



## American Sanctions and European Sovereignty

*Jean De Ruyt*

*‘We Europeans cannot accept that a foreign power – even our closest friend and ally – makes decisions over our legitimate trade with another country. This is a basic element of sovereignty...’ (Federica Mogherini)<sup>1</sup>*

The decision by the United States to withdraw from the “Joint Comprehensive Plan of Action” and re-impose sanctions on Iran broke an international understanding, sanctioned by a UN Security Council Resolution. However, European and other non-US companies dealing with Iran must abide by US law in order to avoid its extra-territorial effects on their US operations. Efforts are being made to help the EU keep its “sovereignty” on sanction issues when there is disagreement with the US, but until now these have not accomplished much. Therefore a new Instrument in Support of Trade Exchanges (INSTEX) was launched at the end of January to ensure the continuation of some trade with Iran. But the only convincing way to allow the EU to increase its autonomy is to boost the role of the Euro in international transactions. Certainly, in today’s unpredictable world, we need more than ever to address the issue of the extraterritorial application of American sanctions – today it is Iran, what if tomorrow it is China?

### THE EXTRA-TERRITORIAL APPLICATION OF AMERICAN SANCTIONS

Sanctions against rogue international actors tend to work best when they are widely supported. When they are decided by the UN, they are expected to be universally respected. Sanctions against Russia linked to the Ukraine crisis work well as long as they are supported by both the US and the EU.

But when, on 8 May 2018, the United States decided to withdraw from the Joint Comprehensive Plan of Action (JCPOA) and re-impose sanctions on Iran, their move was purely unilateral. It was even strongly opposed by the EU and other UN members, who continue to consider that the JCPOA is the best instrument possible to prevent a resumption of the Iranian nuclear programme.

The fact that the JCPOA is rooted in a UN Security Council Resolution makes their position even stronger.<sup>2</sup> The International Atomic Energy Agency has certified Iran’s compliance with its obligations at no less than thirteen different occasions. Even the head of the CIA said in January 2019 that Tehran was abiding by the agreement.

Nevertheless, European companies and citizens are obliged to respect the US sanctions if they do not want to be sanctioned themselves. The extra-territorial application of the US law

ensures that any company or individual, worldwide, can be punished through their links with the jurisdiction of the United States, such as dollar transactions or the existence of an American subsidiary.<sup>3</sup>

### THE BLOCKING STATUTE

The extra-territorial imposition of American sanctions became a topic of dispute between the US and the EU as early as 1996, with the “Cuban Liberty and Democratic Solidarity Act”, better known as the Helms–Burton Act, which extended the territorial application of the US embargo to foreign companies trading with Cuba. At the time, the EU was trying to improve its relations with the island, and agreed on legislation which would circumvent the US sanctions, the so-called “blocking statute”.

The statute allows EU operators to recover damages arising from the extra-territorial sanctions “from the persons causing them” and nullifies the effect in the EU of any foreign court ruling based on them. Moreover, it forbids EU persons from complying with those sanctions, unless exceptionally authorised to do so by the Commission.

As could be expected, the first reaction by the EU after the US reinstated the Iran sanctions consisted in updating the Blocking Statute by making it applicable to the new extra-territorial US sanctions on Iran. This was done on 6 August 2018, the day the first of the two sets of American sanctions entered into force.

The core weakness of the blocking statute is that it was never really used. In particular, the guidelines on the way to proceed were not very clear. For example, it is very difficult for the EU authorities to prove that the reason why a company discontinues its activities in Iran is linked to the American sanctions, and not based on economic reasons or changes in its industrial strategy.

Large European companies that are very active in Iran, such as Total and Peugeot, have decided early on that they would comply with the US sanctions. They were followed by Airbus, Siemens and Swift, the international financial transactions platform which had been part of the EU sanctions against Iran since 2012 but had re-started its connections with Iranian banks after the conclusion of the JCPOA. The imposition of the blocking statute regulation in fact results in European companies, including the European subsidiaries of US companies, navigating potentially conflicting legal obligations. At the end of the day they do not have much of a choice but to comply with the US law rather than the EU regulation.

### THE EUROPEAN INVESTMENT BANK

Another suggestion coming from the EU Commission was to use the European Investment Bank (EIB) as a vehicle to ensure that projects in Iran would continue to be financed. As liquidity is a major problem in Iran, the objective would have been to enable the EIB to support small and medium-size companies in Iran, helping them offset the impact of US sanctions.

However, the Bank, which is supposed to mobilise private capital in order to finance projects of public interest, did not wish to take this risky path. EIB president Werner Hoyer told the press on July 18 that “the European Investment Bank would risk its business model if it invested in Iran”. He insisted that he supported the EU position on Iran, but also regretted the EIB could not play an active role, as long as the financing flows were the way they are.

### THE SPECIAL PURPOSE VEHICLE

On the occasion of the UN General Assembly week in September 2018, officials from the countries having negotiated the JCPOA, minus the US, issued a statement welcoming “the

initiative to establish a special purpose vehicle (SPV) to facilitate payments related to Iran's exports, including oil, and imports, which will assist and reassure economic operators pursuing legitimate business with Iran".<sup>4</sup> France, the UK and Germany, with help from the European Commission and the EEAS, started in September 2018 to elaborate the SPV. The discussions, long and difficult, were finally concluded at the end of January 2019, with the creation of a new institution called INSTEX – short for Instrument in Support of Trade Exchanges – aimed at facilitating “legitimate” trade between European economic operators and Iran.

INSTEX will function as a form of barter arrangement: a Euro-denominated clearing house allowing a European exporter of goods to Iran to be paid by a European importer of goods from Iran. The payments will thus remain outside the reach of US control over global money-transfer systems. It also avoids the need to rely on banks that fear being cut off from doing business in US financial markets. The company was registered by the “E 3” in Paris on January 29, with an initial €3,000 in capital and a supervisory board with members from the three countries and chaired (for the first 6 months) by Per Fischer from Germany. It received the formal endorsement of all 28 EU members on January 31 and will become operational after Iran will have created its local counterpart.

According to a statement by the E 3 foreign ministers, INSTEX will “focus initially on the sectors most essential to the Iranian population – such as pharmaceuticals, medical devices and agri-food goods”.<sup>5</sup> This restriction – notably the absence of oil and petroleum products – seems to have been a deliberate decision aimed at avoiding a harsh reaction from the U.S. The scope of the instrument is provisionally restricted to the EU-28. However, the three founders stated that INSTEX must aim “in the long term” to be open to economic operators

from third countries who wish to trade with Iran.

### **A REINFORCED ROLE FOR THE EURO?**

The INSTEX was conceived in a prudent way, with limited objectives, at least at this stage. It is more of a symbolic gesture, showing Iran that the Europeans are prepared to do their part to save the JCPOA. But it does not solve the broader problem of re-establishing European sovereignty over its trade policy. This is why the European Commission has started to address the main reason why the US is able to control most international transactions: the mere fact that the majority of them, even when they only involve European companies, use the United States Dollar.

In December 2018, on the occasion of the 20th anniversary of the creation of the Euro, the Commission issued a communication entitled “Towards a stronger international role of the Euro”.<sup>6</sup> It opens a discussion on the way to overcome the (numerous) technical obstacles in having the Euro used more broadly in financial transactions. It recalls that the share of the Euro in global payments in the world amounts to 36% compared with 40% for the US Dollar, but that the US Dollar's share of the world's foreign exchange reserves still amounts to 60% as compared to 20% for the Euro.

The communication is not a direct answer to the “sovereignty” issue. However, it does mention the benefits of a stronger international role for the Euro: “Stronger autonomy of European consumers and businesses, allowing them to pay or receive payments for their international trade, and finance themselves with reduced exposure to legal actions taken by third country jurisdictions, like extraterritorial sanctions”.

### **AN ORDER IMPOSED BY A ‘SUPERIOR POWER’**

The Iran case gave new arguments to the EU and other UN members, in the name of their

own sovereignty, “to call into question the practice that the United States has taken upon itself to make decisions for the rest of the world”.<sup>7</sup> More and more unilateral sanctions are decided by Washington alone, without consultation of the EU or any other partner, but are then also imposed on non-US companies under the threat of huge fines. Recently, Société Générale agreed to pay \$1.34 billion for the settlement of an action by OFAC for violations of US sanctions targeting Cuba, Iran, and Sudan.<sup>8</sup> The violation of American sanctions against Iran was also a major factor motivating the US request to Canada to arrest and extradite Huawei’s chief financial officer Meng Wanzhou.

In a recent article on “American Hegemony”, Harvard professor Joseph Nye quotes the well-known neo-conservative theorist Robert Kagan, who stated that “a liberal world order, like any world order, is something that is imposed, and as much as we in the West might wish it to be imposed by superior virtue, it is generally imposed by superior power”. Yet only the United States, adds Nye, “has tried to develop foreign policies that reflect such exceptionalism and has had the scope conferred by sufficient

power to take an original path in the international jungle”.<sup>9</sup>

The security protection provided by the US and ensured by the Atlantic Alliance and our common attachment to universal values and the multilateral system have for a long time made it possible for the Europeans to accept this “exceptionalism”. But the Iran case is probably a step too far. If the American administration does not hesitate to conduct a foreign policy which we consider contrary to our interests – if Iran today, why not China tomorrow? – it might be important that we claim back the sovereignty we were willing to share with the US during the cold war.

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## ENDNOTES

<sup>1</sup> Federica Mogherini, Interview with the European Council on Foreign relations, 11 January 2019, available from: [https://www.ecfr.eu/article/commentary\\_shaping\\_europes\\_present\\_and\\_future](https://www.ecfr.eu/article/commentary_shaping_europes_present_and_future).

<sup>2</sup> UN Security Council Resolution 2231 of 20 July 2015, available from: [http://undocs.org/S/RES/2231\(2015\)](http://undocs.org/S/RES/2231(2015)).

<sup>3</sup> The issue has been the object of a workshop presided by Pascal Lamy, the former WTO director general and chief of staff of Jacques Delors, whose results have been published under the title: “EU and US sanctions, which sovereignty?”, Policy paper # 232, Notre Europe, 23/10/2018, available from: <http://institutdelors.eu/wp-content/uploads/2018/10/EUandUSSanctionswhichsovereignty-Lamyetalii-Oct18.pdf>.

<sup>4</sup> Joint ministerial statement on the implementation of the JCPOA, New York, 24/09/2018.

<sup>5</sup> Joint statement on the creation of INSTEX, in “France diplomatie”, 31 January 2019, available from: <https://www.diplomatie.gouv.fr/en/country-files/iran/events/article/joint-statement-on-the-creation-of-instex-the-special-purpose-vehicle-aimed-at>.

<sup>6</sup> “Towards a stronger international role of the euro”, Brussels, 5/12/2018, COM 2018, 796, final, available from: [https://ec.europa.eu/commission/sites/beta-political/files/communication\\_-\\_towards\\_a\\_stronger\\_international\\_role\\_of\\_the\\_euro.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication_-_towards_a_stronger_international_role_of_the_euro.pdf).

<sup>7</sup> Pascal Lamy and others, “EU and US sanctions, which sovereignty?”, op. cit., p. 1.

<sup>8</sup> OFAC is the U.S. Treasury Department’s Office of Foreign Assets Control, which administers and enforces the American sanctions regime.

<sup>9</sup> Joseph Nye, “The rise and fall of American hegemony from Wilson to Trump”, *International Affairs*, vol. 95 (1) January 2019, available from: <https://academic.oup.com/ia/article/95/1/63/5273551>.