Decertification of the JCPOA and the Risk of European Union "Blocking Regulations"

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On October 13, 2017, Donald Trump announced that he would not certify to Congress that the Joint Comprehensive Plan of Action (JCPOA) remained in the national security interest of the United States. The move, widely expected based on Trump's frequent condemnation of the deal, caused rampant speculation about whether the United States would unilaterally reimpose the sanctions on Iran that had been relaxed in January 2016 pursuant to the JCPOA. If reimposed, these sanctions would not significantly restrict US business in Iran, which remains broadly prohibited under the US embargo. Rather, there would be a threat invoked by the United States of sanctions against third-country companies for doing business involving Iran, including in the energy, shipping, insurance, and auto sectors.

From 2010 to 2014, the United States built up those so-called secondary sanctions to persuade foreign companies to draw down their business with Iran, often with the tacit endorsement of other governments that encouraged their companies to heed the US threats. US secondary sanctions are still controversial and have not always been accepted even by US partners. Importantly, for example, the European Union enacted a "blocking regulation" in the 1990s to prevent European compliance with previous US sanctions laws the EU considered to be extraterritorial. This commentary discusses the history of the EU blocking regulations and explores the potential outcomes of the United States unilaterally reimposing secondary sanctions for Iran.

US Adoption of Secondary Sanctions

The EU passed blocking legislation in response to two statutes passed by Congress in 1996: the Cuban Liberty and Democratic Solidary Act, known as "Helms-Burton," and the Iran and Libya Sanctions Act (ILSA). Both Helms-Burton and ILSA ushered in an era of broad and often effective use of secondary sanctions by the United States, but not until a decade later. The European reaction in 1996 and the blocking statute had a lot to do with that delay.

By 1996, Cuba had been subject to a broad US embargo for several decades but was not subject to similar sanctions from Europe. For over a year, Senator Jesse Helms and Representative Dan Burton had pushed legislation to strengthen the US embargo and deter foreign companies from doing business in Cuba. While the proposal faced stiff opposition when first introduced in 1995, it accelerated when, in February 1996, Cuban fighter jets shot down two US humanitarian aircraft over international waters. President Clinton signed the bill into law less than three weeks later.[1]

Title III of Helms-Burton authorizes civil suits by US nationals against any individual or entity that traffics in property that has been confiscated by the Cuban government. A separate title of the statute requires the secretary of state to deny visas to any corporate officer or controlling shareholder of a company that has trafficked in a US national's property confiscated by the Cuban government.

[1] Pub. L. 104-114, 110 Stat. 785 (1996), 22 U.S.C. §§ 6021 *et seq.*

Just months later, Congress passed a bill to impose a different set of secondary sanctions for Iran and Libya. In 1996, President Clinton had already taken major steps toward imposing a US embargo on Iran by generally prohibiting the export or import of any US goods or services to or from Iran.[2] Nonetheless, Congress remained concerned about the growing threat of Iran's nuclear program and its support for international terrorist groups, including Hezbollah. Congress also wanted to increase the pressure on Libyan leader Muammar Gaddhafi to stop his support for terrorism and turn over those suspected of involvement in the Pan Am 103 bombing as well as other terrorist attacks. In the spring and summer of 1996, the House and Senate rapidly considered and approved ILSA. President Clinton signed the bill into law in August 1996.

ILSA required the president to impose sanctions on any foreign person the president determines to have made an investment of $20 million or more in Iran or $40 million or more in Libya that directly and significantly contributes to the enhancement of Iran's or Libya's ability to develop petroleum resources.[3] The statute authorized an array of sanctions the president could impose on a foreign company making such an investment, such as limitations on US export licenses or a prohibition on US financing.

The European Response

The European response to both ILSA and Helms-Burton was swift and forceful. The EU told House Speaker Newt Gingrich in a March 1996 letter that "the collective effects of these provisions have the potential to cause grave and damaging effects to bilateral EU-US relations."[4] The UK foreign secretary Malcolm Rifkind said there was no doubt EU members were united in opposition to the US laws.[5] The French foreign minister Herve de Charette remarked, "It is clear that this law is directly contrary to the rules which govern international trade."[6] On May 3, 1996, the EU requested consultations in the World Trade Organization (WTO) and filed a complaint that Helms-Burton was inconsistent with US obligations under the WTO agreement and the General Agreement on Tariffs and Trade.[7]

EU foreign ministers met in July 1996 to consider options to retaliate against the United States and discussed the possibilities of freezing of US assets and the imposition of visa requirements for US business travelers.[8] President Clinton averted serious retaliation by suspending and eventually waiving those provisions of Title III of Helms-Burton related to civil suits, an action that has been repeated every six months by his successors, thereby effectively neutering the provision.

Nonetheless, opposition to US "extraterritorial" measures continued to grow in Europe, particularly after Clinton signed ILSA into law in August. On November 22, 1996, the EU Council adopted Regulation Number 2271/96, which protected "against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom."[9] The preamble to the regulation left no question where the EU stood on the US laws as a political matter: the council stated that the "extra-territorial application of such laws, regulations and other legislative instruments violate

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[2] E.O. 12959 § 1(a)–(b), May 6, 1995.
[3] Pub. L. 104-172, 110 Stat. 1541 (1996), 50 U.S.C. § 1701 note; Iran Sanctions Act of 1996 § 5(a)(1).
[4] Jim Lobe, "U.S.–Cuba: Clinton Delays Lawsuit Provisions in Helms-Burton" (July 16, 1996), http://www.ipsnews.net/1996/07/us-cuba-clinton-delays-lawsuit-provisions-in-helms-burton/.
[5] Sarah Helm, "EU Threatens Trade War over Anti-Cuba Laws," The *Independent*, July 15, 1996, http://www.independent.co.uk/news/world/eu-threatens-trade-war-over-anti-cuba-laws-1328965.html.
[6] Ibid.
[7] WTO Doc. WT/DS38/1-6.
[8] Helm, *EU Threatens Trade War over Anti-Cuba Laws*.
[9] Council Regulation No. 2271/96, OJ. L 309/1 (1996).

international law" and "are likely to affect the established legal order and have adverse effects on the interests of the Community."[10] The council also stated that the goal of the regulation was to remove, neutralize, block, and otherwise counter the effects of the US laws.

Contents of the Blocking Regulation

The EU blocking regulation is often described casually as prohibiting European companies from complying with the US sanctions, but the actual prohibitions in the regulation are more nuanced than that. The regulation includes several key provisions:

- The regulation prohibits any EU person to "comply…actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts…from the laws specified [including Helms-Burton and ILSA]."[11]

- The regulation prohibits the recognition or enforcement of any judgment of a court or tribunal or an administrative authority located outside the EU giving effect, directly or indirectly, to the specified laws.[12]

- The regulation authorized damages caused to any EU person by the application of the specified laws or by actions based thereon.[13]

On its face, the blocking regulation appears to take a hard stand against the US sanctions, giving European companies a clear mandate not to change their behavior based on the threat of sanctions from the United States. However, several elements of the regulation make it less than what it might initially appear.

First, enforcement of the regulation, like the EU's own economic sanctions measures, is left to member states. The regulation states that each member state shall determine the sanctions (i.e., penalties) to be imposed in the event of breach of any relevant provisions and that such sanctions must be effective, proportional, and dissuasive.[14] Only about half the EU member states have ever adopted potential penalties for violations of EU sanctions measures, and so it is difficult to imagine the other half would ever take any action to impose penalties under a blocking regulation. Moreover, it is difficult to say whether any EU member state would ever impose a penalty for a violation of the blocking regulation, because none ever have.

Second, the actual prohibitions in the regulation are vague and potentially unenforceable. The regulation prohibits EU persons from complying with any requirement or prohibition in the specified US statutes. To begin, the use of the term "comply" suggests the statute is referring to the prohibitions under US law, rather than avoiding the threat of secondary sanctions. A non-US company could be sued under Helms-Burton or could be sanctioned for investing in Iran yet still be "in compliance" with US law. The United States would not need to turn to secondary sanctions if they could outright prohibit the activities of companies outside of US jurisdiction. Even assuming the regulation is referring to the activities against which the United States has threatened secondary sanctions, it cannot be that the regulation prohibits a company from not engaging in the activities covered by the US statutes. Otherwise, every European company not doing business in Cuba or Iran would be in violation of the regulation. So what is left? Presumably, a member state would need to prove that

[10] Ibid.
[11] Ibid., Article 5.
[12] Ibid., Article 4.
[13] Ibid., Article 6.
[14] Ibid., Article 9.

a company took some step involving Iran or Cuba only for purposes of avoiding US sanctions. This would be difficult to do given that there might be multiple reasons for abandoning business in Cuba or Iran, including reputational risk, corruption, or profit margins, even if the threat of sanctions was also a possibility. It would be quite easy for a company to simply cite to one of these other motives as a reason for avoiding activity covered by US sanctions.

Third, the blocking regulation only applies to specific US laws identified in its annex. That annex lists the Cuban Democracy Act of 1992, Helms-Burton, ILSA, and the Cuban Assets Control Regulations. If the EU or any member state wished to apply the blocking regulation against any of the broad secondary sanctions imposed by the United States since 2010, and that could be reinstated by the president, the EU Council would need to revisit and amend the regulation. (US sanctions under the Iran Sanctions Act [ISA]—which is the amended form of ILSA—is an exception in this regard, and US sanctions imposed under ISA could be met with retaliation immediately.) While it is possible to see European unity in response to any such move by the United States so long as Iran is in compliance with the JCPOA, the ensuing debate—and the need for unanimity in the council—would likely be divisive both within the EU and for transatlantic relations.

Accordingly, the blocking regulation appears to have been much more of a political statement to the United States than any type of effective regulation of EU companies. Nonetheless, it seems to have been an effective one. US presidents have maintained the waiver of Article III of Helms-Burton, and no European company was sanctioned—or even cajoled—out of an Iranian investment until the Obama administration negotiated several European energy companies out of Iran in 2010.

Even if the regulation has not been a particularly effective legal tool, it has been a useful marker for the EU to point to when it believes the United States has overstepped international consensus, and could well be in the future.

Indeed, because the EU legislation remains on the books, any EU member state could decide to utilize the retaliatory element with respect to covered US statutes at any time and potentially without much warning. The scope of potential retaliation is undefined, meaning that it could be marginal, or it could be quite substantial. The absence of a precedent to follow in this instance is therefore not entirely comforting.

Additionally, we don't yet have a precedent to study because successive US administrations have carefully managed this process, utilizing waivers and executive discretion to avoid creating a circumstance in which European governments are forced to respond. The Trump administration appears to present a new challenge in that its capacity for this kind of careful, nuanced diplomacy seems to be limited by the absence of confirmed appointees at the State Department, and there is a strong political incentive on the part of some European politicians to buck dictates coming from Washington and Donald Trump in particular.

Looking Forward

It is possible we could reenter a period of discord and legal retaliation between the United States and the EU. The United States—in an era of "America first" foreign and economic policy—will be signaling its disregard for the EU's partnership in addressing Iran if it were to reimpose sanctions against Iran. Moreover, European companies are anxiously awaiting guidance from the administration on how it intends to implement broad secondary sanctions included in recent Russia sanctions legislation passed in July.[15] The US shift in approach could awaken European sensitivities on US sanctions writ large and motivate a response in the EU Council.

[15] Pub. L. 115-44 (2017).

Left to its own devices and politics, the EU would likely shy away from a confrontation with the United States, but the politics and international dynamics may be different now. European governments may feel a shift in incentives and demands as transatlantic relationships degrade over multiple issues. For this reason, though the EU blocking statute has been dormant for twenty years, we may soon see it resurrected in policy and economic debates in Brussels, with grave implications for US-European sanctions coordination and the efficacy of US sanctions policies writ large.

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The views represented in this commentary represent those of the authors.