

The EU Legal Protection System against the Effects of Extra-territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom

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Abstract

On 8 May 2018, following the withdraw from the Joint Comprehensive Plan of Action (JCPOA), the United States announced they will no longer waive their national restrictive measures relating to Iran. Some of those measures have extra-territorial application and cause adverse effects on the interests of the European Union and the interests of natural and legal persons exercising rights under the Treaty on the Functioning of the European Union.

The European Union acknowledged that by their extra-territorial application, such instruments violate international law.

Therefore, in June 2018, the European Union counteracts the effects of this extra-territorial application of laws, including regulations and other legislative instruments adopted by third countries, and of actions based thereon or resulting therefrom, where such application affects the interests of natural and legal persons in the EU engaging in international trade and/or the movement of capital and related commercial activities between the Union and third countries. The article gives a general overview on the relevant EU legislation and discusses the violation of international law by the extra-territorial application.

Keywords: US Sanctions, Iran, extra-territorial application, EU

I. Introduction

On 8 May, 2018, U.S. President Trump announced the unilateral withdrawal from the Joint Comprehensive Plan of Action (JCPOA), the landmark nuclear agreement signed by Iran and the E3/EU+3 – France, Germany, the UK and the EU plus China, Russia, and the USA – in 2015. He also announced that the U.S. would re-impose sanctions on Iran that had been lifted as part of the implementation of the JCPOA. These sanctions have extraterritorial effect, essentially making it illegal for EU companies and financial institutions to engage in a wide range of economic and commercial activities with Iran. Companies that disregard the U.S. secondary sanctions face major fines and/or criminal charges in the U.S., or even exclusion from the U.S. market. U.S. sanctions will be reinstated after a 90 or 180day wind-down period, to allow companies to make the necessary arrangements.

Following the signing of the JCPOA in 2015, European companies have entered into important commercial and investment agreements with Iranian counterparts, worth billions of euros. Many of these companies also have important commercial ties with the U.S. Faced with the prospect of penalties in the U.S., several EU companies have already announced that they are ending their dealings with Iran, unless a way can be found to exempt or shield them from U.S. secondary sanctions.

In response, the EU Commission adopted a delegated act on 6 June 2018 to update the annex to the 'Blocking Regulation', which was adopted in 1996 to protect EU businesses against the effects of the extraterritorial application of legislation adopted by a third country. The Blocking Regulation forbids EU persons from complying with extraterritorial sanctions, allows companies to recover damages arising from such sanctions, and nullifies the effect in the EU of any foreign court judgment based on them. The effectiveness of the regulation as a mechanism to offset U.S. sanctions has been questioned, however its adoption sends an important political message. Parliament now has two months to object to the delegated act, but may signal earlier that it will not do so, thus allowing the measure to come into force earlier than the end of the two-month period.

II. U.S. Sanctions on Iran

The United States has imposed restrictions on activities¹ with Iran under various legal authorities since 1979, following the seizure of the U.S. Embassy in Tehran. Many of these sanctions, especially those that affect non-U.S. companies, were suspended or lifted as part of the implementation of the JCPOA. Moreover, exemptions and licences were issued to allow for limited engagement of U.S. companies with Iran. On 8 May, 2018, President Trump announced² that all sanctions waived as part of the implementation of the JCPOA would be reinstated, and all licences and exemptions be revoked, after a 90- or 180-day wind-down period. Below is a non-comprehensive summary of the relevant sanctions.³

A. Primary Sanctions were never Lifted under the JCPOA

Since 1995, U.S. legislation has prohibited U.S. persons from engaging in almost any business dealings with individuals or entities in Iran, including a ban on investments. These primary U.S. sanctions were essentially not lifted by the JCPOA, with some exceptions. Most importantly for the EU, a favourable licensing policy was put in place in respect of exports of commercial passenger aircraft and related parts and services. This carve-out was created to allow U.S.-based Boeing and EU-based Airbus to export U.S. \$40 billion worth⁴ of aircraft to Iran. As part of the re-imposition of sanctions, the licence will be revoked by 6 August, 2018. Airbus is subject to U.S. restrictions on exports to Iran because more than 10% of the parts on its jets originate from U.S. companies.

U.S. law prohibits U.S. firms, including any foreign subsidiaries that are controlled by the U.S. parent, from dealing with Iran. However, a licence – 'General Licence H': authorising certain transactions relating to foreign entities

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- 1) *Iranian Sanctions*, U.S. Dep't of Treas. (Last update: Mar. 14, 2019), <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>.
 - 2) *Read the Full Transcript of Trump's Speech on the Iran Nuclear Deal*, N.Y. Times (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html>.
 - 3) *Iran Sanctions*, Congressional Research Service, Federation of American Scientists (Last update: Mar. 25, 2019), <https://fas.org/sgp/crs/mideast/RS20871.pdf>.
 - 4) Julie Johnson and Ben Katz, *Trump Exit From Iran Pact Halts \$40 Billion Boeing, Airbus Deals*, Bloomberg (May 9, 2018), <https://www.bloomberg.com/news/articles/2018-05-08/trump-exit-from-iran-pact-halts-40-billion-boeing-airbus-deals>.

owned or controlled by a United States person – was published on 16 January, 2016 as part of the sanctions relief agreed under the JCPOA. It authorised non-U.S. companies that are owned or controlled by U.S. persons to engage in almost all forms of civilian trade with Iran (provided the U.S. parent had no involvement). This licence, which affects companies based in the EU but controlled by a U.S. parent, will be revoked, with the revocation taking full effect on 4 November, 2018.

U.S. sanctions have also focused on excluding Iran from the international banking system. U.S. regulations still ban Iran from direct access to the U.S. financial system. Moreover, U.S. dollars cannot be directly transferred to an Iranian bank, but must be channelled through an intermediary financial institution. U.S. banks are also barred from handling any indirect transaction with Iranian banks, namely transactions with non-Iranian foreign banks that are handling transactions on behalf of Iranian banks. This ban remained in effect throughout the implementation of the JCPOA.

B. All Nuclear-Related Secondary Sanctions Reinstated

Secondary sanctions, many of which were lifted or modified as part of the implementation of the JCPOA, will be reinstated after a 90 or 180 day wind-down period. These affect non-U.S. companies and/or banks engaged in the following commercial activities with Iranian counterparts:

From 7 August, 2018, the U.S. re-imposes sanctions on

- the Iranian government's purchase of U.S. dollar banknotes;
- Iran's trade in gold and other precious metals;
- direct or indirect sale, supply or transfer to or from Iran of graphite, raw or semi-finished metals like aluminium and steel, coal and software for integrating industrial processes;
- significant transactions related to the sale or purchase of Iranian rials or the maintenance of significant funds or accounts of rials outside Iran;
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- Iranian sovereign debt;
- Iran's automotive sector.

From 5 November, 2018, the U.S. re-imposes sanctions on

- petroleum-related transactions with the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- Iran's port operators, and shipping and shipbuilding sectors, including the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
- transactions by foreign financial institutions with Iran's Central Bank and other designated Iranian financial institutions;
- the provision of specialised financial messaging services to Iran's Central Bank and other designated Iranian financial institutions;
- the provision of underwriting services, insurance, or reinsurance for transactions with Iran;
- Iran's energy sector.

The Iran Sanctions Act (ISA),⁵ enacted in 1996, has been a pivotal component of U.S. sanctions against Iran's energy sector for over 20 years. It contained the first major extraterritorial sanctions on Iran. Many of its provisions were waived to implement the JCPOA. In conjunction with the 8 May 2018 U.S. withdrawal from the JCPOA, U.S. sanctions on Iran's energy sector will come back into effect as of 5 November, 2018. Transactions that are considered violations of the ISA include investments to develop Iran's oil and gas fields, and the transport of Iranian crude oil. The French group Total⁶ has warned that it will not continue its project to develop the biggest gas field in the world in Iran unless it obtains a specific project waiver from the U.S. authorities. The two Danish oil shipping companies Maersk⁷ and Torm⁸ have announced that they

5) IRAN SANCTIONS ACT OF 1996 [As Amended Through P.L. 114-277, Enacted Dec. 15, 2016], <https://legcounsel.house.gov/Comps/Iran%20Sanctions%20Act%20of%201996.pdf>.

6) David Keohane and Najmeh Bozorgmehr, *Threat of U.S. Sanctions Pushes France's Total out of Iran*, Financial Times (Aug. 20, 2018), <https://www.ft.com/content/6baba178-a459-11e8-926a-7342fe5e173f>.

7) Patrick Wintour and Daniel Boffey, *EU Sets Course for US Clash with Law Blocking Iran Sanctions*, The Guardian (May 17, 2018), <https://www.theguardian.com/world/2018/may/17/maersk-tankers-pull-out-of-iran-in-blow-to-nuclear-deal>.

8) Jacob Gronholt-Pedersen, *Denmark's Torm Says Stops Taking Orders in Iran Due to U.S. Sanctions*, Reuters (May 15, 2018), <https://www.reuters.com/article/us-iran-nuclear-torm-a/denmarks-torm-says-stops-taking-orders-in-iran-due-to-us-sanctions-idUSKCN1IG0W3>.

plan to wind down their dealings with Iran.

Other U.S. provisions impose sanctions on companies that provide insurance or reinsurance for the National Iranian Oil Company (NIOC) or the National Iranian Tanker Company (NITC); or purchase or facilitate the issuance of sovereign debt of the government of Iran, including Iranian government bonds.

An executive order issued in 1992 imposes sanctions, and bars banks from the U.S. financial system, for activities related to the purchase of oil, other petroleum or petrochemical products from Iran, and transactions with designated Iranian oil companies. There are also penalties on transactions with Iran's central bank.

C. Specially Designated Nationals List

The U.S. Treasury keeps a list of specially designated nationals (SDN),⁹ a list of individuals and companies owned or controlled by, or acting for or on behalf of, countries targeted by sanctions. It also lists individuals, groups and entities designated under programmes that are not country-specific (such as on counter-terrorism). The assets of persons on the list in the U.S. are blocked, and U.S. persons are generally prohibited from dealing with them. To implement the JCPOA, many Iranian entities were 'delisted' from the SDN list. U.S. persons or foreign entities owned or controlled by U.S. persons continued to be prohibited from conducting business with these entities, but this restriction no longer applied to non-U.S. persons, companies or banks. However, the U.S. Office of Foreign Assets Control (OFAC) will put certain Iranian entities – such as the National Iranian Oil Company (NIOC) and Naftiran Intertrade Company (NICO) – back on the SDN List. This means that non-U.S. persons who engage in activities with these entities will – as of 5 November 2018 – run the risk of infringing U.S. secondary sanctions. Foreign entities that violate the above provisions might be penalised. Any bank that knowingly facilitates a financial transaction on behalf of an Iranian SDN will be prohibited from operating in the U.S.

D. New Sanctions

U.S. President Trump and newly appointed U.S. Secretary of State, Mike

9) *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. Dep't of Treas. (Last update: Apr. 17, 2019), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

Pompeo, have announced that the U.S. will also impose new sanctions on Iran, referring to them as the 'strongest sanctions in history'. The Countering America's Adversaries Through Sanctions Act (CAATSA)¹⁰ introduces additional sanctions with regard to Iran. There are a number of other possible sanctions that might receive consideration – either in a global or multilateral framework.

Consequences for companies and financial institutions Violators of U.S. sanctions can be subject to criminal and civil penalties. Moreover, U.S. law provides for a range of specific sanctions against entities that violate the restrictions on activities with Iran.

The entity concerned can currently become subject to a maximum of five of the following sanctions:

- denial of export-import bank loans, credits, or credit guarantees for U.S. exports to the sanctioned entity;
- denial of U.S. bank loans exceeding U.S. \$10 million in one year to the entity;
- if the entity is a financial institution, a prohibition on its service as a primary dealer in U.S. government bonds; and/or a prohibition on its serving as a repository for U.S. government funds;
- a prohibition on U.S. government procurement from the entity;
- prohibitions in transactions in foreign exchange subject to the jurisdiction of the U.S. (i.e. U.S. \$) by the entity;
- prohibition on any credit or payments between the entity and any U.S. financial institution;
- prohibitions and limitations for banks regarding the opening and maintenance of correspondent accounts in the U.S.;
- prohibition of the sanctioned entity from acquiring, holding, using, or trading any U.S.-based property in which the sanctioned entity has a (financial) interest;
- restriction on imports from the sanctioned entity;
- a ban on a U.S. person from investing in or purchasing significant amounts of equity or debt instruments of a sanctioned person;
- exclusion from the U.S. of corporate officers or controlling shareholders of a sanctioned firm;
- imposition of any of the ISA sanctions on principal officers of a sanctioned firm;

10) Countering America's Adversaries Through Sanctions Act, U.S. Dep't of Treas. (Last update: Dec. 12, 2018), <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx>.

- denial of licences for the U.S. export of military or militarily useful technology to the entity;
- refusal of landing, and port-calling restrictions for vessels.

Moreover, a mandatory sanction for any violating entity is the prohibition on contracts with the U.S. government. Companies, as a condition of obtaining a U.S. government contract, must certify to the relevant U.S. government agency that the firm – and any companies it owns or controls – are not violating the ISA.

U.S. secondary sanctions have extraterritorial effect.¹¹ This means that they affect non-U.S. companies, prohibiting them from engaging with Iranian counterparts. If these companies have no exposure in the U.S., extraterritorial sanctions against them will be difficult to enforce. However, a company that has a U.S. subsidiary, has U.S. citizens on its board or operates in the U.S., provides scope for U.S. sanctions to be enforced against it. These can range from massive penalties to prohibition of access. For example, fines for banks that breach U.S. sanctions have reached billions of dollars.¹²

III. Extraterritorial Sanctions and Their Foundation in International Law

Andreas Lowenfeld once noted that “[t]he search for a satisfactory definition of extraterritorial jurisdiction ... is doomed to failure: ‘extraterritorial jurisdiction,’ like ‘bureaucratic,’ is a term that could never be rescued from its unattractive reputation.”¹³

Beyond the common notion that there are different strands of jurisdiction extending to the question of extraterritoriality, there are multiple understandings of what exactly constitutes extraterritorial jurisdiction. In fact, there is debate as to whether extraterritorial prescriptive jurisdiction refers

11) *RAPPORT D'INFORMATION DÉPOSÉ en application de l'article 145 du Règlement PAR LA COMMISSION DES AFFAIRES ÉTRANGÈRES ET LA COMMISSION DES FINANCES en conclusion des travaux d'une mission d'information constituée le 3 février 2016 sur l'extraterritorialité de la législation américaine*, ASSEMBLÉE NATIONALE (National Assembly of France), Oct. 5, 2016, <http://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf>.

12) Beatrix Immenkamp, *Updating the Blocking Regulation: The EU's answer to US extraterritorial Sanctions*, Briefing by the EUR. PARL.DOC. PE 623.535 (Jun. 2018) at 4, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI\(2018\)623535_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf).

13) Andreas Lowenfel, *International Litigation and the Quest for Reasonableness* 16 (Clarendon Press, 1996).

exclusively to the governance of situations that are wholly located abroad, or whether it includes the governance of situations that are partially located abroad. As to the latter, a follow-up inquiry is how substantial the “abroad portion” has to be to qualify as extraterritorial jurisdiction. This debate is mirrored in the three approaches to extraterritoriality discussed below. One approach defines extraterritoriality as jurisdiction in the absence of a territorial link. Another approach qualifies it as jurisdiction in the absence of a substantial territorial link. Yet another approach defines extraterritoriality as jurisdiction in the presence of a non-exclusive territorial link. Depending on the definition, extraterritoriality is either a highly exceptional or a very common occurrence within the context of jurisdictional claims.¹⁴

In the narrowest sense, extraterritoriality is defined as jurisdiction that lacks a territorial nexus between the state and the regulated action.¹⁵ The regulating state asserts jurisdiction over persons, property, and conduct exclusively on the basis of other jurisdictional principles. One example of this type of extraterritoriality is crimes against humanity. It is a settled principle that states can legislate, adjudicate, and enforce sanctions regarding such crimes even if they were committed outside their territorial borders. Another example is the taxation of nationals. It is generally admitted that a state has jurisdiction over its citizens even if they reside outside the domestic territory. In spite of these examples, cases of extraterritoriality in this narrow sense are rare. As a rule, sovereign states do not have an interest in asserting jurisdiction when a territorial link is totally missing.¹⁶ For example, a transaction between a European and an Asian party where goods are transported by a flight carrier crossing U.S. borders. Under the narrow definition of extraterritoriality, this element would be sufficient to make it a territorial issue from the U.S. point of view.¹⁷

A broader approach defines extraterritoriality as jurisdiction in the absence of a substantial territorial connection.¹⁸ In this definition, extraterritorial

14) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*; 33 *Ariz. J. Int'l & Comp. L.* 631, 639 (2016).http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

15) Louis d'Avout, *L'extraterritorialité du droit dans les relations d'affaires* [The extraterritoriality of law in business relations], 42 *LA SEMAINE JURIDIQUE* [JCP] 1875, 1887 (2015) (Fr.).

16) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*; 33 *Ariz. J. Int'l & Comp. L.* 631, 639-640 (2016).http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

17) *Id.* at 631, 640.

jurisdiction is not limited to cases that completely lack territorial connections but rather extends to cases where the territorial connections are not substantial. However, as soon as an issue is deemed to have a substantial territorial connection, jurisdiction will be categorized as territorial regardless of whether foreign elements exist.¹⁹ To return to the examples above, a sales transaction between a European and an Asian party where goods are transported by a flight carrier crossing U.S. borders is a weak territorial connection from the U.S. perspective. If jurisdiction is assumed, it is extraterritorial.²⁰ Under the substantial territorial nexus approach, two important categories of cases are included in the definition of territorial jurisdiction: first, the cases where conduct occurs, in substantial part, within the domestic territory.²¹ Second, the cases where conduct outside territorial borders produces substantial effects within those borders.²² Under the substantial territorial nexus approach, extraterritoriality is limited to the cases where the jurisdictional claim lacks a substantial territorial connection. This still puts a large number of cases in the category of territorial jurisdiction and a relatively small number of cases in the category of extraterritorial jurisdiction. The numbers will be even smaller if a low threshold is set for “substantial connection.”²³

18) See Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 89–90 (2014); (“[A] measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state.”). See also Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1679 (2013) (“[E]xtraterritoriality is implicated whenever a state exercises jurisdiction on a basis other than territorial jurisdiction.”).

19) A U.S. Supreme Court case on extraterritoriality developed a qualified version of the substantial nexus approach. In *Morrison v. National Australia Bank*, the Court held that if a statute has a domestic “focus,” the issue does not involve extraterritoriality even if it concerns a foreign party or foreign conduct. See *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010); see also Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law, 40 SW. L. REV. 655 (2011) (discussing *Morrison* further); see also William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635 (2011).

20) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*; 33 Ariz. J. Int’l & Comp. L. 631, 641 (2016). http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

21) RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (AM. LAW INST. 1987).

22) *Id.*; See Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J. WORLD TRADE 5, 12 (1997).

The broadest approach on extraterritoriality is to define it as jurisdiction on a non-exclusively territorial basis.²⁴ The focus is not on a possible substantial territorial nexus or the lack of such a nexus making it extraterritorial. Rather, the focus is on the foreign elements of cases—the “foreign element approach.” If there are relevant foreign elements in a particular case, the jurisdictional claim is extraterritorial regardless of whether there is also a substantial territorial nexus. Relevant foreign elements would be that the person, the property, or the conduct that is subject to the jurisdictional claim is situated outside the national territory. To take up the examples above: a sales transaction between a European and an Asian party that includes air transportation going over U.S. territory is an example of extraterritorial jurisdiction if the U.S. claims jurisdictional authority. Similarly, jurisdictional claims under the substantial conduct or the substantial effects doctrine will be qualified as extraterritorial. This is because “substantial conduct” as an exclusive basis for jurisdiction within the territory presupposes that the person engaging in this conduct is domiciled outside of the territory. This adds a relevant foreign element. The same is true with regard to the “substantial territorial effect” of conduct that, by definition, is taking place outside the territorial border.²⁵

However, there is no established definition of extraterritorial jurisdiction. Out of the three approaches described above, the narrowest (no territorial connection) is mentioned in scholarship and has occasionally surfaced in the context of unilateral economic sanctions.²⁶ However, it lacks doctrinal support

23) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 *Ariz. J. Int'l & Comp. L.* 631, 641 (2016).http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

24) Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 *HARV. L. REV.* 1217, 1218 & n.3 (1992) (“a case involves extraterritoriality when at least one relevant event occurs in another nation.”).

25) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 *Ariz. J. Int'l & Comp. L.* 631, 642 (2016).http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

26) When controversies arose between the United States and its trading partners with regard to the U.S. sanctions regime, the United States claimed that its measures were not extraterritorial as they did not directly regulate foreign persons or wholly foreign conduct. See Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Law*, 44 *GEO. J. INT'L L.* 1055, 1071 (2013) (“These measures were not extraterritorial in the strict sense of imposing penalties on foreign persons for actions taken wholly outside U.S. jurisdiction. While their effect may be aimed at foreign companies, the sanctions only impose legal duties on U.S. entities.”).

and it fails to capture the realities of international relations. Moreover, sovereign states are unlikely to accept another state's claims of territorial jurisdiction over situations that have no link whatsoever with their territory. This leaves the substantial territorial nexus approach and the foreign element approach. The foreign element approach is more convincing. It clearly distinguishes between extraterritoriality and its justification. First, the identification of a relevant foreign element (person, property, conduct) establishes the category of extraterritorial jurisdiction. Then follows the analysis of whether extraterritoriality is permissible. One of the accepted justifications for extraterritoriality is the existence of a substantial territorial nexus. This two-step approach follows the methodology that has been used successfully within the field of conflicts of law. Under the substantial territorial nexus approach, the line between extraterritoriality and territoriality remains blurry, as everything depends on the material question of whether a territorial connection is substantial (territoriality) or not substantial (extraterritoriality). If the connection is deemed substantial, the issue is territorial and it follows that jurisdiction is justified because the territoriality principle is the most basic and undisputed ground for the exercise of jurisdiction in international customary law. In effect, the substantial territorial nexus approach defines territoriality and extraterritoriality along the lines of the main justification for jurisdiction in international law. If the territorial connection is substantial, jurisdiction is territorial and territorial jurisdiction is always justified. This creates a risk that territoriality is expanded to satisfy the domestic claims for jurisdiction. Instead of having to justify extraterritorial jurisdiction, the issue is simply defined as territorial.²⁷

IV. Responding to Extraterritorial Legislation: The European Union and Secondary Sanctions

While the United States is an enthusiastic proponent of extraterritorial legislation, other nations, have an uneasy relationship with America's often-expansive assertions of jurisdiction.²⁸ In many cases, these allies have

27) Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*; 33 *Ariz. J. Int'l & Comp. L.* 631, 643 (2016). http://arizonajournal.org/wp-content/uploads/2017/01/02_EMMENEGGER_EICFinal.pdf.

28) *Developments in the Law – Extraterritoriality*, 24 *Harv. L. Rev.* 1246 (Mar. 2011).

vigorously opposed the most aggressive U.S. claims of jurisdiction,²⁹ accepting only a subset of U.S. extraterritorial efforts.³⁰

The European Union, the largest U.S. trade partner, offers a prime example in its opposition to secondary sanctions. Such sanctions seek not only to bar entities within the enacting state from exporting to or doing business with the target state, but also to bar entities in third states from doing so — either by imposing penalties on third-state entities that trade with the target state or by prohibiting those third-state entities from trading with the enacting state.³¹

The EU has objected to U.S. enactment of such nakedly extraterritorial legislation on legal grounds and has worked to block these sanctions' implementation.

The EU's opposition to secondary sanctions and other assertions of extraterritorial jurisdiction seems to have a ready explanation. Such jurisdiction is of questionable legitimacy under international law, and the EU is deeply devoted to those norms.³² In short, the EU's responses consistently have aligned with its legal values, which it has cited as justification. The United States, in contrast, often shows disdain for international jurisdictional rules.³³

European resistance to secondary sanctions began as long ago as the 1960s, when the U.S. Treasury Department attempted to stop a French company

29) Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 63 (1999); Runa Kinzel & Helms Burton, *A View from Abroad*, 10 U. MIAMI INT'L & COMP. L. REV. 81, 84 (Fall, 2002).

30) Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

31) Secondary sanctions are also called secondary boycotts. See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 429-30 (1996); see also Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 626, 641 (2008).

32) For example, one of the two foundational EU treaties requires that the EU's "action on the international scene shall be guided" in part by "respect for . . . international law." Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1, 23 [hereinafter "Treaty of Lisbon"].

33) For example, Congress passed one significant piece of extraterritorial legislation, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 1643(l)-(m), 6021-6091 (2006 & Supp. III 2009)), discussed below, despite the State Department's pronouncement that it was "not consistent with the traditions of the international system" because "[u]nder international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state." 141 CONG. REC. 27,752 (1995).

controlled by U.S. nationals from executing a contract with China. The first significant instance of EU opposition to secondary sanctions, however, came during the Reagan Administration. In 1982, the U.S. Department of Commerce promulgated export regulations³⁴ in an attempt to stop the Soviet Union from constructing a major gas pipeline from Siberia to Western Europe.³⁵ The United States sought to bar foreign subsidiaries of U.S. entities from exporting equipment to the Soviet Union. It also sought to bar entirely foreign entities from exporting equipment to the Soviet Union if that equipment was made with technology licensed from U.S. entities.³⁶ The European Community responded with “megaphone diplomacy,” claiming that the “measures . . . are unacceptable under international law because of their extraterritorial aspects.”³⁷ Judicial and executive action in Community member states backed up the legal objection.³⁸ Eventually, the United States retreated.³⁹

In the 1990s, the United States again adopted extraterritorial sanctions, sparking even more strident opposition from Europe. First, Congress passed the Cuban Democracy Act of 1992 (CDA)⁴⁰, which subjects foreign subsidiaries of U.S. corporations to restrictions on trade with Cuba.⁴¹ Although the approach

34) Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (Jun. 24, 1982) (codified at 15 C.F.R. § 376, 379, 385); Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., 47 Fed. Reg. 141 (Jan. 5, 1982) (codified at 15 C.F.R. § 379, 385, 399).

35) See Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy*, at 69–70 (1985). The United States cited the crackdown on the solidarity movement in Poland as its motivation. See Lowenfeld, *supra* note 4, at 432–33.

36) Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. at 27,251–52.

37) Comments of the European Community on the Amendments of 22 Jun. 1982 to the U.S. Export Regulations 4 (Aug. 12, 1982), available at http://aei.pitt.edu/1768/01/US_dispute_comments_1982.pdf.

38) In the Netherlands, for example, a court held that *Sensor Nederland*, a locally incorporated subsidiary of a U.S. corporation, was not excused from performing its contractual obligations because of the U.S. regulations. The court reasoned that the U.S. claim to extraterritorial jurisdiction over Sensor was inconsistent with international law. In France, the government issued an order directing companies to continue performing their contracts that the U.S. regulations would have prohibited. See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, at 83–84 (1988).

39) Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (Nov. 18, 1982) (codified at 15 C.F.R. §379, 385, 390, 399).

40) Pub. L. No. 102-484, 106 Stat. 2575 (codified as amended at 22 U.S.C. §§ 6001–6010 (2006 & Supp. III 2009)).

41) See Laura A. Donner, *Recent Development, The Cuban Democracy Act of 1992: Using Foreign Subsidiaries as Tools of Foreign Economic Policy*, 7 Emory Int’l L. Rev. at 259,

was similar to the pipeline regulations, EU frustration did not reach a breaking point until several years later, when President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.⁴² More popularly known as the Helms-Burton Act, after its chief sponsors, the law imposes a variety of extraterritorial trade restrictions. Most significantly, it creates a cause of action for former Cuban property owners against almost any entity engaged in trade with Cuba.⁴³ Helms-Burton faced worldwide opposition. Nonetheless, soon after its passage, President Clinton signed another major extraterritorial sanction measure, the Iran and Libya Sanctions Act of 1996⁴⁴ (ILSA). The Act, among other things, imposes sanctions on any foreign person or entity that invests more than \$20 million in either country to support the development of its petroleum resources.⁴⁵

In response to Helms-Burton, the EU again issued a formal diplomatic protest, which extended to the CDA as well, asserting that the U.S. statutes were incompatible with international law.⁴⁶ After the passage of the ILSA, however, the EU initiated proceedings at the WTO.⁴⁷ It also adopted Council Regulation 2271/96⁴⁸ to respond to “violat[ions of] international law,”⁴⁹ including the CDA, Helms-Burton, and the ILSA.⁵⁰ The regulation prohibits EU entities from

262–263 (1993).

42) Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 1643(l)–(m), 6021–6091 (2006 & Supp. III 2009)).

43) Specifically, among its other provisions, the law creates a cause of action for former Cuban property owners against foreign persons and entities who “traffick[·] in property which was confiscated by the Cuban Government” in the Cuban revolution. 22 U.S.C. § 6082(a)(1)(A) (2006). Because trafficking includes “engag[ing] in a commercial activity using or otherwise benefiting from” confiscated property, *id.* § 6023(13)(A)(ii), most transactions with Cuban companies are within the law’s ambit.

44) Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 note (West 2010)). Unlike Helms-Burton, the ILSA was at least arguably in furtherance of U.N. resolutions. *See infra* at 1289–90.

45) Initially, the limit was \$40 million, but a provision that quickly went into effect mandated the decrease when other countries failed to join the U.S. sanctions regime. *See Iran and Libya Sanctions Act* §§ 4–5, 110 Stat. at 1542–45.

46) European Union, Demarches Protesting the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Mar. 5, 1996 & Mar. 15, 1995), reprinted in 35 I.L.M. 397, 398–99 (1996) [hereinafter Helms-Burton Demarches].

47) Although the European Union referenced the ILSA, it was not formally a subject of the proceedings.

48) Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC).

49) *Id.* at 1.

complying with U.S. sanctions⁵¹ and bars EU recognition of judgments imposed for violating them.⁵² More significantly, the regulation includes a “clawback” provision that allows EU entities to recover any costs the sanctions impose.⁵³ Ultimately, however, the EU suspended its WTO proceedings and adopted vague policy statements favoring democracy in Cuba and counterproliferation efforts against Iran.⁵⁴ In return, the United States took advantage of provisions in both Helms-Burton and the ILSA that allowed the President to suspend application of sanctions.⁵⁵

Despite this uneasy *détente*, U.S. secondary sanctions remained a major issue in the European Union. The EU continued protesting them throughout the 2000s, even though suspension meant they had little if any effect.⁵⁶ EU pre-enactment objections to the Iran Nonproliferation Act of 2000⁵⁷ led President Clinton to issue a signing statement that effectively assuaged European concerns about the Act’s extraterritorial enforcement.⁵⁸ Early concerns about anti-money laundering provisions in the USA PATRIOT Act⁵⁹ similarly dissipated as it became apparent that those provisions were not truly extraterritorial.

Still, the mere possibility of sanctions continued to be a cause of EU concern. In 2004, despite the lack of any enforcement against the EU, the European Commission formally declared that the EU “continues to expect that the Bush Administration will take the appropriate steps to repeal the threat of sanctions against EU entities.”⁶⁰

50) *Id.* annex, at 5-6.

51) *Id.* art. 5, at 2.

52) *Id.* art. 4, at 2.

53) *Id.* art. 6, at 2-3.

54) *See* Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, EU-U.S., Apr. 11, 1997, 36 I.L.M. 529.

55) *See id.*

56) European Comm’n, United States Barriers to Trade and Investment Report for 2008, at 8-9 (2009), http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf.

57) Pub. L. No. 106-178, 114 Stat. 38 (codified as amended at 50 U.S.C. § 1701 note (2006)).

58) European Comm’n, Report on United States Barriers to Trade and Investment, at 10 (2000), http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_111689.pdf.

59) Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

60) European Comm’n, Report on United States Barriers to Trade and Investment, at 13 (2004), http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf.

A. Regulation (EC) 2271/96 – The Blocking Regulation

Regulation (EC) 2271/96,⁶¹ known as the 'Blocking Regulation', was first adopted on 22 November 1996 to protect EU businesses 'against the effects of the extraterritorial application of legislation adopted by a third country.'⁶² The EU initially adopted the regulation in 1996 as a countermeasure to U.S. extraterritorial economic sanctions against Cuba, Libya and Iran, which EU governments argued benefited U.S. foreign policy interests at the expense of the sovereignty of EU Member States. The annex to the Blocking Regulation sets out the measures the regulation seeks to 'block.'

1. Adoption of the Regulation

After the U.S. Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act⁶³ ("Helms-Burton Act") in March of 1996, the Council of the European Union ("Council"), during its July 15, 1996 session, identified a range of measures that the European Union could deploy in response to the damage EU companies incurred from the implementation of the Helms-Burton Act.

The Council identified the introduction of legislation by the European Union with the objective of neutralizing the extra-territorial effects of the U.S. legislation.

According to EC law, the initiative for legislation lies with the Commission of the European Communities ("Commission").⁶⁴ Therefore, on July 31, 1996, the

61) Council Regulation (EC) 2271/96 of Nov. 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, O.J. 309, 29/11/1996 P. 0001 – 0006, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996R2271>.

62) A "Regulation" is a binding legislative act. It must be applied directly in its entirety across the EU.

63) Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021 et. seq. (1996)) [hereinafter Helms-Burton Act].

64) Under Title V, Provisions on a Common Foreign and Security Policy, and Title VI, Provisions on Co-operation in the Fields of Justice and Home Affairs of the Treaty on European Union, individual Member States may take the initiative for Joint Actions (art. J.3 and J.8(8)), programs implemented to further the objectives of the common foreign and security policy of the European Community which are passed in areas of common interest to and binding on the Member States. Treaty on European Union, Feb. 7, 1992, art.J.3, K3, O.J. C 224/1, 94-95, 97-98 (1992), [1992] 1 C.M.L.R. 719, 730-31, 736, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I) [hereinafter EEC Treaty], as amended by Single

Commission submitted to the Council a "proposal for a Council regulation protecting against the effects of the application of certain legislation of certain third countries, and actions based thereon or resulting therefrom."⁶⁵ After long and intensive discussions by the Committee of Permanent Representatives of the Member States ("COREPER")⁶⁶ and at the ministerial level, which proved to be difficult due to political and legal reasons, the Council, during its October 28, 1996 session, arrived at a political agreement in Council Regulation 2771/96 ("Regulation").⁶⁷

The Regulation aimed to "protect[] against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom."⁶⁸ The Council based this Regulation on Articles 73c, 113, and 235 of the Treaty Establishing the European Community ("EC Treaty").⁶⁹ The Council believed that this piece of Community legislation did not cover all areas of activities that needed protection, and, therefore, the Council also adopted a Joint Action⁷⁰ based on Articles J.3 and K3 of the Treaty

European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC OWI Pub. Off. 1987)).

65) O.J. C 296/10 (1996).

66) The "Committee of Permanent Representatives of the Member States ("COREPER") prepares and carries out the tasks assigned to it by the Council, acting as a link between the Council and the Commission." Treaty Establishing the European Community, Feb. 7, 1992, art. 151 (1), [1992] 1 C.M.L.R. 573, 681 [hereinafter EC Treaty], incorporating changes made by TEU, *supra* note 2.

67) Council Regulation 2271/96, O.J. L 309/1 (1996).

68) *Id.*

69) EC Treaty, *supra* note 4, art. 73c., [1992] 1 C.M.L.R. at 621. Art. 73c of the EC Treaty provides:

Whilst endeavouring to achieve the objective of free movement of capital between Member-States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment (including investment in real estate), establishment, the provision of financial services, or the admission of securities to capital markets.

Additionally, Art. 113 states, "the Commission shall submit proposals to the Council for implementing the common commercial policy." *Id.* art. 113, (1992) 1 C.M.L.R. at 656.

Furthermore, Art. 235 asserts:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures. *Id.* art. 235, [1992] 1 C.M.L.R. at 716.

on European Union ("TEU").⁷¹⁷²

The official adoption of this Regulation and of this Joint Action by the Council took place on November 25, 1996 after legal linguistic experts had finalized the legal texts.⁷³

B. The EU Regime

1. Objectives of the Regulation

The EU Regulation and Joint Action are mainly concerned with removing the adverse effects of Title III and Title IV of the Helms-Burton Act⁷⁴ Under Title III of the Helms-Burton Act, legal proceedings may be brought in the United States against EU citizens or companies involved in the trafficking⁷⁵ of property formerly owned by U.S. citizens and confiscated by the Cuban Government.⁷⁶ In addition, Title III provides that such proceedings may lead to judgments against EU citizens to pay multiple compensation to a U.S. party.⁷⁷ Title IV provides for the refusal of entry into the United States of persons involved in the trafficking of confiscated property, including the spouses, minor children, and agents thereof.⁷⁸

70) Joint Action of Nov. 22, 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, O.J.L 309, 29/11/1996 P. 0007.<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996E0668>. (hereinafter "Joint Action").

71) TEU, *supra* note 2, art. J.3, K.3, O.J. C 224/1, at 94-95, 97-98 (1992), [1992] 1 C.M.L.R. at 730-31, 736; Joint Action, *supra* note 8, p.mbl., O.J. L 309/7, at 7 (1996).

72) The Joint Action was a legally binding act which is no longer used since the Treaty of Lisbon came into force in Dec. 2009. The Joint Action constituted an operational action by the Member States within the framework of the common foreign and security policy. The joint action sets out the objective, means, and duration of the operational action. The Joint Action was replaced by the "Decision" in the current Lisbon Treaty. <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dppt594uz>.

73) Council Regulation 2271/96, *supra* note 5, O.J. L 309/1 (1996).

74) Helms-Burton Act, *supra* note 63.

75) *Id.*, § 6023(13)(A)(i) (defining trafficking as use, sale, transfer, control, management, and other activities that benefit persons).

76) *Id.* §§ 6081-85 (1996).

77) *Id.*

78) *Id.* § 6091 (1996).

The preamble of EC Regulation No. 2271/96 sets out the reasons for its adoption.⁷⁹ It recalls that the objectives of the European Community include contributing to the harmonious development of world trade, progressively abolishing restrictions on international trade, and achieving, to the greatest extent possible, the free movements of capital.⁸⁰ These two stated reasons are linked directly to the scope of the Regulation, and they indicate clearly that Articles 113 and 73c of the EC Treaty constitute, together with Article 235, the legal basis of this act.⁸¹ The preamble then sets out, "a third country has enacted certain laws which purport to regulate activities of persons under the jurisdiction of the Member States,"⁸² and, "by their extra-territorial application such laws... violate international law and impede the attainment of the aforementioned objectives."⁸³ The preamble further states that these laws "affect or are likely to affect the established legal order and have adverse effect on the interests of natural and legal persons exercising rights under the [EC Treaty]."⁸⁴

The preamble then proceeds to state:

Under these exceptional circumstances, it is necessary to take action at the Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons, in particular by removing, neutralizing, blocking or otherwise countering the effects of the foreign legislation concerned.⁸⁵

Finally, the preamble makes a cross reference to the Joint Action the Council adopted on the same day and indicates that the purpose of the Joint Action is to ensure that Member States take measures to protect those persons whose interests the foreign legislation affects insofar as this Regulation does not protect those interests.⁸⁶

2. Scope of the Regulation

Articles 1 and 11 of the Regulation determine its scope. According to Article

79) Council Regulation 2271/96, *supra* note 5, pmb., O.J. L 309/1, at 1 (1996).

80) *Id.*

81) *Id.*

82) *Id.*

83) Council Regulation 2271/96, *supra* note 5, pmb., O.J. L 309/1, at 1 (1996).

84) *Id.*

85) *Id.*

86) Huber, *supra* note 85, at 699, 702.

1, the Regulation provides protection against the extra-territorial application of the laws specified in the annex.⁸⁷ The Regulation provides protection where such application affects the interests of persons, referred to in Article 11,⁸⁸ who engage in international trade or the movement of capital and related commercial activities between the European Community and third countries.⁸⁹

Article 11 provides for wide coverage of the Regulation. Paragraph one covers all nationals of Member States who are residents in the European Community, whether they are found inside or outside the European Community.⁹⁰ Paragraph four includes any natural person who is a citizen of a third country and a resident in the European Community, wherever that person is found, unless that person is in the country of which he is a national.⁹¹ Paragraph five embraces any other natural person present in the European Community, who is not a resident of the European Community, if that person acts in a professional capacity.⁹² Paragraph five would cover such person if he is on a business trip in the European Community, but not if he stays in the European Community as a tourist.⁹³ Paragraph two encompasses any legal person incorporated within the European Community.⁹⁴ Finally, paragraph three covers any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86, an EC Regulation on maritime transport.⁹⁵ It follows from the above that all five paragraphs establish a clear link between the persons the

87) These are the Helms-Burton Act, 22 U.S.C.A. §§ 6021 et seq. (1996), and the D'Amato Act ("Iran and Libya Sanctions Act of 1996"), Pub. L. No. 104-172, 110 Stat. 1541 (1995) (codified at 50 U.S.C. § 1701 (1996)).

88) Council Regulation 2271/96, *supra* note 5, art. 11, O.J. L 309/1, at 3 (1996).

89) *Id.* art. 1, O.J. L 309/1, at 2 (1996).

90) *Id.* art. 11.1, O.J. L 309/1, at 3 (1996).

91) *Id.* art 11.4, O.J. L 309/1, at 4 (1996).

92) Council Regulation 2271/96, *supra* note 5, art. 11.5, O.J. L 309/1, at 4 (1996).

93) *Id.*

94) *Id.* art. 11.2, O.J. L 309/1, at 4 (1996).

95) *Id.* art. 11.3, O.J. L 309/1, at 4 (1996); Council Regulation 4055/86, O.J. L 378/1, at 1 (1986) (stating "applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries"). Art.1(2) of Council Regulation 4055/86 stipulates the following:

The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

Council Regulation 4055/86, *supra*, art. 1(2), O.J. L 378/1, at 2 (1986).

Regulation covers and the European Community, either through nationality,⁹⁶ residency,⁹⁷ physical presence,⁹⁸ incorporation,⁹⁹ or control.¹⁰⁰ It must, however, be stressed that the Regulation only protects these persons if they are engaging in one of the activities referred to in Article 1.¹⁰¹

3. The Substantive Rights and Obligations Created by the Regulation

Article 2 imposes upon any person referred to in Article 11 whose economic or financial interests the foreign legislation affects, the obligation to inform the Commission accordingly within thirty days.¹⁰² If a legal person is affected, this obligation applies to directors and persons with management responsibilities.¹⁰³ This information is of essential importance to the Commission in order to enable it to assess the impact of the Helms-Burton Act on EU based companies.

According to Article 3, all information supplied may only be used for the purposes for which it was provided.¹⁰⁴ The Commission may, therefore, not disclose confidential information without the express permission of the person providing the information.

This provision aims to counterbalance the obligation to inform the Commission under Article 2 by creating a clear obligation for the Commission to respect the principle of confidentiality.

The most important substantive provisions are contained in Articles 4,^{105,5}¹⁰⁶ and 6.¹⁰⁷ Article 4 prohibits, in categorical terms, the recognition and enforcement of any judgment of a court as well as any decision of an administrative authority located outside of the European Community giving effect to the Helms-Burton Act or the D'Amato Act or to actions based thereon

96) Council Regulation 2271/96, *supra* note 5, art. 11.1, O.J. L 309/1, at 4 (1996).

97) *Id.* art. 11.1, 11.4, O.J. L 309/1, at 3-4 (1996).

98) *Id.* art. 11.5, O.J. L 309/1, at 4 (1996).

99) *Id.* art. 11.2, O.J. L 309/1, at 4 (1996).

100) Council Regulation 2271/96, *supra* note 5, art 11.3, O.J. L 309/1, at 4 (1996).

101) Huber, *supra* note 85, at 699, 703.

102) *Id.* art. 2, O.J. L 309/1, at 2 (1996).

103) *Id.*

104) *Id.* art. 3, O.J. L 309/1, at 2 (1996).

105) Council Regulation 2271/96, *supra* note 5, art. 4, O.J. L 309/1, at 2 (1996).

106) *Id.* art. 5, O.J. L 309/1, at 2 (1996).

107) *Id.* art. 6, O.J. L 309/1, at 2 (1996).

or resulting therefrom.¹⁰⁸ Article 4 clearly aims at preventing the enforceability in the European Community of judgments of U.S. courts based on Title III of the Helms-Burton Act and providing for compensation against EU companies or natural persons. Moreover, because Article 4 addresses decisions of administrative authorities as well, it is also expected to apply to decisions based on the D'Amato Act.¹⁰⁹

Article 5 provides for an obligation of non-compliance with any requirement or prohibition, including requests of foreign courts, based on the Helms-Burton Act and the D'Amato Act.¹¹⁰ Under certain circumstances, however, non-compliance might result in disproportionate damage to the person or company concerned, and, thus, Article 5(2) provides for the possibility of obtaining an authorization to comply to the extent that non-compliance would seriously damage the interests of the person concerned or those of the European Community.¹¹¹ The Commission may grant such authorization according to the procedure set out in Article 8.¹¹² Article 8 provides for a "comitology decision"¹¹³ in accordance with Procedure III variant (a) of the Council Decision of July 13, 1987¹¹⁴ laying down the procedures for the exercise of implementing powers conferred on the Commission.¹¹⁵

108) *Id.* art. 4, O.J. L 309/1, at 2 (1996).

109) Huber, *supra* note 85, at 699, 704.

110) Council Regulation 2271/96, *supra* note 5, art. 5, O.J. L 309/1, at 2 (1996). Art. 5 provides: No person referred to in Art. 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.

111) *Id.* art. 5, 1 2, O.J. L 309/1, at 2 (1996).

112) *Id.* art. 8, O.J. L 309/1, at 3 (1996).

113) *Id.* Without going into specific details of this complicated "comitology," under a type III variant (a), the Commission first submits to the committee a draft of the measure it will likely take. Council Decision of 13 Jul. 1987, O.J. L 197/33, 34 (1987). For example, in the present case a draft to grant the authorization of compliance is submitted. Next, the Committee delivers its opinion by qualified majority. *Id.*; see EC Treaty, *supra* note 4, art. 148(2), [1992] 1 C.M.L.R. at 680. If the measure envisaged corresponds to the opinion of the Committee, the Commission adopts the measure. Council Decision of Jul. 13, 1987, O.J. L 197/33, at 34. If the Commission's draft measure is not in accordance with the opinion of the Committee or if the Committee delivers no opinion, the Commission must submit to the Council a proposal relating to that measure. *Id.* If the Council has not acted by qualified majority within two weeks, the Commission adopts the proposed measures. *Id.*

114) Council Decision of Jul. 13, 1987, O.J. L 197/33, 34 (1987).

115) *Id.*

Article 6 represents the cornerstone of the whole Regulation. It contains the so-called "claw-back" clause which enables the persons referred to in Article 11 who are engaging in activities set out in Article 1 to recover any damages, including legal costs, caused to that person by the application of the Helms-Burton Act.¹¹⁶ The claimant may recover from the natural or legal person, a person acting on its behalf or as an intermediary, or any other entity causing the damages.¹¹⁷ It is important to note that this provision does not allow recovery from a company incorporated within the European Community in accordance with the laws of a Member State, if a U.S. based company of which the EU company is a subsidiary caused the damage.¹¹⁸ Indeed, under Community law such a subsidiary is an EU based company and legally to be distinguished from the U.S. based company. Article 6(3) creates a new special jurisdiction not foreseen in the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters¹¹⁹ insofar as it allows for judicial proceedings to be brought in the courts of any Member State where the defendant holds assets.¹²⁰ According to Article 6(4), without prejudice to other means available, the recovery may take the form of seizure and sale of defendant's assets within the European Community, including shares held in a legal person incorporated within the European Community.¹²¹ It follows from these provisions that, for example, any damage General Motors causes to an EU based company could not be recovered from Opel, Germany, as that company is a separate legal person incorporated in the European Union, but any shares held by General Motors in the Opel company could be seized if held within the European Community.¹²²

In order to make sure that the provisions of the Regulation will be effective, the Council believed it was indispensable to provide for sanctions in case of a breach of "any relevant provision" of the Regulation. While it would have been legally possible to specify such sanctions directly in the Regulation, Article 9 imposes on a Member State the task of determining those sanctions.¹²³ The

116) Council Regulation 2271/96, *supra* note 5, art. 6, O.J. L 309/1, at 2-3 (1996).

117) *Id.*

118) *Id.*

119) Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 388/1 (1982), amended by O.J. L 285/1 (1989).

120) Council Regulation 2271/96, *supra* note 5, art. 6, 3, O.J. L 309/1, at 3 (1996).

121) *Id.* art. 6, 1 4, O.J. L 309/1, at 3 (1996).

122) Huber, *supra* note 85, at 699, 706.

Regulation provides, however, that the sanctions must be effective, proportional, and dissuasive.¹²⁴

Because the Regulation does not cover all persons and areas of activities which the Commission had proposed and which Council and Member States wanted to protect, it alone would not have been an adequate response to the Helms-Burton Act and the D'Amato Act. Therefore, the Council, on the same day it adopted the Regulation, adopted a joint Action¹²⁵ based on Articles J.3 and K.3 of the TEU.¹²⁶ The Joint Action provides that each Member State shall take the measures it deems necessary to protect the interests of any person referred to in Article 11 of the Regulation that the Helms-Burton Act or the D'Amato Act affects, insofar as the Regulation does not protect these interests.¹²⁷ The preamble of that Joint Action states that it and the Regulation

"constitute together an integrated system involving the Community and the Member States each in accordance with its own powers."¹²⁸

In order to fully understand the construction of this integrated system and the legal relation between the Regulation and the Joint Action, it is necessary to proceed with a legal analysis of these two pieces of legislation paying particular attention to their legal basis under the EC Treaty and the TEU.

C. Legal Questions

The proposal which the Commission submitted to the Council on July 31, 1996¹²⁹ for the adoption of a "Helms-Burton blocking statute" was based on Articles 113 and 235 EC Treaty.¹³⁰ Article 1 of the proposal provided for protection against the extra-territorial effects of the Helms-Burton Act¹³¹ and the Commission intended the Regulation to be applicable to any natural or legal person resident or incorporated within the European Community.

The Commission suggested no Joint Action because it believed that the Regulation would cover all persons and activities which had to be protected.

123) *Id.* art. 9, O.J. L 309/1, at 3 (1996).

124) *Id.*

125) Joint Action, *supra* note 8, O.J. L 309/7, at 7 (1996).

126) *Id.*

127) *Id.* art. 1, O.J. L 309/7, at 7 (1996).

128) *Id.* pmb1, O.J. L 309/7, at 7 (1996).

129) O. J. C. 296/10 (1996).

130) *See* EC Treaty, *supra* note 4, art. 113, 235, [1992] 1 C.M.L.R. at 656, 716.

131) Helms-Burton Act, *supra* note 63, §§ 6021 et seq.

This proposal immediately raised legal problems within the Council. The main issues facing the Council were whether the Community was competent to adopt the measures proposed and, if yes, what scope could the Regulation have under Community law.¹³²

It was clear from the outset that the measures proposed went far beyond the common commercial policy. Measures adopted under Article 113 of the EC Treaty must deal specifically with international trade and the proposed measures did not.¹³³ The proposal was supposed to protect all persons the Helms-Burton Act affected and not only those engaging in international trade. It provided for remedies, especially in Articles 4,5, and 6, which are not available under Article 113. It would also have covered persons engaging in activities which fall under Member State competence.

The addition of Article 235¹³⁴ as a legal basis could not remedy this situation. According to well-established jurisprudence of the Court of Justice, Article 235 cannot serve as a basis for widening the scope of the EC Treaty.¹³⁵ Action may be based on Article 235 only where it falls within EC competence and where the EC Treaty does not provide any specific power for that purpose. Nor does Article 235 permit the use of all remedies indiscriminately. The European Community remains bound by the other rules the EC Treaty set, in particular, the principles of legality, subsidiarity, and proportionality.¹³⁶

The first question to be addressed is whether the EC Treaty provides any specific power elsewhere which would have allowed the adoption of the Commission's original proposal. One might, in this context, think of Article 228a of the EC Treaty.¹³⁷ That provision, however, had not been conceived to

132) Huber, *supra* note 85, at699, 707.

133) EC Treaty, *supra* note 4, art. 113 [1992] 1 C.M.L.R. at 656. Art. 113 deals with the common commercial policy of the European Community and asserts:
the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.
See Opinion 1/94 [1994] E.C.R. 1-5267, 5405, 57.

134) EC Treaty, *supra* note 4, art. 235 [1992] 1 C.M.L.R. at 716.

135) *See* Re the Accession of the Community to the European Human Rights Commission (Opinion 2/94), [1996] E.C.R. 1-1759, [1996] 2 C.M.L.R. 265.

136) Huber, *supra* note 85, at699, 708.

137) EC Treaty, *supra* note 4, art. 228a [1992] 1 C.M.L.R. at 715. Art.228a stipulates:
Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security

Article 59 (provision of services other than cross-border services which are covered by Article 113),¹⁴² Articles 73b and 73c (free movement of capital),¹⁴³ Article 73 (transport),¹⁴⁴ as well as Article 100a (approximation of legislation for the establishment or functioning of the internal market).¹⁴⁵

Under this approach, the legal basis would have been a whole range of articles together with Article 235. This approach was inconvenient because it would have had important procedural implications which would have delayed the adoption of the Regulation by months. Indeed, the inclusion of Articles 57, 59, and 100a would have meant that the co-decision procedure¹⁴⁶ with the EC Parliament would have had to be applied, while the inclusion of Article 75 would have required the cooperation procedure with the Parliament.¹⁴⁷ Furthermore, if all these articles had been included, the wording of the definition of the scope of the Regulation in Article 1 would have been extremely complicated and might have blurred the exact delineation between the Regulation and the Joint Action. A third option for the Council would have been to base the proposed Regulation on Article 228a of the EC Treaty.¹⁴⁸ This option had to be ruled out because of the legal grounds set out above.¹⁴⁹

In the end, the Council chose an intermediate solution. Rather than limit its action to the objectives covered by the exclusive EC competence under the common commercial policy,¹⁵⁰ the Council added the objective of Article 73c, concerning the free movement of capital between Member States and third countries. The preamble and especially Article 1, which defines the scope of protection of the Regulation, clearly illustrate the Council's choice. Indeed, Article 1 limits the application of the Regulation to persons "engaging in international trade and/or the movement of capital and related commercial

Verloren Van Themaat, Introduction to the Law of the European Communities 76 (Laurence Gormley ed., 2d ed. 1989).

142) *Id.* art. 59, [1992] 1 C.M.L.R. at 616.

143) *Id.* art. 73b, 73c, [1992] 1 C.M.L.R. at 621.

144) *Id.* art. 75, [1992] 1 C.M.L.P. at 623-24.

145) EC Treaty, *supra* note 4, art. 100a, [1992] 1 C.M.L.R. at 633-34.

146) *See id.* art. 189b, [1992] 1 C.M.L.R. at 694 (outlining co-decision procedure between Commission, Council, and Parliament).

147) *See id.* art. 189c, [1992] 1 C.M.L.R. at 696 (detailing cooperation procedure with Parliament).

148) *Id.* art. 228a, [1992] 1 C.M.L.R. at 715.

149) *See supra* notes 68-69 and accompanying text (discussing Art. 228a and legal grounds for not utilizing it).

150) EC Treaty, *supra* note 4, art. 113, [1992] 1 C.M.L.R. at 656.

activities between the Community and third countries.”¹⁵¹ The Member States, in accordance with the Joint Action, would have to protect any other person affected by the Helms-Burton Act or the D’Amato Act.¹⁵²

As neither Article 113 nor Article 73c provides for the remedies envisaged in Articles 4, 5, and 6 of the Regulation, the question became whether the addition of Article 235 as a legal basis would allow the European Community to adopt these remedies in an EC Act. Three conditions must be met in order to use Article 235 as a basis for specific action. The action must aim to achieve an EC objective, relate to the operation of the common market, and be necessary.¹⁵³

Regarding the Community objective, it follows clearly from the wording of the text, particularly Article 1 and the preambler recitals, that the Regulation does indeed aim to achieve Community objectives covered by Articles 113 and 73c and is confined to those objectives. The first recital expressly refers to the harmonious development of world trade and to the abolition of restrictions on international trade.¹⁵⁴ The second recital states that the Community endeavors to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries.¹⁵⁵ Article 1, for its part, provides protection for persons engaging in international trade or the movement of capital to and from third countries and related commercial activities.¹⁵⁶

The operation of the common market is clearly at issue in the areas the Regulation covers. If some nationals of Member States engaging in investments or trade connected with Cuba were to be subject to U.S. sanctions, whereas others investing in other countries were not, the rights conferred by the EC Treaty upon the first category of persons would be seriously impaired. The Member States would be required to take national measures individually in the areas the Regulation covers, thereby disturbing the operation of the common market.¹⁵⁷

Assessing whether action is necessary is partly a legal and partly a political

151) Council Regulation 2271/96, *supra* note 5, art. 1, O.J. L 309/1, at 2 (1996).

152) *uber, supra* note 85, at 699, 711.

153) EC Treaty, *supra* note 4, art. 235, [1992] 1 C.M.L.R. at 716.

154) *See* EC Treaty, *supra* note 4, art. 110, [1992] 1 C.M.L.R. at 655 (stating "Member-States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade...").

155) *See id.* art. 73c(2) [1992] 1 C.M.L.R. at 621 (stating EC Treaty objective as "endeavoring to achieve the objective of free movement of capital between Member-States and third countries ...").

156) Council Regulation 2271/96, *supra* note 4, art. 1, O.J. L 309/1, at 2 (1996).

157) Huber, *supra* note 85, at 699, 711.

matter. As to the legal aspects of the assessment, the action must be necessary in order to enable the common market to continue to operate properly and must comply with the principles of EC law, particularly subsidiarity and proportionality. These conditions have been met. In the absence of measures taken on a uniform basis by the European Community, if Member States were to adopt unilateral measures in the areas the Regulation covers, the common market would be disturbed. Moreover, action of a more limited scope or intensity than that provided for by the Regulation would not appear to ensure implementation of the EC Treaty, particularly ensuring that the common market and the common commercial policy continue to operate. The action envisaged, including Articles 4, 5, and 6, would seem to be the minimum needed to achieve those objectives and to react effectively to the challenge facing the EC common market and the operation of that market.¹⁵⁸

These remedies, the use of which is, of course, limited to the objective of the Regulation as determined by Articles 73c and 113 of the EC Treaty and by Article 1 of the Regulation itself, are remedies legally available to the European Community. The Council has already used similar remedies in a number of earlier cases involving Iraq,¹⁵⁹ Libya,¹⁶⁰ Haiti¹⁶¹ and the former Yugoslavia.¹⁶² Article 1 (2) (c) and (e) of these four regulations contains provisions that roughly match Articles 4 and 5 of the Regulation.¹⁶³ Article 6 of the Regulation does not appear word for word in the precedents, but is a logical consequence of Articles 4 and 5 and adds nothing in relation to the Community legislator's power to act. The four previous regulations were all adopted unanimously without any disagreement on EC competence to adopt them.¹⁶⁴

These precedents may not be disregarded on the grounds that the principal aim of the regulations was to prohibit trade and that the provisions which correspond to Articles 4 and 5 were simply a means to that end. As stated above,

158) *Id.* at 712.

159) Council Regulation 3541/92, O.J. L 361/1 (1992).

160) Council Regulation 3275/93, O.J. L 295/4 (1993).

161) Council Regulation 1264/94, O.J. L 139/4 (1994).

162) Council Regulation 1733/94, O.J. L 182/1 (1994).

163) Compare Council Regulation 2271/96, *supra* note 5, art. 4, 5, O.J. L 309/1, at 2 (1996) with Council Regulation 3541/92, *supra* note 86, art. 1(2)(c), (e), O.J. L 361/1, at 1-2 (1992); Council Regulation 3275/93, note 87, art. 1 (2)(c), (e), O.J. L 295/4, at 4 (1993); Council Regulation 1264/94, *supra* note 88, art. 1(2)(c), (e), O.J. L 139/4, at 4 (1994); Council Regulation 1733/94, *supra* note 89, art. 1(2)(c), (e), O.J. L 182/1, at 1(1994).

164) Huber, *supra* note 85, at 699, 713.

the objective of the measures provided for in the Regulation is a Community objective within the meaning of Article 235, in that it directly concerns the operation of the common market in the areas covered by Articles 73c and 113 of the EC Treaty. Therefore, the question of the subsidiary nature of these measures does not arise, because they are the objective of the Regulation. By their nature, those measures also constituted one of the principal objectives of the above precedents. Likewise, it is the operation of the common market which is at issue now. The objective is no doubt even clearer in legal terms than at the time of these precedents.¹⁶⁵

That the Council further adopted the previous regulations following U.N. Security Council resolutions obviously does not affect this legal analysis. The provisions of the EC Treaty determine EC power to act and external factors such as the existence of a U.N. Security Council resolution do not condition this power. A U.N. decision could not have the legal effect of modifying the EC Treaty to give the European Community competence that the EC Treaty does not confer upon it. EC competence, therefore, already existed legally, independent of whether the United Nations adopted a resolution. Finally, the legal argument that it would be possible to take action on the basis of Title VI of the TEU and that this action would rule out Community actions is patently quite erroneous. Article M of the TEU clearly establishes that Titles V and VI of the TEU cannot "affect" Community competence, much less call it into question.¹⁶⁶

That leaves us with the question of where the exact borderline has to be drawn between the Regulation and the Joint Action which Member States must implement. This question is mainly relevant as concerns the provision of services. In its Opinion 1/94,¹⁶⁷ the Court of Justice of the European Communities ruled that the cross-border provision of services is covered by the common commercial policy and is, thus, an area of exclusive EC competence of Article 113.¹⁶⁸ Therefore, the Regulation covers persons engaging in this kind of activity in the same way as persons engaging in trade of goods. The Regulation covers other modes of the provision of services only to the extent that they can be considered as "related commercial activities" in relation to international trade or the movement of capital as set out in Article 1 of the Regulation. In order to understand what "related commercial activities" means,

165) *Id.*

166) Huber, *supra* note 85, at 699, 713.

167) Opinion 1/94 [1994] E.C.R. at 1-5267, 5401, 44 [1995] 1 C.M.L.R. 205, 316.

168) *Id.* at 1-5401, 44, [1995] 1 C.M.L.R. at 316.

one has to take into account that the legal basis of the Regulation, namely Articles 73c and 113, limit the scope of the Regulation to the objectives of those two articles.¹⁶⁹ Thus, the essential objective of the Regulation is to protect persons engaging in international trade or in the movement of capital.¹⁷⁰

The related commercial activities which Article 1 of the Regulation also covers may, therefore, only be activities which are linked inextricably to international trade or the movement of capital and which, therefore, may be regarded as ancillary in respect to the activities covered by Articles 73c and 113 of the EC Treaty. In other terms, the provision of services under modes 2, 3, and 4 of Article 1 of the General Agreement on Trade in Services¹⁷¹ ("GATS") normally would be covered only by the Regulation if they were closely linked to an investment or other movement of capital or to an activity in international trade. On the other hand, the Regulation would not protect persons engaging in other activities which may not be linked to an activity that Articles 73c or 113 of the EC Treaty cover.¹⁷² This would be the case, for example, where there is purely a provision of services through the presence of the service provider in Cuba, including as a consultant, architect, or manager of a hotel. In the same way, the Regulation only covers transport services to the extent that they are linked to international trade or to a movement of capital.¹⁷³

Member States, in accordance with the Joint Action, would have to protect any other persons the Helms-Burton Act or the D'Amato Act affected. The Joint Action does not specify which measures the Member States may or must take to protect these persons. They may clearly adopt measures which are similar to those provided for in the Regulation. They are not limited, however, to such measures. Each Member State has to take the measures it deems necessary. This

169) The objectives of these articles are goods and cross-border provision of services (art. 113) as well as the free movement of capital between Member States and third countries (art. 73c). *See* EC Treaty, *supra* note 4, art. 73c, 113, [1992] 1 C.M.L.R. at 621, 656. *See also supra* notes 80-88 and accompanying text (stating that Art. 235 has been added to Regulation in order to cover remedies provided for in Articles 4, 5, and 6 of the Regulation and not falling within the limits of Articles 73c and 113).

170) Huber, *supra* note 85, at 699, 714.

171) World Trade Organization, General Agreement on Trade in Services, art. 1, 33 I.L.M. 44, 48 (1994).

172) Unless a Community competence can be based on the principles resulting from the "AETR" jurisprudence, *See EC Commission v. EC Council*, Case 22/70, [1971] E.C.R. 263, [1991] C.M.L.R. 335 [hereinafter AETR Case].

173) Huber, *supra* note 85, at 699, 715.

leaves a large margin of appreciation to each Member State. Because of the wide range of measures available to the Member States under the Joint Action, it was necessary to base it not only on Article J.3 of the TEU¹⁷⁴ but also on Article K3(2) (b).¹⁷⁵ Indeed, some Member States might want to take protective measures which consist of rules governing the crossing by persons of its external borders. Article K1 (2) covers such measures¹⁷⁶ and, therefore, the Joint Action had to be based on Article K.3 as well. Furthermore, if Member States want to adopt measures outside the scope of the Regulation which correspond to Article 6 of the Regulation, such measures would be subject to judicial cooperation in civil matters as covered by Article K.1 point 6.¹⁷⁷ For these reasons, the Council has correctly based the Joint Action on Articles J.3 and K3 of the TEU.¹⁷⁸

D. Update of the Annex to the Blocking Regulation

On 6 June, 2018, the European Commission adopted its Delegated Regulation (EU) 2018/1100 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.¹⁷⁹ This was the legal reaction since on 8 May, 2018 the United States announced

174) See TEU, *supra* note 2, art. J.3, O.J. C 224/1 at 94-95, [1992] 1 C.M.L.R. at 730-31 (laying out EC "procedure for adopting joint action in matters covered by the foreign and security policy...").

175) See *id.* art. K3(2)(b), O.J. C 224/1 at 98, [1992] 1 C.M.L.R. at 736 (stating that Council may "adopt joint actions insofar as the objectives of the Union can be attained better by joint action than by Member States acting individually on account of the scale or effects of the action envisaged ...").

176) See *id.* art. K.1(2), O.J. C 224/1, at 97, [1992] 1 C.M.L.R. at 735 (maintaining that "rules governing the crossing by persons of the external borders of the Member States" is area of common interest and as such, subject to cooperation).

177) See *id.* art. KI, O.J. C 224/1 at 97, [1992] 1 C.M.L.R. at 735 (stating that "[f]or the purposes of achieving the objectives of the Union," Member States shall consider judicial cooperation as matter of common interest).

178) Huber, *supra* note 85, at 699, 715.

179) Commission Delegated Regulation (EU) 2018/1100 of Jun. 6, 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C/2018/3572, O.J. L. 199/I, Aug. 7, 2018, at 1-6, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0001.01.ENG&toc=OJ:L:2018:199:TOC>.

that they will no longer waive their national restrictive measures relating to Iran. Since some of those measures have extra-territorial application and cause adverse effects on the interests of the EU and the interests of natural and legal persons exercising rights under the Treaty on the Functioning of the European Union, the Annex to the 1996 Regulation was amended to include those current new restrictive measures.

At the same time a template¹⁸⁰ was made available for EU operators who consider that non-compliance with relevant extra-territorial legislation within the scope of the Blocking Statute would seriously damage their interests or the interests of the Union, in order to help them prepare and submit an application for an authorisation. The possibility to apply for an authorisation is foreseen as an exception in Regulation (EC) No 2271/96, which does not create an individual right for the applicant to obtain an authorisation. The Commission will assess each application and provide the applicant with a succinct motivated decision. Applications will be assessed on the basis of agreed criteria,¹⁸¹ also adopted on 7 August, 2018.

In Addition, to help EU operators with the implementation of the updated Blocking Statute the EU Commission also published a Guidance Note¹⁸² to facilitate understanding of the relevant legal acts.

1. The Main Provisions of the Blocking Regulation

- Regulation (EC) 2271/96 only covers the extraterritorial application of the laws set out in its annex (see (b) U.S. measures targeted by the Blocking Regulation).
- The regulation applies only to 'persons' listed in Article 11, including EU

180) European Commission Service for Foreign Policy Instruments (FPI), *Updated Blocking Statute in Support of Iran Nuclear Deal*. https://ec.europa.eu/fpi/what-we-do/updated-blocking-statute-support-iran-nuclear-deal_en.

181) Commission Implementing Regulation (EU) 2018/1101 of Aug. 3, 2018 laying down the criteria for the application of the second paragraph of Art. 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C/2018/5247, O.J. L. 199I, 7.8.2018, at 7-10, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0007.01.ENG&toc=OJ:L:2018:199I:TOC>.

182) Guidance Note - Questions and Answers: Adoption of Update of the Blocking Statute C/2018/5344, O.J. C. 277I, 7.8.2018, at 4-10, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CL.2018.277.01.0004.01.ENG&toc=OJ:C:2018:277I:TOC>.

nationals (i.e. nationals of one of the EU Member States), EU residents (meaning legally established in the Community for a period of at least six months within the 12-month period immediately prior to a date relevant to the application of the regulation) and companies incorporated in one of the EU Member States. The regulation also applies to any person 'in the territorial waters or air space' of the EU and in any 'aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity'.

- The regulation only covers such persons when they engage in 'international trade and/or movement of capital and related commercial activities between the EU and third countries' (Article 1).
- Persons whose economic and/or financial interests are directly or indirectly affected by the U.S. sanctions set out in the annex are under an obligation to inform the European Commission within 30 days of the date on which they became aware that they are so affected (Article 2).
- Judgments issued by U.S. courts applying the U.S. laws set out in the regulation's annex are not enforceable before the courts of the EU (Article 4).
- Moreover, a person covered by the regulation is prohibited from complying 'whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission', with any requirement or prohibition based on or resulting from the U.S. laws listed in the annex (Article 5).
- The regulation includes a mechanism that allows companies to ask the European Commission for an exemption from this prohibition if they can demonstrate that compliance with the regulation would 'seriously damage their interests' or the interests of the EU (Article 5).
- Article 9 provides that each Member State is to decide what sanctions are to be imposed for breach of the regulation. The regulation merely requires that sanctions be 'effective, proportional and dissuasive'.
- At the same time, Article 6 enables EU persons covered by the U.S. sanctions 'to recover any damages, including legal costs, caused to that [EU] person by the application of the sanctions'. Such recovery may be obtained 'from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary'. Recovery could take the form of 'seizure and sale of assets held by those persons or entities'.

2. U.S. Measures Targeted by the Updated Blocking Regulation

The revised annex to the Blocking Regulation lists the U.S. legal provisions that EU persons or entities will not be allowed to comply with. On Iran, these include:

- The Iran Sanctions Act of 1996, which focuses on significantly curtailing foreign investments in Iran's petroleum industry, or delivery of goods and services to that industry.
- The Iran Freedom and Counter-Proliferation Act of 2012, focuses on significantly reducing foreign support to the ports, energy, shipping or ship building sectors in Iran; as well as prohibiting petroleum purchases from Iran and related financial transactions, transactions in natural gas to and from Iran, trade in precious metals, and providing insurance, reinsurance and underwriting services to Iranian entities.
- The National Defense Authorization Act for Fiscal Year 2012 prohibits significant financial transactions with the central bank of Iran or other designated Iranian financial institutions.
- The Iran Threat Reduction and Syria Human Rights Act of 2012 also prohibits underwriting services, insurance and reinsurance to certain Iranian persons, and makes it illegal to facilitate the issuance of Iranian sovereign debt. It also makes it illegal to engage in any transactions with the government of Iran.
- The Iranian Transaction and Sanctions Regulation, which prohibit the re-export to Iran of any goods, technology and services that have been exported from the U.S. and are subject to export control rules in the U.S.

In force, the updated Blocking Regulation makes it illegal for EU companies or banks to comply with these U.S. sanctions. Any natural or legal EU person that violates this prohibition can be sanctioned by the authority of the Member State with jurisdiction over the person in question.

However, in order to enforce this provision, the EU Commission has to establish, for example, that a company that is no longer conducting business with Iran is acting pursuant to U.S. legislation, rather than simply implementing a commercial decision. As the Commission has admitted in the past, 'It is not usually possible to establish that the [company's] decision is a direct result of the U.S. legislation rather than commercial considerations.'

E. Past Use of the Blocking Regulation

There are very few instances of the Blocking Regulation being used in practice. There is no jurisprudence at the EU level. In 2007, Austria brought charges for breach of Regulation (EC) 2271/96 against BAWAG, at the time the fifth-largest Austrian bank.¹⁸³ The charges were based on the Austrian Federal Law on the Punishment of Offences against the Provisions of EC Regulation (EC) No 2271/96. BAWAG had closed the accounts of 100 Cuban nationals. Having Cuban clients would have prevented the acquisition of BAWAG by a U.S. investor, Cerberus Capital, at a time when U.S. Cuban sanctions made it illegal for U.S. companies to deal with Cuba. Following a public uproar, and after U.S. authorities agreed to grant BAWAG an exemption,¹⁸⁴ BAWAG reinstated the accounts held by Cuban nationals. Cerberus Capital's acquisition of BAWAG went ahead as planned and the investigation against BAWAG for breach of Regulation (EC) 2271/96 was discontinued.¹⁸⁵

The Society for Worldwide Interbank Financial Telecommunication (SWIFT) is a Belgian company that provides an international system for facilitating cross-border payments. The company operates a huge secure messaging service for 11,000 financial institutions, transmitting payment requests across its electronic platform, and keeping a record of these transactions on servers in Europe and the U.S. In 2012, SWIFT had to disconnect Iranian banks that were subject to sanctions, but Iranian banks were reconnected when the JCPOA came into effect in 2016. To avoid renewed U.S. extraterritorial sanctions on Iran, SWIFT had to cut off specific Iranian banks from its network, otherwise it would have faced U.S. countermeasures. These could include asset freezes and U.S. travel bans for board members, as well as restrictions on banks' ability to do business in the U.S. In late 2018, the system again disconnected the Iranian banks that were "relisted" for U.S. sanctions as of November 5, 2018.¹⁸⁶

183) *Austria Charges Bank after Cuban Accounts Cancelled*, Reuters (Apr. 27, 2007), <https://www.reuters.com/article/austria-bawag/austria-charges-bank-after-cuban-accounts-cancelled-idUSL2711446820070427>.

184) *BAWAG Restores Cuban Accounts after Public Uproar*, Reuters (May, 2007), <https://www.reuters.com/article/austria-bawag-cuba/bawag-restores-cuban-accounts-after-public-uproar-idUSL0450488520070504>.

185) *Foreign Ministry Ceases Investigations against BAWAG Bank*, Europe, Integration and Foreign Affairs, Federal Ministry Republic of Austria (Jun. 21, 2007), <https://www.bmeia.gv.at/en/the-ministry/press/announcements/2007/foreign-ministry-ceases-investigations-against-bawag-bank>.

The Blocking Regulation will allow the company to seek compensation for U.S. penalties through EU courts. At the same time, at the moment SWIFT disconnected Iranian banks to avoid U.S. penalties, it violated the EU Blocking Regulation. Keeping Iranian banks in SWIFT is deemed essential to encouraging SMEs to conduct business in Iran, but to do so, U.S. authorities will have to grant the company an exemption from U.S. sanctions in future.¹⁸⁷

F. Mitigating the Effects of U.S. Sanctions on EU Entities

Commentators have raised questions about the effectiveness of the Blocking Regulation as a mechanism to offset the effects of re-instated U.S. sanctions on Iran, at least from an economic or commercial point of view, citing the following reasons:

- Companies engaging in business with Iran would have to stop using the dollar, used in about 90 % of global transactions. They would also have to stop using data that goes through the U.S.
- While the Blocking Regulation might shield a company from fines imposed by the U.S. – by compensating EU companies for whatever costs they incurred as a result of U.S. sanctions – it cannot shield the company from the practical effects of sanctions imposed on it. These may include asset seizures and even criminal charges in the U.S.; a prohibition on any credit or payments between the entity and any U.S. financial institution; restriction on imports from the sanctioned entity; a ban on a U.S. person from investing in or purchasing significant amounts of equity or debt instruments from a sanctioned person; and exclusion from the U.S. of corporate officers or controlling shareholders of a sanctioned firm.
- The links between European multinationals and the U.S. financial system are much deeper today than they were in 1996.
- The Blocking Regulation can do nothing to stop financial institutions that engage in transactions with Iran from losing access to the U.S. financial system. By way of example, a foreign bank that processes payments through Iran's central bank may in future be prevented from opening an

186) *Iran Sanctions*, Congressional Research Service, at 4 (Updated Mar. 25, 2019), <https://fas.org/sgp/crs/mideast/RS20871.pdf>.

187) Beatrix Immenkamp, *Updating the Blocking Regulation. The EU's Answer to US Extraterritorial Sanctions*, Briefing by the EUR. PARL. DOC. PE 623.535 (Jun. 2018) at 7, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI\(2018\)623535_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf).

account in the U.S., or find that strict limitations are imposed on existing accounts. This provision may even be applied to foreign central banks, if the transactions concern Iranian oil purchases.

- Many EU companies would be faced with the dilemma of having to choose between doing business in the U.S. or in Iran; given the size and importance of the U.S. market, many will choose the U.S. Medium-sized EU companies with little or no U.S. exposure could continue to conduct business in Iran in non-dollar currencies. However, multinationals with important economic interests in the U.S. may simply prefer to pull out of Iran.
- The Blocking Regulation may actually harm EU companies, which will face the choice of incurring fines in the U.S. (for non-compliance with U.S. sanctions) or in the EU (for complying with U.S. law).
- Compared with 1996, when the idea of a 'blocking regulation' was conceived, U.S. sanctions targeting financial transactions have become more robust and costly for EU firms. European Commission Vice-President Valdis Dombrovskis, Commissioner responsible for financial services, has questioned the effectiveness of a revised Blocking Regulation, especially for banks, given the international nature of the banking system and in particular the exposure of large systemic banks to the U.S. financial system and U.S. dollar transactions.

V. The Blocking Regulation as Bargaining Chip

The legal provisions of the regulation enable companies that violate U.S. extraterritorial sanctions and suffer damages as a result of the application of U.S. sanctions, to recover such damages, including legal costs, through EU courts. Such recovery may be obtained 'from the natural or legal person causing the damages' or from any person acting on their behalf. Recovery could take the form of the 'seizure and sale of assets held by the U.S. person, entities, or persons, including shares held in a company incorporated in the EU.' The provision provides protection for companies and banks that find themselves – perhaps unwittingly – subject to U.S. sanctions.

Moreover, the adoption of the revised Blocking Regulation sends a political message to the U.S. government. In 1996, the Blocking Regulation was introduced as part of a broader European campaign, which also included a dispute process against the U.S. at the World Trade Organization (WTO). Taken

together, these actions gave the EU greater clout in negotiations with the U.S. administration. In 1998, the two sides reached a political solution under which U.S. authorities did not actively enforce extraterritorial sanctions on EU companies still doing business with Cuba.

The EU is hoping for exemptions from U.S. secondary sanctions for EU companies. In a letter sent on 4 June, 2018, France, Germany, the UK and the High Representative of the EU for Foreign Affairs and Security Policy/Vice-President of the Commission demanded that the U.S. government commit to not enforcing U.S. secondary sanctions on EU banks and companies engaging with Iran, especially in key sectors such as energy, automotive, civil aviation and infrastructure sectors.

VI. Political Agreement with the U.S. on Sanctions in 1998

In 1996, the U.S. adopted the Cuban Liberty and Democratic Sanctions (Libertad) Act, known as the Helms-Burton Act, which included extraterritorial sanctions against Cuba. Considering that the U.S. legislation was in conflict with international law and harming EU rights and interests in the trade and investment sectors, the EU decided to seek consultations with the U.S. in the World Trade Organization (WTO). Amid threats of an escalating trade dispute, in April 1997, the EU and the U.S. reached an accommodation, in the form of a 'first understanding', covering sanctions against Cuba as well as Iran and Libya. The EU subsequently agreed to suspend the WTO case, on condition that the U.S. commit to working towards neutralising the effects of the Helms-Burton Act and the Iran-Libya Sanctions Act (ILSA) on EU companies and individuals. In May 1997, Parliament adopted a resolution on the Helms-Burton Act and the ILSA; in September 1997, Parliament adopted a resolution condemning the Helms-Burton Act. In both resolutions, Parliament urged the Commission to pursue its case at the WTO against U.S. extraterritorial policies. In April 1998, the European Commission announced that it would allow its WTO case against the Helms-Burton Act to lapse, to help bilateral negotiations with the U.S., but that it would revive the appointed dispute panel if the U.S. took actions under its sanctions law against any EU company. At a bilateral EU-U.S. summit in May 1998, a package of measures was agreed, that in essence would freeze the application of the controversial sanction laws with regard to EU investments in Cuba, Libya and Iran. The agreement confirmed the EU's stand against the use

of secondary boycotts and legislation with extraterritorial effect.

VII. Special Purpose Vehicle for Trade with Iran

Following the May 2018 announcement of the United States' withdrawal from the 2015 Iran nuclear deal and of the re-imposition of U.S. sanctions on Iran, the EU is continuing to endorse implementation of the agreement, providing Iran fulfils its nuclear-related obligations. The EU is also committed to ensuring that EU-Iran trade and economic relations continue to benefit from the positive impact of lifting the sanctions. The EU has already introduced measures to alleviate the effects of U.S. sanctions on European firms, and has announced the creation of a new mechanism, a special purpose vehicle (SPV), to facilitate financial transactions with Iran.¹⁸⁸

In the joint statement issued on the occasion of the 24 September, 2018 ministerial meeting of the remaining parties to the JCPOA, 'the participants welcomed practical proposals to maintain and develop payment channels, notably the initiative to establish a special purpose vehicle, to facilitate payments related to Iran's exports (including oil) and imports'. As the EU High Representative for Foreign and Security Policy explained, this would mean in practical terms that EU Member States would create a legal entity to facilitate financial transactions with Iran, to allow European companies to continue trade with this country. The mechanism could also be made available to other global partners. The High Representative also announced that EU experts would conduct technical discussions to set out the operational details. Following the statement, the U.S. Secretary of State expressed disappointment concerning the EU's decision to create a mechanism for financial transactions with Iran.¹⁸⁹

The SPV would be designed to handle transactions between companies and their Iranian trade partners without being transparent to U.S. authorities, and thus not be subject to sanctions. The vehicle would operate as a barter system allowing Iran to supply, for instance, oil and, in return, to purchase the goods or technology it needs, using a credit account. To carry out payment processing between trade partners, so as to balance out different amounts and varying

188) Krisztina Binder, *Special Purpose Vehicle for Trade with Iran*, European Parliamentary Research Service, Members' Research Service PE 630.273, at 1 (Nov. 2018), [http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630273/EPRS_ATA\(2018\)630273_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630273/EPRS_ATA(2018)630273_EN.pdf).

189) *Id.* at 2.

payment periods, the mechanism may require a banking licence. The SPV would be able to provide export loans to facilitate significant economic projects. The new financial instrument could also facilitate humanitarian trade with Iran, including sales of pharmaceuticals and food products. Although these transactions are not covered by U.S. sanctions, concerns have been raised about the negative effect of U.S. sanctions on humanitarian transfers, as Western banks may suspend these transactions out of fear of sanctions.

On 2 November, 2018, the EU High Representative, together with the French, German and UK ministers of foreign affairs and finance, published a joint statement mentioning the intensified efforts of recent weeks to establish the SPV. During a 2 November, 2018 briefing on Iran sanctions, the U.S. Secretary of the Treasury expressed doubts as to whether any significant transaction would go through the prospective SPV, adding that 'if there are transactions that go through there that have the intent of evading our sanctions, we will aggressively pursue our remedies.' Experts see the SPV rather as an opportunity for smaller enterprises that have no U.S. nexus to continue trading with Iran. Analysts have also highlighted that the SPV might lead to the creation of an alternative to the dollar-dominated payment architecture extending beyond the case of Iran. It was pointed out that Jean-Claude Juncker, President of the European Commission, in his 2018 State of the Union speech, stressed the need for the EU to reinforce the international role of the euro, the second most used currency worldwide. Moreover, China and Russia have already considered challenging the U.S. dollar's dominance in international transactions, but this could be envisaged only with the participation of the EU.¹⁹⁰

On 31 January, 2019, three European countries — France, Germany and UK (named as E3) have launched this special payment vehicle called INSTEX or Instrument in Support of Trade Exchanges. The E3 foreign ministers declared in a joint statement¹⁹¹ that initially, the INSTEX will support “pharmaceutical, medical devices and agri-food goods.”

To begin with, the Euro-denominated barter arrangement will work for limited transactions. Later, it could be extended to energy transactions and also to third countries. In a statement,¹⁹² the EU High Representative for Foreign

190) *Id.*

191) Government of United Kingdom, *New Mechanism to Facilitate Trade with Iran: Joint Statement*, Foreign & Commonwealth Office (Jan.31,2019), <https://www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran>.

192) European Union, *Statement by High Representative/Vice-President Federica Mogherini on*

Affairs & Security Policy Federica Mogherini asserted that the mechanism “will provide economic operators with the necessary framework to pursue legitimate trade with Iran.”

The INSTEX is registered in Paris with an initial capital of €3,000. Per Fischer, a German citizen and former director of Commerzbank will head this instrument. The Board will be chaired by the UK with members from E3 countries. Although European companies were allowed to trade with Iran on non-sanctioned goods, most banks having exposure in the U.S. avoided Iranian payments.

This new non-dollar channel will help EU and possibly companies from other countries to facilitate their Iranian trade. At the moment, the relevance is limited, as payments will be made only between importers and exporters of the same European country. This will not result in direct monetary flows towards Iran. To make it fully operational, a similar mechanism needs to be established in Iran as well.¹⁹³

More than immediate economic relevance, this is clearly a political and strategic move by the EU. This will help smaller European companies with their Iranian trade as they were finding it difficult to make financial transactions. Large companies with significant U.S. exposure may still avoid transactions with Iran. The real evidence of European commitment will be tested if the arrangement is extended to sanctioned goods and also to countries outside the EU, particularly having tensed relations with the U.S.¹⁹⁴

VIII. Conclusion

Still, apparently seeking to avoid risk to their position in the large U.S. market, more than 100 companies, mostly in Europe, have announced they are leaving Iran. Press reports indicate that European exports to Iran have fallen as well, including German exports down about 4% in the first eight months of

the Creation of INSTEX, Instrument for Supporting Trade Exchanges, European External Action Service (Jan.31,2019),https://eeas.europa.eu/delegations/iran/57475/statement-high-representativevice-president-federica-mogherini-creation-instex-instrument_en.

193) Gulshan Sachdeva, *Can INSTEX Unite India, China and EU to Bypass US Sanctions on Iran?*, Money Control (Feb. 5, 2019), <https://www.moneycontrol.com/news/trends/current-affairs-trends/opinion-can-instex-unite-india-china-and-eu-to-bypass-us-sanctions-on-iran-3481411.html>.

194) *Id.*

2018. And, as noted in the table above, only two EU countries bought any Iranian oil in October 2018 and their purchases were lower than earlier in the year, suggesting that European refiners are trying to avoid any risk of U.S. sanctions. Italy and Greece were given SRE sanctions exemptions on November 5, 2018.¹⁹⁵

Some of the post-2016 European investments in/transactions with Iran that are being unwound include the following:

- Renault and Citroen of France have suspended their post-JCPOA \$1 billion investments in a joint venture (with two Iranian firms) to boost Renault's car production capacity in Iran to 350,000 cars per year.¹⁹⁶
- Scania of Sweden established a factory in Iran to supply the country with 1,350 buses, but it is not clear what its status is in light of reimposed U.S. sanctions.¹⁹⁷
- German industrial giant Siemens signed an agreement in March 2016 with Iranian firm Mapna to transfer technology to produce gas turbines in Iran, and other contracts to upgrade Iran's railways. Siemens said subsequent to the U.S. JCPOA exit that it would pursue no new Iranian business. Italy's Danieli industrial conglomerate and Gruppo Ventura also exited the Iran market.¹⁹⁸
- On August 6, 2018, Daimler (manufacturer of Mercedes Benz autos) announced it was suspending its activities in Iran "until further notice." In September 2018, Volkswagen said it would wind down its Iran-related business.¹⁹⁹
- In July 2018, at U.S. request, and even though U.S. financial sanctions do not resume effect until November 4, 2018, Germany's central bank (Deutsche Bundesbank) introduced a rule change that will block Iran's planned withdrawal of \$400 million in cash from the Europäische-Iranische Handelsbank (EIH). EIH is reportedly at least partly owned by Iran and has often partnered on transactions with the Bundesbank. (EIH was "de-listed" from sanctions by the United States to implement the JCPOA, but will be

195) *Iran Sanctions*, Congressional Research Service, CRS REPORT, at 46 (Updated Mar. 25, 2019) <https://fas.org/sgp/crs/mideast/RS20871.pdf>.

196) *Id.*

197) *Id.*

198) *Id.*

199) *Id.*

relisted as of November 5, 2018.)²⁰⁰

- Norway's Saga Energy (Norway is not in the EU) signed a \$3 billion deal to build solar power plants in Iran.²⁰¹
- Italy's FS signed a \$1.4 billion agreement to build a high-speed railway between Qom and Arak.²⁰²
- On energy issues: Total SA has said it would exit a nearly \$5 billion energy investment in South Pars gas field, and it is likely to transfer its stake to its joint venture partner, China National Petroleum Corporation (CNPC). As noted above, European countries have reduced their purchases of Iranian oil as of August 2018 as several European oil refiners have announced cuts in purchases of Iranian oil, including ENI and Saras SpA of Italy; Royal Dutch Shell of the Netherlands; Repsol and Cepsa of Spain; and Hellenic Petroleum of Greece. OMV of Austria announced it would halt energy development work.²⁰³
- Among banks, the following have announced since the U.S. JCPOA exit that they would cease transactions with Iran: DZ Bank and Allianz of Germany; Oberbank of Austria; and Banque Wormser Freres of France. Hapag-Lloyd of Germany and Denmark's AP Moller-Maersk have announced they would cease shipping services to Iran.²⁰⁴
- Germany telecommunications firm Deutsche Telekom announced in September 2018 that it would end its business in Iran.²⁰⁵
- Although air service is not subject to U.S. sanctions per se, Air France and British Air announced in September 2018 that they would cease service to Iran due to lack of demand.²⁰⁶
- One project, the Rhum gas field in the North Sea that is partly owned by Iranian Oil Company (a subsidiary of NIOC), has been able to continue operating. In part because the field supplies about 5% of Britain's demand

200) Benjamin Weinthal, *Germany's Central Bank Imposes Rule to Stop Cash Delivery to Tehran*, Jerusalem Post (Aug. 6, 2018), <https://www.jpost.com/Israel-News/Germanys-central-bank-imposes-rule-to-stop-cash-delivery-to-Tehran-563975>.

201) *Iran Sanctions*, Congressional Research Service, at 47(Updated Jan. 4, 2019), <https://fas.org/sgp/crs/mideast/RS20871.pdf>.

202) *Id.*

203) *Id.*

204) *Iran Sanctions*, Congressional Research Service, CRS Report, at 47(Updated Mar. 25, 2019). <https://fas.org/sgp/crs/mideast/RS20871.pdf>.

205) *Id.*

206) *Id.*

for natural gas, in October 2018, the Trump Administration renewed the license of BP and Serica Energy to continue providing goods and services to the field, despite the Iranian involvement in the project.²⁰⁷

More than immediate economic relevance, the updated Blocking Regulation is clearly a political and strategic move by the EU. In addition, INSTEXT will help smaller European companies with their Iranian trade as they were finding it difficult to make financial transactions. Large companies with significant U.S. exposure may still avoid transactions with Iran. The real evidence of European commitment will be tested if the arrangement is extended to sanctioned goods and also to countries outside the EU, particularly having tensed relations with the U.S.

Apart from China, India, Japan, Taiwan, South Korea, and Turkey, two EU countries viz. Italy and Greece also received limited oil import waivers until April 2019. Despite these waivers, exports of Iranian oil were down to about 1 million barrels per day (bpd) in November and December 2018. Just few months back these exports were about 2.5 million bpd. Apart from hesitation by large private companies from these eight countries, financial transactions with Iran have been a major issue. None of these problems are going to be resolved by INSTEX.²⁰⁸

The successful implementation of INSTEX and extension to other countries could benefit Iran both financially as well as politically. Compared to bilateral arrangements, the Euro-denominated instrument will be sustainable and more beneficial to Tehran. The EU has the resources and institutional capacity to lead an alternative mechanism. However, the real question is whether they will have political will to counter US's sanctions regime in the long run. The Iran nuclear deal had provided the EU a good opportunity to project itself as a significant global player. At the moment, the relevance of INSTEX seems limited and symbolic. Iran has welcomed it but called it a 'long overdue first step.' However, if the mechanism is extended to energy deals and third countries, it will make Europe a credible actor in global economic and legal affairs.

However, the amended EU Blocking Regulation as well as the creation of a

207) RonBouso, *U.S. Grants BP, Serica License to Run Iran-Owned North Sea Field*, Reuters (Oct. 9, 2018), <https://www.reuters.com/article/us-bp-serica-rhum/us-grants-bp-serica-license-to-run-iran-owned-north-sea-field-idUSKCN1MJ0JN>.

208) Gulshan Sachdeva, *Can INSTEX Unite India, China and EU to Bypass US Sanctions on Iran?*, Money Control (Feb. 5, 2019), <https://www.moneycontrol.com/news/trends/current-affairs-trends/opinion-can-instex-unite-india-china-and-eu-to-bypass-us-sanctions-on-iran-3481411.html>.

Special Purpose Vehicle do not solve the fundamental question of extraterritorial sanctions in general. The current EU legislation is just an example for how to handle divergent positions in international law and how to minimize the effects of extraterritorial sanctions and consequences for its own citizens and companies.

Bibliography

Books

- Andreas Lowenfel, *International Litigation and the Quest for Reasonableness* (Clarendon Press, 1996).
- Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* (1988).
- Eric Stein et al., *European Community Law & Institutions in Perspective* (1967).
- Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy* (1985).
- PJ. G. Kapteyn & P. Verloren Van Themaat, *Introduction to the Law of the European Communities* (Laurence Gormley ed., 2d ed. 1989).

Journals and Periodic Materials

- Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, (1996).
- Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. (2013).
- Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J. WORLD TRADE (1997).
- Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. (2008).
- David Keohane and Najmeh Bozorgmehr, *Threat of U.S. Sanctions Pushes France's Total out of Iran*, Financial Times (Aug. 20, 2018), <https://www.ft.com/content/6baba178-a459-11e8-926a-7342fe5e173f>.
- Developments in the Law – Extraterritoriality*, 24 Harv. L. Rev. (Mar. 2011).
- Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. (1999).
- Jacob Gronholt-Pedersen, *Denmark's Torm Says Stops Taking Orders in Iran Due to U.S. Sanctions*, Reuters (May 15, 2018), <https://www.reuters.com/article/us-iran-nuclear-torm-a/denmarks-torm-says-stops-taking-orders-in-iran-due-to-us-sanctions-idUSKCN1IG0W3>.
- Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L.

Cases

EC Commission v. EC Council, Case 22/70, [1971] E.C.R. 263, [1991] C.M.L.R. 335.

Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. (2010).

Internet Sources

Beatrix Immenkamp, *Updating the Blocking Regulation: The EU's answer to US extraterritorial Sanctions*, Briefing by the EUR. PARL. DOC. PE 623.535 (Jun. 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI\(2018\)623535_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf).

Countering America's Adversaries Through Sanctions Act, U.S. Dep't of Treas. (Last update: Dec. 12, 2018), <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx>.

Comments of the European Community on the Amendments of 22 Jun. 1982 to the U.S. Export Regulations 4 (Aug. 12, 1982), http://aei.pitt.edu/1768/01/US_dispute_comments_1982.pdf.

Commission Delegated Regulation (EU) 2018/1100 of Jun. 6, 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C/2018/3572, O.J. L. 199/I, Aug. 7, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0001.01.ENG&toc=OJ:L:2018:199I:TOC>.

Commission Implementing Regulation (EU) 2018/1101 of Aug. 3, 2018 laying down the criteria for the application of the second paragraph of Art. 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C/2018/5247, O.J. L. 199I, 7.8.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0007.01.ENG&toc=OJ:L:2018:199I:TOC>.

European Commission Service for Foreign Policy Instruments (FPI), *Updated Blocking Statute in Support of Iran Nuclear Deal*. https://ec.europa.eu/fpi/what-we-do/updated-blocking-statute-support-iran-nuclear-deal_en.

European Comm'n, United States Barriers to Trade and Investment Report for 2008 (2009), http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf.

European Comm'n, Report on United States Barriers to Trade and Investment(2000),
http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_111689.pdf.

Guidance Note - Questions and Answers: Adoption of Update of the Blocking
Statute C/2018/5344, O.J. C. 277I, 7.8.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2018.277.01.0004.01.ENG&toc=OJ:C:2018:277I:TOC>.

Iran Sanctions, Congressional Research Service, Federation of American Scientists
(Last update: Mar. 25, 2019), <https://fas.org/sgp/crs/mideast/RS20871.pdf>.

Iranian Sanctions, U.S. Dep't of Treas. (Last update: Mar. 14, 2019), <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>.

Trump's Speech on the Iran Nuclear Deal, N.Y. Times (May 8, 2018),
<https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html>.

*Specially Designated Nationals and Blocked Persons List (SDN) Human
Readable Lists*, U.S. Dep't of Treas. (Last update: Apr. 17, 2019), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

Legislatures, Regulations and Other Legislative Materials

15 C.F.R. § 376, 379, 385.

15 C.F.R. § 379, 385, 399.

15 C.F.R. § 379, 385, 390, 399.

22 U.S.C. §§ 1643(l)–(m), 6021–6091 (2006 & Supp. III 2009).

22 U.S.C. §§ 1643(l)–(m), 6021–6091 (2006 & Supp. III 2009).

22 U.S.C. § 6082(a)(1)(A) (2006).

22 U.S.C. §§ 6001–6010 (2006 & Supp. III 2009).

22 U.S.C. §§ 6021 et. seq. (1996).

47 Fed. Reg. at 27, 251–52.

50 U.S.C. § 1701 (1996).

141 CONG. REC. 27,752 (1995).

Council Decision of Jul. 13, 1987, O.J. L 197/33,34 (1987).

Council Regulation 3541/92, O.J. L 361/1 (1992).

Council Regulation 3275/93, O.J. L 295/4 (1993).

Council Regulation 1264/94, O.J. L 139/4 (1994).

Council Regulation 1733/94, O.J. L 182/1 (1994).

Council Regulation 2271/96, O.J. L 309/1 (1996).

European Union, Demarches Protesting the Cuban Liberty and Democratic
Solidarity (LIBERTAD) Act (Mar. 5, 1996 & Mar. 15, 1995), reprinted in 35

- I.L.M. 397, 398–99 (1996).
- European Comm'n, Report on United States Barriers to Trade and Investment, at 13 (2004), http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf.
- Iran and Libya Sanctions Act §§ 4–5, 110 Stat. at 1542–45.
- IRAN SANCTIONS ACT OF 1996 [As Amended Through P.L. 114–277, Enacted Dec. 15, 2016], <https://legcounsel.house.gov/Comps/Iran%20Sanctions%20Act%20of%201996.pdf>.
- RAPPORT D'INFORMATION DÉPOSÉ en application de l'article 145 du Règlement PAR LA COMMISSION DES AFFAIRES ÉTRANGÈRES ET LA COMMISSION DES FINANCES en conclusion des travaux d'une mission d'information constituée le 3 février 2016 sur l'extraterritorialité de la législation américaine*, ASSEMBLÉE NATIONALE (National Assembly of France), Oct. 5, 2016. <http://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf>.
- RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (AM. LAW INST. 1987).
- Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.
- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Other Documents

- Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 388/1 (1982), amended by O.J. L 285/1 (1989).
- Treaty on European Union, Feb. 7, 1992, art. J.3, K3, O.J. C 224/1, 94-95, 97-98 (1992), [1992] 1 C.M.L.R. 719, 730-31, 736, 31 I.L.M.
- Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I).
- Treaty Establishing the European Community, Feb. 7, 1992, art. 151 (1), [1992] 1 C.M.L.R. 573, 681.
- Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306).
- Re the Accession of the Community to the European Human Rights Commission (Opinion 2/94), [1996] E.C.R. 1-1759, [1996] 2 C.M.L.R. 265.

198 The EU Legal Protection System against the Effects of *Stefan Brocza*
Extra-territorial Application of Legislation Adopted by a Third Country, and
Actions Based Thereon or Resulting Therefrom

World Trade Organization, General Agreement on Trade in Services, art. 1, 33
I.L.M. 44, 48 (1994).