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The Abuse of Economic Sanctions is Undermining the Use of Financial Suasion

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The widespread use of economic sanctions constitutes one of the paradoxes of contemporary American foreign policy. Although sanctions are often criticized, even derided, they are simultaneously and quickly becoming the policy mechanism of choice for the United States. The U.S. has economic sanctions against dozens of countries. Even though the success rate of sanctions is unimpressive,¹ sanctions are so popular that they are being introduced by many states and municipalities.

Economic sanctions encompass the imposition by governmental or international organizations of economic sanctions for noneconomic foreign policy reasons. Economic sanctions can be multilateral, such as by the United Nations and the European Union, or they can be unilateral.

Sanctions are applied for a variety of reasons, which include discouraging the proliferation of weapons of mass destruction and ballistic missiles, strengthening human rights, ending terrorism, combating drug trafficking, discouraging armed aggression, promoting market access, protecting the environment, and replacing governments.

Sanctions take the form of arms embargoes, foreign assistance reductions and cut-offs, export and import limitations, asset freezes, tariff increases, revocation of most favored nation (MFN) trade status, negative votes in international financial institutions, withdrawal of diplomatic relations, visa denials, cancellation of air links, prohibitions on credit, financing, and investment, and authorization of lawsuits.

In a global economy, unilateral sanctions tend to impose greater costs on U.S. businesses than on the target, which can usually find substitute sources of supply and financing.

Secondary sanctions can exacerbate matters. Trying to compel others to join a sanctions effort by threatening secondary sanctions against third parties unwilling to sanction the target can cause serious harm to many U.S. foreign policy interests. When the U.S. imposed sanctions against overseas firms who violated the terms of U.S. legislation affecting Cuba, Iran, and Libya, the

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¹ Lauren Ralph, *In Consideration of Economic Sanctions* 28 SAE/No. 131 (Jan. 2019).

sanctions may have had some deterrent effect on the willingness of certain individuals to enter into proscribed business activities, but at the price of increasing anti-American sentiment, stimulating challenges within the World Trade Organization, and drawing attention away from the provocative behavior of the target governments.² They also helped the targeted countries unite political opinion and support against U.S. measures.

As the U.S. is increasingly resorting to unilateral sanctions, they are inadvertently mobilizing a club of countries and international organizations, including U.S. allies, to develop ways to circumvent U.S. sanctions.

This article discusses the limitations of sanctions generally and then focuses on the unilateral sanctions imposed on Iran and Cuba to show how such sanctions are counterproductive.

The Limitations of Sanctions Generally

Sanctions are criticized due to their lack of effectiveness, adverse humanitarian effects, and adverse public health effects. Sanctions foment criminalization both during and after the sanctions as a way to circumvent sanctions. Sanctions also result in unintended negative effects on neighbor countries, such as driving up costs of goods.³

The U.S. has become responsible for the majority of 20th century economic sanctions.⁴ As the U.S. increased its use of sanctions, their utility declined rapidly. During the early post-World War II era approximately 50 percent of the sanctions in which the U.S. was involved were successful. In the 1970s and 1980s, less than one in four sanctions were successful.⁵

Another study concludes that sanctions have had limited success overall. The success rate depends on the type of policy or governmental change sought. Their use involving destabilization worked in half the cases, usually against target countries that were small and shaky. Sanctions with modest goals and efforts to disrupt minor military adventures succeeded about one-third of the time. Efforts to destroy a foreign adversary's military potential, or otherwise change its policies in a major way, achieved success infrequently. An adverse effect of sanctions is the criminalization of the sanctioned state and its neighbors. Criminalization happens when the targeted government attempts to maintain its power by resorting to organized crime in order to generate revenue or obtain supplies. The conduct to circumvent sanctions through smuggling tends to institutionalize relationships between the government and shadow economic actors.⁶

² Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, Brookings Policy Brief Series, June 1, 1998 <https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing>.

³ Ralph, *supra* at 23.

⁴ A.C. Drury, *U.S. Presidents and the Use of Economic Sanctions*, PRESIDENTIAL STUDIES QUARTERLY 30. 51 (2000).

⁵ Ralph, *supra* at 7.

⁶ Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliott, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 92-93 (2d ed. 1990).

International cooperation may help in three areas: to increase the moral suasion of the sanctions, to help isolate the target government from the global community psychologically as well as economically, and to preempt foreign backlash.⁷

In evaluating the effectiveness of sanctions, broad claims of extraterritoriality can be decidedly counterproductive when U.S. allies do not share the U.S. position on the underlying issue.⁸

The Iran Sanctions

On May 8, 2018, President Trump chose to remove the U.S. from the Joint Comprehensive Plan of Action (JCPOA) and to reinstate all previously lifted sanctions under this agreement. The re-imposed U.S. sanctions came into effect after a “wind-down” period of 90 days, which ended August 6, 2018 for certain sanctions and 180 days (November 4, 2018) for others.

As U.S.-Iran sanctions continue to unfold, the European Union and the U.S. are clashing on their implementation. On May 18, 2018, for example, the European Commission commenced a formal process to update the 1996 EU Blocking Regulation (as referred to as the Blocking Statute) to include certain U.S. sanctions on Iran. The regulation entered into effect on August 7, 2018. On September 24, 2018, a joint statement of a ministerial meeting of the E3/EU+2 (China, France, Germany, the Russian Federation, and the United Kingdom, with the High Representative of the EU for Foreign Affairs and Security Policy, and the Islamic Republic of Iran) reaffirmed their dedication to the full and effective implementation of the JCPOA. They announced an initiative to establish a Special Purpose Vehicle (SPV) to facilitate payments related to Iran’s exports (including oil) and imports, assisting and reassuring economic operators seeking legitimate business with Iran.⁹ Yet even with this international cooperation, U.S. National Security Adviser John R. Bolton stated on September 25, 2018 that “(w)e do not intend to allow our sanctions to be evaded by Europe or anybody else.”¹⁰ On July 31, the Trump administration imposed sanctions against Iran’s Foreign Minister Mohammad Javad Zarif for complying with the Iranian ‘regime.’¹¹

Responses

The updated Blocking Statute is a core element of the EU’s continued dedication to the total implementation of the JCPOA, including sustained trade and economic relations between the EU and Iran, which underwent normalization after the lifting of nuclear-related sanctions that came with the JCPOA.

⁷ *Id.* at 96.

⁸ Barry Carter, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAZARD U.S. LEGAL REGIME 252 (1988).

⁹ Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement, Sept. 24, 2018

<https://eeas.europa.eu/headquarters/headquarters-homepage/51036/implementation-joint-comprehensive-plan-action-joint-ministerial-statement>

¹⁰ Gardiner Harris, *Bolton Warns of ‘Terrible Consequences’ if Nations Defy Iran Sanctions*, N.Y. TIMES, Sept. 26, 2018, at A10, col. 1.

¹¹ U.S. Treasury, *Treasury Designates Iran’s Foreign Minister Javad Zarif for Acting for the Supreme Leader of Iran*, July 31, 2019 <https://home.treasury.gov/news/press-releases/sm749>

The Blocking Statute allows EU operators to recover damages arising from U.S. extraterritorial sanctions from the persons causing them, as well as nullifies the effect in the EU of any foreign court rulings based on them. It further prohibits EU persons from complying with those sanctions, unless the Commission specifically permits them to do so if non-compliance were to seriously harm their interests or the interests of the EU.¹²

To assist EU companies in implementing the updated Blocking Statute, the Commission has also published a Guidance note to offer advice and promote understanding of the relevant legal acts.¹³

The EU has proven and remains dedicated to the continued, total implementation of the JCPOA, as long as Iran also respects its nuclear-related pledges. The lifting of nuclear-related sanctions allowing for the normalization of trade and economic relations with Iran is a key element of the JCPOA. Simultaneously, the EU remains dedicated to maintaining cooperation with the U.S., who continues to prove an essential partner and ally.

The EU, in close coordination with Member States and other partners, is striving to implement measures that sustain cooperation with Iran in key economic sectors, such as banking and finance, trade and investment, oil, and transport.¹⁴

During their September 24, 2018 meeting, JCPOA participants reaffirmed their dedication to its full and effective implementation in good faith and in a constructive atmosphere. They reiterated that the JCPOA is a key example of global non-proliferation policy, as well as a significant achievement of multilateral diplomacy unanimously endorsed by the UN Security Council through Resolution 2231.

The participants acknowledged that Iran has routinely met its nuclear-related commitments, as confirmed by the International Atomic Energy Agency through twelve consecutive reports. The agency further emphasized the need for Iran to continue to fulfil its pledges.

Additionally, the participants noted that, alongside Iran's implementation of its nuclear-related commitments, the elimination of sanctions, including the economic benefits arising from it, prove an important piece of the JCPOA.¹⁵ On August 25, 2019, the French Prime Minister Macron invited Zarif to the G-7 meeting, showing that, notwithstanding his designation by the U.S., Macron deems him important to include in the dialogue to reach an accommodation over the U.S.-Iran JCPOA dispute.

Trade associations have expressed concern over the conflicting regimes. Specifically, UK Finance has detailed how Article 6 of the Blocking Regulation potentially exposes the EU

¹² Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0007.01.ENG&toc=OJ:L:2018:199:TOC>.

¹³ European Commission, *Guidance Note – Questions and Answers: adoption of update of the Blocking Statute*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, 61, Aug. 7, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2018:277I:TOC>

¹⁴ European Commission, Updated Blocking Statute in support of Iran nuclear deal enters into force, Brussels, Press release, August 6, 2018 http://europa.eu/rapid/press-release_IP-18-4805_en.htm

¹⁵ Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement, *supra*.

financial sector to private claims for damages. Any person, for example, who suffers losses because of the EU person's compliance with U.S. sanctions in breach of the Regulation is entitled to claim damages against the EU person.¹⁶ The paper explains how, in comparison to pre-JCPOA days, the updated Blocking Regulation has seen a substantive rise in the risk of civil litigation.¹⁷

A key factor of this case is whether, in the long-term, the creation of an SPV may undermine U.S. hegemony of the international payment systems, on which the effectiveness of the U.S. to successfully impose unilateral sanctions depends.¹⁸ At the beginning of May 2019, the U.S. government waivers for six countries to buy Iranian oil expired. The U.S. government announced that it is considering targeting financial networks that transfer U.S. dollars to Iranian companies as payment for petrochemicals and exports.¹⁹ On May 2, after oil prices posted their strongest first quarter in decades, rising about 30 %, Mohammed Barkindo, the head of the Organization of Petroleum Exporting Countries, warned against the political use of oil markets.²⁰

Ultimately, the U.S.'s ability to successfully utilize sanctions depends on the active use of America's strategic suasion, which is the directed use of U.S. power and influence to align influential state and nonstate actors and networks with U.S. interests.²¹ Effective U.S. sanctions against large countries have depended on multilateral support. The continued implementation of U.S. unilateral sanctions against Iran without the backing of U.S. allies – especially with their active resistance – risks jeopardizing the success of the Iran sanctions and the long-term ability of U.S. financial suasion.

The Trump Administration's withdrawal from the JCPOA has eroded the prior effective regime of multilateral sanctions and international consensus. It will make future negotiations with other countries over nuclear agreements more difficult, as both U.S. allies and adversaries have lost confidence in the ability of the U.S. to adhere to agreements.

Cuba

The imposition of economic sanctions against Cuba since the 1960s has also failed to achieve success in changing the Cuban economic and political system. The previous U.S. stance against Cuba alienated the U.S. from regional and international partners.²²

On April 17, 2019, the United States government announced new sanctions against Cuba.

¹⁶ UK Finance, The EU Blocking Regulation – Issues and Considerations for the Financial Services Section, at 2 (July 11, 2018) <https://www.ukfinance.org.uk/wp-content/uploads/2018/07/UK-Finance-paper-EU-Blocking-Regulation-11-July-2018-FINAL.pdf>.

¹⁷ *Id.* at 4.

¹⁸ Noack, *supra*.

¹⁹ Benoit Faucon and Ian Talley, *U.S. Considers Broader Sanctions on Iran*, WALL ST. J., May 3, 2019, at A8, col. 1.

²⁰ Sune Engel Rasmussen, *OPEC Warns on Mixing Oil, Politics*, WALL ST. J., May 3, 2019, at A8, col. 3.

²¹ Juan C. Zarate, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 431 (2013).

²² Karen DeYoung, *Obama moves to renew official ties after American captive's release*, Wash. Post, Dec. 18, 2014, at A1, col. 2.

While speaking in Miami, National Security Advisor John Bolton stated that the Trump administration is re-imposing limits on the amount of money Cuban Americans can send to relatives in Cuba, as well as ordering new restrictions on U.S. citizen, nonfamily travel to Cuba.

Also on April 17, Secretary of State Mike Pompeo declared the administration will remove restrictions that have inhibited U.S. citizens from pursuing lawsuits seeking compensation for property expropriated by the Cuban government when it rose to power in 1958.

Pompeo noted that the Trump administration will terminate waivers, activated by five U.S. presidents over the past 20 years, of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, referred to as Helms-Burton, allowing for compensation lawsuits by U.S. citizens against any entity or person “trafficking” in confiscated property in Cuba. The law includes foreign companies and persons.²³

In March 2019, the U.S. State Department announced that it would allow U.S. citizens and companies to commence actions in U.S. federal court against entities on the Cuban Restricted List. The State Department issued this list based on the entities considered by the U.S. Government as under the control of, or acting for or on behalf of, the Cuban military. The initial list was published on November 9, 2017 and has received several updates. The State Department extended the suspension a number of times until, on April 17, Pompeo announced the end to the extensions.²⁴

On April 17, 2019, Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland, and EU Commissioner for Trade Cecilia Malmström, released a joint statement on the U.S.’s decision, stating, “the EU and Canada consider the extraterritorial application of unilateral Cuba-related measures contrary to international law. We are determined to work together to protect the interests of our companies in the context of the WTO and by banning the enforcement or recognition of foreign judgements based on Title III, both in the EU and Canada.” Since their laws allow for counter-claims or counter-suits, they claimed, the decision will instigate an unnecessary rush of legal claims.²⁵

The U.S. initially based their unilateral sanctions on the demand that Cuba reduce military ties with Russia and stop supporting revolution abroad. In later years, the U.S. further demanded that Cuba repudiate the key elements of the revolution by restoring capitalism and adopting a multiparty liberal democracy.²⁶ The Trump administration has re-imposed sanctions to undue Obama-era policy and – most recently – because of Cuba’s assistance to the Maduro administration in Venezuela. On April 30, President Donald Trump threatened to impose a “full

²³ U.S. Department of State, *Remarks to the Press*, (Apr. 17, 2019), <https://bit.ly/2DgkN8>; P.L. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021–91) (hereinafter “LIBERTAD”).

²⁴ The White House, Fact Sheets, *President Donald J. Trump is Taking a Stand For Democracy and Human Rights in the Western Hemisphere* (Apr. 17, 2019), available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere>.

²⁵ European External Action Service, *Joint Statement by Federica Mogherini, Chrystia Freeland and Cecilia Malmstrom on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act*, (Apr. 17, 2019), <https://bit.ly/2IoUCFj>.

²⁶ William M. Leogrande and Peter Kornbluh, *BACK CHANNEL TO CUBA: THE HIDDEN HISTORY OF NEGOTIATIONS BETWEEN WASHINGTON AND HAVANA* 404 (2014).

and complete embargo” and further sanctions on Cuba if does not immediately end its military support for Maduro.²⁷ However, Florida politics have motivated the policy, just as domestic politics are always an issue on both sides.²⁸ When the U.S. replaces demands about Cuban internal affairs with demands about Cuban internal affairs, Cuba has reacted with more indignation.²⁹ The Trump administration’s resumption of the hegemonic presumption with sanctions and hostile policy will not change Cuban policy. Instead, it will again polarize foreign relations with other countries both in and out of the Western Hemisphere, while adversely impacting jobs in both the U.S. and Cuba.

Analysis and Recommendations

The imposition of unilateral extraterritorial sanctions has a limited impact when it comes to changing the policies of other countries, even when such sanctions are imposed against countries comparatively small in economic and political power (e.g., Cuba). Sanctions have worked when they are multilateral, especially through the U.N., as was the case against Iran and North Korea. The excessive use of economic sanctions, especially when U.S. allies oppose them and become targets, produces diplomatic tension, and damages the U.S.’s economy and reputation abroad. The growing number of countries in the club of targets has caused countries to develop innovative means to circumvent the use of the dollar.

Economic sanctions should be chosen only after they meet the following rules.

1. The likely benefits of a specific sanction to U.S. foreign policy should be greater than the anticipated costs to the U.S. government and the U.S. economy. In addition, the relationship between how the sanction is likely to affect U.S. interests should compare favorably to the likely consequences of all other policies, including military intervention, covert action, public and private diplomacy, offering incentives, or doing nothing.
2. Multilateral support for economic sanctions should normally constitute a prerequisite for their use by the United States.
3. Secondary sanctions are not a useful mechanism to obtain multilateral support for sanctions and should be rarely used.
4. The U.S. should include humanitarian exceptions as part of any comprehensive sanctions. Innocent people should not be made to suffer any more than is absolutely necessary.
5. The federal government should challenge the imposition of sanctions by states and municipalities.
6. Any sanction should be the subject of an annual impact statement.³⁰

²⁷ Matt Spetalnick and Eric Beech, *Trump threatens 'full' embargo on Cuba over Venezuela security support*, REUTERS, Apr. 30, 2019 <https://www.reuters.com/article/us-venezuela-politics-trump-tweet/trump-threatens-full-embargo-on-cuba-over-venezuela-security-support-idUSKCN1S62PD>.

²⁸ William M. Leogrande and Peter Kornbluh, *supra*, at 413-414.

²⁹ *Id.* at 409.

³⁰ See Haass, *supra*, for these and other recommendations.

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