authority. See Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 1987 BRIT. Y.B. INT'L L. 39, 58–61 (1988).

For a resolution to take on the form of international law, the General Assembly must have intended that it become binding. See Porotsky, *supra* note 81, at 923–24. Otherwise, resolutions are merely seen as recommendations as set out in Article 14 of the U.N. Charter, which states:

Subject to the provisions of Article 12, *the General Assembly may recommend measures* for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

U.N. CHARTER art. 14 (emphasis added); see Porotsky, *supra* note 81, at 923–24.

174. See *supra* notes 167–69 and accompanying text.

175. See Lillich, *Second Look*, *supra* note 81, at 111.

176. See *id.* at 111–12 & n.25.

vote, but in all circumstances by an overwhelming majority.<sup>177</sup> A nation's vote endorsing a norm embodied in a resolution constitutes evidence of *opinio juris* with respect to that norm.<sup>178</sup> Therefore, all members of the United Nations have evidenced at least once, and probably three separate times, that they have accepted one of two elements needed to create customary international law.<sup>179</sup>

The language in the strongest of these resolutions set forth the General Assembly's intention that it creates binding international law.<sup>180</sup> An affirmative vote for such a resolution clearly evidences a nation's intent to be bound by it. Additionally, that vote, as an affirmative act, may contribute to evidence of state practice—the other element needed to form binding customary law. This element is weakened, however, by the failure of these nations to implement the proscription against economic coercion.<sup>181</sup>

Taken as a whole, this body of resolutions provides a rich source of evidence for the emergence of customary international law.<sup>182</sup> The number of resolutions, consistency of purpose, and clear declaration of intent to create international law has convinced many commentators that international law now prohibits certain types of economic coercion.<sup>183</sup>

The ILSA is an act of economic coercion<sup>184</sup>—economic coercion that violates both the U.N. Charter<sup>185</sup> and several

177. See *supra* notes 167–69.

178. See Sir Ian Sinclair, *The Significance of the Friendly Relations Declaration*, in *THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST* 1, 27 (Vaughan Lowe & Colin Warbrick eds., 1994).

179. State practice and *opinio juris* are the two factors which form customary international law. See *supra* text accompanying notes 84–86, 152.

180. See *Declaration on Friendly Relations*, *supra* note 168, at 121 (expressing the conviction that adoption “constitute[s] a landmark in the development of international law”). The violation of international law is predicated upon the principle of non-intervention, as opposed to the prohibition against the use of force in Article 2(4) of the U.N. Charter. See *id.* at 123.

181. See Porotsky, *supra* note 81, at 901 (“However, analysis of the text of the resolutions and the positions of individual voting members reveals that there has been little or no movement toward a norm prohibiting the use of economic coercion.”).

182. See Lillich, *Second Look*, *supra* note 81, at 112 (quoting ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 5 (1963)).

183. See *id.*

184. Recall that economic coercion is that conduct which projects influence across borders by conditioning access to economic resources. See Farer, *supra* note 80, at 408. Recall also the economic nature of the sanctions. See Iran and

U.N. Resolutions.<sup>186</sup> The U.N. Charter and its Resolutions represent two types of binding international law.<sup>187</sup> Therefore, the ILSA is a violation of international law.

#### IV. SECONDARY BOYCOTTS

The ILSA is by design a secondary boycott.<sup>188</sup> Congress acknowledged this in the final version of the report to accompany H.R. 3107.<sup>189</sup> In fact, a change to section 5 of the ILSA was made “because the cost to United States interests of imposing such a broadly based secondary boycott would be too high.”<sup>190</sup> While the breadth of this section was narrowed, the nature of it was not.<sup>191</sup>

Congressional testimony also demonstrates that the ILSA was recognized as a secondary boycott prior to its passage. Representative Bill Archer, Chairman of the Committee on Ways and Means, when referring to the ILSA, made clear he was “extremely doubtful that secondary boycotts, or other extraterritorial approaches, are appropriate mechanisms for affecting such policies.”<sup>192</sup> His concern was coupled with worries that the ILSA “imposes unilateral sanctions on our trading partners, exposes United States exporters and investors to possible retaliation, and puts the United States at the center of a dispute with our allies over appropriate policies toward Iran and Libya.”<sup>193</sup> However, in light of what

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Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 6, 110 Stat. 1541, 1545-46 (to be codified at 50 U.S.C. § 1701).

185. See *supra* notes 160-63 and accompanying text.

186. See *supra* notes 167-70 and accompanying text.

187. See *supra* notes 149-52 and accompanying text.

188. See Gaugh, *supra* note 53, at 85 (“Representative Peter King introduced legislation [that would later become the ILSA] to impose a secondary boycott on those foreign companies doing business with Iran.”); Jeffrey L. Snyder, *ILSA Perplexes Foreign Firms*, NAT’L L.J., Oct. 7, 1996, at C1, C1 (calling the secondary boycott, as embodied in the ILSA and LIBERTAD, the U.S. “tool of choice”); Abid Aslam, *U.S.-Trade: Washington in Quandary Over Turkey-Iran Gas Deal*, INTER PRESS SERV., Aug. 12, 1996, available in LEXIS, News Library, Inpres File (“European countries, including France and Germany which have threatened to prepare retaliatory legislation of their own, contend [that the ILSA] constitutes an illegal ‘secondary boycott’ . . .”).

189. See H.R. REP. NO. 104-523, pt. 2, at 14-15 (1996) (stating the reasons for changes to section 5 of the ILSA).

190. *Id.* at 14.

191. See *id.*

192. *Full Committee Mark-Up of H.R. 3107 Before the House Committee on Ways and Means*, 104th Cong., 2d Sess., June 13, 1996 available in 1996 WL 10165008 [hereinafter *Full Committee Mark-Up*]. Mr. Archer went on to say that because of the complacency on the part of U.S. allies, the ILSA was nonetheless necessary. See *id.*

193. *Id.*

he called allied complacency, he went on to endorse H.R. 3107.<sup>194</sup>

Congressman Archer was correct in his predictions about international response.<sup>195</sup> In fact, the response to the ILSA is much like the U.S. response to the Arab boycott.<sup>196</sup> The primary objection from the international community concerning the ILSA is the issue of national sovereignty—a consequence predicted by Congress before it enacted the statute.<sup>197</sup> Likewise, the United States principal objection to the Arab boycott was that it violated national sovereignty.<sup>198</sup>

Many in Congress saw the similarities between the ILSA and the Arab Boycott.<sup>199</sup> Some even went on to realize that the ILSA may violate the very law Congress enacted to stop this type of coercion: the United States own anti-boycott statute. During debates on the ILSA, Representative Johnson of Connecticut said:

The concept of a secondary boycott was opposed by the United States when the Arab League used it against Israel in the 1970's and 1980's, and remains contrary to the principles endorsed by this very body when it approved NAFTA and GATT. Indeed, U.S. law, most recently enacted in the Export Administration Act, has long prohibited any U.S. person from "complying with or supporting" a foreign boycott against another country.<sup>200</sup>

Surprisingly, however, even Representative Johnson voted for the ILSA's passage.<sup>201</sup> After seven paragraphs of an ardently persuasive argument against it, she, in the last two sentences, endorsed the ILSA because of its discretionary measures.<sup>202</sup> The apparent inconsistency in her argument is common throughout the debate and may be attributable to one thing: politics.<sup>203</sup>

194. *See id.*

195. *See, e.g., supra* notes 3–4, 34–37 and accompanying text.

196. *Compare supra* notes 106–109 and accompanying text, with *supra* note 35 and accompanying text.

197. *See, e.g.,* 142 CONG. REC. H8126 (1996) (statement of Rep. Hamilton noting that U.S. allies consider the ILSA a threat to their sovereignty).

198. *See supra* notes 106–109 and accompanying text.

199. *See, e.g.,* 142 CONG. REC. H6474 (1996) (statement of Rep. Roth comparing the ILSA to the Arab boycott); *infra* text accompanying note 200.

200. 142 CONG. REC. H6478 (1996).

201. *See id.*

202. *See id.*

203. There is no way to ascertain the real reason behind the decision of any politician. However, when one argues so vehemently against a bill only to vote

The similarities between the ILSA and the Arab boycott could spell trouble for the United States. The EU has already drafted antiboycott legislation similar to that passed by the United States in response to the Arab boycott.<sup>204</sup> The U.S. legislation “forced the Arab boycotting states to abandon many of their extraterritorial demands on American firms.”<sup>205</sup> If the similarity between the ILSA and the Arab boycott holds, the United States will soon be forced to do the same.

#### V. CONCLUSION & RECOMMENDATIONS

Hans Morgenthau, a noted commentator on international law, once said that “[n]o rules of international law are binding upon [a nation] but those it has created for itself through its consent.”<sup>206</sup> As true as this may be, the United States, through the GATT, the WTO, and the United Nations, has repeatedly bound itself to the principle that economic coercion—especially the secondary boycott—is improper.

By enacting the ILSA, the United States has published an open invitation for legal, political, and economic conflict, not with its enemies, but with its allies. This invitation has already been accepted and a number of nations have “RSVP’d.” The ILSA’s objectives may be lost in the dust kicked up by the resulting struggle. The irony is that the ILSA’s authors realized the importance of cooperation and even devoted an entire section to promote multilateral initiatives. Can true cooperation ever come about from threats? Of course not. “We must never forget that Iran and Libya are the targets of our condemnation,” not our allies.<sup>207</sup>

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for its passage, it is fair to question the motives behind that vote. Any politician with the intention to run for another term would think twice before voting against a piece of legislation designed to stem the flow of terrorism.

The premise behind Representative Johnson’s decision to vote for the ILSA’s passage is not a strong one. There are limits to the ILSA’s discretionary measures. *See supra* notes 21–24 and accompanying text.

204. *See supra* notes 38–43 and accompanying text.

205. Fenton, *supra* note 88, at 280.

206. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 301 (4th ed. 1966).

207. *Full Committee Mark-Up*, *supra* note 192.