# ‘With Friends Like That, Who Needs Enemies?’: Extraterritorial Sanctions Following the United States’ Withdrawal from the Iran Nuclear Agreement

ejiltalk.org/with-friends-like-that-who-needs-enemies-extraterritorial-sanctions-following-the-united-states-withdrawal-from-the-iran-nuclear-agreement/

Daniel Franchini

Published on May 29, 2018

On Monday 21 May 2018, the US Secretary of State announced that, as a result of its withdrawal from the Joint Comprehensive Plan of Action (‘JCPOA’ or ‘Iran Nuclear Deal’), the United States is set to impose the ‘strongest sanctions in history’ against Iran. While the remaining states parties are committed to preserve the Iran Nuclear Deal, whether the JCPOA can in fact survive in the face of the US change of heart is a matter of uncertainty. Of particular concern is the effect that the resumption of US economic sanctions will have on non-US companies that have flocked to Iran in the aftermath of the JCPOA. Unlike the sanction programmes implemented against Iran by various states before 2015, the US measures present distinctively extraterritorial features, directly targeting foreign companies carrying out business with Iran despite the absence of a significant connection with the United States. The European Union has already vowed to take action in order to protect its trade interests and to ‘block’ unwarranted interference by the United States. As tension in the transatlantic relations mounts, serious questions arise concerning the legality of the US sanctions regime under international law. This post will focus in particular on the compatibility of these measures with the international rules governing the assertion of jurisdiction by states. It will be shown that, in the absence of an adequate jurisdictional basis, the extraterritorial aspects of the US sanctions regime must be considered unlawful. Some measures that the European Union and other JCPOA states can take in order to react to these wrongful acts will further be considered. Despite the availability of legal means to counter the US sanctions, a negotiated settlement between the United States and its economic partners remains the most viable solution to this standoff.

***The long arm of the US sanction regime***

Despite the Trump administration’s lack of specific directions on the issue, the US Treasury Department’s Office of Foreign Assets Control (OFAC) recommends that persons engaged in transactions with Iran:

> ‘should take the steps necessary to wind down those activities to avoid exposure to sanctions or an OFAC enforcement action under U.S. law after August 6, 2018, or November 4, 2018, depending on the activity’ (Question 1.4).

Of particular concern for foreign firms are the provisions contained in Executive Order 13590 (providing for an almost complete ban on the Iranian petrochemical sector), Executive Order 13622, and Executive Order 13645 (which prohibit foreign financial institutions from carrying out a vast set of transactions on behalf of Iranian entities). As recently as August 2017, Congress also vested the US President with ample powers to take measures against:

> ‘any person that … knowingly engages in any activity that materially contributes to the activities of the Government of Iran with respect to its ballistic missile program, or any other program in Iran for developing, deploying, or maintaining systems capable of delivering weapons of mass destruction’ (Section 104 of the Countering America’s Adversaries Through Sanctions Act).

Alongside their broad content, these measures all are characterised by an unspecified — and potentially unlimited — jurisdictional scope. Through these provisions, the United States seeks to compel not only US persons, but ‘any person’ — wherever located and regardless of their connection with the United States — to refrain from engaging in certain transactions with Iran. This is problematic in several respects.

Even leaving aside the fact that, by imposing its Iran policies on states that hold diametrically opposed views, the United States is infringing upon ‘matters in which each State is permitted, by the principle of State sovereignty, to decide freely’ (*Nicaragua* case, para 205), the United States is disregarding the most basic principles regulating the assertion of state jurisdiction under international law. There is little doubt that, since at least the *Lotus* case, state practice requires the existence of a nexus (or basis of jurisdiction) in order for a state to regulate the conduct of persons (save for crimes of universal jurisdiction). This is a rule that the United States itself has long-recognised, including in multiple iterations of its Restatements of Foreign Relations Law (see Dodge’s comments on the most recent version). While certain jurisdictional bases are more controversial than others, it would seem that the US measures fall short of international law standards even on a generous reading of these rules.

The exorbitant nature of the US scheme is illustrated by the controversy that the imposition of similar measures has generated in the past. The United States has a poor track record when it comes to extraterritorial measures impinging upon the rights of other states. On various occasions, the United States has attempted to impose restrictions on exports carried out by foreign subsidiaries of US companies, despite the fact that these companies were incorporated in other states and were not ‘US nationals’ for jurisdictional purposes. Similar claims were made regarding re-exports by foreign entities of goods originating in the United States or produced abroad under licences obtained from the United States. All these attempts were strongly resisted by other states, particularly in the context of the famous Pipeline dispute of 1982.

The United States went even further in 1996 when it sought to forbid any person (wherever located and regardless of their nationality) from ‘trafficking’ in property confiscated by the Cuban Government. In the same year, it also imposed sanctions on foreign investors (not otherwise linked to the United States) entering into business with Iran and Libya, on the basis of their alleged support for terrorism. At least with regard to the first set of measures, US Congress put forward the argument that the conduct it sought to regulate produced some effects in the United States and therefore that jurisdiction could be based on the controversial ‘effects doctrine’. This argument was, however, largely rejected and various states including Mexico, Canada, and the European Union, took significant steps in order to counteract the effects of these exorbitant jurisdictional claims. Whether other jurisdictional bases are available to support extraterritorial economic sanctions of this kind is also questionable. Ryngaert, for example, notes that self-serving reliance on the ‘protective principle' is inadequate to defend these claims in the absence of a direct and specific threat to the security of the nation. Indeed, Stern convincingly argues that secondary boycotts — that is boycotts that target persons trading with entities subject to primary boycotts — are 'always based on extraterritorial jurisdiction contrary to international law'.

It remains to be seen how OFAC will proceed to enforce the new sanctions regime against Iran. Recent trends in the administration of US sanctions vis-à-vis foreign entities are however far from promising. The US Department of Treasury has recently stepped up its enforcement action by targeting foreign financial institutions trading in US dollars, even when their transactions have not received clearance in the United States. It is far from clear whether this factor alone is sufficient to confer territorial jurisdiction upon the United States. Considering the dominance of the US dollar in international trade, this would expose virtually every international firm to the jurisdiction of the United States.

As long as all UN Member States were mandated to take restrictive measures against Iran by virtue of multiple resolutions adopted by the UN Security Council between 2006 and 2015, the United States could realistically purport to exercise jurisdiction extraterritorially without fear of protest. Now that several states have reinstated economic relations with Iran, tolerance of the US measures is unsurprisingly very low.

***Heading towards a clash***

In the absence of a realistic claim that extraterritorial sanctions are supported by an adequate jurisdictional basis, other states will have little difficulty claiming that they are unlawful. This, however, does not solve the main problem of preventing the United States from having its way by using its economic leverage to force foreign businesses into compliance with its sanctions regime. To this end, the European Union (recently joined by Russia) announced last week that it will be resorting to the favourite weapon of choice in this context: 'blocking' statute. The European Union, in particular, is taking steps to re-activate Council Regulation (EC) No 2271/96 which was first adopted in order to counter the effects of the exorbitant US claims with respect to Cuba, Iran, and Libya mentioned above. Under this regulation, EU nationals are prohibited to comply with the extraterritorial US measures and are granted the right to 'recover any damages, including legal costs, caused … by the application of the [exorbitant] laws' (Articles 5 and 6).

Strong doubts remain as to whether this blocking statute will ultimately prove effective. Some fear that the European Union might be unwilling to start a trade war with the United States and that, even if it does, European firms with trading interests in the United States will ultimately have strong incentives to bow to the American diktat. The limitations of the European measures should not, however, be overstated. If past experiences are instructive, it should be noted that in all cases in which the United States was isolated, it ultimately caved in to the protests of other states. This can hardly be exclusively attributed to the use of blocking statutes, but these measures clearly played a role in building up the political pressure necessary to bring the United States to the negotiating table. In 1997, the threat of a complaint before the World Trade Organisation also contributed to the settlement of the dispute via an extrajudicial agreement between the United States and the

European Union. As European diplomats are pondering similar initiatives at this very moment, it is not unlikely that the play will unfold according to what is now a well-rehearsed script.

If pragmatism is to prevail, the European Union will avoid a fully-fledged trade war by seeking an exemption from the United States. While this would not resolve the illegal nature of the US extraterritorial measures, it would represent the least harmful way out of a potentially intractable economic conflict. It is too soon to say whether any of these initiatives will work, but what seems clear so far is that the unity required to save the JCPOA must come initially from within the European Union. In the times of Brexit and harsh divisions amongst Member States on many issues, this might be precisely the test that the Union needs.