Catholic University Law Review

Volume 69
Issue 1 *Winter 2020*

Article 10

5-22-2020

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Meaghan Jennison

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Cover Page Footnote

J.D, The Catholic University of America Columbus School of Law, expected 2020; MPP, Harvard University, The John F. Kennedy School of Government, 2011; B.A., The University of North Carolina at Chapel Hill, 2009. The author would like to thank Mr. Christian C. Davis and Ms. Chiara Klaui of Akin Gump Strauss Hauer & Feld for their guidance and expertise in reviewing this publication, her mother Beverly P. Jennison for her unwavering and constant support throughout the writing process, and the Catholic University Law Review for its assistance in the publication process.

THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: THE UNITED STATES, TRADE SANCTIONS, AND INTERNATIONAL BLOCKING ACTS

MEAGHAN JENNISON[†]

In May of 2018, President Donald J. Trump announced the United States would unilaterally withdraw from the heavily-negotiated and widely-touted Joint Comprehensive Plan of Action ("JCPOA," colloquially known as the Iran Nuclear Deal).[1] Instead, according to the President, the United States, a signatory of the agreement with Iran as well as one of its major negotiators, proclaimed that it would re-impose international trade sanctions in an attempt to prevent Iran from engaging in any international trade that could potentially enrich the Iranian economy. Of course, concomitant with that U.S. change, should Iran also choose to pull out of the agreement as a result of the Trump administration's stance, the nuclear protections negotiated as part of the JCPOA that restrict Iranian nuclear development in exchange for favorable trade by Iran with other nations could disappear as well.[2]

Within one day of President Trump's withdrawal announcement, the European Union (EU) expressed its frustration with the U.S. announcement and updated its own protective trade legislation, underscoring its historical abhorrence of U.S. extraterritorial interference with international trade. In response to the Trump administration announcement, the European Commission announced the renewal of the EU Blocking Statute, the previously enacted and utilized EU trade vehicle. In essence, the Blocking Statute prevents European countries from abiding by any extraterritorial sanctions imposed by the United States. as a result of its withdrawal from the JCPOA.

President Trump's announcement regarding the JCPOA, although disruptive, is not the first American attempt to utilize trade to achieve foreign policy objectives. In fact, the United States has a long history of attempting to impose international trade embargo actions with extraterritorial effects. During the era of World War I, the United States sought to impose trading restrictions upon countries in Europe and elsewhere in the world through the Trading with the

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1. Exec. Order No. 13846, 83 Fed. Reg. 38939 (2018).

2. This did not seem to be a central concern of the Trump administration in making its announcement regarding withdrawal from the JCPOA.

Enemy Act. For decades after the enactment of that statute, the United States, under the guise of protecting its own and other countries' national security, has imposed a series of trading restrictions through various legislative initiatives. Over time, European countries simply ignored some of these U.S. legislative efforts or at least did not actively oppose them. However, when the United States exerted its international punch with respect to Cuban trade restrictions from the late 1950s on, and tried to impose sanctions upon European-based companies, the nations of Europe began their revolt in various ways that ebbed and flowed during the subsequent years of the twentieth century.

During the 1990s, this revolt came to a head when the United States pushed for international trade restrictions against Cuba and the EU forcefully bucked this U.S. attempt at domination of world trading markets. In response, in 1996, the EU crafted a resolution creating a so-called "blocking statute" to neutralize or seriously hinder the effect of such U.S. extraterritorial measures. This is the same legislative scheme recently re-authorized as a reaction to the U.S. announcement of its non-continuation as a party to the JCPOA.

The EU blocking statute, as it pertains to the U.S. withdrawal from the JCPOA, essentially requires European companies covered by the statute ignore the mandates of the U.S. sanctions scheme and continue any existing business relationships with Iran. This re-authorization increases legal uncertainty and risk for EU companies, as well as for those U.S. companies doing business in the EU. Multinational corporations must decide — will the U.S. sanctions control their actions, or will the EU mandates carry the day?

In light of these recent developments, this Comment will discuss the tensions engendered by the U.S. withdrawal from the JCPOA, and the resultant U.S. movement towards international trade manipulation and domination versus the EU's self-preservation efforts to maintain its own trade goals. This Comment will examine the development of U.S. extraterritorial trade measures from the end of World War I until the present day, and international reaction to those perceived encroachments by the United States on international trade. Then, this Comment will review several possible directions that could emerge as a result of the re-imposition of U.S. sanctions on Iran following the U.S. exit from the JCPOA, the effects of those sanctions on international trade, and the resultant European efforts to thwart U.S. actions.

Part I describes the history of U.S. extraterritorial trade efforts as well as present-day developments, including international efforts to control and contain U.S. extraterritorial trade reach. Part II discusses European efforts to enforce a contemporary legislative scheme in order to protect European trading interests, as well as currently available international dispute resolution mechanisms and possible international paths away from a U.S.-EU showdown. Part III suggests a forceful methodology of enforcement of the EU's own regulations to bypass the current European conundrum. Finally, this Comment suggests that despite the strict U.S. sanctions scheme triggered by the JCPOA pullout, the United States, over time, likely will temper its efforts towards extraterritorial

international sanctions when one or more members of the EU forcefully extend their own statutory efforts to enforce the newly reinvigorated EU blocking statute.

I. HISTORY OF U.S. EXTRATERRITORIAL TRADE MEASURES AND PRESENT-DAY DEVELOPMENTS

A. Prior Historical Efforts of the United States with Respect to Extraterritorial Measures in Trade

In 1917, against the backdrop of the Great War—World War I—the United States of America vigorously asserted its role as a global power by entering the modern world of international trade restriction. The U.S. Congress passed—and President Woodrow Wilson signed into law—the Trading With the Enemy Act of 1917 (TWEA).[3] A statement by President Wilson about the statute, clearly intended to affect negatively German commerce, noted that the law specifically targeted "companies incorporated under the laws of the German Empire, no matter where located."[4] This law—part economics and part foreign policy—set the stage for future endeavors by the United States to influence, control, and restrict trade in the international market in accordance with the U.S. worldview.

While TWEA persisted through both World Wars and beyond, the next major attempt by the United States to restrict international trade did not emerge until about 1959, when the United States increasingly became concerned with the rise of communism in Fidel Castro's Cuba, as well as with the reported presence of Russian missiles within Cuba located only ninety miles from the coast of Florida.[5] President Eisenhower determined that the best course of overt action to address these concerns was to enact a partial blockade against Cuba.[6] In 1960,

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3. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 1-44 (2012)). The original Trading With the Enemy Act of 1917 (TWEA) prohibited "any person in the United States . . . to trade, or attempt to trade; either directly or indirectly, with…an enemy or ally of enemy." *Id.* at 412. Additionally, TWEA specifically restricted licenses of "enemy" insurance companies in section 4, foreign exchange of precious metals in section 5, property transfers in section 5 and 9, and other transactions with those designated as the "enemy." *Id.* at 413–20.

4. German Insurance Companies Proclamation, 40 Stat. 1684, 1685 (1917) (codified as amended at 50 U.S.C.S. § 4304 (2019)). Of course, the United States directed its trade restrictions against the Germans, who were perceived as the aggressors in the "Great War."

5. *See generally* David W. Dent & Carol O'Brien, *The Politics of the U.S. Trade Embargo of Cuba, 1959–1977*, VOL. L TOWSON U. J. INT'L AFF. 166, 169 (2016). Interestingly, then-President Eisenhower delegated dealing with Castro to then-Vice President Richard Nixon. *Id.* at 168. If Eisenhower was suspicious of Castro and of communism, Nixon was even more suspicious, stating during the 1960 Presidential campaign that the United States should "move vigorously . . . to eradicate this 'cancer' in our own hemisphere." *Id.* This attitude, permeating the Eisenhower administration, sparked additional trade actions towards Cuba. *Id.*

6. *Id.* at 167. However, "[t]he irony of the policy of economic denial against the Cuban economy was that no one seemed to question its consequences and the simple fact that the trade embargo produced the exact circumstances that it was supposed to eliminate." *Id.* at 172.

under the authority of U.S. legislation known as the Export Control Act of 1949, Eisenhower instituted a complete ban on U.S. exports to Cuba.[7] The blockade additionally enacted controls on the import of sugar from Cuba into the United States.[8] American lawmakers believed, in theory, that this could cripple the Cuban economy as well as strangle Castro's communist movement in Cuba and affect Castro's ties with the Soviet Union.[9] Again, these efforts reflected the then-current U.S. worldview, and were pursued not only to affect trade, perhaps, but also most likely to impose U.S. foreign policy goals in the region that was located just a bit too close for comfort.

Following Eisenhower's efforts, President John F. Kennedy continued the same sanctions and trade path with respect to Cuba.[10] In March of 1962, under Kennedy's leadership, the United States imposed a full embargo against Cuba.[11] To do so, President Kennedy invoked the authority of the TWEA.[12] By 1963, these continuing and escalating bans[13] on both imports and exports from Cuba resulted in the virtual disappearance of Cuban products from the U.S. market.[14]

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7. 43 Dep't St. Bull. 715, 716 (1960); *see* Export Control Act, Pub. Law. No. 86-464, 74 Stat. 130 (repealed 1969).

8. Dent & O'Brien, *supra* note 5, at 169–70. Reviewing "[t]he debates that ensued [in the House of Representatives] reveal that the Cuban policy of the United States was clearly moving into a new stage of retaliation and hostility toward the Castro government . . . [and towards] support [for] some form of economic strangulation of Cuba." *Id.* at 170.

9. *Id.* at 172. Members of Congress clearly viewed Castro as nothing more than a puppet of the Russian government and felt that economic measures would not only weaken Castro and his government but the seemingly growing alliance between Castro and Russia. *Id.* at 170.

10. *Id.* at 171. However, Kennedy's approach appeared to be more political than economic, because he seemed to believe that Cuba, ninety miles from the United States, could be a base for Communist subversion not only in the United States but also among other nations of the Western Hemisphere. *Id.*

11. Embargo On All Trade With Cuba, Proclamation No. 3447, 27 Fed. Reg. 1085 (1962); Dent & O'Brien, *supra* note 5, at 169; Anna P. Schreiber, *Economic Coercion As An Instrument of Foreign Policy: U.S. Economic Measures Against Cuba and the Dominican Republic*, 25 WORLD POL. 387, 389 (1973). The Kennedy administration "made it illegal to import any product of Cuban or partial Cuban origin from any part of the world." *Id.* at 387. Although the Kennedy administration tried to persuade the Organization of American States (OAS) to join in this full trade embargo, because of Latin American opposition, the OAS did not encourage the imposition of a full trade embargo by its members until 1964. *Id.* at 389.

12. Schreiber, *supra* note 11, at 389. *See* Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 1-44 (2012)).

13. Natalie Maniaci, *The Helms-Burton Act: Is the U.S. Shooting Itself in the Foot?*, 35 SAN DIEGO L. REV. 897, 898 (1998). Notably, "[e]ight American presidents and a succession of Congresses have tried unsuccessfully for nearly four decades to legislate Fidel Castro out of existence." *Id.* The eight Presidents included Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush, and Clinton, not to mention Eisenhower's efforts as well. *Id.*

14. Schreiber, *supra* note 11, at 395–96. Likewise, the U.S. trade policies also affected the Cuban marketplace. Before the trade bans, "Cuba had relied on U.S. trade for a wide variety of food products and consumer goods." *Id.* at 397. Similar to the disappearance of Cuban goods in the U.S. markets, "[d]urable consumer goods practically disappeared from [Cuban] stores in 1961, and basic consumer items such as soap, toothpaste, and clothing had to be rationed." *Id.* After the

Following the initial flurry of trade sanctions against Cuba in the Fifties and the Sixties, the United States, in 1992, took further extraterritorial action when Congress passed the Cuban Democracy Act.[15] That statute completely blocked trade between Cuba and any and all overseas firms "owned or operated by U.S. residents or nationals."[16] Of particular concern, not only to Cuba but also to the international trading community, was the language in the Cuban Democracy Act stating that subsidiaries of U.S. companies based abroad that had previously traded with Cuba could be prosecuted under U.S. law for continuing to do so.[17] With this action, the United States appeared to move significantly further, and in a much more visible way, into a position of extraterritorial influence—and perhaps interference—in international trade.

In addition to this trade embargo's history over the course of the twentieth century and the twenty-first century, the U.S. government has simultaneously employed two other primary methods of restricting trade with Cuba: foreign assets control regulations and export control regulations. An examination of these two methods and how they transpired with respect to that nation provides a useful backdrop to the current situation regarding the U.S. sanctions against Iran and the possible impact of the newly resurrected EU blocking statute and its offspring legislation in particular European countries.

First, the United States historically has utilized foreign assets control regulations to restrict trade. Under the continuing and omnipresent authority of the TWEA, the United States in 1999 created the Cuban Assets Control Regulations (CACRs) in an effort to further restrict Cuban trade.[18] The CACRs were strict in nature, restricting any exports from the United States to Cuba of products, technology, and services, or imports of the same into the United States, plus imposing a complete freeze on all Cuban assets in the United States or controlled by U.S. citizens.[19] As well, the CACRs imposed travel bans on U.S.

U.S. embargo, Cuba continued to have trade relationships not only with the Soviet Union, but with some non-Communist states as well, including Spain, Canada, Japan, England, and France. *Id.* at 398–99.

15. Cuban Democracy Act, Pub. L. No. 102-484, §§ 1701–12, 106 Stat. 2575 (1992) (codified as amended at 22 U.S.C. §§ 6000-6010 (Supp. V. 1993)).

16. Maniaci, *supra* note 13, at 899.

17. 22 U.S.C. § 6005(a). This language is parallel to the language of the EU blocking statute described *infra* in Section II.B. As one might expect, the Cuban Democracy Act engendered much the same reaction by the international community as the present-day U.S. withdrawal from the JCPOA and re-imposition of sanctions against Iran—namely that the United States, through its sanctions provisions, was interfering with the sovereign affairs of other countries in trying to control entities incorporated outside of the United States, but owned or controlled by U.S. nationals. *See* Julia P. Herd, *The Cuban Democracy Act: Another Extraterritorial Act that Won't Work*, 20 BROOK. J. INT'L L. 397, 397 (1994).

18. Cuban Assets Control Regulations, 31 C.F.R. § 515 (1999).

19. *Id.* This part of the regulations was particularly concerning to the international community, since the regulation stated the following about who exactly was subject to the jurisdiction of the United States:

The term *person subject to the jurisdiction of the United States* includes:

nationals for travel to Cuba.[20] The U.S. Treasury Office of Foreign Assets Control administered the CACRs.[21]

The CACRs also affected licenses to export goods to Cuba. In 1975, the U.S. government eliminated general licenses to do business with Cuba.[22] After that repeal, companies needed to apply for specific licenses in order to do business with Cuba. However, under the then-present regulations, such licenses would only be granted "if the foreign firm operated independently of its U.S. parent with respect to its decision-making, risk-taking, negotiation and financing."[23] This tool, therefore, attempted to control foreign, rather than wholly domestic entities, in much the same way as the post-JCPOA sanctions are intended to operate. Further, with the 1992 passage of the Cuban Democracy Act, as noted above, an absolute prohibition upon the issuance of any license to any foreign affiliates of a U.S. firm became the law.[24]

Second, the United States historically has also utilized export control regulations as a trade strategy with Cuba. In addition to the CACRs, the U.S. Department of Commerce operates a separate export control and licensing office now known as the Bureau of Industry and Security, which administers export administration rules. That office, with respect to Cuba in particular, governs export and re-export of goods to Cuba when the U.S. content is 20 percent or

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(a) Any individual, wherever located, who is a citizen or resident of the United States;
(b) Any person within the United States as defined in § 515.330;
(c) Any corporation organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
(d) Any corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by persons specified in paragraph (a) or (c) of this section.

Id. at § 515.329 (emphasis added). This language became particularly contentious even with U.S. allies. For a discussion of trade restrictions on Cuba and how it affected U.S.-Canadian trade relations, *see* John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL'Y INT'L BUS., 439 (1999).

20. 31 C.F.R. § 515.415; *see also* Office of Foreign Control, Specially Designated Nationals and Blocked Persons, U.S. DEPT. OF THE TREASURY (1998), http://www.ustreas.gov/ofac (discussing companies that the Treasury views as acting on behalf of Cuban authorities in international trade).

21. Terrorism and Financial Intelligence, Office of Foreign Assets Control (OFAC), U.S. DEPT. OF THE TREASURY, https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx (last visited Feb. 15, 2019) (explaining that "[t]he Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.").

22. *See* 31 C.F.R. § 515.541, *repealed by* 40 Fed. Reg. 47, 108 (1975).

23. Boscariol, *supra* note 19, at 447.

24. *Id.*

more of the total value of the good being exported.[25] Again, utilizing the authority of both the TWEA as well as the Export Administration Act, entities desiring to export or re-export items to Cuba, subject to the provisions of the Export Administration Act, must obtain a license from the Department of Commerce to do so, with very limited exceptions.[26] The exceptions, still in existence today, include such things as temporary exports and re-exports by the news media, items of baggage, humanitarian donations, items used by international organizations, vessel and aircraft parts, and excepted agricultural commodities.[27] Further, reinforcing the stringent nature of the licensing scheme, the applicable regulations state that any licenses granted by the Department of Commerce are subject to a policy of general denial.[28]

Further, in 1996, Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, commonly known as the Helms-Burton Act.[29] This effort at restraining trade with Cuba as a thinly-disguised means to topple the Castro regime was enacted when Cuba shot down two U.S. civilian airplanes in February of 1996.[30] The Act's main purpose, as with many of the U.S. actions regarding Cuba, was not only to strengthen sanctions against Cuba, but also to destabilize the Cuban government.[31]

B. International Efforts to Contain U.S Extraterritorial Trade Reach

Over time, the international community, primarily the EU, fought back against what appeared to be blatant violations of international norms regarding trade restrictions by the United States through enactment of various legislative

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25. Export Administration Regulations, 15 C.F.R. § 746.2(b)(3)(ii) (1996).

26. *Id.* § 746.2(a).

27. *Id.* § 746.2 (a)(1)(i) – (xiv); *Id.* § 746.2(a)(2).

28. *Id.* § 746.2(b).

29. Cuban Liberty and Democratic Solidarity (LIBERTAD) (Helms-Burton) Act of 1996, Pub. L. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–91, 1643, 28 U.S.C. § 1611 (1996)).

30. Maniaci, *supra* note 13, at 899–900. The matter was memorialized in a lawsuit filed in the United States District Court for the Southern District of Florida, Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). The *Alejandre* case presented a suit against the Cuban government and its air force to recover damages for loss of life in connection to an aggression by the Cuban air force. *Id.* at 1242. Four rescue pilots who were flying civilian unarmed planes on a humanitarian mission in international airspace between Florida and Cuba were killed without warning. *Id.* In a default judgment, the court awarded over $187 million in compensatory and punitive damages to the families of the pilots. *Id.* at 1253.

31. Maniaci, *supra* note 13, at 900. The Act's purposes were laid out more completely than just the issue of strengthening sanctions. In fact, in its 'Purposes' statement, the Helms-Burton Act in its original text claimed as its purposes, *inter alia*, that it would assist the Cuban people in regaining their freedom and prosperity so that they could "join" the communities of democratic nations within the Western Hemisphere, and that it would help provide for the continued national security of the United States in light of continued threats from the Castro government. Helms-Burton Act § 6022.

schemes to counteract the various U.S efforts. These legislative pushback schemes took the form of both blocking and clawback statutes.[32]

A comparison between these two types of statutes is informative here, especially since the EU has reauthorized these same legislative initiatives to deal with U.S. re-imposition of anti-Iran sanctions. Blocking statutes are retaliatory in nature. At their simplest, they prevent a country's nationals from complying with foreign regulatory schemes. At a more nuanced level, they serve as a political statement against exterritorial assertions by another country and protect both a country's nationals and a country's economy.[33] Clawback statutes go hand-in-hand with blocking statutes; layered on top of blocking statutes, clawbacks allow persons or entities that suffer economic loss from compliance with the blocking statute to recover damages incurred by such compliance.[34]

As early as 1980, the United Kingdom acted to prevent the United States from exerting extraterritorial jurisdiction over international trade by U.K. entities. In 1980, the U.K. government enacted the Protection of Trading Interests Act of 1980.[35] The preamble to the Act clearly reflected the U.K. opposition to any U.S. or other counties efforts to control the flow of international trade.[36] Explaining that the statute was intended to protect the U.K. and counter any efforts "imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom," the preamble to the Act referred generally to overseas countries, but was clearly aimed at the United States.[37] The statute addressed extraterritorial efforts to control the trade of British entities and denoted its applicability to any measures proposed, taken, or to be taken that could damage the trading interests of the U.K.[38]

Subsequent to the U.K.'s enactment of that particular piece of legislation, but tangentially related to it, the United States and the U.K. engaged in a judicial

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32. Maniaci, *supra* note 13, at 911–13, 916–18. This may have foreshadowed the EU's current iteration of blocking legislation in response to the Iran situation, as detailed *infra* at Section I.C.

33. *Id.* at 911 ("A blocking statute is a retaliatory measure whose underlying goals are to protect the State's nationals from objectionable foreign legislation, and to compel the foreign State to cede its claims to regulate aspects of the affected State's economy.").

34. *Id.* ("A clawback statute allows for a right of recovery in the affected State's courts of any sum of money paid in satisfaction of a judgment under the objectionable foreign legislation.").

35. Protection of Trading Interests Act 1980, c. 11 (United Kingdom), *reprinted at* www.legislation.gov.uk/ukpga/1980/11.

36. *Id.* Basically, the Protection of Trading Interests Act gave the U.K. Secretary of State the power to invoke the act against exterritorial measures by a foreign state concerning trade. *Id.* § 1.

37. *Id.* The Act dances around naming the United States but does state that it applies to "any overseas country…regulating or controlling international trade" in matters affecting things "outside the territorial jurisdiction of that country . . . ." *Id.* §§ 1(1)(a), 1(1)(b).

38. *Id.* § 1(1). The statute required those affected to report to the U.K. Secretary of State regarding which requirements or prohibitions were interfering with trade, *id.* § 1(2), after which time the Secretary of State could give directions to the reporting entity "prohibiting compliance" with such statutes of any overseas country. *Id.* § (3).

battle over extraterritorial imposition of U.S. antitrust laws in the various lawsuits surrounding the demise of Laker Airways,[39] a low-cost British airline that created a world-wide stir with its economy transcontinental flight service. In 1982, the liquidator of Laker Airways Ltd. brought suit in the United States District Court for the District of Columbia alleging that a number of international airlines, including several British-based companies, had engaged in predatory pricing and other conspiratorial actions in violation of major U.S. antitrust statutes, the Sherman and Clayton Antitrust Acts.[40] The airlines involved in the original lawsuits attempted to seek from the U.K.'s courts an injunction to restrict Laker Airways from pursuing its antitrust action in U.S. courts.[41] The challenging airlines were in fact successful in getting an injunction from the British Court of Appeals, enabling them in effect to "circumvent the jurisdiction of the U.S courts instead of directly challenging it."[42] The grant of the injunction by the British courts, plus the blocking statute already enacted via the Protection of Trading Interests Act of 1980, demonstrated the U.K.'s determination to counter the attempted reach of the United States either through direct interference with trade or through the U.S. court system.

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39. Robert Cannon, *Laker Airways and the Courts: A New Method of Blocking the Extraterritorial Application of U.S. Antitrust Laws*, 7 J. COMP. BUS. & CAP. MKT. L. 63, 64 (1985). Laker Airways was an international air carrier that provided low-cost airline transportation between London and New York. *Id.* at 64. At one time, Laker flew about one of seven passengers traveling between England and the United States. *Id.* When Laker attempted to expand to other routes, Pan American, TWA, and British Air (all international carriers as well) lowered their fares so that they equaled Laker's fares. *Id.* at 65. This, of course, had a detrimental effect upon Laker's expansion plans as well as its bottom line, and Laker was forced to enter into a refinancing scheme to keep the business afloat. *Id.* According to Laker's version of the story, its competitors attempted to block this refinancing. *Id.* As a result, the refinancing failed, and Laker was forced to declare bankruptcy. *Id.* After that, various antitrust suits were brought in the U.S. courts against the other involved international air carriers. *See, e.g.*, Laker Airways Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124 (D.D.C. 1983).

40. Cannon, *supra* note 39, at 63. The author's point is that the Laker lawsuits "highlight[ed] the irreconcilable conflict between U.S. and British theories of extraterritorial jurisdiction in the area of antitrust law." *Id.* at 67. His argument could also extend beyond antitrust law to the law of sanctions. As he further elaborated, the British position is that principles of international law "limit a state's power to prescribe laws regulating economic behavior that occurs outside its territory" whereas the U.S. position is that "international law does not prohibit the exercise of jurisdiction over conduct that produces harmful effects on domestic commerce." *Id.* In the conundrum presented by the JCPOA withdrawal and re-institution of sanctions against Iran, this argument could be extended to say that the U.S. position is that international law does not prohibit the exercise of jurisdiction over conduct that produces harmful effects on domestic commerce or otherwise affects the perceived safety and security of the United States.

41. *Id.* at 65. The lawsuits originally involved two British airlines and two other European airlines, and eventually morphed into lawsuits against approximately eight international air carriers. *Id.* at 80 n.3. The original lawsuits were filed in the United States District Court for the District of Columbia. *Id.* at 65.

42. *Id.* at 63. The decision of the British Court of Appeals was subsequently overruled by the House of Lords. *Id.* at 67. However, the U.K. government had made its stand with respect to another attempt by the United States to exert extraterritorial jurisdiction, this time within the courts.

Although blocking and clawback statutes, such as the Protection of Trading Interests Act, previously had been enacted to protect countries' trading interests generally,[43] enactment of the Helms-Burton Act by the United States Congress quickly and affirmatively fired up the international community, causing countries to enact such statutes as a direct and targeted response to that particular piece of legislation. Seen by international trading partners as an "outrageous example of United States extraterritorial reach,"[44] Canada, Mexico, and the EU responded to the Helms-Burton Act with their own defensive legislative schemes.[45] Those three entities enacted laws declaring the Helms-Burton Act null and void in an attempt to cripple the impact of what was perceived internationally as illegal U.S. international trade moves.[46]

Of particular historical relevance to the U.S. withdrawal from the JCPOA and resultant renewed trade sanctions, in 1996, the EU passed its Council Regulation 2271/96,[47] completely new legislation enacted solely to counteract the impact of the Helms-Burton Act.[48] The opening language of that legislation is exacting in its denigration of the extraterritorial trade actions of the U.S. behaviors expressed in the Helms-Burton Act. The European Regulation asserted that the legislation "violat[ed] international law and imped[ed] the attainment of" harmonious world trade and abolition of barriers thereto.[49] The Regulation Annex (setting forth particulars of the legislation's reach) specifically referred to the U.S. sanctions on Cuba, Iran, and Libya as the foreign legislation targeted by the Regulation.[50] It is notable that the EU specifically named not just the Helms-Burton Act, but also included reference to the 1992 Cuban Democracy Act as targets of the Regulation. Clearly, the EU had reached its collective limits with respect to U.S. trade encroachment on what were perceived as issues of

43. *See* Protection of Trading Interests Act 1980, c. 11 (United Kingdom), *reprinted at* www.legislation.gov.uk/ukpga/1980/11. The 1980 U.K. blocking statute, with a clawback provision, was the first blocking statute of the modern era. It afforded U.K. citizens legal protection from the impact of extraterritorial laws of any country. Maniaci, *supra* note 13, at 911–12.

44. Maniaci, *supra* note 13, at 909.

45. *Id.* at 909–10. The legislation passed included both blocking and clawback legislation and forbade nationals of the enacting country to comply with the Helms-Burton Act. *Id.*

46. *Id.* at 912. In a possibly interesting precursor to modern day U.S. sanctions moves, the British acknowledged that its blocking statute might not be the only way to counter aggressive exterritorial enforcement by the United States of trade law; nevertheless, the U.K. government "viewed the blocking statute as the best and only way, at that time, to protect the legitimate interests of the United Kingdom." *Id.*

47. Council Regulation No. 2271/96, 1996 O.J. (L 309) 1, 2 (EC). The regulation states in its preamble that "the objectives of [the EU] include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade." *Id.*

48. Maniaci, *supra* note 13, at 916. The Council Regulation incorporates two blocking provisions and a clawback provision. *Id.*

49. Council Regulation No. 2271/96, *supra* note 47, at 2.

50. *Id.* at 8–9. The legislation specifically mentioned in the Annex includes the Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act), the Iran and Libya Sanctions Act, and the Cuban Democracy Act of 1992. *Id.*

sovereignty and international free trade, and finally attempted to fight back forcefully.[51]

Following the aforementioned international legislative developments, some litigation did arise within the U.S. court system stemming from enforcement of the TWEA and the CACRs. Though the cases dealt with fairly specific Cuban trading issues, they resulted in some notable judicial findings as the judiciary grappled with extraterritorial enforcement of U.S. laws. In *United States v. Plummer*,[52] a criminal case, the Eleventh Circuit, directly responding to the defendant's assertion that a section of the charging statute could not be applied extraterritorially, stated: "Congress unquestionably has the authority to enforce its laws beyond the territorial boundaries of the United States."[53] Further, the court noted that the TWEA provided the President broad authority and broad powers consistent with the constitutional powers granted to the chief executive with respect to foreign affairs.[54] These broad statements by the *Plummer* court fully supported the expansive nature of U.S. international trade policy.

Additionally, in 2001, the Eastern District of Pennsylvania decided the case of *United States v. Brodie*.[55] In *Brodie*, the court denied a motion to dismiss charges against a defendant under the TWEA and the CACRs. In determining that the court had jurisdiction over a case involving a defendant's "wholly" extraterritorial conduct, the court applied a two-part test.[56] First, according to *Brodie*, the court must consider congressional intent regarding extraterritorial application of the statute at hand.[57] Finding that, the court then determines if the defendant's conduct had effects in the United States.[58] Invoking *Plummer*, the *Brodie* court asserted that the jurisdiction test was met in *Brodie* because

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51. Likewise, in 1996, the U.K. extended its earlier blocking legislation, the U.K. Protection of Trading Interests Act of 1980, focusing on these U.S. extraterritorial actions. The Extraterritorial U.S. Legislation (Sanctions Against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, No. 3171, www.legislation.gov.uk/uksi/1996/3171/made.

52. United States v. Plummer, 221 F.3d 1298, 1301 (11th Cir. 2000). In that case, the defendant was charged with two criminal counts: attempting to smuggle Cuban cigars into the United States pursuant to 18 U.S.C. § 545 and unauthorized transportation of Cuban merchandise in violation of the Trading with the Enemy Act. *Id.*

53. *Id.* at 1304. It should be noted that in this particular case, the court grappled with the extraterritorial application of federal criminal laws, not specifically laws affecting extraterritorial trading. *Id.*

54. *Id.* at 1309. One could read the court's decision to support both a President's powers under the TWEA as well as with respect to foreign relations in general. *Id.* at 1307. The court additionally noted that attempts in other cases to "second-guess" the CACRs, asserting that they have no rational purpose, have been rejected because of, *inter alia*, the President's broad powers in foreign affairs. *Id.* at 1309.

55. United States v. Brodie, 174 F. Supp. 2d 294 (E.D. Pa. 2001).

56. *Id.* at 304–05.

57. *Id.*

58. *Id.* In a footnote to its opinion, the district court stated that "[w]here Congress has explicitly stated its intention to overrule international law, no effects test is required." *Id.* at 304 (citing United States v. Martinez-Hidalgo, 993 F.2d 1052, 1055 (3d Cir. 1993)).

violation of TWEA and the CACRs has domestic effects no matter where the violation occurs.[59] Again, this judicial view of U.S. international authority further illustrates an expansive view of U.S. extraterritorial authority.

Historically, however, while the United States forcefully threatened or enforced its portfolio of extraterritorial trade legislation and regulation, the EU had less success in counteracting U.S. efforts to legislate international trade.[60] Although the EU blocking statute required corporations and others "affected, directly or indirectly, by the laws specified in the Annex . . . [to] inform the [EU] Commission"[61] of such efforts, no such reports were made to the EU.[62] Further, the Commission opened numerous investigations into companies that they suspected were in breach of the blocking statute, but none of these investigations yielded any action by the EU. As a result, the net effect of the EU blocking statute was clearly undermined.[63]

The sole attempt at enforcement of the EU blocking statute occurred in 2007, by the government of Austria, attempting to impose Austrian law consistent with the provisions of that statute.[64] The Austrian government brought charges against the fifth-largest Austrian bank, BAWAG P.S.K., in an attempt to enforce Austrian law punishing offenses of the EU blocking statute. BAWAG closed the bank accounts of one hundred Cuban nationals while in the process of being acquired by a U.S. investor. Because of U.S. anti-Cuban sanctions, having such accounts would have prevented the bank's acquisition. When Austria attempted to pursue its enforcement action, the Austrian public revolted. At the same time, the United States, in a seemingly reversal of attitude, granted the bank an exemption to the existent Cuban sanctions which would allow the acquisition to proceed. BAWAG then reinstated the accounts of the Cuban nationals, resulting in no enforcement by the Austrian government and the subsequent acquisition of the bank.[65] Thus, the entire effort of the EU to thwart U.S. extraterritorial efforts with respect to Cuban sanctions ground to an unceremonious halt with but one attempted—and failed—enforcement action by Austria, a member of the EU.

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59. *Brodie*, 174 F. Supp. 2d at 305.

60. Maniaci, *supra* note 13, at 917.

61. Council Regulation No. 2271/96, *supra* note 47, at 3.

62. Maniaci, *supra* note 13, at 917.

63. *Id.* "The concern [by the European Commission] was that European companies obeying Helms-Burton might set a dangerous precedent by encouraging the United States to use further legal mechanisms to promote foreign policy in other areas of the world." *Id.* Ultimately, President Clinton and the EU reached an understanding in which the United States would waive part of the Helms-Burton act specifically for EU companies. *Id.* at 917–18.

64. Pursuant to Article 9 of the European Commission Regulation No. 2271/96, "[e]ach Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation." Council Regulation No. 2271/96, *supra* note 47, at 6.

65. *Press Release*, Foreign Ministry Press Dep't, Fed. Ministry for Eur. Integration and Foreign Aff., Rep. of Austria, *Foreign Ministry ceases investigations against BAWAG bank* (June 2, 2007), https://www.bmeia.gv.at/en/the-ministry/press/announcements/2007/foreign-ministry-ceases-investigations-against-bawag-bank/.

C. Current International Situation: The Iran Sanctions Re-Emerge

Closely tied to the historical situation in Cuba and also to past U.S. relations with the country of Iran, the United States has recently begun to disentangle itself from an Obama-era treaty known as the Joint Comprehensive Plan of Action ("JCPOA" colloquially known as the Iran Nuclear Deal). The agreement, finalized on July 14, 2015, sought to curtail the Iranian nuclear program in exchange for relaxed economic and trade sanctions by the signatory countries, of which the United States was one.[66]

However, on May 8, 2018, President Donald J. Trump ceremoniously announced the unilateral withdrawal of the United States from the JCPOA and the reinstatement of U.S. sanctions on Iran.[67] President Trump issued a series of Presidential Memoranda that directed the Secretary of State and the Secretary of the Treasury "immediately [to] begin taking steps to re-impose all United States sanctions lifted or waived in connection with the JCPOA."[68] On that same day, the Department of the Treasury Office of Foreign Assets Control (OFAC) issued explanatory guidance on the re-imposed sanctions.[69]

Pursuant to the Presidential Memoranda, OFAC crafted a two-part wind-down period for withdrawal from the JCPOA, to be effected in 90-day and 180-day increments.[70] Effective August 6, 2018, OFAC revoked certain licenses and authorizations for sale and trade of certain goods to or from Iran that had been issued consistent with the JCPOA, as well as re-imposed certain primary and secondary sanctions.[71] Effective November 4, 2018, OFAC re-imposed

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66. *The Joint Comprehensive Plan of Action (JCPOA) at a Glance*, ARMS CONTROL ASS'N (May 9, 2018), https://www.armscontrol.org/factsheets/JCPOA-at-a-glance. The agreement was reached by Iran and the P5+1, which consisted of China, France, Germany, Russia, the United Kingdom, and the United States. *Id.*

67. Babak Hoghooghi, *U.S. Withdrawal from JCPOA and Re-Imposition of U.S. Sanctions Suspended in 2016*, 34 INT'L ENFORCEMENT L. REP. 446 (Aug. 2018).

68. Presidential Memoranda, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, Section 3: Restoring United States Sanctions (May 8, 2018), https://www.whitehouse.gov/presidential-actions/ceasing-U-S-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/. The President further directed the Secretary of State and the Secretary of the Treasury to re-impose sanctions "under the National Defense Authorization Act for Fiscal Year 2012, the Iran Sanctions Act of 1996, the Iran Threat Reduction and Syria Human Rights Act of 2012, and the Iran Freedom and Counter-proliferation Act of 2012." *Id.*

69. *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, U.S. DEP'T OF THE TREASURY (last updated Aug. 6, 2018), https://www.treasury.gov/resource-center/sanctions/programs/documents/jcpoa_winddown_faqs.pdf.

70. *Id*; *see also* Hoghooghi, *supra* note 67, at 446.

71. Frequently Asked Questions Regarding the Re-Imposition of Sanctions, *supra* note 69; Hoghooghi, *supra* note 67, at 446.

additional secondary sanctions.[72] Most consequentially, the 180-day stage marked the revocation of General License H authorized under the JCPOA. That license pertained directly to U.S. owned or controlled foreign entities and their authority to engage in certain transactions with the government of Iran, which would otherwise be prohibited by 31 C.F.R. § 560.215.[73] The revocation forced those entities to cease immediately all business relationships with Iran,[74] and created civil penalties for a violation of U.S. sanctions against Iran.[75]

The EU quickly responded to the May 8, 2018 U.S. unilateral action. In a swift and definitive declaration dated May 9, 2018, the High Representative of the EU reconfirmed the EU's commitment to the JCPOA.[76] Shortly thereafter, the foreign and economic affairs ministers of France, Germany, and the United Kingdom, as well as the High Representative of the EU, sent a joint letter to the U.S. Secretaries of State and the Treasury requesting that there be no enforcement of the extraterritorial effects of the re-imposed sanctions.[77] In response, the United States rejected the European plea and emphasized a U.S. policy of no exceptions save in limited national security or humanitarian cases.[78]

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72. Hoghooghi, *supra* note 67, at 446. The secondary sanctions involved transactions regarding shipping, shipbuilding, petroleum and energy; transactions between foreign financial institutions and the Bank of Iran; other financial limits regarding transfer of funds in and out of Iran; and insurance restrictions. *Id.*

73. Prohibition on Foreign Entities Owned or Controlled by U.S. Persons, 31 C.F.R. § 560.215 (2018).

74. Hoghooghi, *supra* note 67, at 446.

75. *Id.*

76. European Council Press Release 251/18, Declaration by the High Representative onBehalf of the EU Following U.S. President Trump's Announcement on the Iran Nuclear Deal (JCPOA) (May 9, 2018). In fact, one EU official stated that "if EU companies abide by U.S. . . . sanctions they will, in turn, be sanctioned by the EU." Nathalie Tocci, Aide to Federica Mogherini, *quoted in* Jacqueline Thomsen, *EU Issues Warning to European Companies that Comply with new U.S. Sanctions on Iran*," THE HILL (Aug. 7, 2018), http://thehill.com/policy/international/europe/400704-eu-threatens-to-sanction-european-companies-that-comply-with-new.

77. Letter from Bruno Le Maire, et al., Minister of Economy and Finance, France, to Steven Mnuchin, Secretary of the Treasury, U.S. and Mike Pompeo, U.S. Dep't of State, U.S. (June 7, 2018), https://franceintheus.org/spip.php?article8665. Notably, Boris Johnson, the British foreign secretary, authored an opinion piece in the New York Times in which he scathingly criticized the Trump administration for undermining the significant progress that had been made on curtailing the Iranian nuclear program through the JCPOA. Boris Johnson, Opinion, *Boris Johnson: Don't Scuttle the Iran Nuclear Deal*, N.Y. TIMES (May 6, 2018), https://www.nytimes.com/2018/05/06/opinion/boris-johnson-trump-iran-nuclear-deal.html. He commented that "[o]nly Iran would gain from abandoning the restrictions on its nuclear program" and that it is "[f]ar better to police the deal with the greatest rigor—and the I.A.E.A. has certified Iran's compliance so far—while working together to counter Tehran's belligerent behavior in the region." *Id.*

78. Dan De Luce, Abigail Williams & Andrea Mitchell, *U.S. refuses European requests for exemptions from its new sanctions on Iran*, NBC NEWS (July 14, 2018, 7:30 AM), https://www.nbcnews.com/news/world/u-s-refuses-european-requests-exemptions-its-new-sanctions-iran-n891371.

In rapid response to the United States, on June 6, 2018, the EU adopted an update to its original Cuba-era blocking statute by adding the U.S. extraterritorial sanctions on Iran to the scope of that statute by adoption of the Commission Delegated Regulation 2018/1100.[79] According to a European Commission press release, the "measures [were] meant to help protect[] the interests of EU companies investing in Iran and to demonstrate the EU's commitment to the . . . (JCPOA)."[80]

The updated and revitalized EU blocking statute entered into effect on August 7, 2018 to counter the impact of re-imposed U.S. sanctions on Iran with respect to "EU companies doing legitimate business in Iran."[81] The EUs clarifying documents included two items, in addition to the amending regulation, that expanded and enhanced the scope of the original blocking statute: an authorizing regulation and a guidance note.

The authorizing regulation, set forth in European Commission Implementing Regulation 2018/1101,[82] is designed to protect "against the effects of the extra-territorial application of legislation" promulgated by the United States.[83] Specifically, the reauthorized blocking statute relieves "EU operators" from complying with extra-territorial legislation as listed in the Annex to the regulation (including the U.S.'s re-imposed Iran sanctions) or any penalties arising therefrom, because the EU "does not recognize its applicability to/effects towards EU operators."[84] The amended blocking statute further renders ineffective in the EU any foreign court rulings based on the U.S. sanctions, and allows EU operators to recover damages and seek compensation for any losses caused by application of or rulings related to the sanctions.[85] Despite the fact that EU law gives the blocking statute legal effect in all EU member states, that statute likewise affirmatively requires member states to adopt and implement in their individual countries their preferred methodologies for penalties of any

79. European Commission Daily News MEX/18/4085, Upholding the EU's Commitment to the Iran Nuclear Deal and Protecting the Interests of European Companies—Next Steps (June 6, 2018), https://ec.europa.eu/commission/presscorner/detail/en/MEX_18_4085.

80. *Id.*

81. European Commission Press Release IP/18/4805, Updated Blocking Statute in support of Iran nuclear deal enters into force (Aug. 6, 2018), http://eueuropaeeas.fpfis.slb.ec.europa.eu:8084/delegations/japan/49162/updated-blocking-statute-support-iran-nuclear-deal-enters-force_en.

82. The original Cuba-era Blocking Statute was Council Regulation (EC) No 2271/96. Council Regulation No. 2271/96, *supra* note 47, at 5. Council Regulation 2018/1101 clarifies the application of that original proclamation with regard to the recent Iran developments. Commission Regulation 2018/1101, 2018 O.J. (L199) 1,7 (EC).

83. Commission Regulation 2018/1101, supra note 82, at 1.

84. Official Journal of the European Union, *Guidance Note—Questions and Answers: Adoption of Update of the Blocking Statute*, 2018 O.J. (C277) 1, 2.

85. *Id.* Note that the EU Blocking Regulation does not render foreign court rulings based on the U.S. sanctions invalid; it merely states that such judgments will not be recognized and cannot be enforced in the EU. Of course, enforcement outside of the EU against EU companies is still a possibility.

possible breaches.[86] Thus, under the revitalized blocking statute, the individual countries must enact their own implementing legislation and penalty scheme, and enforce the same, in accordance with their own national schemes of legislation.[87]

II. EXTRATERRITORIAL EFFORTS BY THE UNITED STATES AND THE EUROPEAN UNION: THE REAL TRADE WARS

A. EU Efforts to Enforce the Blocking Statute

With the removal of the United States from the Iran Nuclear Deal, the EU finds itself in a peculiar situation regarding trade efforts with Iran. In a statement issued after the United States announced its withdrawal from the JCPOA, the President of the EU stated that "[a]s long as the Iranians respect their commitments, the EU will of course stick to the agreement of which it was an architect."[88] Further, the EU President expressed the duty of the EU to protect European businesses in light of the U.S. sanctions.[89] However, having embraced and signed off on the JCPOA, many of the major trading players in the EU have found themselves between the proverbial "rock and a hard place." Accordingly, "[t]he EU, which wants to preserve the nuclear deal, [worked] . . . with France and Germany on a plan that would allow companies to circumvent the U.S. sanctions."[90] In particular, France and Germany worked feverishly to come up with some scheme that would provide companies a work-around for the U.S. sanctions.[91] That work-around, known as INSTEX SAS (Instrument for Supporting Trade Exchanges), was announced on January 31, 2019, by the High Representative/Vice President of the EU, Federica Mogherini, as an instrument that would allow Member States of the EU to create legitimate trading relationships with the Iranian government and industry, with the initial

86. *Id.*

87. *Id.*

88. European Commission Press Release IP/18/3861, European Commission Acts to Protect the Interests of EU Companies Investing in Iran as Part of the EU's Continued Commitment to the Joint Comprehensive Plan of Action (May 18, 2018), http://europa.eu/rapid/press-release_IP-18-3861_en.htm.

89. *Id.* Emphasizing both the U.S.'s decision to withdraw from the JCPOA and decision to reinstate sanctions, the EU President emphasized that these actions have the "potential" to negatively affect European companies. *Id.* However, in the same announcement, the EU Commission expressed its continued belief that the United States remains a key ally and partner to the EU. *Id.*

90. Matthew Karnitschnig, *BASF Commits to Complying with US Sanctions on Iran*, POLITICO (Sept. 19, 2018), https://www.politico.eu/article/iran-donald-trump-sanctions-basf-commits-to-complying/. As the article notes, however, companies that generate income in the United States are keenly focused on being shielded from potential "legal jeopardy" in the United States. *Id.* The stakes for some large multinational companies are simply too high.

91. *Id.* In addition to BASF, featured in the article, other large multinational companies are contemplating withdrawing from doing business with Iran. *Id.*

"shareholders" of the trading instrument being France, Germany, and the U.K.[92] Because many large companies have centers of business both in the United States and in one or more European countries, this is a difficult issue for the EU to solve. Critics of INSTEX have labeled this "special financial vehicle" as at best a modest attempt to preserve the trading aspects of the JCPOA.[93] It remains to be seen if it will have any effect at all upon EU-Iran trade.

The problem still remains that protecting European businesses with U.S. sanctions in effect is a difficult balancing act. In its May 2018 press release, the European Union stated that it was moving forward on four fronts to counteract the re-imposition of U.S. sanctions on companies doing business in Iran.[94] First, the EU updated its list of sanctions on Iran that come within the ambit of the blocking statute.[95] Second, the EU began its effort to allow the European Investment Bank to determine whether it would "finance activities outside the European Union, in Iran."[96] Third, the EU determined that it would provide some stability to Iran in particular sectors, such as in the energy field, to indicate to Iran that the European Union would stand by its end of the JCPOA bargain.[97] And fourth, the European Commission promoted making bank transfers to the Central Bank of Iran to facilitate the receipt by Iran of oil revenues from European companies or countries that could otherwise be held up or stopped by the re-imposition of U.S. sanctions against Iran.[98]

Of these various answers by the EU to the re-imposition of U.S. sanctions against Iran, the blocking statute itself could have the most impact on whether or not European companies would suffer under the U.S. sanctions scheme. The

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92. European External Action Service, *Statement by High Representative/Vice-President Federica Mogherini on the Creation of INSTEX, Instrument for Supporting Trade Exchanges*, EUROPEAN COMMISSION EXTERNAL ACTION (Jan. 31, 2019), https://eeas.europa.eu/headquarters/headquarters-homepage/57475/statement-high-representativevice-presdent-federica-mogherini-creation-instex-instrument_en. The stated purpose of this "Special Purpose Vehicle" was to continue EU commitment to the "full and effective implementation of the JCPOA in all its aspects" so long as Iran continued implementation of its nuclear commitments under the JCPOA. *Id.*

93. Keith Johnson, *EU Offers Up a Meager Workaround to U.S. Iran Sanctions*, FOREIGN POLICY (Jan. 31, 2019), https://foreignpolicy.com/2019/01/31/eu-offers-up-a-meager-work-around-to-u-s-iran-sanctions-spv-instex/.

94. European Commission Press Release IP/18/3861, *supra* note 88.

95. *Id.* As noted *infra* at Section IIA, the Blocking Statute "forbids EU persons from complying with US extraterritorial sanctions, allows companies to recover damages arising from such sanctions from the person causing them, and nullifies the effect in the EU of any foreign court judgements [sic] based on them." Commission Regulation 2018/1101, *supra* note 81.

96. European Commission Press Release IP/18/3861, *supra* note 88. If this is put into place, then the European Investment Bank could provide financing to European companies doing business in Iran. *Id.*

97. *Id.* In its Press Release, the European Commission called these "confidence building measures," meant to assure Iran of the continuation of support consistent with the JCPOA. *Id.*

98. *Id.* This particular measure was designed to help Iran receive its oil-related revenues particularly in the event that U.S. sanctions target EU entities involved in oil-related transactions with Iran. *Id.*

implementing regulation for the blocking statute includes a provision for EU companies to apply for an authorization from the European Commission allowing them to abide by the U.S. sanctions vice the EU Blocking Statute if they are "exceptionally authori[z]ed to do so by the Commission."[99] This requires a showing of serious harm under the sanctions. However, it is unclear how the European Commission will determine how compliance with the blocking statute would cause "serious harm" to any European entity in question.[100] Additionally, it remains to be seen whether companies with a very strong United States connection would be more easily granted such "exceptional" authorizations.[101]

Further, not all EU member states have enacted country-specific implementing legislation regarding penalties for noncompliance with the EU blocking statute as necessary for actual imposition of penalties by each separate country, as contemplated in the EU legislative scheme. For those countries that actually have created a penalty system, the penalties span the range of severity. For example, in the U.K., a breach of the EU blocking statute equals a criminal

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99. European Commission Press Release IP/18/4805, *supra* note 81.

100. Another interesting aspect to the enforcement or lack thereof relative to the EU blocking statute is whether the courts will engage in the process of enforcing the EU legislation. Recently, in December 2018, a U.K. judgment was issued from the High Court of Justice, the Business and Property Courts of England and Wales Commercial Division, concerning a marine insurance claim that related to U.S. sanctions. Mamancochet Mining Ltd. v. Aegis Managing Agency Ltd. [2018] EWHC 2643 (Comm). The *Mamancochet* decision dealt with several issues related to the U.S. withdrawal from the JCPOA and the re-imposition of sanctions against Iran, with the two most relevant ones being: 1) would payment of an insurance claim under an insurance contract expose an insurer to any trade restrictions; and 2) if the claim was in fact paid, would that expose the insurer to either U.S. or EU sanctions. *Id.* at 2. The claim was issued against the insurer and its policy underwriters on May 22, 2018, after Trump's decision on May 8, 2018, to re-impose sanctions. *Id.* The underwriters were a group of thirty defendants, of whom nine were U.S.-owned or controlled foreign entities, thus purportedly bringing those nine under the umbrella of the revived Iranian sanctions. *Id.* The court ultimately decided that the U.S. sanctions did not prohibit payment of the claim, and thus did not reach a determination on whether or not the EU Blocking Statute applied in this particular instance. *Id.* However, it is instructive to note that the judge stated—in what would be dicta in the American legal system—that in his view, there is:

> [C]onsiderable force in the Defendants' "short answer" to the point, namely that the Blocking Regulation is not engaged where the insurer's liability to pay a claim is suspended under a sanctions clause such as the one in the Policy. In such a case, the insurer is not "complying" with a third country's prohibition but is simply relying upon the terms of the policy to resist payment.

Id.

101. Karnitschnig, *supra* note 90. Additionally, it seems that some major European companies—primarily those that are German-based—have already decided that they will abide by the U.S. sanctions, including BASF, the giant chemical company; Daimler, a global automotive company; and Siemens, a worldwide engineering giant, among others. *Id.* These companies all gain massive revenues from their North American operations. *Id.* However, this could seriously impact the efforts of the European Commission to take a stand against U.S. extraterritorial reach via its re-imposed sanctions against Iran.

offense.[102] In Germany, by contrast, a breach is viewed as an administrative offense.[103] Therefore, a large company with a significant North American presence could escape punishment either through an exception granted by the EU on hardship grounds, or could receive merely the proverbial slap on the wrist if the prosecuting EU member country has a very lax penalty system in place.

B. International Dispute Resolution Mechanisms

One alternative enforcement and settlement mechanism that has been attempted before, during the Cuban trade crisis, is the use of the World Trade Organization (WTO) and its claims resolution process. In the past, however, neither the United States nor the EU used the full WTO dispute resolution process to settle claims arising with respect to the Helms-Burton Act, which, as noted above, was severely criticized by the international community as an illegal and inappropriate extraterritorial legislative effort by the United States.

In 1996, after the passage of Helms-Burton, the EU challenged the extraterritorial aspects of the embargo on trade with Cuba at the WTO.[104] The EU requested the establishment of a dispute settlement panel to take the Helms-Burton Act and its international trading provisions under consideration.[105] As part of that request, the EU sought to challenge the Helms-Burton Act and the CACRs (particularly sugar quotas and measures regarding passenger and freight-carrying vessels).[106] In so challenging the U.S. extraterritorial measures, the EU relied on the General Agreement on Tariffs and Trade 1994 (GATT 1994), as well as the General Agreement on Trade in Services (GATS).[107]

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102. The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171, art. 2, http://www.legislation.gov.uk/uksi/1996/3171/made.

103. Außenwirtschaftsverordnung [AWV] [Foreign Trade and Payments Ordinance], Aug. 2, 2013, FED. LAW GAZETTE, as amended Dec. 13, 2017, [BAnz] at 20.12.2017 V1, § 82 (Ger.), www.gesetze-im-internet.de/englisch_awv/englisch_awv.html#p0894.

104. *See* Request for Establishment of a Panel by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/2 (Oct. 4, 1996); Boscariol, *supra* note 19, at 486.

105. *Id.* at 486. This challenge by the EU was fashioned as a request to establish a panel to consider the consistency of the Helms-Burton actions by the United States with the General Agreement on Trade in Services (GATS). The challenge was a wholesale attack not only on Helms-Burton, but on the CACRs; imposition of sugar quotas (the origin of the trade battles with Cuba); prohibitions on ships entering or leaving Cuba; and some financial aspects of the U.S. embargo against Cuba. *Id.* at 486–87.

106. *Id.* at 487. The EU further maintained that not only were the trade embargo measures violative of both GATT 1994 and GATS, but they also presented an obstacle to benefits that "the EU and other WTO Members could have reasonably expected to have accrued under the specific WTO commitments of the United States and Cuba." *Id.* at 488.

107. *Id.* The EU asserted in its complaint to the WTO that the Helms-Burton Act also affected things such as most-favored-nation treatment, market access, and national treatment, among others. *Id.* at 487–88.

In response, the United States countered that its extraterritorial measures were justified under the "national security exception."[108] Under principles of the WTO, a member state can decide for itself what constitutes a "national security exception."[109] At least some commentators have noted, however, there are objective criteria that should be considered in claiming such an exception.[110] First, the party claiming the national security exception should demonstrate that any such trade embargo (like the Cuban trade embargo memorialized in the Helms-Burton legislation) is a proportional response to the threat posed by the country penalized by the trade restrictions.[111] Second, the party claiming the national security exception should demonstrate that the measures have been "taken in time of war or other emergency in international relations."[112] These seem to be common-sense objectives, but because the WTO allows individual countries to make their own decisions and assertions regarding the national security exception, in practical fact these objectives are hard to enforce.

Notably, the EU challenge to the U.S. measures within the Helms-Burton Act never reached full consideration by the WTO. A series of negotiations between the EU and the U.S. resulted in an agreement to suspend the EU challenge in 1997.[113] This agreement ended the WTO process, foreclosing the use of the full array of WTO possibilities. Whether this lack of a completed WTO settlement was due primarily to the fact that the WTO was a newly created organization, having only come into creation in 1994, or whether it was due to the EU deciding to move away from a challenge against the United States is still undetermined.

C. Logical Possibilities for a Solution

Considering the historical background as enumerated within, there are three logical possibilities for a solution to the current extraterritorial efforts of the United States with regard to re-imposition of the pre-JCPOA sanctions against Iran. First, the EU itself or its members could enforce the current blocking statute. Second, the United States could actually move away from its hard stance on penalizing sanction violations. Third, the U.K., alone or perhaps in conjunction with the EU, could become the power player in challenging U.S.

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108. *Id.* at 488. Both GATT 1994 and GATS provide a national security exception that can be utilized by any country when it considers particular actions necessary for the protection of its own essential security interests, as necessary in times of war or other emergency. *Id.*

109. *Id.* at 489.

110. *Id.*

111. *Id.*

112. *Id.* (internal citations omitted); *see also* Michael J. Hahn, *Vital Interests and the Law of GATT: An analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 580 (1991) (explaining that essential security interests focus on "immediate political-military conditions that a State deems important for its position in the world . . .").

113. *Id.* at 489–90. The race to the bargaining table was precipitated by the fact that the United States threatened not to participate in the WTO challenge, the possibility that the WTO might allow the United States to rely upon the national security exception, and basic uncertainty on both sides about the applicability of the national security exception. *Id.* at 489.

trade restriction or manipulation in the same way that it held the original hard line against U.S. extraterritorial encroachment in the early 1980s.

1. EU Enforcement

As noted earlier, there has only been one attempt by the European Commission to challenge U.S. extraterritorial trade efforts. In 1996, the EU requested that the WTO establish a dispute resolution panel with respect to the far-reaching impact of the Helms-Burton Act and the CACRs.[114] At that time, the WTO, in its infancy, did not have an established record of successful dispute resolution. As of this moment in time, however, the WTO has handled over 400 disputes in a period of over twenty-three years.[115] This means that WTO dispute resolution is perhaps a more viable avenue to pursue than it was in 1996, when the WTO was in its infancy, and that the international community has a much stronger belief in the WTO's competency to achieve dispute resolution. Additionally, should the United States attempt to enforce its sanctions in the international arena, thus engaging the EU in a dispute, the WTO process could be one of the swiftest avenues of settlement; the average time for a WTO dispute resolution is about ten months, whereas national court systems or other international organizations can take years.[116]

Of course, the lurking problem is that President Trump has also threatened to pull the United States out of the WTO.[117] In August of 2018, President Trump stated that the WTO benefited everyone but the United States.[118] In light of the Trump administration's criticism of the WTO agreement and its processes, a WTO dispute resolution as a possible avenue to resolve the differences between the EU and the United States over the newly revived Iran sanctions might not be successful.

Alternatively, EU member states could take the reins and be the entities that ardently enforce the EU blocking statute. As previously noted, the European Commission, having only enacted a broad regulation as its blocking statute, has left it up to every member state to enact its own implementing legislation and its own penalty structure. Given that with respect to U.S.-Cuba sanctions, very few

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114. *Id.* at 486.

115. *The WTO can…Settle Disputes and Reduce Trade Tensions*, WORLD TRADE ORGANIZATION (last visited Feb. 15, 2019), https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm. In the WTO's own words, "WTO dispute settlement focuses countries' attention on the rules. Once a verdict has been announced, countries concentrate on complying with the rules, and perhaps later renegotiating them . . . ." *Id.*

116. *Id.*

117. *Trump Threatens to Pull US Out of World Trade Organization*, BBC NEWS (Aug. 31, 2018), https://www.bbc.com/news/world-us-canada-45364150.

118. *Id.* Trump asserted that the WTO rules against the United States too often, although according to the BBC analysis, the United States actually wins about ninety percent of the time when it is the complainant; conversely, it loses about ninety percent of the time when it is complained about. *Id.* Additionally, the United States has been blocking the appointment of judges to the WTO, which, of course, can impact upon its ability to do its international policing job. *Id.*

EU member countries elected to take the responsibility for following through with single state implementing legislation, however, the precedent is not strong for there to be widespread action by individual countries this time around either.

2. Softened U.S. Stance on Penalizing Sanction Violations

In the buildup to the Trump announcement of U.S. withdrawal from the JCPOA and re-imposition of Iran sanctions, and even in the interim period between the first and second phases of re-implementation, the U.S. President repeatedly and adamantly announced that the United States would not yield to any pressure to back down on its hard stance against Iran. The United States maintained that its national security interests required such a position. After all, the few judicial decisions related to TWEA and the CACRs during the Helms-Burton debacle focused at least in part on the language of TWEA as well as the nature of the harm that the statute aimed to prevent.[119] In fact, the courts themselves recognized a congressional intent in that legislation based on national security.[120]

Despite historical rhetoric, perhaps it is predictive that this time around, even prior to implementation of the full scope of sanctions against Iran, the United States provided some exemptions to certain countries.[121] However, the exemptions have been granted only to a handful of countries that are heavy importers of Iranian oil, including India, South Korea, Japan, and China; there were no exemptions or waivers granted to any EU country.[122] Although these exemptions may have been motivated by other U.S. foreign policy goals, it still leaves the EU countries with little hope that the United States will soften its policies regarding the sanctions vis-à-vis the EU. By leaving the EU countries out of the exemption equation, though, it is likely that other long-term historical relationships will deteriorate, and the long-standing transatlantic partnership that has existed between the United States and most of Europe could be severely compromised.

3. Britain's Role in Sanctions Counterattacks

Long before the EU's first round of blocking statutes against the United States, the U.K. took its very powerful stance against U.S. extraterritorial reach through its legislative initiatives and judicial interventions as outlined above. The U.K. was also one of the only countries to enact punishing implementing legislation during the era of the U.S.-Cuba sanctions and the EU's 1996 blocking statute. Given the likelihood that the U.K. post-Brexit (or without Brexit, as the case may be) will need to establish its own trading regulations and parameters,

119. United States v. Brodie, 174 F. Supp. 2d 294, 304 (E.D. Pa. 2001).

120. *Id.* at 305.

121. Gardiner Harris, *U.S. Reimposes Sanctions on Iran but Undercuts the Pain with Waivers*, N.Y. TIMES (Nov. 2, 2018), https://www.nytimes.com/2018/11/02/world/middleeast/us-iran-sanctions-oil-waivers.html.

122. *Id.*

it could be possible that the U.K. will once again exert its considerable international muscle and demand that the United States not encroach on trading taking place outside of its borders or by entities that are not under the jurisdiction of the United States. In fact, if the U.K. re-establishes itself as a unilateral entity apart from the EU, it may seek to assert its power and its leadership and could take the lead in challenging U.S. extraterritorial efforts at restricting international trade both post-JCPOA and into the future.

III. THE SOLUTION: THE EU DEVELOPS SOME BACKBONE

The issue of how to deal with the U.S.'s assertion of extraterritorial power requires the immediate attention of the EU. Specifically, the only way in which the Unted States will back off its sanctions-based claims against multinational corporations is if one or more countries of the EU step up to enforce the EU's own regulations—and in a meaningful rather than symbolic way. Clearly, the movement of the U.K. out of the EU, now or in the future, will leave a power vacuum in the EU because the U.K. has been one of the stronger players in creating implementing legislation and issuing court decisions that directly challenge the power of the United States. Of course, it will make a significant difference which country specifically fills that vacuum, given the foreign policy attitudes of the Trump administration. It must be a country that is strong both economically and politically, and that country must impose stringent economic penalties against any violating multinational company in order for there to be any hope of the United States respecting the actions of the new lead player and taking their pushback seriously. A unified EU should review the policies and purposes of the EU blocking statute against the backdrop of much noise from the Trump administration.

IV. CONCLUSION

The Iran Nuclear Deal, and its mutual promises among the members of the international community, including the United States, promised the lifting of certain trade sanctions against Iran in exchange for concessions by Iran regarding development of its nuclear program. From the trade perspective, as well as from the perspective of greater nuclear security, that agreement was welcomed news to the international community. However, the 2018 withdrawal by the United States from the Iran Nuclear Deal has dealt the international trading community a body blow. The U.S. withdrawal means that the United States will put prior sanctions against Iran back in place. This leaves the world's trading partners with a conundrum of massive proportions: whether to continue the deal with Iran consistent with the JCPOA, risking the ire of and possible sanctions by the United States, or whether to pull out of the deal altogether. Compounding this problem, the United States has vowed to use its reinstated sanctions against Iran towards international businesses to force compliance with U.S. policy regarding trade with Iran. This threatened display of extraterritorial force by the United States can possibly be sidelined by the creation and

enforcement of penalty schemes in support of the EU blocking statute in the various member countries of the EU. However, unless the EU members really intend to put some teeth into their individual blocking statute penalty legislation, including the enactment of solid enforcement mechanisms, the EU may simply be bringing the proverbial sword to a gunfight. Sooner or later, the EU will have to step up and exert its collective strength on the world stage or the United States will simultaneously exert its worldview and determine the future of international trading vis-à-vis Iran and most probably other countries around the world.