The British Yearbook of International Law © The Author(s) 2020. Published by Oxford University Press. Available online at www.bybil.oxfordjournals.org

doi:10.1093/bybil/braa007

Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions

By Tom Ruys* and Cedric Ryngaert**

Abstract

The US is increasingly weaponizing economic sanctions to push through its foreign policy agenda. Making use of the centrality of the US in the global economy, it has imposed 'secondary sanctions' on foreign firms, which are forced to choose between trading with US sanctions targets or forfeiting access to the lucrative US market. In addition, the US has penalized foreign firms for breaching US sanctions legislation. In this contribution, it is argued that the international lawfulness of at least some secondary sanctions is doubtful in light of the customary international law of jurisdiction, as well as conventional international law (eg, WTO law). The lawfulness of these sanctions could be contested before various domestic and international judicial mechanisms, although each mechanism comes with its own limitations. To counter the adverse effects of secondary sanctions, third states and the EU can also make use of, and have already made use of, various non-judicial mechanisms, such as blocking statutes, special purpose vehicles to circumvent the reach of sanctions, or even countermeasures. The effectiveness of such mechanisms is, however, uncertain.

Keywords: secondary sanctions, extraterritoriality, jurisdiction, international economic law, United States, European Union.

* Professor of Public International Law, Ghent University, Ghent Rolin-Jaequemyns International Law Institute, Tom.Ruys@UGent.be.
** Professor of Public International Law, Utrecht University, RENFORCE research programme, C.M.J.Ryngaert@uu.nl.
The authors would like to extend their gratitude to the European Central Bank (ECB), which has been so kind as to fund the research that informs this article through its Legal Research Programme (2019). Earlier drafts of this paper were presented during an expert seminar at Utrecht University, as well as during a meeting with the ECB Legal Service. The authors wish to thank the participants at both events, and the two anonymous reviewers, for their feedback. The paper was finalized in December 2019, with a minor update undertaken in May 2020.

I. Introduction

Lately, the US has increasingly been 'weaponizing' economic sanctions to push through a foreign policy agenda.[1] Making use of the centrality of the US in the global economy, it has forced foreign states and their firms to choose between halting trade with US sanctions targets or forfeiting access to the lucrative US market. In addition, the US has not shied away from slapping huge fines on foreign firms present in the US that route payments to sanctions targets through the US financial system.[2] While US reliance on economic sanctions as a foreign policy tool is hardly novel,[3] the US has recently made much more aggressive use of them to project US power abroad.[4] Most eye-catching have been the re-instatement of US sanctions against Iran in 2018[5] and the strengthening of the Cuba boycott,[6] however US sanctions are set to grow even more. Just as this article was finalized, for instance, President Trump signed into law an act imposing sanctions on persons involved in the construction of the Nord Stream 2 gas pipeline, which will transport natural gas from Russia to the EU.[7]

[1] See also E Geranmayeh and M Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions' in M Leonard and J Shapiro (eds), *Strategic Sovereignty: How Europe Can Regain the Capacity to Act* (European Council on Foreign Relations 2019). Such sanctions go beyond multilaterally agreed sanctions that are normally promulgated by the UN Security Council.

[2] See Part II.B.3.

[3] See, notably, Cuban Liberty and Democratic Solidarity (Libertad) Act 1996, 22 USC §§ 6021–91 (Helms-Burton Act) and Iran and Libya Sanctions Act 1996, 50 USC §§ 1701ff.

[4] 'Weapons of Mass Disruption: America is Deploying a New Economic Arsenal to Assert its Power' *The Economist* (6 June 2019).

[5] See, notably, 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, 83 Fed Reg 38,939 (7 August 2018).

[6] Notably the reactivation of Title III of the Helms-Burton Act by President Trump in 2019: J Gabilondo, 'No Oligarch Left Behind: Trump's Title III Cuba Policy' (*Just Security*, 3 June 2019) <www.justsecurity.org/64385/no-oligarch-left-behind-trumps-title-iii-cuba-policy/>.

[7] Section 7503 of the National Defense Authorization Act for the Fiscal Year 2020, S.1790, 116th Congress (2019–2020) and Protecting Europe's Energy Security Act of 2019, S.1441, 116th Congress (2019–2020), providing for a visa ban and asset freeze for persons involved in 'the provision of certain vessels for the construction of Russian energy export pipelines'. See for a critical view: S Sultoon, 'US Congress Would Undermine Transatlantic Alliance with Nord Stream 2

US sanctions do not only govern economic relations between the US and the target state ('primary sanctions'), but also relations between *third states* and target states ('secondary sanctions'). These secondary sanctions do not just aim to coerce targeted states to change political course,[8] but also third states. This contribution focuses on the latter type of sanctions. As secondary sanctions limit third states' sovereignty to freely conduct their external economic relations with other states, they raise deep legitimacy questions. They also raise the question as to how third states could respond to mitigate, or even neutralize, the impact of secondary sanctions.

This contribution approaches secondary sanctions from a public international law perspective. We ascertain to what extent such sanctions are in keeping with the customary international law of state jurisdiction, as well as with multilateral and bilateral conventions concluded by the targeting and third states. In addition, we examine what judicial and non-judicial mechanisms third states can resort to in order to contest the legality of secondary sanctions, or to counter their adverse effects.

While the compatibility of US secondary sanctions with international law is not a new topic in legal scholarship,[9] we carry out a fine-grained legal analysis, distinguishing between various types of sanctions, and reviewing their international legality in light of international norms drawn from multiple legal regimes (the law of jurisdiction, trade law, monetary law, etc). The novelty of this contribution also resides in its kaleidoscopic view of possible remedies to challenge US secondary sanctions. While scholarly analyses exist regarding discrete judicial and non-

Sanctions' (*Atlantic Council*, 31 May 2019) <www.atlanticcouncil.org/blogs/new-atlanticist/us-congress-would-undermine-transatlantic-alliance-with-nord-stream-2-sanctions>.

[8] On the contestation of primary sanctions on grounds of perceived coercion, in particular by China, Russia, member states of the Non-Aligned Movement, and even the UN General Assembly (UNGA) where the latter states are dominant, see: Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (25 June 2016); Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China (19 April 2016); Asian African Legal Consultative Organization (AALCO), 'Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties' (Doc No AALCO/53/TEHRAN/2014/SD/S6, 18 September 2014) 22. For an overview of relevant resolutions of the UNGA, see: A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 Chinese Journal of International Law 175, 186–89. This attitude towards sanctions shows a clear divide between the West and the non-West, but, as Alexandra Hofer has argued, relevant resolutions of the UNGA condemning unilateral sanctions do not seem to satisfy the required criteria to establish a new customary rule prohibiting such sanctions: ibid 212. In this context, we do not pronounce on the scope of the principle of non-intervention, nor on the legality of third-party countermeasures. On non-intervention and economic coercion, see also A Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 Cambridge Journal of International and Comparative Law 616.

[9] For a somewhat dated but extensive discussion of (US) secondary sanctions from a public international law perspective, see C Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese Journal of International Law 625; JA Meyer, 'Second Thoughts on Secondary Sanctions' (2009) 30 University of Pennsylvania Journal of International Law 905.

judicial remedies, such as the EU Blocking Statute or the security exception under the law of the World Trade Organization (WTO),[10] no scholarly publication has so far addressed the range of potential remedies that may be available.

The geographic focus of this contribution is on economic relations between the US and the EU. Not only are the US and the EU among the world's largest trading blocs/nations,[11] they also 'have the largest bilateral trade and investment relationship and enjoy the most integrated economic relationship in the world'.[12] Moreover, as the EU and US economies have become ever more interdependent, the EU has become uniquely vulnerable to the imposition of US secondary sanctions, which restrict trade between the EU and third states. For instance, after the reinstatement of US secondary sanctions against Iran in 2018, European investments and transactions with Iran,[13] worth billions of US dollars, were unwound, arguably out of fear of falling foul of US sanctions (eg Renault and Citroën's investments in a joint venture with Iranian partners, Scania's establishment of a bus factory in Iran, and a technology transfer agreement between Siemens and an Iranian firm).[14]

Our focus on the transatlantic relationship means that we zoom in, in particular, on remedial mechanisms that are accessible to, or otherwise involve, the EU and/or its Member States, such as the WTO dispute-settlement mechanism, domestic or regional blocking statutes, or special purpose vehicles facilitating trade between states. It remains the case, however, that many if not most of these mechanisms can also be relied on (or be set up by) other states. Accordingly, the analysis has wider geographic application.

Methodologically, we espouse a largely doctrinal approach, consisting of a close analysis of state practice, legal texts such as treaties, case law, and legal literature. However, we also engage in a critical evaluation of relevant rules and mechanisms, mapping implementation difficulties, procedural or jurisdictional obstacles, and (unintended) consequences. For that purpose, we have also carried out limited empirical research, notably by conducting semi-structured interviews with key,

[10] See, eg, C Van Haute, S Nordin, and G Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place' (2018) 13 Global Trade and Customs Journal 496; RP Alford, 'The Self-Judging WTO Security Exception' (2011) Utah Law Review 697. See also the references in note 295.

[11] European Commission, 'EU Position in World Trade' <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>.

[12] European Commission, 'Countries and Regions: United States' <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>.

[13] After the signing of the Joint and Comprehensive Plan of Action (JCPOA), the international community lifted nuclear-related sanctions against Iran, after which trade with Iran could resume. See European Council and Council of the EU, 'Joint Comprehensive Plan of Action and Restrictive Measures' <www.consilium.europa.eu/en/policies/sanctions/iran/jcpoa-restrictive-measures/>.

[14] For an overview, see US Congressional Research Service, 'Iran Sanctions' (Report RS20871, updated 15 November 2019) 50–51 (giving an overview of EU companies' divestment as a result of the reinstatement of US sanctions).

information-rich elite participants, such as lawyers specializing in sanctions law and compliance, and government and EU officials.

This contribution consists of seven further parts. Part II briefly introduces the concept of economic sanctions, and in particular the distinction between primary and secondary sanctions as understood here. As secondary sanctions have an extraterritorial dimension, Part III reviews their compatibility with the customary international law principles of state jurisdiction (such as territoriality, nationality, and security). The general law of jurisdiction is not, however, the only area of public international law that is relevant to assessing the legality of secondary sanctions. Part IV analyses the extent to which secondary sanctions are compatible with international obligations arising from treaties, in particular treaties concluded in the context of the WTO, but also bilateral treaties of friendship, commerce, and navigation (FCN), as well as bilateral investment treaties (BITs).[15] Parts V, VI, and VII proceed to discuss how third states and the EU could *challenge* secondary sanctions. Part V examines the availability of judicial mechanisms, while Parts VI and VII tackle the availability of non-judicial mechanisms. Part VI concentrates on one specific mechanism, the EU Blocking Statute, which was reactivated in 2018 to counter the effects of reinstated US secondary sanctions, particularly those targeting Iran. Part VII gives a non-exhaustive overview of other non-judicial mechanisms to which states can resort, such as de-dollarization, setting up a special purpose vehicle, and taking retaliatory measures. Part VIII concludes.

II. Secondary Sanctions: Defining the Concept

Economic sanctions are essentially a political tool.[16] They are used to force sanctions targets to fall in line with the targeting state's political

[15] Note that this contribution does not address the compatibility of secondary sanctions with international human rights treaties or other instruments protecting human rights, without, however, denying the validity of this perspective. Especially in Europe, there is a rich body of case law on the compatibility of targeted sanctions, notably asset freezes and travel restrictions imposed on natural and legal persons suspected of supporting terrorism, with human rights protections: see, eg, Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351; *Case of Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016). The human rights impact of secondary sanctions has also been addressed, for instance, by the successive UN special rapporteurs on unilateral coercive measures: see, eg, UNHRC, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (30 August 2018) UN Doc A/HRC/39/54, paras 7, 11, 25, 35–37; 'UN rights expert urges Governments to save lives by lifting all economic sanctions amid COVID-19 pandemic' (3 April 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25769&LangID=E> (drawing attention to the adverse impact of sanctions on targeted countries' efforts to confront the COVID-19 pandemic).

[16] PS Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law' (2018) 83 Missouri Law Review 1, 2; AF Lowenfeld, 'Trade Controls for Political Ends: Four Perspectives' (2003) 4 Chinese Journal of International Law 355.

preferences, relating to, eg, disarmament, human rights compliance, or even choice of regime. They can be taken against both states and non-state actors (eg terrorist groups)[17] and take the form of trade, finance, investment, and asset restrictions.

A conceptual distinction is made between primary and secondary sanctions. Primary sanctions prohibit or condition economic relations between the territory of the targeting state (including economic agents who find themselves in that territory) and the state targeted by the sanctions, or between nationals of the targeting state and the target state.[18] Secondary sanctions, in contrast, apply to relations between a third state and third-country operators on the one hand, and the (foreign) sanctions target on the other. Secondary sanctions have an extraterritorial aspect and thus are potentially suspect under international law. They are the focus of this contribution.

In US literature, secondary sanctions have been defined as 'retaliatory' sanctions that 'do not impose monetary penalties, but rather seek to cut off foreign parties from access to the US financial and commercial markets if these entities conduct business in a manner considered detrimental to US foreign policy'.[19] According to this literature, '[w]hile primary sanctions may be enforced by criminal prosecution or civil fines, secondary sanctions are enforced by economic measures'.[20] In this contribution, however, we adopt a broader notion of secondary sanctions that includes all measures which, in essence, aim to regulate economic transactions between a third state and a target state.[21] This notion also includes sanctions which *do* impose monetary penalties on foreign entities. US literature may consider such sanctions to be *primary* sanctions, as they are allegedly triggered by the presence of a US nexus and thus appear to govern economic relations between the US and target states.[22] However, as this US (territorial) nexus is typically rather tenuous, eg, denominating a contract in US dollars, or re-exporting US technology,[23] such 'primary' sanctions essentially regulate foreign conduct by

[17] On the US Treasury's counterterrorism sanctions, see US Department of the Treasury, 'Counter Terrorism Sanctions' <www.treasury.gov/resource-center/sanctions/programs/pages/terror.aspx>.

[18] See, eg, art 49 of Council Regulation (EU) 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 [2012] OJ L88/1.

[19] M Rathbone, P Jeydel, and A Lentz, 'Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws' (2013) 44 Georgetown Journal of International Law 1055, 1112–13.

[20] Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law', 10.

[21] See also, from an Indian perspective, A Rej and A Tirkey, 'Beyond JCPOA – Secondary Sanctions, Projects and Investments' (*Observer Research Foundation (India)*, 20 July 2018) <www.orfonline.org/expert-speak/42641-jcpoa-secondary-sanctions-projects-investments/> (defining, in the context of US sanctions targeting Iran, 'extraterritorial' or 'secondary' sanctions as sanctions which 'penalise third-country firms that are involved in Iran's energy sector').

[22] Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law', 11 ('the extension of OFAC rules to foreign branches and (sometimes) subsidiaries of U.S. persons is part of the primary sanctions'); H Hurd, 'US Reimposes the Second Round of Iran Sanctions' (*Lawfare*, 9 November 2018) <www.lawfareblog.com/us-reimposes-second-round-iran-sanctions>.

foreign persons. Thus, on closer inspection, they could also be characterized as secondary in nature.[24]

We consider the term 'secondary sanctions' to be largely interchangeable with 'extraterritorial sanctions'.[25] Still, secondary sanctions are not necessarily an exercise of 'extraterritorial jurisdiction'. As the targeting state may formally ground its sanctions authority on the existence of a territorial connection, such as the use of the currency of the targeting state, or the use of its technology, secondary sanctions may appear to be justified under the territoriality principle. What is materially relevant for present purposes, however, is whether such sanctions *in fact* aim to regulate foreign conduct, ie, relations between a third state and the targeting state, regardless of territorial connections to the targeting state.

The incentive to impose secondary sanctions arises where primary sanctions fail to effect the envisaged behavioural change in the target state. If third states are allowed to maintain their economic relations with the target state, and economic operators from the sanctioning state are not, the former could supplant the presence of the latter (a process known as 'backfilling'), thereby undermining primary sanctions.[26] Thus, if primary sanctions also extend to economic relations between *third states* and the target state, their impact is likely to increase.[27] Secondary sanctions could thus be characterized as anti-circumvention measures which prevent third states and economic operators from going about their business with target states as usual. They serve as force multipliers for primary sanctions.

From a political economy perspective, secondary sanctions could be welfare-enhancing for third states insofar as the latter value compliance by the target state with the goals and regulations set by the regulating state (eg nuclear disarmament), even if their economic operators do not willingly participate in these sanctions.[28] However, when third states do not value compliance (eg because, unlike the targeting state, they do not

[23] See Part III.B.

[24] Compare also with the UK Financial Markets Law Committee (FMLC), 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty' (June 2019) section 2.3, note 4 (doubting whether a settlement between OFAC and Singapore-based companies that was jurisdictionally based on US dollars being processed through the US financial system qualified as a primary sanction).

[25] cf Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law', 9 ('the concept of "extraterritorial sanctions" should be compared with its cousin, "secondary sanctions." Extraterritorial sanctions govern conduct by persons located outside the sending state'), but stating at 11 that '[s]econdary sanctions are extraterritorial, though extraterritorial sanctions need not be secondary', there citing the practice of extraterritorial 'primary' sanctions, which we consider secondary in nature.

[26] Rathbone, Jeydel, and Lentz , 'Sanctions, Sanctions Everywhere', 1084.

[27] EV McLean and T Whang, 'Friends or Foes? Major Trading Partners and the Success of Economic Sanctions' (2010) 54 International Studies Quarterly 427. In the case of Iran, the process of backfilling led to the adoption of the Iran Sanctions Act in 1996, which provides for secondary sanctions: Iran Sanctions Act of 1996 (as amended by Iran Sanctions Extension Act, Pub L No 114–277 (2016)).

[28] B Han, 'The Role and Welfare Rationale of Secondary Sanctions: A Theory and a Case Study of the US Sanctions Targeting Iran' (2018) 35 Conflict Management and Peace Science 474.

consider that the target state poses a threat), they will consider such sanctions to be welfare-decreasing, and to impinge on their sovereign right to authorize, or even encourage, trade with the target. In legal terms, such states may consider secondary sanctions to violate the principle of non-intervention, and to be extraterritorial in nature, in violation of constraints imposed by the international law of jurisdiction, in addition to other potential breaches.

Not all secondary sanctions are necessarily internationally unlawful, however, even if they may severely restrict foreign states' political sovereignty to conduct their international economic relations as they see fit.[29] There is no doubt that US secondary sanctions have a major impact on foreign states and non-US persons, as they seriously complicate—or sometimes render nearly impossible—economic and financial transactions between foreign states and persons on the one hand and the foreign sanctions targets on the other. However, adverse economic impacts do not equal international illegality. It is entirely possible that some secondary sanctions adversely affect the economic and financial interests of foreign states and persons without being internationally unlawful.[30]

III. The Legality of Secondary Sanctions and the Customary International Law of Jurisdiction

This part ascertains what types of secondary sanctions engage, and possibly violate, the customary international law of jurisdiction, and which do not. It is argued that sanctions which limit foreign persons' access to the targeting state's economic or financial system fall within that state's territorial sovereignty, and in principle do not raise concerns under the law of jurisdiction. However, sanctions which are more far-reaching, such as fines, are more problematic. As will be explained in this part, a

[29] On the importance of safeguarding EU sovereignty in the face of US extraterritorial sanctions, without necessarily considering such sanctions to be incompatible with international law, see, eg, P Bonnecarrère, 'Rapport d'information fait au nom de la commission des affaires européennes (1) sur l'extraterritorialité des sanctions américaines' (Sénat 4 October 2018) 7.

[30] Interestingly, the British Protection of Trading Interests Act 1980, which was adopted to counter US 'extraterritorial' sanctions, primarily in the antitrust field, limited itself to stating that 'those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, *are damaging or threaten to damage the trading interests of the United Kingdom*' without considering such measures ipso facto internationally unlawful (Protection of Trading Interests Act 1980, s 1(1)(b) (emphasis added)). In contrast, art 1 of Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L309/1 (the 1996 EU Blocking Statute), which 'provides protection against and counteracts the effects of the extraterritorial application' of foreign law, is premised on the incompatibility of such application with international law (ibid, preamble). Bismuth, however, has implied that the Blocking Statute was enacted to protect EU economic interests rather than to protect the international legal order: see R Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas' (2015) 61 Annuaire Français de Droit International Law 785, 803.

substantial connection (nexus) between the sanctioned activity and the targeting state may often be lacking.

The analysis in this part is based on the concept of (state) *jurisdiction* under customary international law. The extent to which secondary sanctions engage, and possibly violate, more specific obligations under international law, in particular as laid down in WTO Agreements and bilateral trade and investment agreements, are addressed in Part IV. Secondary sanctions may also violate some general principles of international law, in particular the principle of non-intervention[31] and the principle (or prohibition) of abuse of rights (*abus de droit*).[32] These principles are vague, however, and it is unclear exactly how they might be applied in respect of secondary sanctions. For instance, precisely when an intervention unlawfully impinges on a foreign state's sovereignty is notoriously difficult to define.[33] Moreover, the principles of jurisdiction already constitute a specific manifestation of the principle of non-intervention. Insofar as secondary sanctions may potentially constitute an abuse of rights,[34] in particular in cases of arbitrary or disproportionate application of sanctions legislation,[35] it remains in the eye of the beholder what is arbitrary or disproportionate in a given case—an issue which has long dogged the related principle of jurisdictional reasonableness.[36]

[31] See AALCO, 'Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties' (considering primary *and* secondary sanctions to violate the principle of non-intervention). But see Tzanakopoulos, 'The Right to Be Free from Economic Coercion', 633 (questioning whether there is a right of states to be free from economic coercion).

[32] A Kiss, 'Abuse of Rights', MPEPIL Online (last updated December 2006) para 6.

[33] The ICJ has ruled that an intervention is unlawful if it is 'bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely': *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205. This definition may just beg the question. For instance, does a denial of access to US markets for non-US companies violate these companies' home states' right to decide freely on sovereign matters?

[34] Kiss, 'Abuse of Rights', para 6.

[35] It is possible that the vagueness of some terms in US sanctions legislation (such as 'persons' and 'significant transactions', as discussed below) may lead to arbitrary application of sanctions, and thus abuse of rights. Also, certain enforcement measures, eg extremely large settlements, may be disproportionate to the aim pursued, and thus constitute an abuse of rights. Foreign states *have* complained about the disproportionality of settlement amounts. See, notably, French President Hollande protesting, on grounds of proportionality, an 8.9 billion US dollar fine imposed on French bank BNP Paribas for violations of US sanctions legislation: J Treanor, 'BNP Paribas Expects "Heavy Penalty" for Sanctions Violations' *The Guardian* (30 June 2014) <www.theguardian.com/business/2014/jun/30/bnp-paribas-fine-penalty-sanctions>. On a state—the Russian Federation—protesting the extraterritorial reach of US anti-bribery legislation on grounds of arbitrariness, see K Daugirdas and J Davis Mortenson, 'Contemporary Practice of the United States relating to International Law – US Department of Justice Charges Leaders of FIFA, Affiliate Soccer Organizations, and Sports Marketing Companies in 47-Count Indictment' (2015) 109 AJIL 643, 674 (denouncing the US prosecution of FIFA leaders as 'yet another example of arbitrary extraterritorial enforcement of US law').

[36] On reasonableness, see C Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) chapter 5; C Ryngaert and M Vagias (eds), 'Jurisdictional Reasonableness' (2019) 62 Questions of International Law (Zoom In) 1.

In terms of structure, this part distinguishes between the two types of secondary sanctions that are imposed: restrictions of access to the US and to US markets (Section A), and measures that go beyond such restrictions and involve civil and criminal penalties for engaging in economic transactions with sanctions targets (Section B). It is argued that the former type of secondary sanctions is presumptively lawful given its strong connection to US territory. The latter type, however, is problematic under the customary international law of jurisdiction, as the jurisdictional triggers used by the US are only based on a tenuous connection to the US.

A. Secondary sanctions as access restrictions

A considerable number of US secondary sanctions are *access restrictions*. Take, for instance, the best-known country-specific sanctions programme of the US: the Iran sanctions. Under the Iran Sanctions Act, the US Secretary of State or Secretary of the Treasury can impose on non-US persons 'menu-based' sanctions. More specifically, they are required to impose at least five out of the following twelve available sanctions:

1. denial of Export-Import Bank loans, credits, or credit guarantees for U.S. exports to the sanctioned entity
2. denial of licenses for the U.S. export of military or militarily useful technology to the entity
3. denial of U.S. bank loans exceeding $10 million in one year to the entity
4. if the entity is a financial institution, a prohibition on its service as a primary dealer in U.S. government bonds; and/or a prohibition on its serving as a repository for U.S. government funds
5. prohibition on U.S. government procurement from the entity
6. prohibitions in transactions in foreign exchange by the entity
7. prohibition on any credit or payments between the entity and any U.S. financial institution
8. prohibition of the sanctioned entity from acquiring, holding, using, or trading any U.S.-based property which the sanctioned entity has a (financial) interest in
9. restriction on imports from the sanctioned entity, in accordance with the International Emergency Economic Powers Act
10. a ban on a U.S. person from investing in or purchasing significant amounts of equity or debt instruments of a sanctioned person
11. exclusion from the United States of corporate officers or controlling shareholders of a sanctioned firm
12. imposition of any of the ISA sanctions on principal offices of a sanctioned firm[37]

[37] US Congressional Research Service, 'Iran Sanctions', 17. This overview consolidates the sanctions imposed under the Iran Sanctions Act, originally the Iran and Libya Sanctions Act, Pub

These sanctions are an attractive enforcement tool as, unlike the punitive measures discussed in Section B, they can almost immediately be applied.[38] Jurisdictionally speaking, access restrictions create obligations for US persons,[39] and regulate activities that occur in the US and involve US persons as counterparties. They could be justified under a combined application of the territoriality and nationality principles, even if their ultimate addressees are non-US persons.[40] Thus, Jeffrey Meyer argues, '[w]hen secondary sanctions are terrinationally restricted to the regulation of U.S. nationals with respect to their non-governmental acts within the United States, then these sanctions should be viewed as presumptively permissible as a matter of customary jurisdictional law'.[41] More fundamentally, from the perspective of non-US persons, most of these measures—denial of access to the US financial system, access to US markets, or access to the US for individual persons—merely amount to the denial of privileges.[42] As international law does not entitle foreign persons to financial, economic, or physical access to the US, such measures do not, in principle, raise jurisdictional problems.

Measures regulating access to a state's territory, including access to economic facilities based in the territory, are grounded on the principle that states, in the exercise of their territorial sovereignty, have considerable discretionary power to control their borders.[43] Recently, states have

L No 104-172 (1996), the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub L No 111-195 (2010), and the Iran Threat Reduction and Syria Human Rights Act, Pub L No 112-158 (2012).

[38] S Sultoon and J Walker, 'Secondary Sanctions' Implications and the Transatlantic Relationship' (Atlantic Council Issue Brief, September 2019) 3.

[39] O Moehr, 'Secondary Sanctions: A First Glance' (Atlantic Council, 6 February 2018): 'US secondary sanctions legally target US persons and not directly third parties'.

[40] Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1071, conceding, however, that 'many U.S. trading partners did not view that distinction as material, and retaliated against the United States for what they considered to be unjustified extraterritorial measures that infringed on their sovereign economic rights'.

[41] Meyer, 'Second Thoughts on Secondary Sanctions', 967.

[42] Rathbone, Jeydel, and Lentz , 'Sanctions, Sanctions Everywhere', 1071. For a recent example of a denial of entry to the US (a travel ban), see 'Statement by Melia Hotels International' (5 February 2020) <www.meliahotelsinternational.com/en/newsroom/our-news/statement-melia-hotels-international-helms-burton> (announcing that its CEO had been denied entry to the US in connection with Melia's alleged violation of the Helms-Burton Act, ie the 'extraterritorial' Cuba boycott. The statement suggests that similar denials of entry were communicated to 'more than fifty companies with interests in Cuba').

[43] In 2009, the ICJ stated in its judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 113, that '[t]he power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory'. Regarding access of aliens, see, eg, T Balzacq and S Carrera, 'Migration, Borders and Asylum. Trends and Vulnerabilities in EU Policy' (Centre for European Policy Studies, August 2009) 55–56 (discussing the tension between the EU and member states regarding the *jus excludendi* and *includendi* regarding aliens). The right to control borders also extends to the right to control access to airspace. This right is laid down in treaty law: see art 6 of the Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295. States do not have absolute discretion, however. For instance, the admission of aliens is subject to international human rights and international refugee law, as well as some

not refrained from using their prerogatives in respect of border control. For instance, President Trump has seriously restricted travel to the US from designated countries,[44] some Arab states have refused entry to persons with passport stamps from Israel,[45] and Israel has denied entry to supporters of the Boycott, Divestment and Sanctions movement.[46] In respect of economic sanctions consisting of entry denials applied to individuals, Vaughan Lowe has stated that '[t]here is no general legal objection, treaty commitments apart, to the United States barring whomsoever it chooses from entering its territory'.[47] Gerhard Hafner has similarly argued that entry denials are compatible with general international law, as states are not required to allow entry to specific persons.[48]

States' prerogatives to control access of aliens to their territory are not limited to the access of individuals, but also extend to visiting vessels and corporations. Thus, it is accepted that states have discretion regarding which vessels are denied entry to their ports, including for reasons related to their extraterritorial conduct (eg engaging in illegal, unreported, or unsustainable fishing on the high seas).[49] After all, foreign vessels have no right to enter ports under customary international law,[50] just like aliens have no right to enter a state's territory unless specific international agreements have been concluded which allow for a right of entry. Similarly, corporations have no right of access to foreign markets—eg to tap foreign capital markets, to bid for contracts (eg public procurement) or to acquire property in foreign territory[51]—again, unless specific agreements have been concluded which do grant such rights

regional supranational norms, eg EU law. On the *acquis* of European migration law see, eg, P Boeles and others, *European Migration Law* (2nd edn, Intersentia 2014).

[44] For instance, 'Protecting the Nation from Foreign Terrorist Entry into the United States' Exec Order No 13,780, 82 Fed Reg 13,209 (9 March 2017), signed by US President Trump in 2017, limits travel to the US from Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela. Presidential Proclamation 9645, which expands on this executive order was upheld by the US Supreme Court in Trump v Hawaii 201 L Ed 2d 775 (2018). This 'travel ban' may, however, violate US obligations under international human rights and international refugee law: see HH Koh, 'The Trump Administration and International Law' (2017) 56 Washburn Law Journal 413.

[45] 'Israeli Passport Stamp – What to Know' (*Tourist Israel: The Guide*) <www.touristisrael.com/israeli-passport-stamp-what-to-know/>.

[46] Amendment No 27 to the Entry Into Israel Law (No 5712-1952, passed 6 March 2017), which prohibits the entry into Israel of any foreigner who makes a 'public call for boycotting Israel' or 'any area under its control' with a 'reasonable possibility' of succeeding.

[47] AV Lowe, 'US Extraterritorial Jurisdiction: the Helms-Burton and D'Amato Acts' (1997) 46 ICLQ 378, 385.

[48] G Hafner, 'Völkerrechtliche Grenzen und Wirksamkeit von Sanktionen gegen Völkerrechtssubjekte' (2016) 76 ZaöRV 391, 397.

[49] AN Honniball, 'Extraterritorial Port State Measures' (PhD thesis, Utrecht University 2018) section 2.5.2.

[50] *Nicaragua*, paras 213-14; A Boyle, 'EU Unilateralism and the Law of the Sea' (2006) 21 International Journal of Marine and Coastal Law 15, 20 (arguing that 'it is implicit in UNCLOS Articles 25, 211(3) and 255 that states are entitled to regulate or deny access to ports').

[51] See also JJ Forrer, 'Secondary Economic Sanctions: Effective Policy or Risky Business?' (Atlantic Council Issue Brief, May 2018) 5.

(which has, for instance, occurred in the EU).[52] It is immaterial in this respect that access denials relate to the corporation's extraterritorial activities. Ultimately, the targeting state is merely taking away the corporation's *privilege* of entering the state's territory and using or offering services there. Thus, Régis Bismuth argues that excluding a corporation from US markets or revoking its bank licence is a sanction that is strictly territorial, even if the underlying prohibition may have an extraterritorial reach.[53]

The US is perhaps the only state which so vigorously issues denials and prohibitions in the context of secondary sanctions, but it is to be kept in mind that many other states have a far less open economy in the first place, and continue to impose stringent conditions on the access of foreign operators to their territory or markets (to the extent compatible with applicable treaty arrangements).[54] As EU practice (eg in the environmental field) shows, such conditions may also relate to extraterritorial activity.[55] Moreover, there is non-US—in this case Arab—practice of states enacting secondary sanctions consisting of denials and prohibitions. Since 1948, the League of Arab States has, at least on paper, boycotted the State of Israel, a boycott which also prohibits non-Israeli persons from entertaining economic relations with Israel. This boycott is enforced through a prohibition on member states of the Arab League

[52] Substantive EU law is very much based on the 'four freedoms', the free movement of goods, persons, services, and capital across intra-EU borders: see C Barnard, *Substantive EU Law* (5th edn, OUP 2016).

[53] Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 789.

[54] For rankings, see International Chamber of Commerce, 'Open Markets Index 2017' <https://iccwbo.org/publication/icc-open-markets-index-2017/> and Heritage Foundation, 'Index of Economic Freedom 2019' <www.heritage.org/index/ranking> (which includes 'open markets' as a parameter). See, eg, China National Development and Reform Commission, 'Negative List for Market Access (2018 Version)', categorizing a considerable number of industries as either 'prohibited' or 'restricted'. For investment restrictions in Russia, see Herbert Smith Freehills, 'Legal Guide for Foreign Investors in Russia' (4th edn, February 2019).

[55] See, eg, Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3; Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms [2004] OJ L338/18 and Commission Regulation (EU) No 550/2011 of 7 June 2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international credits from projects involving industrial gases [2011] OJ L149/1; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63; Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L123/55; and Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23, all of which have extraterritorial aspects, as discussed in N Dobson, 'Extraterritorial Climate Protection Under International Law: A Jurisdictional Analysis of EU Unilateralism' (PhD thesis, Utrecht University 2018) chapter 2.3. These measures 'incorporate an extraterritorial element through making market access conditional, directly or indirectly, on conduct of foreign operators or suppliers occurring abroad'. Their effect is 'to impose an extra *cost* on foreign producers' (original emphasis, ibid 62).

and their nationals entertaining economic relations with blacklisted firms. The boycott is unevenly enforced,[56] but the important point is that enforcement works through the denial of economic privileges and, consequently, falls within states' sovereign prerogatives. It is conspicuous in this respect that, while the US has attempted to counteract the Arab League's secondary boycott by passing anti-boycott legislation,[57] it has not characterized it as a violation of international law.[58] In addition to the Israel boycott, there is also recent practice available of Arab states denying port entry to foreign vessels on the basis of extraterritorial activity. In 2017, a number of states which had fallen out with Qatar—notably the United Arab Emirates, Bahrain, and Saudi Arabia—closed their seaports not only to Qatari-flagged and owned vessels, but also to all vessels coming from or going to Qatar.[59] Such sanctions are of a secondary nature as they target economic relations between foreign states (ie Qatar and a third state whose vessels have previously visited Qatar), even if they are territorially enforced. As Honniball points out, '[t]his practice is best seen as the withholding of port privileges to foreign vessels and, subject to treaty arrangements, a foreign state has no entitlement under general international law to those privileges'.[60] Such practice demonstrates that states' sovereignty regarding the withholding of privileges of (territorial) access has not shrunk.

All this is not to deny the far-reaching impact of secondary sanctions consisting of access restrictions. Notably, the prohibition of 'U-turn transactions' regarding Iran, enacted by the US Treasury in 2008, has had a major impact on non-US banks. U-turn transactions are 'transfers designed to dollarize transactions through the U.S. financial system for the direct or indirect benefit' of sanctioned persons,[61] eg Iranian banks or other persons in Iran, or the Government of Iran. U-turn transactions regarding Cuba were initially allowed,[62] but have now also been prohibited.[63] As international energy contracts are typically issued in dollars, foreign banks financing such contracts normally have to rely on a US correspondent account to pay for goods in US dollars, thereby

[56] MA Weiss, 'Arab League Boycott of Israel' (US Congressional Research Service, Report RL33961, 25 August 2017).

[57] For US anti-boycott export regulations, see 15 CFR § 760.1ff.

[58] cf s 7035 of the Consolidated and Further Continuing Appropriations Act, Pub L No 115-31 (2017), limiting itself to stating that the secondary boycott is 'an impediment to peace in the region and to U.S. investment and trade'.

[59] See, eg, Abu Dhabi Ports, 'Chief Harbour Master Direction: Restriction to Vessels and Cargo Coming from / Going to Qatari Ports' (CHM Direction No 02/17, 5 June 2017).

[60] A Honniball, 'Port State Jurisdiction Beyond Oceans Governance: The Closure of Ports to Qatar in the 2017 "Gulf Crisis"' (*EJIL:Talk!*, 3 July 2017) <www.ejiltalk.org/port-state-jurisdiction-beyond-oceans-governance-the-closure-of-ports-to-qatar-in-the-2017-gulf-crisis/>.

[61] Iranian Transactions Regulations, 73 Fed Reg 66,541 (10 November 2008).

[62] Cuban Assets Control Regulations, 31 CFR § 515.584.

[63] See 'President Trump Ramps Up Cuba Sanctions Changes – Allows Litigation against Non-U.S. Companies Conducting Business in Cuba' (*Gibson Dunn Lawyers*, 1 May 2019) <www.gibsondunn.com/wp-content/uploads/2019/05/president-trump-ramps-up-cuba-sanctions-allows-litigation-against-non-us-companies-conducting-business-in-cuba.pdf> 3.

accessing the US financial system.[64] The ban on accessing the US financial system cripples foreign trade with sanctioned countries, and has been instrumental in European firms winding down business with countries like Iran. For many corporations, such secondary sanctions may be more effective than monetary penalties, especially if their activities are strongly connected to US markets, which may explain why the US has increasingly relied on them.[65] The US has not always actually imposed such sanctions even if it has the authority to do so, and, moreover, insofar as a foreign corporation has few links with the US they will have little effect.[66] Still, the very threat that such sanctions may be imposed,[67] in combination with open-ended formulations such as 'the sale, supply, or transfer . . . of *significant* goods or services',[68] may suffice to have a major deterrent effect on economic transactions between third states (which constitute 'sanctionable activity', even if not formally 'prohibited').[69] Fear of sanctions even leads to over-compliance by non-US persons.[70]

B. Secondary sanctions going beyond access restrictions

The consequences of violating secondary sanctions legislation are not limited to the mere denial of privileges of territorial access. This is especially the case for US secondary sanctions. Depending on the sanctions programme, US authorities can impose draconian civil and criminal penalties on non-US firms, including non-US controlled firms, for violating US sanctions legislation.[71] The threat of penalties has forced such

[64] A financial system is a 'system that aims at establishing and providing a regular, smooth, efficient and cost effective linkage between depositors and investors', and consists of financial institutions, services, markets and instruments: see S Gurusamy, *Financial Services and Systems* (2nd edn, McGraw-Hill 2009) 3. Economic sanctions mainly have an impact on the operation of financial payment systems, especially wire-transfers. For an explanation of value transfer and key payment systems of the US financial system specifically in the context of US economic sanctions, see BE Carter and R Farha, 'Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran' (2013) 44 Georgetown Journal of International Law 903, 905–907.

[65] Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1112.

[66] ibid 1118.

[67] ibid 1119.

[68] Emphasis added. See, eg, 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, s 2: 'Correspondent and Payable-Through Account Sanctions Relating to Iran's Automotive Sector; Certain Iranian Persons; and Trade in Iranian Petroleum, Petroleum Products, and Petrochemical Products'.

[69] See Interview with a representative of a Ministry of Finance of an EU Member State (24 April 2019). See also C Lepage, Directrice de l'international au Mouvement des entreprises de France (MEDEF) in Bonnecarrère, 'Extraterritorialité des sanctions américaines', 54.

[70] Interview with compliance officer of major European bank (16 April 2019). It is not fully clear whether overcompliance is in violation of the EU Blocking Statute: see Interview with Commission official (16 May 2019).

[71] For current OFAC penalty amounts, see section V.B.2.a of appendix A to OFAC's Economic Sanctions Enforcement Guidelines at 31 CFR part 501. For criminal penalties, see International Emergency Economic Powers Act (IEEPA), 50 USC §1705(c): 'A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.'

firms to accept large settlements. In 2014, in what was the largest ever settlement regarding secondary sanctions violations, French bank BNP Paribas settled its potential liability for apparent violations of US sanctions regulations with US federal and state government agencies for a combined US$8.9 billion.[72]

These penalties do not deny to the sanctioned persons privileges previously granted by the US. They are more onerous and intrusive enforcement measures that go beyond a denial of access and may result in a forfeiture of assets and even imprisonment. They do not fall within the above-discussed territorial sovereignty of the US to simply control 'access' to its territory.

In practice, US secondary sanctions that are based on penalties rather than access denials are grounded on four jurisdictional triggers: control by a US company, use of US technology, use of the US financial system, and trafficking in confiscated US property. The question arises whether these triggers are compatible with the customary international law of jurisdiction, as the relevant conduct that is subject to US sanctions appears to be extraterritorial. The regulated economic transactions take place between non-US persons and occur outside the US.

For an assertion of prescriptive jurisdiction to be lawful under the customary international law of jurisdiction, a substantial connection is required.[73] Relevant connections are territory, nationality, and security.[74] Exceptionally, universal jurisdiction is possible for a limited number of international crimes,[75] but is not relevant here since the US does

[72] BNP Paribas stood accused of systemically 'concealing, removing, omitting, or obscuring references to information about U.S.-sanctioned parties in 3,897 financial and trade transactions routed to or through banks in the United States between 2005 and 2012 in apparent violation of the Sudanese Sanctions Regulations, 31 C.F.R. part 538; the Iranian Transactions and Sanctions Regulations, 31 CFR, part 560 (ITSR); the Cuban Assets Control Regulations, 31 C.F.R. part 515; and the Burmese Sanctions Regulations, 31 C.F.R. part 537': see OFAC, 'Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for $963 Million' (30 June 2014) <www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>. In 2018, another French bank, Société Générale, reached settlement agreements with multiple US agencies and agreed to pay penalties totalling 1.3 billion US dollars, thereby resolving the latter's investigations into US dollar transactions processed by the bank involving persons and entities subject to US sanctions: see Société Générale, 'Societe Generale Reaches Agreements with U.S. Authorities to Resolve U.S. Economic Sanctions and AML Investigations' (19 November 2018) <www.societegenerale.com/en/Newsroom/Societe-Generale-reaches-agreements-with-US-authorities-to-resolve-US-economic-sanctions-and-AML-investigations>.

[73] FAP Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours de l'Académie de Droit International 1, 49. On the centrality of the substantial connection test in the context of 'extraterritorial' sanctions context, see The Netherlands, Ministry of Foreign Affairs, 'Beantwoording vragen van de leden Karabulut (SP) en Ploumen (PvdA) over maatregelen tegen Amerikaanse sancties tegen Iran' (5 June 2019) <www.rijksoverheid.nl/documenten/kamerstukken/2019/06/05/beantwoording-kamervragen-over-maatregelen-tegen-amerikaanse-sancties-tegen-iran>, questions 3 and 5.

[74] For the seminal document setting out the basic principles of jurisdiction (notably in the field of criminal law), see 'Draft Convention on Jurisdiction with Respect to Crime' (Harvard Draft) (1935) 29 AJIL (Supplement) 439.

[75] L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003).

not prosecute individuals or entities for committing or facilitating international crimes under its secondary sanctions programmes. This part argues that the US connections on which the four jurisdictional triggers are based are too tenuous to justify US secondary sanctions from a jurisdictional perspective.

1. US corporate control and the nationality principle

It is long-standing US sanctions practice to construe the term 'US person' widely as encompassing US-owned or controlled foreign entities.[76] This implies that primary US sanctions do not just apply to entities incorporated in the US, but also to entities incorporated under the laws of a foreign country, provided that they are majority-owned or controlled by a US person. Parent corporations are normally liable for violations of sanctions by foreign subsidiaries,[77] but under the Cuban sanctions regime foreign subsidiaries themselves may be liable.[78]

From a jurisdictional perspective, this 'control theory' appears to be an improper application of the nationality principle, as in international law the nationality of a corporation is based on its place of incorporation rather than the nationality of its shareholders.[79] Accordingly, several European courts hearing contractual disputes have refused to give effect to US secondary sanctions based on the control theory.[80]

[76] See the 1965 case of the US Treasury ordering US corporation Fruehauf to prevent a shipment of buses by its French subsidiary to China, which at the time was subject to a US embargo, as discussed in AF Lowenfeld, *Trade Controls for Political Ends* (M Bender 1983) 92–93. In that case, the US abandoned its enforcement efforts against the US parent after a French court appointed a temporary administration to carry out the transaction between the French subsidiary and China: *Fruehauf Corporation v Massardy* (1965) 5 ILM 476 (Court of Appeals (Paris)). For the Cuba sanctions, see 31 CFR § 515.329. Before the Mack Amendment in 1990, a US policy was in place that allowed the issuance of licenses for foreign subsidiaries of US companies to do business with Cuba. For the Iran sanctions, see 31 CFR § 560.215.

[77] 22 USC §8725. On prohibited facilitation or approval of a transaction by a foreign person, such as a subsidiary, as a result of acts carried out by a US person, such as a US parent corporation, see 31 CFR §§ 560.208, 560.417.

[78] See OFAC, 'Enforcement Information for February 25, 2016' <www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160225_Halliburton.pdf> (reporting that US corporation Halliburton's Cayman Islands subsidiary paid on its own behalf and on behalf of another subsidiary to settle potential civil liability for violations of US sanctions against Cuba), also cited in Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law', 110.

[79] See notably in the context of diplomatic protection: *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Preliminary Objections, Second Phase) [1970] ICJ Rep 3, para 184; International Law Commission, Draft Articles on Diplomatic Protection (2006) II(2) Yearbook of the International Law Commission 23, art 9 ('For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated'), in combination with art 11 ('A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation. . . . '). For legal literature critical of the jurisdictional control theory, see AV Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 ICLQ 724; Ryngaert, *Jurisdiction in International Law* 109–10; Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain' 796; Meyer, 'Second Thoughts on Secondary Sanctions', 966.

[80] *Compagnie Européenne des Pétroles (CEP), SA v Sensor Nederland, BV* (1982) 22 ILM 66 (District Court (The Hague)); *Fruehauf Corporation v Massardy*.

In its recent sanctions practice, however, the US has maintained the control theory. Thus, under US sanctions regulations concerning Iran, a US-owned or controlled foreign entity is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran.[81] The Office of Foreign Assets Control (OFAC) has confirmed that '[c]ivil penalties for the U.S.-owned or -controlled foreign entity's violation . . . , attempted violation, conspiracy to violate, or causing of a violation shall apply to the U.S. person that owns or controls such entity to the same extent that they would apply to a U.S. person for the same conduct'.[82] In its enforcement practice, OFAC continues to rely on the control theory to take action against US parent corporations' foreign subsidiaries and affiliates engaging in sanctionable activity.[83]

2. Prohibiting re-exportation of US items under the nationality principle

A second trigger for the application of secondary sanctions going beyond denial of privileges is the re-exportation of US-origin items, typically technology. The US prohibition of re-exporting such items engendered substantial controversy in the early 1980s, after the US enacted the 'Soviet Pipeline Regulations' pursuant to which the re-export of US-origin parts, components, or materials to the Soviet Union was prohibited.[84] These Regulations, which had a severe impact on trade between the European Economic Community (now EU) and the Soviet Union, were denounced by the Community as violations of international law as they purported to regulate transactions taking place wholly outside the US.[85] The uproar led President Reagan to lift the sanctions in 1982.[86] Nonetheless, extraterritorial export controls reappeared in US secondary sanction practice. For instance, current US secondary sanctions regulations regarding Iran provide that 'the reexportation from a third

[81] 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, s 8; 'Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran', Exec Order No 13,628, 77 Fed Reg 62,139 (12 October 2012) s 4.

[82] US Department of the Treasury, 'OFAC FAQs: Iran Sanctions' <www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx>, question 621. See also Iran Threat Reduction and Syrian Human Rights Act, Pub L No 112-158 (2012) s 218.

[83] OFAC, 'Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Kollmorgen Corporation; Foreign Sanctions Evaders Determination' (7 February 2019) <www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190207.aspx>, settling with a US corporation on behalf of its Turkish affiliate for six apparent violations of the ITSR, in particular the latter dispatching employees to Iran to service machines and providing other services to Iran.

[84] 47 Fed Reg 27,251 (24 June 1982) (amending 15 CFR § 376.12). For a discussion, see KW Abbott, 'Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst' (1984) 17 Cornell International Law Journal 81, 82–90.

[85] 'European Communities: Comments on the US Regulations Concerning Trade with the USSR' (1982) 21 ILM 891, 895.

[86] 'East-West Trade Relations and the Soviet Pipeline Sanctions, 13 November 1982' (1982) 18 Weekly Compilation of Presidential Documents 1475.

country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States is prohibited, if: [u]ndertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the Government of Iran; and [t]he exportation of such goods, technology, or services from the United States to Iran was subject to export license application requirements'.[87] US regulators have recently vigorously enforced such extraterritorial export control regulations against foreign corporations through settlement agreements.[88]

US export controls appear to be extraterritorial in nature and thus to violate international law.[89] Arguably, once exported from the US, US-origin items forfeit their jurisdictionally relevant nexus to the US. Such items have no US nationality and thus cannot be justified under the personality principle.[90] However, a stronger (territorial) jurisdictional nexus may be present in cases where the US imposes sanctions in relation to *indirect* exports (eg, goods destined for Iran but transiting via the Netherlands), as indirect exports are exports of US goods that arguably take place from US territory.[91]Re-exports, in contrast, concern items that have first been imported by a foreign country and, most often, are included in a processed product for (re)export. For instance, a US item which has been exported to the Netherlands, and is processed there, technically becomes a Dutch-manufactured product that is subsequently (re)exported to a third country like Iran.[92] Unless a US export license has been subjected to an end-user undertaking (eg, a commitment not to sell to Iran), applying US law to such re-exports appears to be problematic.

3. 'Territorial' use of the US financial system

As discussed above, the US can prohibit, or impose strict conditions on, the opening or maintaining in the US of correspondent accounts for foreign financial institutions. Such measures have a major impact on foreign financial institutions but, being access conditions, they fall within

[87] 31 CFR § 560.205(a). Subsection (b) provides for some exceptions.

[88] OFAC, 'Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Yantai Jereh Oilfield Services Group Co. Ltd.' (12 December 2018) <www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181212.aspx>; OFAC, 'Settlement Agreement between OFAC and Aban Offshore Limited; Settlement Agreement between OFAC and an Individual and the Alliance for Responsible Cuba Policy Foundation' (1 December 2017) <www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170112_44.aspx>.

[89] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (EU Blocking Statute) [2018] OJ L199I/1. Also, cf Meyer, 'Second Thoughts on Secondary Sanctions', 911; Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1109.

[90] See also European Communities: Comments on the US Regulations Concerning Trade with the USSR, 894.

[91] Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1109.

[92] See also note 205 and accompanying text on rules of origin in the WTO context.

US sovereignty and do not, as such, raise jurisdictional concerns. However, the US Government may take enforcement action which goes beyond access restriction and impose penalties, including forfeiture of assets, on foreign financial institutions for violations of secondary sanctions legislation. The US Department of the Treasury and other US regulators have repeatedly entered into financial settlements with such institutions on the grounds that they facilitated access to the US financial system for targets of primary sanctions such as Iran. For instance, the aforementioned US settlement with French bank BNP Paribas in 2014 resolved its investigation into the bank's 'systemic practice of concealing, removing, omitting, or obscuring references to information about U.S.-sanctioned parties in 3,897 financial and trade transactions routed to or through banks in the United States' in apparent violation of various US sanctions regulations.[93] By the same token, a settlement with Dutch bank ING in 2012 resolved US regulators' investigation into 'ING Bank's intentional manipulation and deletion of information about U.S.-sanctioned parties in more than 20,000 financial and trade transactions routed through third-party banks located in the United States'.[94]

Unlike denial of access, this enforcement practice does raise jurisdictional concerns under public international law. According to the US view, the exercise of US jurisdiction in these cases is based on the consideration that foreign financial institutions, when routing US dollar payments to or through the US in apparent violation of US sanctions programmes, use the US financial system in their dealings with other foreign persons and thereby export services from the US.[95] In *US v Reza Zarrab*, Judge Berman of the Southern District of New York confirmed that transferring funds through a US bank amounted to 'exportation of services from the United States', providing a sufficient US (territorial) nexus for the exercise of US jurisdiction.[96] However, the territorial connection in these cases is rather tenuous and appears to be merely incidental to the essentially foreign character of the underlying economic transaction between two or more non-US persons.[97] Even applying the presumption against extraterritoriality—a US canon of

[93] OFAC, 'Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for $963 Million'.

[94] OFAC, 'U.S. Treasury Department Announces $619 Million Settlement with ING Bank, N.V.' (6 December 2012) <www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx>.

[95] See, eg, 'Settlement agreement between OFAC and BNPP' (Doc No COMPL-2013-193659, 30 June 2014) para 9.

[96] *United States v Reza Zarrab* 15 Cr 867 (RMB) (SDNY, 17 October 2016) (Decision and Order) 12.

[97] Consider Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 796, citing C Proctor, *Mann on the Legal Aspect of Money* (7th edn, OUP 2012) § 19.19. See also *United States v Reza Zarrab* S1 15 Cr 867 (RMB) (SDNY, 18 July 2016) (Memorandum of Law in Support of Defendant Reza Zarrab's Motion to Dismiss the Superseding Indictment) 1, noting that the defendant is 'accused of violating U.S. law for agreeing with *foreign* persons in *foreign* countries to direct *foreign* banks to send funds transfers from *foreign* companies to other *foreign* banks for *foreign* companies' (emphasis in original).

statutory construction—it is questionable whether the US Congress would consider such an incidental connection to be sufficient to displace the presumption (see also Part V.A).[98] Moreover, as contracts in the energy and commodities sector are almost always priced in US dollars, foreign banks have to use the US financial system out of necessity, through US dollar SWIFT payment messages sent to US financial institutions.[99] The mere dollar denomination of international business transactions may render foreign financial institutions supporting such transactions subject to US jurisdiction, and to severe financial penalties.[100] It is doubtful whether merely 'using the US financial system' for an otherwise non-US business transaction is a sufficiently strong connection to pass muster under the international law of jurisdiction. Accordingly, grounding jurisdiction on the mere use of the US financial system is not only a far-reaching restriction on international banking, but also, as many legal scholars have pointed out, cannot be justified under any existing principle of jurisdiction.[101] A fortiori, grounding jurisdiction on the mere routing of (financial) messages via US servers without any other link with the US whatsoever, cannot be considered to be compatible with the international law of jurisdiction.[102]

[98] See, notably, *Morrison v National Australia Bank* 561 US 247 (2010); *United States v Hoskins* 902 F 3d 69 (2d Cir 2018).

[99] Since the strengthening of US sanctions against Iran in 2018, SWIFT itself—the Society for Worldwide Interbank Financial Telecommunication, a Belgian-based financial intermediary—has suspended 'certain Iranian banks' from accessing its payment network: see Part VI.D.

[100] Apparently, some banks outside the US also clear US dollars, but even these banks are likely to employ OFAC's list of 'specially designated nationals' for fear of falling foul of s 311 of the USA PATRIOT Act, Pub L No 107-56 (2001). Pursuant to this section, the US Treasury can designate a financial institution or jurisdiction as being of 'primary money laundering concern', as a result of which it may be prohibited from maintaining correspondent accounts with US financial institutions: See Carter and Farha, 'Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran', 909–10.

[101] See S Emmenegger, 'Extraterritorial Economic Sanctions and their Foundation in International Law' (2016) 33 Arizona Journal of International and Comparative Law 631, 656; T Rensmann, 'Völkerrechtliche Grenzen extraterritorialer Wirtschaftssanktionen' in D Ehlers and H-M Wolffgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspectiven* (Deutscher Fachverlag 2015) 105; NN Wilson, 'Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act' (2014) 91 Washington University Law Review 1063, 1073, note 49; 'Developments in the Law – Extraterritoriality' (2011) 124 Harvard Law Review 1227, 1251, pointing to the 'dubious permissibility under international law' of correspondent account jurisdiction; M Audit, 'Sanctions contre BNP Paribas: l'extraterritorialité du droit américain est-elle conforme au droit international?' *Les Echos* (25 June 2014) <http://archives.lesechos.fr/archives/cercle/2014/06/25/cercle_101744.htm>; R Bismuth, 'BNP Paribas: derrière les 10 milliards, l'extraterritorialité américaine' *Libération* (5 June 2014) <www.liberation.fr/futurs/2014/06/05/bnp-paribas-derriere-l-arbre-des-10-milliards-la-foret-de-l-extraterritorialite-americaine_1034086>; S Lamrani, 'The United States, BNP Paribas and French Sovereignty' *Huffington Post* (7 July 2014) <www.huffpost.com/entry/the-united-states-bnp-par_b_5557288?guccounter=1>; A-J Schaap and C Ryngaert, 'De internationale onrechtmatigheid van Amerikaanse secundaire sanctiewetgeving' (2015) Tijdschrift voor Sanctierecht en Onderneming 9, 15. See also M Gruson, 'The U.S. Jurisdiction over Transfers of U.S. Dollars between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks' (2004) Columbia Business Law Review 721, 763–65.

[102] This is notably done by US agencies enforcing the US Foreign Corrupt Practices Act and has been upheld by US courts: *Securities and Exchange Commission v Straub* 921 F Supp 2d 244 (SDNY

Still, it is remarkable that foreign governmental protest against this US practice has remained relatively limited. If foreign states do protest, they tend to focus on the disproportionality of the fine rather than on the lack of US jurisdiction under international law.[103] This passive attitude may be attributable to the substantive convergence of international sanctions regimes,[104] as well as foreign states' views that foreign firms' exposure to US sanctions engage private rather than governmental interests.[105] However, since the reinstatement of US sanctions against Iran in 2018, a more active attitude amongst foreign states and the EU is apparent. The EU Blocking Statute, for instance, appears to officially condemn the imposition of penalties on foreign firms for violations of secondary sanctions as incompatible with international law.[106] However, not all EU or EU Member State officials share that view.[107]

4. A private cause of action for trafficking in US property: Reliance on passive personality?

A fourth mechanism of enforcing secondary sanctions beyond a denial of privileges is through the creation of a private cause of action for a US person in relation to a non-US person 'trafficking' in confiscated property. This mechanism is bound up with the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act), which imposes secondary sanctions on non-US persons trading with Cuba.[108] Title III of the Act creates a private cause of action in US courts for US nationals against any person 'trafficking' in confiscated property.[109] This means that US courts can hold non-US nationals (including corporations) liable for money damages in an amount that may equal the fair market value of that property.[110]

2013). See also Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 798.

[103] See, eg, French President Hollande's reaction to the 9 billion US dollar fine imposed by US regulators on French bank BNP Paribas: A de Guigné and P-Y Dugua, 'BNP Paribas: Obama refuse de se « mêler » de l'affaire judicaire' *Le Figaro* (5 June 2014) <www.lefigaro.fr/societes/2014/06/05/20005-20140605ARTFIG00009-l-affaire-bnp-paribas-s-invite-au-diner-entre-hollande-et-obama.php>.

[104] 'Developments in the Law – Extraterritoriality', 1250–55.

[105] See, eg, for the Netherlands: Foreign Affairs Ministry, 'Handboek Iran' (June 2018) <www.rijksoverheid.nl/documenten/rapporten/2018/06/05/handboek-iran> 15. See also Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 803, questioning the passive attitude of the EU in respect of US imposed sanctions on EU-based financial institutions).

[106] 1996 EU Blocking Statute, the annex of which condemns the civil and criminal penalties imposed under the National Defense Authorization Act for Fiscal Year 2012, and the imposition of civil penalties, fines, and imprisonment under the ITSR, while stating in the preamble that 'such instruments violate international law'.

[107] Interview with EU Member State government official (16 May 2019).

[108] 22 USC §§ 6021–91.

[109] ibid, Title IV ('Exclusion of certain aliens') denies visas to, and excludes from the US, persons who 'traffic' in property which was confiscated by Cuba after the revolution and is claimed by US nationals.

[110] ibid § 6084.

The Helms-Burton Act's far-reaching private enforcement right, which threatened investments in Cuba by EU Member States, was a particular thorn in the EU's side. It was instrumental in the adoption of the EU Blocking Statute in 1996, which 'blocks' the enforcement in the EU of US secondary sanctions and features its own private right of action ('clawback') for EU persons suffering damage as a result of another's compliance with US sanctions (see also Part VI.B).[111] The UK,[112] Canada,[113] and Mexico[114] have also passed legislation to counteract the Helms-Burton Act. After an agreement was reached at the WTO in 1997,[115] successive US presidents suspended Title III of the Act. As a result, it lay dormant and did not lead to further tension between the US and other states until President Trump allowed the suspension of Title III to lapse in 2019, apparently to punish Cuba for its support of the regime in Venezuela.[116] This may affect Spain, Canada, and France, which have major investments in tourism and mining in Cuba and may lead to a strong international response. At the time of writing, several lawsuits had already been brought under Title III, including against European corporations.[117]

[111] 1996 EU Blocking Statute, art 6.

[112] The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171.

[113] Foreign Extraterritorial Measures Act, RSC 1985, c F-29; The Foreign Extraterritorial Measures (United States) Order (1996) SOR/96-84.

[114] Ley de Protección al Commercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional (23 October 1996).

[115] *United States – The Cuban Liberty and Democratic Solidarity Act*, Communication from the Chairman of the Panel, WT/DS38/5 (25 April 1997).

[116] N Gámez Torres, 'U.S. Swats Cuba for Role in Venezuela by Moving closer to Fully Implementing Helms-Burton' *Miami Herald* (3 April 2019) <www.miamiherald.com/latest-news/article228735334.html>.

[117] M O'Kane, 'Canadian mining company in Helms-Burton case' (*EU Sanctions*, 4 May 2020) <www.europeansanctions.com/2020/05/canadian-mining-company-in-helms-burton-case/>; M Lester, 'Visa & Mastercard sued under Helms-Burton Act' (*EU Sanctions*, 28 April 2020) <www.europeansanctions.com/2020/04/visa-mastercard-sued-under-helms-burton-act/>; M Lester, 'Miami Federal Court reopens 2 Helms-Burton claims' (*EU Sanctions*, 21 April 2020) <www.europeansanctions.com/2020/04/miami-federal-court-reopens-2-helms-burton-claims/> (concerning claims against Norwegian Cruise Lines and MSC Cruises); M Frank, 'Exxon Mobil Sues Cuba for $280 Million over Expropriated Property' *Reuters* (3 May 2019) <www.reuters.com/article/us-usa-cuba-lawsuit/exxon-mobil-sues-cuba-for-280-million-over-expropriated-property-idUSKCN1S91YQ> (Exxon suing Cuban state-owned Cuba-Petroleo and CIMEX corporations); J Levin, 'Exiles Sue Expedia's Trivago for 'Trafficking' in Cuban Property' *Bloomberg* (19 June 2019) <www.bloomberg.com/news/articles/2019-06-19/exiles-sue-expedia-s-trivago-for-trafficking-in-cuban-property>; M O'Kane, 'SocGen Sued for USD 792 million under Helms-Burton' (*EU Sanctions*, 12 July 2019) <www.europeansanctions.com/2019/07/socgen-sued-for-792m-under-helms-burton-act/>; *Garcia-Bengochea v Carnival Corporation* 407 F Supp 3d 1281 (SD Fla 2019) (order on motion to dismiss); *Havana Docks Corporation v Carnival Corporation*, No 1:19-cv-21724 (SD Fla, 28 August 2019) (order on motion to dismiss) (ruling that doing business under an OFAC licence is not sufficient to grant a motion to dismiss under Helms-Burton); *Daniel A Gonzalez v Amazon.com and Susshi International*, No 19-23988-Civ-Scola (SD Fla, 10 March 2020) (order on motion to dismiss) (dismissing a claim against Amazon.com because, inter alia, an advertisement on Amazon saying that charcoal was 'direct from farmers in Cuba' did not demonstrate that Amazon knew the property had been confiscated or was owned by a US citizen).

The exercise of a private enforcement right may result in an order for foreign persons to pay money damages to US persons. Such an order evidently goes beyond the mere denial of privileges and is a more onerous measure that engages the customary international law of jurisdiction. As the private cause of action relates to wholly foreign transactions—non-US nationals investing in Cuba—it is by no means obvious that the exercise of US jurisdiction can be grounded on any accepted jurisdictional basis. Given the absence of a territorial link to the US, territorial jurisdiction does not seem to be an option. Admittedly, passive personality-based jurisdiction could be considered in light of the personal link to the US; namely that the property confiscated by the Cuban Government originally belonged to US persons or Cuban nationals who later acquired US citizenship, who could thus qualify as US 'victims'. However, that link is probably too remote to ground such jurisdiction, as the territorial or personal connection between the US and the prohibited conduct is ambiguous to say the least.[118] What is more, the principle is normally only used in a criminal law context; in transnational private disputes, the nationality of the plaintiff (victim) is not normally a ground to establish adjudicatory jurisdiction under rules of private international law.[119]

5. Justifying secondary sanctions under the protective principle

The previous jurisdictional triggers were all based on a connection with the US—albeit an insufficient one from a public international law perspective. However, one can imagine a situation in the future in which the US exercises jurisdiction without *any* connection with the US. In fact, existing clauses in US sanctions legislation could well be interpreted as applying to non-US persons *without a link to the US*—apart, perhaps, from such persons purportedly endangering the national security of the US by trading with sanctions targets. For instance, the Iran Sanctions Act (1996) applies to 'persons' in general without a geographical limit.[120] Similarly, since a 2007 amendment, the International Emergency Economic Powers Act (IEEPA),[121] on which most country-

[118] European Commission, 'Report on United States Barriers to Trade and Investment' (November 2002) 5; M Cosnard, 'Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays' (1996) 42 Annuaire Français de Droit International 40, 41–43; Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 788; SH Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 Yale Journal of International Law 41, 64. The fact that successive US presidents waived Title III of Helms-Burton may speak to a conviction that its provisions were not compatible with international law.

[119] For some very circumscribed exceptions for consumer and employment contracts, that do not apply in this context however, see arts 17–23 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[120] See, eg, Iran Sanctions Act of 1996, s 14(15).

[121] International Emergency Economic Powers Enhancement Act (as amended through Pub L No 110-96 (2007)).

specific US sanctions programmes are based,[122] provides that '[i]t shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition' and goes on to provide for civil and criminal penalties to be imposed on 'any person' who commits such an act.[123] The IEEPA likewise does not further define the term 'persons', raising the spectre that non-US persons risk civil and criminal penalties absent any link between their activities and the US, as long as they cause others to violate US sanctions.[124]

So far, US law-enforcement agencies have refrained from giving such a broad interpretation to US law, instead relying on the aforementioned US connections. However it appears that, under US law, such an interpretation would not necessarily be unlawful. In particular, in the aforementioned case of *US v Reza Zarrab*, Judge Berman noted that if the 'issue of extraterritoriality were to be reached, Zarrab's argument that IEEPA and [the Iranian Sanctions and Transactions Regulations (ISTR)] do not apply extraterritorially would likely prove unpersuasive ... [where the] law at issue is aimed at protecting the right of the government to defend itself'[125]. Lawyers have noted that 'it is hard to imagine US prosecutors seeking to bring a case against a foreign national where they could not provide the scintilla of evidence required to establish a domestic nexus'.[126] However, such a possibility is not excluded either, especially not if the US wants to ramp up the pressure on those who continue to deal with sanctions targets.[127]

This brings us to the fundamental question of whether US enforcement of secondary sanctions legislation, absent a strong territorial or personal connection with the US, could be justified under the protective or security principle, ie, the principle that permits jurisdiction 'over aliens for acts done abroad which affect the internal or external security of other key interests of the state'.[128] In fact, a considerable number of US sanctions regulations are premised on the target posing a threat to US national security.[129] When President Trump reinstated US sanctions against Iran after denouncing the Joint Comprehensive Plan of Action

[122] Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1059–60.

[123] 50 USC § 1705(a).

[124] Rathbone, Jeydel, and Lentz, 'Sanctions, Sanctions Everywhere', 1112.

[125] *United States v Reza Zarrab*, 18.

[126] SM Flicker, J Fiebig, and K Manley, 'United States of America v. Reza Zarrab: The Long Reach of U.S. Sanctions May Have Just Gotten Longer' (*Paul Hastings LLP*, 26 October 2016) <www.paulhastings.com/publications-items/details/?id=8f9bea69-2334-6428-811c-ff00004cbded>.

[127] This is one of the fears of foreign governments: see Interview with a representative of a European Ministry of Finance (24 April 2019). This representative considered making use of the US dollar to be an acceptable link with the US.

[128] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 462. The protective principle should be distinguished from the passive personality principle, which allows aliens to be punished for acts harming individual nationals abroad: ibid.

[129] Note that some sanctions programmes may be motivated by human rights rather than security concerns. For an overview, see International Corporate Accountability Roundtable and the Enough Project, 'US Sanctions Regimes and Human Rights Accountability Strategies' (June 2018).

(JCPOA) in 2018, he did so 'to advance the goal of applying financial pressure on the Iranian regime in pursuit of a comprehensive and lasting solution to *the full range of the threats posed by Iran*'.[130] The above-mentioned Helms-Burton Act, including its Title III, also appears to be based on the threat which Cuba poses to the US.[131]

Reliance on essential security interests as a justification for economic sanctions is further fleshed out in Part IV.E in the context of security exceptions enshrined in trade and investment agreements. At this point, however, it suffices to observe that the claim that countries such as Iran or Cuba pose objective security threats to the US is open to serious doubt.[132]

6. Anti-evasion as a jurisdictional ground

Some observers may perhaps wish to justify the imposition of secondary sanctions on the ground that such sanctions serve the purpose of preventing circumvention of primary sanctions.[133] In so doing, they would upgrade the *political rationale* for the imposition of secondary sanctions, as discussed in Part II, to an independent *jurisdictional ground*. The US has not officially relied on anti-circumvention or anti-evasion as (international) legal justification for its secondary sanctions, instead seemingly considering national security as an umbrella jurisdictional justification. Still, it is worth inquiring into the persuasiveness of the anti-evasion justification of assertions of extraterritoriality. Anti-evasion is not listed among the traditional grounds of jurisdiction in international law. Still, it has recently been relied on in financial regulation. In her work on new forms of EU extraterritoriality, Joanne Scott has highlighted the use of a novel jurisdictional trigger that 'is intended to catch artificial behavior designed to evade obligations laid down in EU law' which, as far as EU financial regulation is concerned, has the effect of 'requiring third country entities to comply with the measure's clearing and risk mitigation obligations where this is necessary or appropriate to prevent the evasion of any provision' of the regulation.[134] The anti-evasion jurisdictional ground appears to be quite specific to the field of financial regulation, however. Even if it were to be considered to be transposable, anti-evasion is aimed to capture *artificial* arrangements *designed* to evade legal obligations. The relevant Commission Delegated Regulation defines an

[130] 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, preamble (emphasis added).

[131] Helms-Burton Act, 22 USC § 6021(1)(28).

[132] See also Cosnard, 'Les lois Helms-Burton et d'Amato-Kennedy'. Regarding Iran, it does not help that at the time of the US withdrawal from the JCPOA, the director of the CIA was of the view that Iran was technically in compliance with the JCPOA, and that the International Atomic Energy Agency (IAEA) failed to establish a JCPOA violation on the part of Iran: see IAEA Board of Governors, 'Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)' (Doc No GOV/2019/10, 22 February 2019).

[133] We would like to extend our thanks to one of the anonymous reviewers for raising this issue.

[134] J Scott, 'The New EU "Extraterritoriality"' (2014) 51 Common Market Law Review 1343, 1359.

artificial arrangement as '[a]n arrangement that intrinsically lacks business rationale, commercial substance or relevant economic justification and consists of any contract, transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event'.[135] In light of this restrictive definition, regular business transactions between third countries and sanctions targets, which serve a commercial purpose, are unlikely to qualify as artificial arrangements that trigger the application of a free-standing anti-evasion jurisdictional ground. Arguably, only insofar as evidence is adduced of a person setting up a legal vehicle to deliberately circumvent (primary) sanctions will the targeting state be entitled to exercise jurisdiction based on anti-circumvention. This also appears to be the EU's understanding of the jurisdictional reach of EU sanctions. In its 2018 Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, it held that '[a]n entity incorporated in an EU Member State may not, inter alia, use a company that it controls as a tool to circumvent a prohibition, including where that company is not incorporated in the EU, nor may this entity give instructions to such effect',[136] without considering this to be an example of control-based extraterritoriality.[137]

C. Concluding observations

This part has argued that, for the purposes of assessing the international lawfulness of secondary sanctions, a distinction should be made between restrictions of access to US markets, and civil and criminal penalties imposed on third country persons engaging in sanctionable activities. The former fall within the sovereignty of states; in principle, they do not raise concerns under the customary international law of jurisdiction. The latter, in contrast, raise acute questions of legality under the customary international law of jurisdiction. It has been argued that the connections relied on by the US to justify their assertions of jurisdiction are too tenuous. As a result, such assertions can be considered to fall afoul of the law of jurisdiction. Equally tenuous connections have admittedly been relied on to combat foreign corrupt practices (eg, in the US under the Foreign Corrupt Practices Act)[138] but, unlike sanctions, multiple international conventions have explicitly given broad jurisdictional

[135] Commission Delegated Regulation 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effects of contracts within the Union and to prevent the evasion of rules and obligations [2014] OJ L85/1, art 3(2).

[136] Council of the EU, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy' (Annex to Doc No 5664/18, 4 May 2018) para 54.

[137] ibid, para 52 ('The EU will refrain from adopting legislative instruments having extraterritorial application in breach of international law').

[138] See, notably, 15 USC § 78dd–3(a).

grants to states to address corruption. For instance, article 4 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides that '[e]ach Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official *when the offence is committed in whole or in part in its territory*'.[139] This provision allows, and even mandates, states parties to exercise their jurisdiction in cases with a partial, and possibly only minor, territorial connection. This may mean that connections which may in themselves not be substantial enough could derive validity from being embedded in an international convention, and thus from the perception that they embody 'global values'.[140] Such embeddedness is normally lacking as far as secondary sanctions are concerned.

IV. International Legality of Secondary Sanctions under Conventional Law[141]

Secondary sanctions do not only raise difficult questions in terms of their legality under general international law, specifically with regard to the restrictions on the exercise of state jurisdiction under customary international law. They are also difficult to reconcile with a range of multilateral and bilateral instruments. Some of these instruments, such as the OECD Code of Liberalisation of Capital Movements,[142] belong to the realm of 'soft law'. More relevant for present purposes, however, are those instruments of a legally binding nature, specifically those that apply in the relationship between the US, on the one hand, and the EU

[139] Emphasis added. For broad treaty-based jurisdictional powers over corruption offences, see also art 42 of the UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, which provides for jurisdiction based on territoriality, nationality, passive personality, security, and *aut dedere aut judicare*. For a commentary on this provision, see C Ryngaert and F Haijer, 'Article 42: Jurisdiction' in C Rose, M Kubiciel, and O Landwehr (eds), *The UN Convention against Corruption: A Commentary* (OUP 2019).

[140] Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 795. On the 'global values' justification of unilateral assertions of jurisdiction, see also C Ryngaert, *Selfless Intervention: The Exercise of Prescriptive Jurisdiction in the Common Interest* (OUP 2020, forthcoming). However, even for purposes of combating foreign corrupt practices, commentators have argued that some (territorial) connections, such as routing emails via a US server or wire-transferring funds via the US financial system (connections which have also triggered enforcement of US sanctions laws), are too tenuous to ground jurisdiction: A Leibold, 'Extraterritorial Application of the FCPA under International Law' (2015) 51 Willamette Law Review 225, 260; S Routh, 'Tweet to Defeat Government Bribes: Limiting Extraterritorial Jurisdiction under the Foreign Corrupt Practices Act to Combat Global Corporate Corruption' (2018) 51 Vanderbilt Journal of Transnational Law 625, 647.

[141] The authors would like to thank Jacques Bourgeois, Dominic Coppens, and Deepak Raju for helpful feedback on the application of WTO law to secondary sanctions. Any errors remain, of course, our own.

[142] OECD, 'OECD Code of Liberalisation of Capital Movements' (2019). The Code aims at the abolition of restrictions on movements of capital. Note, however, that the OECD Code does contain a security exception, stating that the Code shall not prevent a Member from taking action which it considers necessary, eg, for the protection of its essential security interests (art 3).

and/or individual EU Member States, on the other, and whose provisions may be breached by (US) secondary sanctions. It is these instruments which this part focuses on.

In terms of multilateral instruments, worth mentioning are the WTO Agreements, to which both the US and the EU, as well as individual EU Member States, are party. Importantly, the EU has repeatedly taken the position that US secondary sanctions breach US obligations vis-à-vis the EU under the WTO Agreements.[143] Following the adoption of the Helms-Burton Act in 1996, the (then) European Communities (EC) effectively requested the creation of a WTO panel to scrutinize a range of measures introduced by the Act.[144] The EC claimed, in particular, that the measures concerned were inconsistent with articles V, XI, and XIII of the General Agreement on Tariffs and Trade (GATT); with articles II, III, VI, XI, XVI, and XVII of the General Agreement on Trade in Services (GATS), as well as with paragraphs 3 and 4 of the GATS Annex on the Movement of Natural Persons.[145] Eventually, however, when a political agreement was reached whereby the US agreed not to enforce the Helms-Burton Act against EC persons, the EC suspended their complaint.[146] As such, the compatibility of secondary sanctions with WTO law—and, more generally, with international trade and international investment law[147]—remains as yet largely 'untested'.[148]

[143] See, eg, Council of the EU, 'Declaration by the High Representative on behalf of the EU on the full activation of the Helms-Burton (LIBERTAD) Act by the United States' (2 May 2019) <www.consilium.europa.eu/en/press/press-releases/2019/05/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-full-activation-of-the-helms-burton-libertad-act-by-the-united-states/>; EU External Action Service, 'Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helm Burton (Libertad) Act' (17 April 2019) <https://eeas.europa.eu/headquarters/headquarters-homepage/61183/joint-statement-federica-mogherini-and-ecilia-malmstr%C3%B6m-decision-united-states-further_en>.

[144] *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities, WT/DS38/2 (8 October 1996).

[145] Additionally, the measures were deemed to nullify and impair benefits under the GATT and GATS, and impede the attainment of the GATT objectives: ibid. Note that Canada, Japan, Malaysia, Mexico, and Thailand reserved their third-party rights in the dispute (*United States – The Cuban Liberty and Democratic Solidarity Act*, Reservation of Third-Party Rights, WT/DS38/4 (24 February 1997)).

[146] *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5. As the Panel was not requested to resume its work, the authority for the establishment of the Panel lapsed as of 22 April 1998 pursuant to art 12.12 of the Dispute Settlement Understanding (*United States – The Cuban Liberty and Democratic Solidarity Act*, Lapse of the Authority for Establishment of the Panel: Note by the Secretariat, WT/DS38/6 (24 April 1998)).

[147] Note that after the adoption of the Helms-Burton Act in 1996, Canada and Mexico took steps to employ the dispute resolution mechanism under chapter 20 of the North American Free Trade Agreement (adopted 17 September 1992, entered into force 1 January 1994) (NAFTA). It appears, however, that ultimately no request for the creation of a Chapter 20 Panel was made, although both Canada and Mexico reserved their right to appear as third parties in the WTO proceedings initiated by the EC: see H Oyer, 'The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations under NAFTA' (1997) 11 Florida Journal of International Law 429, 456–57.

[148] For another interesting WTO procedure (relating to government procurement), which was eventually terminated, see note 227 and accompanying text.

The WTO Agreements are not the only conventional instruments that are relevant in the present context. Equally important at the multilateral level, for instance, are the restrictions imposed by the International Monetary Fund's (IMF) Articles of Agreement. Turning to the bilateral level, one can identify two sets of (largely analogous) treaties whose substance potentially imposes limits on the adoption of secondary sanctions. The first set encompasses the so-called FCN treaties, many of which were concluded in the early UN Charter era between the US, on the one hand, and individual Western European countries on the other.[149] The second category—which is more recent and which can, to some extent, be seen as the successor to the traditional FCN treaties—are the BITs. While no such treaties exist between the US and individual Western European countries, the US has concluded BITs with various Central and Eastern European countries since the end of the Cold War, including Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, and Slovakia.[150]

Notwithstanding the absence of a judicial ruling on the matter, at the time of adoption of the Helms-Burton Act there was a widespread feeling that the US sanctions 'had to be' violating some international obligations.[151] A similar 'gut feeling' is frequently voiced with respect to current secondary sanctions, in particular those targeting Iran.[152] Nonetheless, analyses of the compatibility of secondary sanctions with multilateral or bilateral conventional law, including the substantive rules of WTO law, have remained few and far between, and have mostly focused on the Helms-Burton Act, with only scant scrutiny of the legality of, for instance, the US sanctions against Iran.[153] Against this background, this article seeks to contribute to the debate by mapping and

[149] The list of treaties containing a compromissory clause providing for dispute settlement by the ICJ that is available on the ICJ website (see <www.icj-cij.org/en/treaties>) includes FCN Treaties concluded by the US with Italy, Denmark, Ireland, Greece, Germany, the Netherlands, Belgium and Luxembourg. It also includes a US-France Convention of Establishment (adopted 25 November 1959, entered into force 21 December 1960) (1962) 56 AJIL 1160, whose content appears largely similar to that of the FCN Treaties. More up-to-date information (confirming their continued application) can be found in the list of 'Treaties in Force' that is published periodically by the US Department of State (see, eg, US Department of State, 'Treaties in Force: a list of treaties and other international agreements of the United States in Force on January 1, 2019' (Office of the Legal Adviser 2019) or in the United Nations Treaty Series database.

[150] See, eg, the overview of BITs on the website of the US Office of Trade Agreements Negotiations and Compliance at <https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp>, or the overview on the homepage of the US Department of State at <www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/>.

[151] JA Spanogle Jr, 'Can Helms-Burton be Challenged under WTO?' (1998) 27 Stetson Law Review 1313.

[152] See, eg, Bonnecarrère, 'Extraterritorialité des sanctions américaines', 15.

[153] For two rather cursory analyses of the compatibility of the US Iran sanctions with WTO law, see D Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme: A Contrasting Legal Situation' (Report of the Club des Juristes Ad Hoc Commission, July 2018) 55–57; S Singh, 'WTO Compatibility of United States' Secondary Sanctions relating to Petroleum Transactions with Iran' (Working Paper CWS/WP/200/1, Centre for WTO Studies) 7–8.

tentatively examining potential breaches of conventional law. A number of preliminary observations are, however, due at the outset.

First, while the abovementioned treaty instruments contain rights and obligations that prima facie exclude the adoption of primary sanctions, such as direct trade restrictions, between the respective parties,[154] this does not ipso facto imply that *secondary* sanctions will similarly contravene those same treaty provisions.

Second, and on a related note, notwithstanding common assumptions that secondary sanctions 'have to be' violating WTO law or other manifestations of conventional law, the reality is that the compatibility test is no straightforward and monolithic exercise. Thus, neither the WTO Agreements nor, it would seem, other bilateral or multilateral instruments contain a clause expressly prohibiting *secondary* sanctions.[155] Conversely, save perhaps for the North American Free Trade Agreement, these agreements generally do not contain a clause providing an express exception for certain secondary trade restrictions.[156] As

[154] By way of illustration, in a recent WTO case it was held that Russian sanctions restricting the transit of goods from Ukraine contravened the GATT: see *Russia – Measures Concerning Traffic in Transit*, Panel Report, WT/DS512/R (5 April 2019). Reference can also be made to the alleged breaches of WTO law in several recent requests for consultations lodged by Venezuela, Qatar, and Russia in response to unilateral economic sanctions against them: see, eg, *United States – Measures relating to Trade in Goods and Services*, Request for Consultations by Venezuela, WT/DS574/1 (8 January 2019); *Saudi Arabia – Measures relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Request for Consultations by Qatar, WT/DS528/1 (4 August 2017); *Ukraine – Measures relating to Trade in Goods and Services*, Request for Consultations by the Russian Federation, WT/DS525/1 (1 June 2017). Moreover, in 2018, Iran instituted proceedings before the ICJ against the US pursuant to the US withdrawal from the JCPOA and the re-activation of sanctions against Iran. According to Iran, US sanctions gave rise to various breaches of the 1955 US-Iran Treaty of Amity (Treaty of Amity, Economic Relations, and Consular Rights (adopted 15 August 1955, entered into force 15 August 1955) 284 UNTS 93), including the 'fair and equitable treatment principle' (art IV(1)), the prohibition against certain restrictions on payments (art VII(1)), the national treatment and MFN principles (art IX(2)), and the freedom of commerce and navigation (art X(1)): see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Application Instituting Proceedings) [2018] General List No 175. While the case is still pending before the ICJ at the time of writing, in its order on provisional measures, the ICJ did acknowledge that 'measures adopted by the United States, for example the revocation of licenses and authorizations granted for certain commercial transactions between Iran and the United States, the ban on trade of certain items, and limitations to financial activities' were 'prima facie capable of falling within the material scope of [the Treaty of Amity]': *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Provisional Measures, Order of 3 October 2018) [2018] ICJ Rep 623, para 43. But see BE Carter, 'Economic Sanctions', MPEPIL Online (last updated April 2011) para 28: 'Because many of the recent targets of sanctions are not WTO members … and because of the exceptions in the GATT agreement … , the vast majority of the 100-plus uses of economic sanctions in the last three decades have clearly not violated these treaties, and other cases are unclear. Moreover, few, if any, of these sanctions arguably violate any bilateral treaty, and the questionable cases require further investigation of the facts and the specific treaties.'

[155] Interestingly, the draft Multilateral Agreement on Investment negotiated within the OECD did contain a draft article prohibiting 'secondary investment boycotts': see OECD, 'Draft Consolidated Text' (Doc No DAFFE/MAI(98)7REV1, 22 April 1998) 125–26. Eventually, however, the project was abandoned altogether for lack of support.

[156] See below, however, on the possible impact of the 'security exception'. A rare exception can indeed be found in NAFTA's art 309(3), which was introduced with US sanctions against Cuba in

with the analysis in relation to the customary rules on jurisdiction above, a proper analysis under treaty law requires unpacking the various sanctions triggers and concomitant consequences in case of breach.

Below, we look at some of the main scenarios without in any way claiming exhaustivity. We will address, in turn, the application of the IMF Articles of Agreement (Section A), the WTO Agreements (Section B), and BITs and FCN treaties (Section C), before arriving at a provisional conclusion (Section D). Having identified potential violations, the next section (Section E) tackles the impact of the so-called 'security exception', which is found both in the WTO Agreements and in virtually all relevant bilateral instruments and which provides leeway for measures 'necessary' to protect the state's 'essential security interests'. These sections deal only with the substantive legality assessment. The (procedural) question of whether potential breaches can be challenged through judicial remedies is explored separately in Part V.B.

A. International monetary law: Secondary sanctions as restrictions on payments

At first glance, several US secondary sanctions appear highly problematic under article VIII(2)(a) of the IMF Articles of Agreement, according to which 'no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions'. 'Payments for current transactions' must be distinguished from capital transfers, restrictions on which are still permitted under article VI(3).[157] Article XXX provides several (non-exhaustive) examples of payments for current transactions, including, for instance, 'all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and

mind: Art 309(3) of NAFTA reads as follows: 'In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from: (a) limiting or prohibiting the importation from the territory of another Party of such good of that non- Party; or (b) requiring as a condition of export of such good of the Party to the territory of another Party, that the good not be re-exported to the non-Party, directly or indirectly, without being consumed in the territory of the other Party.' As Oyer notes, the clause would appear to allow NAFTA parties to restrict the importation or exportation of goods from non-NAFTA countries, such as Cuba, without violating art 309. At the same time, the clauses only cover trade in goods, not services; Oyer, 'The Extraterritorial Effects of U.S. Unilateral Trade Sanctions', 458–60. See also s 110(b) of the Helms-Burton Act (22 USC § 6040(b)(2)) which asserts that 'Article 309(3) [of the NAFTA] permits the United States to ensure that Cuban products or goods made from Cuban materials are not imported into the United States from Mexico or Canada and that United States products are not exported to Cuba through those countries'. Note that a similar clause is found in art 2.11(3) of the United States-Mexico-Canada Agreement (signed 30 November 2018), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

[157] Articles of Agreement of the International Monetary Fund (signed 27 December 1945, entered into force 27 December 1945, as amended) 2 UNTS 39 (IMF Articles of Agreement) art XXX. See further, eg, A Nussbaum, 'Exchange control and the International Monetary Fund' (1950) 59 Yale Law Journal 421; R Bismuth, 'Transferts internationaux de fonds: libération, restrictions et contrôle' (2015) Répertoire international Dalloz 1.

credit facilities'. A 1960 decision of the IMF Executive Board clarifies that the term 'restriction' involves a 'direct governmental limitation on the availability or use of exchange' as such.[158]

Several sanctions would seem to come within the ambit of article VIII(2)(a). First and foremost, this is the case for restrictions involving the freezing of assets and bank accounts. In such cases, deposits are made inconvertible and their transfer abroad is forbidden with regards to the making of payments or transfers for current international transactions.[159] It is notable, in this context, that the US not only imposes asset freezes on *primary* sanctions targets, but also uses them to enforce *secondary* sanctions. While, admittedly, the exposure to asset freezes has mainly served a deterrent function, a number of third-state companies have still, on occasion, been added to the US list of designated persons and entities.[160] Second, article VIII(2)(a) seems to have a broader impact beyond actual asset freezes,[161] and could also cover a wide range of financial restrictions that seek to prohibit dollar-denominated transactions where there is some link with the primary sanctions target—in particular so-called 'U-turn transactions'[162]—and/or that threaten non-US companies doing business with the primary sanctions target with exclusion from the US market.[163]

Article VIII(2)(a) provides for only two exceptions, one related to the scarcity of the Fund's holdings of a member's currency (article VII(3)(a)) and the other pertaining to certain transitional arrangements (article XIV(2)). Neither is relevant in the present context. There is, however, more to this than meets the eye. While no exception is made in the Treaty itself for currency restrictions inspired by foreign policy

[158] IMF Executive Board, 'Payments Restrictions' (Decision No 1034-(60/27), 1 June 1960).

[159] In this sense: A Viterbo, *International Economic Law and Monetary Measures: Limitations to States' Sovereignty and Dispute Settlement* (Edward Elgar 2012) 172; CC Lichtenstein, 'The Battle for International Bank Accounts: Restrictions on International Payments for Political Ends and Article VIII of the Fund Agreement' (1987) 19 NYU Journal of International Law and Politics 981, 985.

[160] See US Congressional Research Service, 'Iran Sanctions', annexes.

[161] See, eg, Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 797, 803; NA Simon, 'The Iranian Assets Control Regulations and the International Monetary Fund Agreement: Are the Regulations "Exchange Control Regulations"' (1981) 4 Boston College International and Comparative Law Review 203, 221–22.

[162] See also Part II.A.2. See, eg, US Congressional Research Service, 'Iran Sanctions', 32: 'On November 6, 2008, the Department of the Treasury broadened restrictions on Iran's access to the U.S. financial system by barring U.S. banks from handling any transactions with foreign banks that are handling transactions on behalf of an Iranian bank ("U-turn transactions"). This means a foreign bank or person that pays Iran for goods in U.S. dollars cannot access the U.S. financial system (through a U.S. correspondent account, which most foreign banks have) to acquire dollars for any transaction involving Iran.'

[163] See the list of menu-based sanctions under Part II.A.2, which include a 'prohibition on any credit or payments between the entity and any U.S. financial institution'. For non-US banks, exclusion from the US financial market has been dubbed the 'Wall Street equivalent of the death penalty': see S Lohmann, 'Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad' (SWP Comment No 5, Siftung Wissenschaft und Politik, February 2019) 4. It arguably constitutes the most powerful tool in the US's sanctions arsenal.

objectives,[164] a 1952 decision of the IMF Executive Board has introduced a specific procedure for granting IMF approval for restrictions imposed on security grounds.[165] The decision was inspired, among other things, by the imposition of economic sanctions against the People's Republic of China and North Korea in 1950,[166] its origin (and invocation)[167] thus confirming that article VIII(2)(a) is capable of covering a variety of (primary and secondary) sanctions. Crucially, the decision provides that payments restrictions for security reasons must be notified to the IMF either before they are adopted or, when the situation does not allow for advance notice (eg, for reasons of urgency or secrecy), no later than 30 days after their adoption.[168] The decision continues by stressing that

> [u]nless the Fund informs the member within 30 days after receiving notice from the member that it is not satisfied that such restrictions are proposed solely to preserve such security, the member may assume that the Fund has no objection to the imposition of the restrictions.

While little-known and understudied, the 1952 decision is of pivotal importance in the present context. Indeed, it effectively entails that when a state notifies measures to the IMF and the Fund does not formally object, there will be no breach of article VIII(2)(a) of the IMF Articles of Agreement. An absence of objection is thus equivalent to tacit approval. Moreover, such approval does not expire, nor does it require renewal or review.[169] There is also a spill-over effect in the context of article VIII(2)(b) of the IMF Articles of Agreement, as exchange control regulations that are approved by the IMF must be acknowledged and enforced by the courts of an IMF member at the receiving end of such restrictions, even when they are against the essential interests or fundamental values of their country.[170] Viterbo observes in this context that article VIII(2)(b) 'significantly boosts [the] effectiveness and reach' of

[164] Nor do the IMF Articles of Agreement contain a 'security exception' along the lines of, for instance, the WTO Agreements (see Part III.F).

[165] IMF Executive Board, 'Payments Restrictions for Security Reasons: Fund Jurisdiction' (Decision No 144-(52/51), 14 August 1952). The Decision has a broad scope and 'applies to all restrictions on current payments and transfers, irrespective of their motivation and the circumstances in which they are imposed'. See further MP Malloy, 'Où est votre chapeau? Economic Sanctions and Trade Regulation' (2003) 4 Chicago Journal of International Law 371, 378, note 32.

[166] Lichtenstein, 'The Battle for International Bank Accounts', 988.

[167] See notes 173 and 174, and accompanying text.

[168] If called to a vote, any proposal to challenge the measures is adopted with an ordinary majority of the weighted votes cast. See A Viterbo, 'Extraterritorial Sanctions and International Economic Law' in ECB, *Building Bridges: Central Banking Law in an Interconnected World* (ECB 2019) 157, 164.

[169] ibid.

[170] See further, eg, ibid; Simon, 'The Iranian Assets Control Regulations and the International Monetary Fund Agreement', 204ff (discussing the invocation of the so-called 'Bretton Woods Defence' in private litigation, specifically with a view to holding the contractual obligations of US banks to repay Iranian deposits unenforceable in British courts; but suggesting, however, that this aspect of the IMF Articles of Agreement may be ultra vires); Lichtenstein, 'The Battle for International Bank Accounts', 984ff.

unilateral security restrictions, and forces countries which do not agree with them to apply them nonetheless.[171]

From the IMF's Annual Reports on Exchange Arrangements and Exchange Restrictions (AREAR), it is clear that numerous restrictions have been notified in accordance with the 1952 decision.[172] The 2018 report, for example, notes that:

> 19 members notified the IMF of measures introduced solely for security reasons during 2017, while 10 members did so during January-September 2018. The number of countries notifying the IMF of such measures dropped from 37 in 2015 and 32 in 2016. For the most part, notification came from advanced economies. In general, the restrictions involved take the form of financial sanctions to combat the financing of terrorism or financial sanctions against certain governments, entities, and individuals in accordance with [UN] Security Council resolutions or EU regulations.[173]

Specifically with regard to the US, the US country section of the 2016 AREAR report contains dozens of exchange measures imposed for security reasons in accordance with the 1952 decision.[174] The lion's share of the relevant US legislative and regulatory instruments identified in the report[175] deal with blocked accounts, yet the list also includes, for instance, measures prohibiting imports from certain entities that proliferate weapons of mass destruction, as well as other 'measures on payments and transfers for current international transactions', such as the Iranian Financial Sanctions Regulations.

Very little information is available on the use of the procedure set forth by the 1952 decision within the IMF context. Many large-scale sanctions regimes have ostensibly been notified without giving rise to any form of objection within the IMF.[176] Existing literature even suggests that the Fund has never objected to any notification.[177] This is altogether unsurprising: indeed, the preamble to the decision stresses that while '[s]ometimes members impose . . . restrictions solely for the preservation of national or international security', '[t]he Fund does not . . . provide a suitable forum for discussion of the political and military

[171] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 165.

[172] The Annual Reports are available on the IMF website at <www.imf.org/en/Publications/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions/Issues/2019/04/24/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions-2018-46162>.

[173] IMF, 'Annual Report on Exchange Arrangements and Exchange Restrictions 2018' (16 April 2019) 22.

[174] IMF, 'Annual Report on Exchange Arrangements and Exchange Restrictions 2016' (October 2016) 3611–12.

[175] Note: the document merely lists the relevant legislative and regulatory acts without further explaining their precise content.

[176] Viterbo, *International Economic Law and Monetary Measures*, 173.

[177] Lichtenstein, 'The Battle for International Bank Accounts', 991 (writing in 1987: 'The Fund has never notified a country of its disapproval of the imposition of sanctions if the country has alleged national security reasons for the sanctions'); Viterbo, 'Extraterritorial Sanctions and International Economic Law', 164 (writing in 2019, arriving at the same conclusion).

considerations leading to actions of this kind'.[178] It further acknowledges that 'it is not possible to draw a precise line between cases involving only considerations of this nature and cases involving, in whole or in part, economic motivations and effects for which the Fund does provide the appropriate forum for discussion'.[179] Thus, there appears to be a general policy of non-objection, de facto acknowledging that members' judgment prevails over the Fund's judgment.[180] This passive stance of the IMF has been criticized by a number of authors, who have called for a review of the IMF approach to security restrictions. In particular, it has been argued that the IMF should abstain from giving (tacit) approval to unilateral security restrictions.[181] However, a 1981 proposal to remove the tacit approval procedure and admit only measures in line with UN Security Council resolutions was never debated by the Executive Board.[182]

Thus, if and to the extent that the various US sanctions have been duly notified to the IMF pursuant to the 1952 decision,[183] and have not been objected to, the conclusion must be that their legality cannot be challenged on the basis of article VIII(2)(a) of the IMF Articles of Agreement.

The limited information on, and attention given to, the IMF procedure is all the more striking considering that it may also have consequences vis-à-vis the clauses on payment restrictions in the GATS or in FCN treaties. Article XI(1) GATS,[184] for instance, decrees that '[e]xcept under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers relating to its specific commitments'.[185] Article XII GATS makes allowance for restrictions that aim at safeguarding the balance of payments in the event of financial difficulties. Clearly, this exception cannot be invoked to justify the imposition of sanctions on companies located in WTO member

[178] IMF Executive Board, 'Payments Restrictions for Security Reasons'.

[179] ibid.

[180] Viterbo, *International Economic Law and Monetary Measures*, 172, 174.

[181] Lichtenstein, 'The Battle for International Bank Accounts', 992; Viterbo, 'Extraterritorial Sanctions and International Economic Law', 165–66.

[182] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 165.

[183] Note: the authors have been unable to access the country compilation of the 2018 IMF Annual Report on Exchanges Restrictions. Only the general part of the 2018 report is publicly available.

[184] See also Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme', 55.

[185] Note that case law pertaining to art XI GATS is virtually non-existent. In *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R (10 November 2004) paras 6.440–41, the panel notes that 'Article XI has not, as yet, been the subject of interpretation or application by either panels or the Appellate Body'. At the same time, the panel emphasizes 'that Article XI plays a crucial role in securing the value of specific commitments undertaken by Members under the GATS. Indeed, the value of specific commitments on market access and national treatment would be seriously impaired if Members could restrict international transfers and payment for service transactions in scheduled sectors. In ensuring, *inter alia*, that services suppliers can receive payments due under services contracts covered by a Member's specific commitment, Article XI is an indispensable complement to GATS disciplines on market access and national treatment'.

states once they use the US dollar.[186] FCN treaties also contain partly analogous clauses. Thus, article 10(2) of the US-Belgium FCN Treaty excludes 'exchange restrictions', 'except to the extent necessary to maintain or restore adequacy to its monetary reserves'.[187] Article 10(4) adds that exchange restrictions 'shall not be imposed by either Party in a manner unnecessarily detrimental ... to the claims, investments, transport, trade and other interests of the nationals and companies of the other Party'. The term 'exchange restrictions' is understood broadly as encompassing all restrictions 'which burden or interfere with payments, remittances, or transfers of funds or financial instruments between the territories of the two Parties' (article 10(5)).

Just as asset freezes and far-reaching US restrictions on dollar transactions appear prima facie incompatible with article VIII(2)(a) of the IMF Articles of Agreement, so too would they appear to be contrary to article XII GATS and comparable clauses in the FCN treaties. At the same time, it must be stressed that these clauses tend to contain a built-in referral to the IMF regime. Thus, article XI(2) GATS asserts that:

> [n]othing in this Agreement shall affect the rights and obligations of the members of the [IMF] under the Articles of Agreement of the Fund, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Likewise, article 10(2) of the US-Belgium FCN Treaty holds that it does 'not ... preclude imposition by either Party of particular restrictions whenever the Fund specifically so authorizes or requests'.

These clauses could be interpreted in two ways. According to the first, they could be read as implying that, whenever a payment restriction has been approved, or at least 'not objected to', by the IMF, it will not contravene the GATS or FCN clauses either. Alternatively, the opposite reading would be that an absence of objection by the IMF is not equivalent to a 'request of the Fund' (per article XI(2) GATS) or a 'specific' authorization or request (in the sense of article 10(2) of the US-Belgium FCN Treaty) so that the mere (and non-objected) notification of a payment restriction to the IMF pursuant to the 1952 decision does not of itself preclude a breach of the latter instruments. Textually, at least, the latter interpretation appears the more compelling, albeit that the interaction between the IMF rules, on the one hand, and the GATS and FCN clauses, on the other, remains as yet untested in judicial practice.

[186] Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme', 55.

[187] US-Belgium FCN Treaty (Treaty of Friendship, Establishment and Navigation (adopted 21 February 1961, entered into force 3 October 1963) 480 UNTS 149) art 10(2). The provision further stipulates that it does not alter the obligations of either state in the IMF context. Similar clauses can be found in other FCN treaties concluded between the US and (Western) European countries.

B. Secondary sanctions and WTO law

Leaving aside restrictions on international payments in various forms, how do secondary sanctions fare under international trade law, especially under the two fundamental principles of WTO law, namely the principle of 'national treatment' and the 'most-favoured nation' (MFN) principle? More specifically, do policies that seek to restrict the trade between the primary sanctions target (eg, Iran or Cuba) and third countries (eg, EU Member States) ipso facto contravene either of these principles? This is the question addressed in Section 1. Subsequent sections then turn to the compatibility of secondary sanctions with the GATT' prohibition of quantitative restrictions (Section 2) and other rules of WTO law (Section 3).

1. National treatment and most-favoured nation treatment

With respect to the MFN principle, article I GATT prescribes that goods from one WTO member must be treated no less favourably than 'like product[s] originating in or destined for the territories of all other contracting parties'. Article II(1) GATS restates this principle in respect of 'like' services and service suppliers.[188] In turn, the national treatment principle enshrined in article III GATT prohibits internal taxes and other internal charges or regulations that discriminate between imported products and 'like domestic products'.[189] To a more limited extent, article XVII GATS provides for a similar prohibition of discrimination between services and service suppliers of other WTO members and 'its own like services and service suppliers', at least for those sectors inscribed in a member's Schedule of Commitments.[190] Discrimination in the sense of the national treatment and MFN principles can be both de jure as well as de facto.[191]

Clearly, when a WTO member prohibits companies established in a specific third country from importing goods (eg, oil or sugar) into its territory, or prohibits its own companies from exporting goods or services (eg, maintenance services in the civil aviation sector) to that specific country (but not to others), this would normally give rise to a prima facie

[188] Note that pursuant to art II(2) GATS, measures inconsistent with the MFN principle may, however, be maintained inasmuch as they are listed in, and meet the conditions of, the Annex on Article II Exemptions.

[189] Art III GATT disciplines also extend to directly competitive and substitutable products.

[190] Under the GATS, national treatment applies only when the WTO member in question has made a specific commitment for the sector and mode of supply at issue, and subject to the conditions and qualifications set out in its Schedule of Commitments.

[191] In this sense, see, eg, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R (9 September 1997) paras 233–34.

breach of the MFN principle,[192] at least where the primary sanctions target is a WTO member (such as Cuba).[193]

The more difficult question is whether a secondary sanctions regime through which a state seeks to undermine trade between the primary sanctions target and third countries could also, in and of itself, breach the above principles. Some authors appear to answer in the affirmative.[194] Others note, arguably more correctly, that it would be erroneous to regard the mere extraterritorial dimension of US sanctions legislation as resulting ipso facto in a breach of WTO law.[195]

Taken at face value, US secondary sanctions do not appear to treat imported goods or services less favourably than 'like' domestic goods or services (on the contrary, domestic goods and services are generally subject to more far-reaching restrictions); nor do they appear to discriminate between 'like' products or services from different WTO members (other than, perhaps, the primary sanctions target itself). In the words of Viterbo:

> the violation of the non-discrimination principle cannot be readily claimed by countries targeted by secondary sanctions. The latter do not infringe the most-favoured nation principle as all countries other than the one directly targeted are treated alike. As for the national treatment, domestic and imported products are subject to the same conditions.[196]

In a similar vein, with regard to the closure of the US market to products incorporating Cuban property pursuant to the Helms-Burton Act, Spanogle notes how

> domestic products incorporating Cuban property are just as subject to Helms-Burton sanctions as E.U. products incorporating the same Cuban property. Whatever its faults may be, the purpose of the Helms-Burton Act is not to afford protection to the United States domestic sugar industry, or any other domestic industry. Thus, Article III [GATT]... does not appear to be violated ...[197]

[192] Assuming that the security exception does not apply. On this issue, see Part III.F below.

[193] Note that Cuba has long been a member of the WTO. Iran, by contrast, is not. Whether such a breach can be challenged before the WTO Dispute Settlement Body, not only by the primary target itself but also by other WTO members, is a separate question related to the requirement of *locus standi*. See Part IV.B.1 below.

[194] Singh, 'WTO Compatibility of United States' Secondary Sanctions', 7: 'Thus, if the United States chooses to impose sanction [sic] against select countries and not all, it will be in violation of its obligations under Article I, GATT 1994'.

[195] Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 804–805. Also Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1319–20.

[196] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 166. In a similar vein, see Oyer, 'The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations under NAFTA', 461, finding that 'so long as U.S. secondary boycott laws do not treat Canada or Mexico any differently than they treat any other country, the U.S. secondary boycott laws do not violate' NAFTA's MFN clause (s 1103).

[197] Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1320. In a similar vein, Spanogle finds no discrimination between like products from different countries (other than Cuba itself): ibid, 1319–20.

Admittedly, it is possible that some form of discrimination could occur in the application of secondary sanctions. De facto discrimination might arise, for instance, if it were demonstrated that US secondary sanctions against Cuba would have a far greater impact on the EU, as opposed to other WTO members, eg, because of major EU investments in Cuba. In a similar vein, Bismuth envisages a possible breach of the national treatment principle if it were established that foreign entities are de facto exposed to higher financial sanctions than American companies,[198] although this would require an in-depth statistical analysis of the amounts of the fines imposed on US and non-US companies respectively.[199] Exceptionally, the application of secondary sanctions may even be overtly discriminatory. Thus, under section 4(c)(I)(B) of the Iran Sanctions Act, the US President can adopt a country-specific waiver from sanctions for all companies whose governments are determined to be cooperating with the US in preventing Iran from acquiring weapons of mass destruction. Further, pursuant to section 1245 of the National Defense Authorization Act for the Fiscal Year 2012,[200] a number of countries, such as China, effectively received a temporary waiver from the US authorities to continue importing oil from Iran,[201] at least until these waivers were revoked in mid-2019.[202]

At the same time, it would be erroneous to regard *any* form of (de facto or de jure) discrimination in the application of secondary sanctions as automatically constituting discrimination between like products (or services) in the sense of articles I or III GATT (or the analogous provisions in the GATS). Thus, the national treatment principle does not operate in splendid isolation; rather, it must naturally be tied to some form of trade (in goods or services) with the author of the discriminatory measures (here the US). In particular, article III GATT only covers internal measures discriminating between domestic products of the state adopting sanctions and 'imported products', that is, products *imported into the sanctioning state*.

Does the requirement of a trade nexus with the sanctioning state also apply in respect of the MFN principle? At least textually, article I GATT is potentially open to a broader interpretation. In particular, the

[198] Consider, in this context, *United States – Section 337 of the Tariff Act of 1930*, Panel Report, L/6439 – 36S/345 (7 November 1989) (relating to a situation where a judicial procedure treats imported goods less favourable than domestic goods, particularly in the context of patent infringement procedures).

[199] Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 805.

[200] Pub L No 112-81 (2011) (NDAA).

[201] The waiver is made contingent on the third countries concerned 'significantly' reducing their oil purchases from Iran. The banks of countries that were given a 'significant reduction exception' (SRE) could continue to conduct transactions with the Central Bank of Iran or with any sanctioned Iranian bank. US Congressional Research Service, 'Iran Sanctions', 28; 'Iran Sanctions: US Grants Oil Exemptions for Several Countries' *DW* (5 November 2018) <www.dw.com/en/iran-sanctions-us-grants-oil-exemptions-for-several-countries/a-46160363>.

[202] 'Iran Oil: US to End Sanctions Exemptions for Major Importers' *BBC News* (22 April 2019) <www.bbc.com/news/world-middle-east-48011496>.

provision refers to the granting of an 'advantage, favour, privilege or immunity' granted by a WTO member 'to any product originating in or destined for any other country', stipulating that it should also be accorded 'to the like product originating in or destined for the territories of all other contracting parties'. The text does not explicitly assert that it deals exclusively with products imported into, or exported from, the actual state granting the advantage. Inasmuch as a requirement for such a nexus to the latter state is not read into article I GATT, there is room for arguing that the selective waivers for trade in oil with Iran, granted to some states, but not to others, are at odds with the MFN principle.[203] The counter-argument would be that, having regard to the context and aim of the provision, a required nexus to actual trade with the state granting the favourable treatment must be deemed implicit in article I GATT (and article II GATS). The authors are not aware of any case law where the MFN principle was applied absent such a nexus.

Overall, it seems unlikely that secondary sanctions seeking to restrict trade between the country that is the primary sanctions target and third states would contravene the national treatment or MFN principles.

Exceptionally, a potential breach of the MFN principle could arise where a secondary boycott takes the form of a prohibition on the import of certain products from third countries that contain components from the primary sanctions target. Specifically, with respect to section 110(a) of the Helms-Burton Act, Spanogle finds that the US ban on importing goods that are 'made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba' (eg, sugar or rum)[204] breaches article I GATT, read together with the WTO Agreement on Rules of Origin.[205] Indeed, by imposing a ban on the import of, eg, Belgian chocolate containing Cuban sugar, but not on Canadian chocolate containing no Cuban-origin sugar, the Helms-Burton Act could be said to discriminate between like products of different contracting parties contrary to the MFN principle.[206]

Lastly, even where an attempt to restrict trade between the primary sanctions target and third states would not *as such* contravene the national treatment and/or MFN principles, there is still the possibility that the specific

[203] *Mutatis mutandis*, a similar argument could be developed in respect of art II GATS (at least in respect of measures covered by the GATS).

[204] 22 USC § 6040(a)(3).

[205] Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1323–25; WTO Agreement on Rules of Origin, available at <www.wto.org/english/docs_e/legal_e/22-roo_e.htm> art 3(b). The Agreement stipulates that, where goods are processed, the country of origin will normally be the country 'where the last substantial transformation has been carried out'. The Agreement also makes clear that rules of origin must be administered 'in a consistent, uniform, impartial and reasonable manner' (art 3(d)) and should not create 'restrictive, distorting, or disruptive effects on international trade' (art 2(c)). It follows from these rules that Belgian chocolate containing Cuban sugar must in principle be regarded as a Belgian (European) product, rather than a Cuban one. See further S Inama, *Rules of Origin in International Trade* (CUP 2009).

[206] Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1325.

(menu-based) sanctions through which a secondary boycott is enforced are linked to trade with the sanctioning state, and in turn contravene specific rules of WTO law.[207] One such rule which merits closer scrutiny is the prohibition of quantitative restrictions in article XI GATT.

2. The prohibition of quantitative restrictions

Article XI(1) GATT provides that

> [n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Several scholars have argued that specific secondary sanctions contravene article XI(1) GATT, notably those involving a ban on obtaining licences within the US[208] or a ban on imports in the US[209] vis-à-vis certain companies that conduct business with the primary sanctions target.[210] Others have pondered whether a secondary boycott may ipso facto breach article XI(1).[211]

Clearly, a ban imposed by one WTO member (here the US) on the import into *its own* territory of certain goods (eg, rum, sugar, and cigars) from 'any other contracting party' (read: a WTO member, such as Cuba) prima facie breaches article XI GATT, in addition to contravening the MFN principle discussed above.[212]

A related, yet separate, question is whether the prohibition in article XI(1) GATT could extend to 'prohibitions or restrictions' which a WTO member de facto imposes in respect of import and export flows between two other WTO members, namely the primary sanctions target (eg, Cuba) on the one hand, and other states subject to secondary sanctions (eg, the EU Member States) on the other. In other words, are secondary sanctions incompatible with article XI(1) GATT as a matter of principle—at least where the primary target is also a WTO member—or not? Those arguing in the affirmative might point out that the text of

[207] As far as services are concerned, such sanctions may, for instance, pertain to the offering of banking services in the US from abroad, or the opening of a branch in the US.

[208] Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme', 56.

[209] Bismuth, 'Pour une appréhension nuancé de l'extraterritorialité du droit américain', 805.

[210] Consider also Singh, 'WTO Compatibility of United States' Secondary Sanctions relating to Petroleum Transactions with Iran', 8/22 (construing s 1245 of the NDAA as a de facto import prohibition in violation of art XI(1) GATT).

[211] See Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1321–22.

[212] The same would hold true *mutatis mutandis* for a ban on the export of goods from the sanctioning state to another WTO member. Again, whether such a breach can be challenged before the WTO Dispute Settlement Body, not only by the primary target but also by other WTO members, is a separate question related to the requirement of *locus standi*, to which we will return below in Part IV.B.1.

article XI(1) GATT does not explicitly require that the prohibition or restriction concerned relate to import or export flows *with the sanctioning state itself*. Just as we discussed with respect to the MFN principle above, however, the counter-argument would be that, having regard to the context and aim of the provision, the requirement of such a nexus to actual trade with the sanctioning state must be deemed implicit in article XI(1) GATT. Actual cases involving breaches of article XI(1) GATT have so far exclusively concerned restrictions on the import of goods to, or their export from, the actual state adopting those restrictions. By contrast, there have been no GATT/WTO proceedings as of yet establishing that secondary sanctions violate article XI[213] (even if the reasons for this may be manifold).[214]

If one assumes that sectoral secondary sanctions affecting other WTO members are not a priori contrary to article XI GATT, the question remains whether the 'sticks' through which the sanctioning state enforces—or threatens to enforce—such secondary sanctions may nonetheless give rise to a breach of article XI GATT, at least inasmuch as these sticks themselves are related to trade in goods with the sanctioning state. Most obviously, one of the so-called menu-based sanctions applied by the US effectively provides for 'restrictions on imports' from the sanctioned entity. Let us assume, for example, that a French company selling automotive equipment to Iran is in turn subject to the abovementioned menu-based sanction and is, in particular, excluded from selling its products to the US.[215] Does this constitute a potential breach of article XI(1) GATT? On the one hand, one might argue that the exclusion of a foreign (in this case, French) company from importing into the US does not qualify as a 'measure' because it is targeted against a single undertaking, rather than constituting a restriction having general application. On the other hand, it could be argued that, underpinning the individual sanction against this specific undertaking is a more general restriction, pursuant to which the trade in automotive equipment to the US is de facto made contingent on the requirement that companies established in other countries do not sell such equipment to Iran.[216]

All in all, it is plausible that the menu-based sanction at hand could be regarded as a 'restriction on importation' in the sense of article XI(1) GATT. The notion of 'restrictions' in article XI(1) GATT must be understood as being 'comprehensive', and encompasses 'all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation ... of products other than measures that take the form of duties, taxes or other charges', irrespective of the 'legal

[213] In a similar sense, see Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1322.

[214] See further Part V.B.1.

[215] The fact that Iran is not a member of the WTO itself is not relevant here; the relevant question is whether the resulting menu-based sanctions can be regarded as a quantitative restriction imposed by one WTO member (the US) on another (France).

[216] See also the text accompanying note 231 below.

status of the measure'.[217] Furthermore, it is not limited to direct 'legally binding obligations' in respect of import and export, but equally encompasses government action operating 'in a manner equivalent to mandatory requirements' and creating 'sufficient incentives or disincentives for [the] non-mandatory measures to take effect'.[218]

Still, additional challenges remain, illustrating that we are navigating uncharted waters. First, there is the question of whether the menu-based sanctions qualify as 'measures at the border' or rather as 'internal measures', that is, measures that apply to products after they have legally entered the market.[219] The latter are implicitly permitted under article III GATT insofar as they are non-discriminatory (as between domestic and imported products).[220] The distinction between 'internal measures' and measures taken 'at the border' may, however, be difficult to draw. In *India-Autos*, the panel suggested that article III is engaged where opportunities in the domestic market are affected, while article XI is engaged where the opportunities for importation itself are affected.[221] In the present case, it could be argued, for instance, that sections 3 and 5 of Executive Order 13846, providing for menu-based sanctions for companies that sell 'significant' goods 'in connection with the automotive sector in Iran' are not limited in scope to non-US persons, but apply equally to both US and non-US persons. On the other hand, a menu-based sanction consisting of an actual prohibition of imports into the US, and which is unrelated to the intrinsic features of the product or the production process, by its nature seems to affect the opportunities for importation in the sense of article XI(1) GATT.

Second, does a breach of article XI(1) GATT presuppose an effect on trade flows? In one dispute, the panel held that the complainant was required to show that a measure had trade effects.[222] If such an approach is upheld, it may be more difficult to frame the menu-based sanctions as potentially infringing article XI(1) GATT. After all, the deterrent effect of these sanctions has been such that many European companies have halted their trade with Iran, rather than risk losing access to the US market. In other words, they have not resulted in a direct and actual

[217] Note *Japan – Trade in Semi-Conductors*, Panel Report, L/6309 – 35S/116 (4 May 1988) para 104–108.

[218] ibid, para 109.

[219] M Matsushita and others, *The World Trade Organization: Law, Practice and Policy* (3rd edn, OUP 2015) 240.

[220] ibid. A footnote to art III GATT indeed indicates that laws, regulations, and requirements that apply to both domestic and imported products, when enforced in the case of imported products at the time of importation, are to be governed by the provisions of art III. See M Trebilcock, R Howse and A Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013) 281; see also, eg, *European Communities – Measures Affecting Asbestos*, Panel Report, WT/DS135/R (18 September 2000) paras 8.83–85.

[221] *India – Measures Affecting the Automotive Sector*, Panel Report, WT/DS146/R, WT/DS175/R (13 November 2002) para 7.224.

[222] *Argentina – Measures Affecting the Export of Bovine Hides*, Panel Report, WT/DS155/R (19 December 2000).

effect on trade between the EU and the US. On the other hand, certain WTO cases suggest that under article XI(1), what matters is the 'design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.'[223] If a *potential* impact on trade suffices, a stronger argument can be made that a breach of article XI(1) GATT is indeed at stake.

3. Other potential breaches of WTO law

As explained in Part III.A, the US employs a variety of menu-based sanctions vis-à-vis foreign companies (both financial and other institutions) that ignore US secondary boycotts. The relevant rules do not directly 'prohibit' foreign companies from conducting business with the country targeted by primary sanctions in the sense that such transactions would give rise to civil or criminal liability in the US. Rather, the menu-based sanctions entail various forms of exclusion from, or denial of access to, the US market. Executive Order 13846 serves as a useful illustration. Pursuant to sections 3 and 4 of the Executive Order, foreign companies selling automotive equipment to, or purchasing petroleum products from, Iran, find themselves exposed to, eg, exclusion from procurement contracts in the US, exclusion from receiving trade licences, prohibition from importing goods or services into the US, freezing of property and interests in the US, or the denial of visas to corporate officers of the company.[224] In turn, 'foreign financial institutions' that knowingly conduct or facilitate any significant financial transaction, eg, for the supply of automotive equipment to or the purchase of petroleum products from Iran, may be prohibited from maintaining a correspondent account or a payable-through account in the US, thus effectively excluding the institution from the US financial market. The underlying message is clear: foreign companies must choose to do business either with Iran or the US, but they cannot have it both ways.

Above, we saw that denial of access measures are, on the whole, unlikely to constitute an unlawful exercise of jurisdiction under customary international law. From a WTO law perspective, however, a different picture emerges. In addition to the potential breach of article XI(1) GATT discussed above, specific menu-based sanctions may also sit uneasily with other WTO rules.

The exclusion from the US procurement market, for instance, is difficult to reconcile with the revised 1994 Agreement on Government Procurement (GPA), a plurilateral agreement to which both the US and

[223] *Colombia – Indicative Prices and Restrictions on Ports of Entry*, Panel Report, WT/DS366/R (27 April 2009) para 7.240.

[224] See the list of menu-based sanctions in 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, ss 4–5.

the EU are parties.[225] Most strikingly, article VIII(1) of the revised GPA decrees that '[a] procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement'. Admittedly, article VIII(4) adds that a party may exclude a supplier on grounds such as 'final judgments in respect of serious crimes or other serious offences' (paragraph (d)) or 'professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier' (paragraph (e)). Still, it is difficult to see, for example, how the fact that a company engages in certain trade with Iran (eg, by selling motor engines for commercial vehicles) could provide a ground for exclusion in the sense of the aforementioned exceptions. It is worth recalling in this context that a 'sanctionable activity' in the sense of US Executive Order 13846 is not the same as an 'offence', and that article VIII(4)(d), moreover, requires a 'final judgment'. Nor does it seem plausible to construe an exclusion from procurement vis-à-vis companies engaging in trade with specific states (eg, with Iran) as a (permissible) technical specification pertaining to the 'processes and methods [of] production or provision' of the goods or services to be procured.[226]

An interesting precedent in this context concerns a 1996 act adopted by the State of Massachusetts in response to human rights violations in Myanmar, and which forbade state entities from procuring goods and services from any person doing business with Myanmar.[227] Considering the measure to be inconsistent with the GPA, the EC and Japan challenged it at the WTO.[228] The panel proceedings were, however, suspended when the Act was attacked before the US domestic courts, and was eventually struck down by the US Supreme Court.[229] Interestingly, while the reasoning in *Crosby v National Foreign Trade Council* was based on considerations of domestic US law (viz, the existence of a conflict between the state law and federal regulations), the Supreme Court did draw attention to the fact that the contested act had embroiled the

[225] Nothing in the US coverage schedules would seem to provide for a carve-out relevant in the present context: WTO, 'Coverage Schedules' <www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA>.

[226] In the sense of art 1(u) of the revised GPA.

[227] See: *United States – Measure Affecting Government Procurement*, Request for Establishment of a Panel by the European Commission, WT/DS88/3 (9 September 1998): 'The Law forbids State agencies, State authorities and other State entities from procuring goods and services from any person currently doing business with the Union of Myanmar … In practice, this is achieved by applying an automatic price penalty of 10% on bids from companies which are deemed to be doing business in or with the Union of Myanmar'. See further C McCrudden, 'International Economic Law and the Pursuit of Human Rights: a Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 Journal of International Economic Law 3.

[228] *United States – Measure Affecting Government Procurement*, WT/DS88/3; *United States – Measure Affecting Government Procurement*, Request to Join Consultations: Communication from Japan, WT/DS88/2 (2 July 1997).

[229] *Crosby et al v National Foreign Trade Council* 530 US 363 (2000).

US in an international dispute and that the EC and Japan had brought a formal WTO complaint, claiming that the state act violated the GPA.[230]

Even if no panel report ultimately ensued, this is a remarkable illustration of a secondary sanction being challenged on the basis of the GPA. One peripheral question is whether any meaningful distinction exists from a WTO perspective between, on the one hand, a formal exclusion from government procurement for all companies doing business with another country that is the primary sanctions target (eg, Myanmar) and, on the other, a regulation that provides that the executive *may* exclude individual companies from government procurement if they are found to have done business with the primary sanctions target (as in Executive Order 13846). In the present authors' view, this question must be answered in the negative. The impact on competitive opportunities is the same in both cases, so that the mere threat of imposing a menu-based sanction of this nature must suffice to breach the WTO rules concerned.[231] If one were to hold otherwise, this would open the door for states to simply evade their WTO obligations by adding an extra administrative layer to what is essentially a general trade restriction.

Whether specific menu-based sanctions are contrary to the GATS obligations pertaining to market access (article XVI GATS) is a particularly complex question. The relevant GATS rules are highly circumscribed and are only applicable inasmuch as a Member has positively accepted them in its Schedule of Commitments (and for those sectors covered by it). Even so, a conflict may arise in respect of denials of visas to staff of foreign service-providers; the US menu-based sanctions include the possible exclusion from the US of corporate officers or controlling shareholders of a sanctioned firm (and such exclusions have indeed been put into practice in connection with the Helms-Burton Act).[232] In its Schedule of Commitments, the US has indeed undertaken several horizontal commitments in respect of 'mode 4' of the GATS pertaining to the presence of natural persons, inter alia in respect of 'managers, executives and specialists' who are employees of firms that provide services within the US.[233] Admittedly, paragraph 4 of the GATS Annex on Movement of Natural Persons clarifies that the Agreement 'shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders', although it

[230] ibid 383. The judgment notes that, in its *amicus curiae* brief, the EU had specifically stated that it would begin new WTO proceedings should the Act be upheld by the Supreme Court.

[231] Consider, by analogy, *Japan – Trade in Semi-Conductors*, L/6309 – 35S/116, para 111.

[232] See note 42.

[233] Entry for such persons is limited to a three-year period that may be extended for up to two additional years for a total term not exceeding five years. Consolidated information on countries' commitments and exemptions on movement of natural persons can be found in the WTO services database at <http://i-tip.wto.org/services/GATS_Detail.aspx/?id=22776&sector_path=00000>.

simultaneously adds that such measures must not be applied 'in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific agreement'.[234] A footnote further explains that the 'sole fact of requiring a visa for natural persons of certain Member States and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment'. Still, this does not alter the fact that the selective imposition of visa requirements for individuals supplying services under the GATS can be justified only if, and to the extent that, it accords with the first clause of paragraph 4.[235] What is more, an actual *denial* of entry for corporate officers because of their company's dealings with a primary sanctions target goes beyond the imposition of a visa *requirement*; seems hardly related to the objective of protecting the integrity of one's borders and the ensuring of 'orderly movement' of natural persons; and could be said to nullify or impair the benefits under mode 4 of the GATS.

Secondary sanctions can also potentially take the form of market access restrictions for foreign service-providers, as when a foreign financial institution is denied access to the US financial market. Verifying whether such restrictions entail a breach of article XVI GATS necessitates an in-depth analysis of the sanctioning state's Schedule of Commitments, and the precise commitments for the sector(s) concerned.[236] For financial services, for instance, the US has undertaken sector-specific commitments, essentially accepting their cross-border supply (mode 1), while subjecting the commercial presence in the US of foreign banks (mode 3) to various limitations.[237] Even where the US has undertaken commitments with respect to a specific sector, an additional hurdle remains, in that article XVI(2) GATS *exhaustively*[238] lists the types of market access restrictions which members are prohibited from adopting. These restrictions essentially relate to quantitative limitations of service suppliers; limitations on the total value of imported service transactions; limitations on the total number of service operations; limitations on the total number of natural persons employed; measures requiring specific legal qualifications of service operators; and

[234] See further J Bast, 'Annex on Movement of Natural Persons Supplying Services under the Agreement' in R Wolfrum, P-T Stoll, and C Feinäugle (eds), *WTO: Trade in Services* (Martinus Nijhoff 2008) 573–95.

[235] ibid 594.

[236] Interestingly, inasmuch as a state has undertaken market access commitments for a given sector, footnote 8 to art XVI GATS makes clear that cross-border movement of capital is an essential part of those services and is equally protected, at least with respect to GATS modes 1 (cross-border supply of services) and 3 (commercial presence): P Delimatsis and M Molinuevo, 'Article XVI GATS: Market Access' in R Wolfrum, P-T Stoll, and C Feinäugle (eds), *WTO: Trade in Services* (Martinus Nijhoff 2008) 367, 373.

[237] The US Schedule of Commitments is available at <http://i-tip.wto.org/services/Search.aspx>. US commitments pertaining to 'financial services' are limited to those services indicated in paras B.3(c) and B.4(c) of the GATS 'Understanding on Commitments in Financial Services', available at <www.wto.org/english/tratop_e/serv_e/21-fin_e.htm>.

[238] P Delimatsis and M Molinuevo, 'Article XVI GATS', 374, 376–77.

limitations on foreign capital or shareholding.[239] Even if article XVI(2) GATS is interpreted with some degree of flexibility, eg, by acknowledging that a total prohibition of the supply of certain services amounts to a quantitative limitation (ie, a 'zero quota'),[240] it is far from obvious that specific menu-based sanctions could fit either of the scenarios listed in that clause. A ban on access for foreign banks that conduct certain transactions with a primary sanctions target can, for instance, hardly be assimilated to a 'limitation on the number of service suppliers' in the sense of article XVI(2)(a) GATS.

The above examination of potential breaches of WTO law is not exhaustive. Consider, for instance, restrictions on trans-shipment or transit resulting from secondary sanctions. Specifically, under the Helms-Burton Act, a vessel carrying Cuban goods may be prohibited from entering a US port or offloading other goods for shipment across the US to Canada or Mexico.[241] As Spanogle observes, such a restriction appears to infringe article V GATT on the 'freedom of transit'.[242] At the same time, the author rightly notes that this is not the main stumbling block as far as the Helms-Burton Act is concerned, observing that 'whether [the breach of GATT article V] causes sufficient trade loss to require significant compensation or allow significant retaliation is open to question. It is technically a violation of our obligations under the WTO, even though it may not be the stuff of which trade wars are made.'[243]

It has also been suggested that US secondary sanctions contravene the GATT transparency requirement.[244] Article X(1) GATT requires that

> [l]aws, regulations ... and administrative rulings of general application, made effective by any contracting party, pertaining to ... requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.[245]

The fragmented nature of the complex web of US Iran sanctions[246] and the deliberately ambiguous phrasing of certain instruments—with the

[239] T Cottier and M Oesch, *International Trade Regulation* (Cameron May 2005) 831.

[240] P Delimatsis and M Molinuevo, 'Article XVI GATS', 378.

[241] 22 USC § 6040(a).

[242] Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1321. According to art V(2) GATT, '[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport'.

[243] ibid.

[244] Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme', 57.

[245] The parallel clause in the GATS (article III(1)) merely requires in more general terms that members 'publish promptly ... all relevant measures of general application...'.

[246] cf OFAC's 'Iran sanctions' page, which lists no fewer than 23 executive orders and 11 statutes, not to mention guidances, licenses, etc: <www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx>.

aim of encouraging 'over-compliance' and deterring virtually all trade with Iran—appears hard to reconcile with the need for trade restrictions to be administered in a uniform, impartial, and reasonable manner (article X(3)(a) GATT). At the same time, this allegation relates to a mere procedural defect, which is an issue that is distinct from the substantive permissibility of secondary sanctions under WTO law, and which could theoretically be remedied (eg, by codifying, simplifying, and/or clarifying the extant web of sanctions).

C. Potential breaches of bilateral instruments

In order to verify whether, and to what extent, secondary sanctions entail breaches of conventional law, reference must not only be made to multilateral instruments, such as the WTO Agreements, but also to bilateral treaties binding upon the sanctioning state. In particular, the BITs and FCN treaties concluded between the US and individual European countries contain a range of obligations that are potentially affected.

Some of the relevant clauses overlap (at least partly) with those found in the multilateral instruments discussed above. For instance, the national treatment and MFN principles do not only feature in the WTO Agreements, but also surface—in various shapes and forms—in FCN treaties and BITs to which the US is a party. By way of illustration, numerous provisions of the 1961 US-Belgium Treaty of Friendship, Establishment and Navigation[247] give expression to the principle of national treatment by stating that the parties should not discriminate between their own nationals and the nationals of the other party, eg, in tax matters (article 9) or in relation to access to court (article 3). It also provides for a right of vessels of one party to enter the ports of the other party 'on equal terms with vessels of the other Party and on equal terms with vessels of any third country', referring expressly to 'national treatment' and 'most-favoured-nation treatment'.[248] References to the national treatment and MFN principles can similarly be found in BITs.[249] However, inasmuch as secondary sanctions are mostly applicable in a non-discriminatory manner to US persons and foreign companies alike, a breach of these clauses appears to be prima facie excluded.

In a similar vein, FCN Treaties tend to include an obligation for either party to permit nationals of the other party to enter their territory and reside therein 'for the purpose of carrying on trade between the two countries and engaging in related commercial activities'.[250] In turn,

[247] US-Belgium FCN Treaty.

[248] ibid, arts 12 and 13.

[249] See, eg, arts II(1) and IV of the US-Croatia BIT (Treaty between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment (signed 13 July 1996, entered into force 20 June 2001) TIAS 01-620).

BITs often require states to permit nationals of the other party to enter and to remain in their territory for the purpose of, eg, establishing, developing, or administering an investment.[251] Are the above clauses breached when a state denies entry to corporate officers of foreign companies that conduct trade with the primary sanctions target? Admittedly, the clauses are not framed in absolute terms, but normally contain a reservation allowing states to adopt 'laws relating to the entry and sojourn of aliens'.[252] It is doubtful, however, whether the denial of visas in the context of a secondary sanctions regime is covered by this standard formula. In addition, it is questionable whether such a sanction could qualify as a measure 'necessary to maintain public order and protect the public health, morals and safety'.[253]

Apart from the foregoing, there are a range of rules commonly found in FCN treaties and BITs which could be invoked to challenge the legality of secondary sanctions affecting the property of nationals and companies of the other contracting party.[254] One such rule relates to expropriation. In particular, BITs and FCN treaties typically prescribe that expropriation can only take place for a public purpose; in a non-discriminatory manner; in accordance with due process; and upon payment of prompt, adequate, and effective compensation.[255] Importantly, many BITs extend this rule to cases of 'indirect' expropriation[256] where there is an equivalent effect on property, even though the owner retains the formal title. A second rule concerns the 'full protection and security' (FPS) standard,[257] which contains both a negative and a positive component, thus also requiring states to take active measures to protect foreign property or investments from adverse effects.[258] Importantly, while the FPS standard primarily seeks to ensure protection against physical damage and violence, it also extends to cover entitlements to legal rights, and requires the host state to guarantee 'legal' security.[259] Other standards

[250] US-Belgium FCN Treaty, art 2(1).

[251] See, eg, US-Croatia BIT, art VIII.

[252] See, eg, US-Croatia BIT, art VIII(1)(a); US-Belgium FCN Treaty, art 2(1).

[253] US-Belgium FCN Treaty, art 2(5). Note that this question is separate from the possible application of the security exception which is also commonly found in BITs and FCN Treaties: see further Part IV.E.1.

[254] P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions' in AZ Marossi and MR Bassett (eds), *Economic Sanctions in International Law* (TMC Asser Press 2015) 197; EJ Criddle, 'Humanitarian Financial Intervention' (2013) 24 EJIL 583, 592.

[255] See, eg, US-Belgium FCN Treaty, art 4(3); US-Croatia BIT, art III(1).

[256] See, eg, US-Croatia BIT, art III(1).

[257] See, eg, US-Croatia BIT, art II(3)(a); US-Belgium FCN Treaty, art 4(1).

[258] P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 205.

[259] D Collins, *An Introduction to International Investment Law* (CUP 2016) 144; P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 205–206. Note that art 4(1) of the US-Belgium FCN Treaty frames the FPS standard in terms of 'full legal and judicial protection'.

which regularly surface in the instruments concerned—although the exact wording may differ—include the principle of 'fair and equitable treatment' of investments, the protection of 'legitimate expectations', and the prohibition of arbitrary and discriminatory measures.[260]

At the risk of stating the obvious, it is worth observing that, at least as far as the BIT clauses are concerned, the (alleged) breach must be tied to a covered 'investment' within the meaning of the relevant BIT. While a universally agreed definition of the term is lacking, and different treaties may define the concept differently, an 'investment' presupposes an element of duration. Apart from the opening of a local subsidiary, it may extend to contractual rights, including concessions, as well as rights conferred pursuant to law, such as licences and permits.[261] As to financial services, Dupont notes how 'banking activities such as the provision of loans are an undisputed form of investment in the meaning of BITs ... and ... it is widely admitted that financial instruments such as loans or the purchase of bonds may qualify as investments'.[262]

Insofar as investments affected by secondary sanctions are located, first and foremost, in the country directly targeted by sanctions and, as such, are not protected by a possible investment agreement hypothetically concluded between the sanctioning country and the investor's country, this substantially limits the extent to which investors may be able to invoke a BIT as a shield against secondary sanctions.[263] Still, upon closer scrutiny, there are various ways in which secondary sanctions may affect a covered investment. This may be the case, for instance, where sanctions render existing contracts null on grounds of illegality, without leaving room for a claim for performance or damages.[264] Another possibility is that a European company is ordered to pay compensation on the basis of Title III of the Helms-Burton Act because of its supposed investment in expropriated US property in Cuba, and subsequently finds its US assets seized in enforcement proceedings.[265]

Furthermore, another obvious illustration concerns the imposition of an asset freeze. A (lengthy) asset freeze could indeed qualify as a form of indirect expropriation of property without compensation, depriving the owner of effective use, even if legal title remained.[266] That said, the case

[260] See, eg, US-Croatia BIT, art II(3)(a)-(b); US-Belgium FCN Treaty, art 4(2). As far as the FET principle is concerned, it may be recalled that in the *Oil Platforms* case, the ICJ asserted that the FET clause in the Iran-US 1955 Treaty of Amity did 'not include any territorial limitation' and accordingly had a wider scope than, eg, the clause on expropriation: *Case Concerning Oil Platforms (Islamic Republic of Iran v United States)* (Preliminary Objections) [1996] ICJ Rep 803, para 35.

[261] See, eg, US-Croatia BIT, art I(d).

[262] P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 202–203.

[263] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 172.

[264] P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 198–99.

[265] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 173.

[266] Collins, *An Introduction to International Investment Law*, 292; P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 203; Viterbo,

law differentiates between actual 'indirect expropriation', on the one hand, and a state's reasonable bona fide exercise of 'police powers' in matters such as the maintenance of public order, health, or morality, on the other.[267] Thus, in *Tecmed v Mexico*, the tribunal asserted that '[t]he principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable'.[268] The police powers doctrine has been applied in several cases to reject claims challenging regulatory measures designed specifically to protect public health.[269] Could it also be used to justify asset freezes in the sanctions context? Interestingly, in *Weinstein v Iran*, Bank Melli Iran claimed that the attachment of its assets offended the Takings Clause of the Fifth Amendment to the US Constitution, as well as the expropriation clause in the 1955 Iran-US Treaty of Amity. While not expressly couching the attachment in terms of an exercise of 'police powers', the US Court of Appeals stressed that Bank Melli had been added to the OFAC list because of its 'unlawful actions in support of terrorism' and its conduct 'as a funder of weapons of mass destruction', as a result of which there could be no indirect expropriation in the sense of the Treaty of Amity.[270] It remains to be seen whether this approach will be upheld in the *Certain Iranian Assets* case (pending before the ICJ at the time of writing). Even *if* the blocking of property of banks or companies of the primary sanctions target (in this case Iran) was to be regarded as a valid exercise of police powers,[271] this would still leave room for arguing that a 'secondary' asset freeze against the banks or companies of other countries cannot normally constitute a bona fide exercise of this sovereign prerogative.[272]

In a similar vein, with respect to the other property and investment protection standards, there may be additional hurdles to overcome.[273] For instance, the requirements of 'legitimate expectations' and 'legal

'Extraterritorial Sanctions and International Economic Law', 172. Consider also, in the context of domestic courts' power to issue provisional measures in the form of an asset freeze, B Demirkol, *Judicial Acts and Investment Treaty Arbitration* (CUP 2018) 230.

[267] See further *Philip Morris v Uruguay*, ICSID Case No ARB/10/7 (Award, 8 July 2016) paras 290ff.

[268] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB(AF)/00/2 (Award, 29 May 2003) para 119.

[269] *Philip Morris v Uruguay*, para 298.

[270] *Weinstein v Iran* 609 F 3d 43 (2d Cir 2010) 54.

[271] It is worth observing that the exercise of 'police powers' or the 'right to regulate' of states is often framed in terms of the protection of public welfare objectives relating to health, safety, and the environment. See, eg, annex 8-A, art 3 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (signed 20 October 2016) [2017] OJ L11/23.

[272] Even if a measure aims at protecting a legitimate public welfare objective, art 3 of CETA's annex 8-A asserts that it should not be 'manifestly excessive'.

[273] Consider, eg, the award in *Philip Morris v Uruguay*, where the tribunal stresses with respect to the standard of 'arbitrariness' that states have a margin of appreciation and that what matters is whether there was a 'manifest lack of reasons' for the contested measure(s) (paras 390–400). Or, consider the high standard applied in respect of 'denial of justice', where the tribunal requires that there be 'clear evidence of an outrageous failure of the domestic system' (paras 498–500).

security' do not in any way create an enforceable guarantee that a state will not introduce sanctions legislation that will adversely affect foreign companies/investors without proper compensation. As the tribunal stated in *EDF v Romania*, '[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a [BIT] as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework'.[274] Clearly, states do not commonly make commitments vis-à-vis foreign investors that they will abstain from introducing economic sanctions. An exceptional—possibly unique—situation where states may have created 'legitimate expectations' in the sanctions domain concerns the adoption of the JCPOA. Indeed, even if the JCPOA was and is not a legally binding instrument, it could be argued that the US withdrawal from the agreement—notwithstanding (initial) International Atomic Energy Agency confirmations of Iranian compliance[275]—contravened the legitimate expectations of foreign investors that the US would not unilaterally re-activate the full panoply of primary and secondary sanctions.

In the section above dealing with the IMF Articles of Agreement, we already discussed how FCN treaties may also exclude the imposition of 'exchange restrictions', although such clauses tend to contain an in-built referral to the IMF regime. Interestingly, no such referral to the IMF rules is found in BIT clauses guaranteeing the free transfer of capital and returns (as found, for instance, in article VI of the US-Croatia BIT).[276] The implication is that while the scope of these clauses is limited to transfers relating to a 'covered investment', the mere notification of an asset freeze to the IMF will not prevent a breach of the clauses concerned.

[274] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13 (Award, 8 October 2009) para 219. In a similar vein, see *Philip Morris v Uruguay*, para 426. But for a more flexible interpretation, see Viterbo, 'Extraterritorial Sanctions and International Economic Law', 173: 'Assuming that a Moroccan investor opened a US clothing company to manufacture T-shirts using exclusively Egyptian raw cotton and Egypt is subsequently targeted by US sanctions, the foreign investor may invoke the Morocco-United States BIT. . .'.

[275] See the various 'verification and monitoring' reports issued by the IAEA Director-General, available at <www.iaea.org/newscenter/focus/iran/iaea-and-iran-iaea-reports>.

[276] See, eg, art VI of the US-Croatia BIT. Para 1(d) clarifies that such transfers include payments made under a contract. Para 4 lists a limited number of situations where a party may prevent a transfer through the 'equitable, non-discriminatory and good faith application of its laws relating to . . . (c) criminal or penal offenses; or (d) ensuring compliance with orders or judgments in adjudicatory proceedings'. No provision is made for restrictions on payments as part of a state's economic sanctions policy. Similar language can be found in other BITs concluded between the US and European countries. See, however, for a restrictive reading: Viterbo, 'Extraterritorial Sanctions and International Economic Law', 173, noting that 'whether the terms "criminal or penal offences" include infringements to sanctions regimes remains an unsettled question in international law'.

D. Provisional conclusion

What, then, to conclude on the basis of the foregoing analysis? As mentioned at the outset, testing the compatibility of secondary sanctions with conventional law is a complex exercise. Absent an overarching rule prohibiting secondary sanctions *in abstracto*, a case-by-case assessment is required, having regard to the nature and impact of the sanctions concerned, as well as to the specific treaty rules.

Potential breaches of the IMF Articles of Agreement flowing from asset freezes and far-reaching restrictions on dollar transactions can easily be avoided by notifying the measures concerned to the IMF, assuming there is no objection from the IMF Executive Board (which appears never to have hitherto occurred). On the other hand, it is open to debate whether such 'tacit approval' at the IMF level also rules out a breach of similar provisions on payment restrictions in bilateral treaties. Moreover, such 'tacit approval' by the IMF presumably does not prevent breaches of BIT clauses ensuring the free transfer of capital where an asset freeze targets a covered investment.

Regarding WTO law, secondary sanctions are unlikely to contravene the national treatment or MFN principles. In a similar vein, it would seem difficult to construe secondary sanctions as such as contravening the prohibition of quantitative restrictions in article XI(1) GATT. At the same time, even if testing secondary sanctions against the WTO Agreements sometimes feels like trying to fit a square peg into a round hole, various menu-based sanctions employed by the US appear to be contrary to specific WTO rules, including article XI(1) GATT, the revised GPA, and the GATS 'mode 4' commitments pertaining to the movement of persons. Demonstrating a breach of market access commitments under article XVI GATS would seem much more difficult. Additionally, restrictions on trans-shipment may contravene article V GATT, while the sheer (and deliberate) complexity might be at odds with the transparency requirement of article X(1) GATT.

Mutatis mutandis, similar observations can be made in respect of analogous provisions in BITs and FCN treaties (eg, pertaining to the right of entry). As for the traditional standards in these treaties relating to the protection of foreign property or foreign investments, some (eg, the protection of 'legitimate expectations') do not offer firm ground to contest the legality of secondary sanctions, while other avenues (eg, reliance on the notion on 'indirect expropriation') may be more promising.[277]

[277] See also P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 215 (concluding that 'there exists a reasonable chance of success in an investor-State arbitration against a targeting State, for those foreign companies belonging to the targeted State in a position to rely on a BIT in force between their home country and the targeting State, based on the violation of some substantive standards of investment protection').

Finally, even for those secondary restrictions that would prima facie seem contrary to treaty obligations, the question remains whether the sanctioning state (in this case, the US) could nonetheless rely on the 'national security' exception to counter allegations of wrongful conduct. It is to this question that we turn next.

E. The security exception as an impenetrable line of defence for sanctioning states?

1. Security exceptions in bilateral investment treaties and friendship, commerce, and navigation treaties

Assuming that secondary sanctions may entail violations of the WTO Agreements, and/or of various bilateral FCN treaties or BITs concluded between the US and EU Member States, it must be acknowledged that, at first sight, virtually all of these treaties[278] contain a so-called 'security exception', or a broader clause listing so-called 'non-precluded measures'.[279] The exact phrasing of these security exceptions differs from one treaty to another. On the one hand, some treaties reserve each party's right to take measures 'necessary to protect its security interests'. On the other hand, other treaties allow greater leeway and assert that nothing in the treaty shall preclude the application by either party of measures 'which a party regards/considers as' necessary to protect its essential security interests. The different language has obvious repercussions for the provisions' relevance and application.

'Security exceptions' of the first type have been addressed on several occasions by the ICJ. Thus, the Court has made it clear that such clauses

[278] As for the BITs referred to in note 150, see art X of the US-Bulgaria BIT; art XV of the US-Croatia BIT; art X of the US-Czech Republic BIT; art IX of the US-Estonia BIT; art IX of the US-Latvia BIT; art IX of the US-Lithuania BIT; art XII(3) of the US-Poland BIT; art X of the US-Romania BIT; and art X of the US-Slovakia BIT. As to the various FCN treaties mentioned under note 149, see art XXIV(e) of the US-Italy FCN Treaty (1948); art XXI(d) of the US-Denmark FCN Treaty (1948, 1951); art XX of the US-Ireland FCN Treaty (1950); art XXIII(d) of the Greece-US FCN Treaty (1951); art XXIV(d) of the US-Germany FCN Treaty (1954); art XXII(d) of the Netherlands-US FCN Treaty (1956); art XVI of the US-Belgium FCN Treaty; and art XIV(d) of the US-Luxembourg FCN Treaty (1962). Note that there appears to be one limited category of bilateral treaties concluded by the US with individual European countries that does not contain a security exception, viz the post-War Economic Cooperation Agreements. On the latter agreements, see Part IV.B.2.b.

[279] Note that these clauses often list multiple 'non-precluded measures', eg, pertaining to fissionable materials, traffic in arms, protection of cultural heritage, implementation of UN sanctions, etc, in addition to clauses pertaining to measures 'necessary' to protect 'essential security interests'. The present section, however, only focuses on the latter, more generic, security exception. For a brief discussion of the relevance of 'NPM' clauses in the sanctions context, see P-E Dupont, 'The Arbitration of Disputes related to Foreign Investments affected by Unilateral Sanctions', 212–13. Note that Dupont also observes that grounds precluding wrongfulness, such as *force majeure* or necessity cannot normally be invoked to justify the adoption of unilateral sanctions (ibid 207–208). On the possible reliance on countermeasures in connection with secondary sanctions, see notes 321–22 and accompanying text. On the role of 'denial of benefits' clauses, see: Viterbo, 'Extraterritorial Sanctions and International Economic Law', 74.

do not restrict the Court's jurisdiction, but instead serve as an affirmative defence on the merits.[280] In *Nicaragua*, it was held that, in order to justify certain measures under the 'security exception' of the 1956 US-Nicaragua FCN treaty, it was not sufficient for these measures to be taken with a view to protecting the essential security interests of the state concerned; rather the measures should additionally be '"necessary" for that purpose; and whether a given measure is "necessary" is not purely a question for the subjective judgment of the party ... and may thus be assessed by the Court'.[281] A similar approach was adopted in *Oil Platforms*. In that case, Iran was prepared to recognize some of the interests referred to by the US—viz the safety of US vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf during the Iran-Iraq war—as being reasonable security interests of the US in the sense of article XX(1)(d) of the 1955 Iran-US Treaty of Amity. By contrast, it denied that the contested US military action against Iranian oil platforms could be regarded as 'necessary' to protect those interests.[282] Interpreting 'necessity' by reference to the necessity and proportionality criteria for the exercise of the right of self-defence, and finding the parameters for a lawful exercise of self-defence not to be fulfilled, the Court eventually agreed.[283] Finally, the scope of the security exception is also at the heart of the proceedings brought by Iran against the US on the basis of the compromissory clause in the 1955 Treaty of Amity, which concerns the re-activation of US sanctions following the withdrawal of the US from the JCPOA. While the case remains to be decided at the time of writing, the Court has already briefly touched upon the impact of the 'security exception' in the Treaty of Amity in its unanimous order on provisional measures when dealing with the plausibility of the rights asserted by Iran under the Treaty. In particular, the Court accepted that the application of article XX(1)(d)[284] 'might affect at least some of the rights invoked by Iran under the Treaty of Amity'.[285] By contrast, the Court was of the view that 'Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of [article XX(1)(d)]'.[286] For this reason, the Court ordered the US to lift sanctions relating to

[280] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 20.

[281] *Nicaragua*, para 282. The Court stresses that the relevant treaty provision did not refer to what the party 'considers necessary' to protect its security interests. It follows *a contrario* that if such language is used, there is more room for 'subjective judgment' by the party invoking the clause.

[282] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States)* (Merits) [2003] ICJ Rep 161, para 73.

[283] ibid, para 78.

[284] As well as art XX(1)(b) of the Treaty, which deals with 'fissionable materials' and which was also invoked by the US.

[285] *Alleged Violations of the 1955 Treaty of Amity* (Provisional Measures) para 68.

[286] ibid, para 69.

the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services ... necessary for civil aircraft.[287]

An illustration of a security exception of the second type can be found in article 99(1)(d) of the EU-Russia Partnership Agreement, which was addressed by Court of Justice of the EU in the *Rosneft* case.[288] The Court examined, in particular, whether the clause could be invoked vis-à-vis the EU's 'restrictive measures' adopted after the Russian military intervention in Crimea in 2014. Answering in the affirmative, the Court first noted that the provision's reference to 'serious international tension constituting a threat of war' does not refer to a war directly affecting the territory of the EU.[289] Accordingly, it accepts that the events in Ukraine since 2014 are capable of justifying measures to protect EU security interests. Second, in respect of the question of whether the measures adopted were indeed 'necessary' for the protection of these essential security interests, the Court adopts a deferential approach. It merely acknowledges the 'broad discretion' of the Council of the EU in areas involving complex political, economic, and social choices, and accepts that the Council 'could take the view' that the measures taken were necessary for the protection of essential EU security interests and for the maintenance of international peace and security.[290]

While the Court was ultimately applying EU law, the *Rosneft* judgment provides support for the view that security exception clauses of the second type leave considerably less room for judicial review. Three observations are nonetheless in order. First, case law confirms that the phrase 'if it considers' does not give *absolute* discretion to the party invoking it, as reliance on such language remains subject to the obligation of good faith.[291] Second, case law confirms that 'when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly'.[292] Third, it appears that many of the FCN treaties and BITs concluded between the US and

[287] ibid, para 70.

[288] Case C-72/15 *Rosneft v Her Majesty's Treasury et al* EU:C:2017:236, para 108ff. The relevant clause provides that '[n]othing in this Agreement shall prevent a Party from taking any measures (1) *which it considers necessary* for the protection of its essential security interests: ... (d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security' (our emphasis).

[289] ibid, para 112.

[290] ibid, paras 113–16.

[291] See, eg, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 145.

[292] *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8 (Award, 12 May 2005) para 370; *Enron Corporation Ponderosa Assets LP v Argentina*, ICSID Case No ARB/01/3 (Award, 22 May 2007) para 335.

individual European countries contain security clauses of the first type. This is true, for example, of the US-Belgium FCN Treaty and the US-Croatia BIT.[293] Invocation of these clauses is thus subject to judicial review.

2. Security exceptions in the WTO Agreements

Security exceptions can also be found in the WTO Agreements (in addition to the lists of 'general exceptions' relating, eg, to the protection of 'public morals' or health protection[294]). Relevant clauses include article XXI GATT, article XIVbis GATS, article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, and article III(1) of the revised GPA. Most well-known is article XXI(b) GATT, which provides that nothing in the GATT shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms; ...
(iii) taken in the time of war or other emergency in international relations; ...

The question of whether article XXI GATT is 'self-judging' or not has received ample attention in legal scholarship.[295] This question has become all the more relevant in recent years, as the security exception has been increasingly invoked with a view to justifying trade restrictions at odds with the WTO rules, eg, in the context of the ongoing US-China trade conflict.[296] Until recently, however, the scope of the exception had never directly been addressed by the WTO Dispute Settlement Body.[297]

[293] See, eg, US-Belgium FCN Treaty, art 16(e); US-Croatia BIT, art XV.

[294] See in particular art XX GATT; art XIV GATS.

[295] Alford, 'The Self-Judging WTO Security Exception'; D Akande and S Williams, 'International Adjudication on National Security Issues: What Role for the WTO' (2002) 43 Virginia Journal of International Law 365; OQ Swaak-Goldman, 'Who Defines Members' Security Interest in the WTO?' (1996) 9 LJIL 361; MJ Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1990) 12 Michigan Journal of International Law 558; WJ Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 Journal of International Economic Law 481; R Dattu and J Boscariol, 'GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception' (1997) 28 Canadian Business Law Journal 198; S Kitharidis, 'The Unknown Territories of the National Security Exception: The Importance and Interpretation of Art XXI of the GATT' (2014) 21 Australian International Law Journal 79.

[296] See, eg, 'A Timeline of the U.S.-China Trade War' *Bloomberg* (14 May 2019) <www.bloomberg.com/news/articles/2019-05-14/u-s-china-trade-war-timeline-what-led-up-to-the-stalemate>.

[297] The validity of the national security defence was, for instance, excluded from the terms of reference of the panel in the Nicaragua-US dispute (see *US – Trade Measures Affecting Nicaragua*, Unadopted GATT Panel Report, L/6053 (13 October 1986)). Nor was it addressed in the context of the EC complaint regarding the Helms-Burton Act, as the procedure was eventually suspended. Questions pertaining to the security exception did, however, pop up in discussions within the GATT Council pertaining to a Swedish import quota system on footwear and in the context of the UAR accession to the GATT. See, eg, Spanogle, 'Can Helms-Burton be Challenged under WTO?', 1331–32.

This has now changed as a result of a WTO panel report in *Russia – Measures Concerning Traffic in Transit*,[298] which, for the first time, contains an in-depth examination of article XXI(b) GATT. The importance of this landmark decision (which was not appealed before the Appellate Body) is illustrated by the number of interventions of other WTO members, including Brazil, China, the EU, Japan, and the US.

Contrary to the position of both Russia and the US,[299] the panel confirmed that, notwithstanding the adjectival clause 'which it considers' in the chapeau of article XXI(b) GATT, the existence of one of the circumstances listed in subparagraph (iii) is a matter for objective determination.[300] Specifically, having regard to the object and purpose of the GATT and its *travaux*, the panel found that the existence of an 'emergency in international relations' (in the sense of article XXI(b)(iii)) is a question of fact, as is the question of whether the contested measures were 'taken in the time of' such an emergency.[301] The panel further signalled that 'political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations ... unless they give rise to defence and military interests, or maintenance of law and public order interests'.[302] An emergency in international relations would therefore appear to refer generally to 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state'.[303] The panel had no difficulty in finding that, having regard to the tense border situation and the armed conflict in Ukraine, Russian restrictions on the transit of goods from Ukraine effectively qualified as measures taken in a time of international emergency.[304]

Subsequently, the panel turned to the chapeau of article XXI(b) and, in particular, to the meaning of the phrase 'action which it considers necessary for the protection of its essential security interests'. Given the wording, it conceded that it is normally for every WTO member itself to define what it considers to be its essential interests.[305] At the same time, members remain subject to the obligation of 'good faith', and cannot

[298] *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R. See further T Voon, 'Russia – Measures concerning Traffic in Transit' (2020) 114 AJIL 96.

[299] *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, paras 7.51–52.

[300] ibid, para 7.82.

[301] ibid, para 7.77.

[302] ibid, para 7.75.

[303] ibid, para 7.76.

[304] ibid, paras 7.111–25. Note that the panel drew attention, among other things, to the fact that the situation was recognized by the UNGA as involving an armed conflict. The panel found further evidence of the 'gravity' of the situation in the fact that several countries had imposed sanctions against Russia in connection with the situation (albeit that this latter argument appears to put the cart before the horse).

[305] ibid, paras 7.131 and 7.146. The panel does note that 'essential security interests' is 'evidently a narrower concept than "security interests"' and 'may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally': ibid, para 7.130.

invoke alleged 'security interests' to engage in mere protectionist trade measures.[306] For this reason, members must 'articulate the essential security interests ... sufficiently enough to demonstrate their veracity.'[307]

Last but not least, the panel added—rather cursorily—that the obligation of good faith applies equally to the 'connection' between the essential security interests and the measures at issue. Specifically, the measures ought to 'meet a minimum requirement of plausibility in relation to the proffered essential security interests'. Put differently, they should not be 'implausible as measures protective of these interests'.[308] The panel thus envisaged a marginal review to verify whether 'measures are so remote from, or unrelated to, [the emergency] that it is implausible that [they were implemented] for the protection of [the member's] essential security interests arising out of the emergency'.[309]

3. Implications in the secondary sanctions context

What can be derived from the foregoing? First, the panel report in *Russia – Measures Concerning Traffic in Transit* suggests that if the EU were to contest the legality of certain US secondary sanctions at the WTO level, the first question to arise would be whether one or more of the three circumstances listed in article XXI(b) GATT (or article XIVbis(b) GATS) is present. In the case of the US sanctions against Iran, a plausible argument could be developed—having regard to international tensions over Iran's nuclear programme or its support for terrorist groups—that these sanctions are indeed 'taken in time of an international emergency' for the sake of this provision.[310] It is highly doubtful a WTO panel would be inclined to challenge such an interpretation. As far as sanctions against Cuba are concerned, this seems much less obvious, especially when one considers the origins of the Helms-Burton Act.[311] The onus would arguably be on the US to explain why its relationship with Cuba is, and remains, more than a matter of 'political or economic differences' between the respective countries (to paraphrase the panel report in *Russia – Measures Concerning Traffic in*

[306] Note that this was also the position defended by the EU: ibid, para 7.43.

[307] ibid, para 7.134. When the alleged security interests are further removed from the international emergency, a member 'would need to articulate its essential security interests with greater specificity': ibid para. 7.135. *In casu*, the panel concluded that Russia's articulation of its essential security interests was 'minimally satisfactory': ibid, para 7.137.

[308] ibid, para 7.138.

[309] ibid, para 7.139.

[310] In parallel, it could be argued that the sanctions are related to 'fissionable materials' in the sense of art XXI(b)(i) GATT (as the US has claimed: see note 284).

[311] *Pro memorie*, the Helms-Burton Act was adopted in 1996 in response to the shooting by the Cuban air force of two civilian aircraft, resulting in the killing of three US citizens and a US resident. According to Viterbo, the concept of 'emergency in international relations', as interpreted by the panel, 'prevents WTO members from indiscriminately qualifying any conceivable security threat as an emergency'. With regard to the Helms-Burton Act, she finds it 'disputable that such emergency still exists today or that, after more than two decades, it requires urgent action'. See Viterbo, 'Extraterritorial Sanctions and International Economic Law', 169.

Transit).[312] It is uncertain to what extent human rights violations in the territory of another WTO member might amount to an international emergency in the sense of article XXI(b)(iii). The regrettable reality is that a considerable number of WTO members have a poor human rights record. This sobering fact might counsel against an overly broad interpretation of the notion of 'international emergency' to avoid excessive use (or abuse) of the security exception.

Second, as to the 'necessity' of the sanctions adopted, both the WTO panel report and the ICJ case law suggest that there ought to be at least a *plausible link* between the sanctions adopted and the security interests they seek to protect, in that the sanctions ought to be reasonably capable of fostering the interests concerned and should not be purely punitive in nature. Interestingly, the underlying message of the ICJ's order on provisional measures in *Alleged Violations of the 1955 Treaty of Amity*—while not made explicit—appears to be that embargoes targeting certain goods, including 'foodstuffs and agricultural commodities', can never meet this test. This finding carries potentially far-reaching implications, eg, for the US embargo on Cuban sugar, or the Russian ban on the importation of certain foodstuffs from the EU.[313] The case law of the ICJ would also appear to require more than mere 'plausibility' and could, in fact, be read as hinting at a requirement not to go beyond what is necessary to meet the security interests at stake; in other words, as an obligation to use the less harmful alternative. Whether a stricter or more lenient 'necessity' standard is adopted evidently has major implications. For instance, for those US sanctions that are justified by reference to the threat of nuclear proliferation, a strict reading of the necessity requirement might entail that trade restrictions should primarily be limited to goods, equipment, and technology that can contribute to the proliferation of weapons of mass destruction, as opposed to goods that manifestly pose no such risk. Yet, by the same token, one may wonder whether the EU's restrictive measures adopted as a result of Russia's intervention in Crimea, and which include restrictions on the export of goods and equipment for Russia's energy sector,[314] would meet the test.[315] The outcome of the proceedings before the ICJ in *Alleged Violations of the 1955 Treaty of Amity* may shed further light on the required link between the sanctions adopted and the security interests claimed by the

[312] *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, para 7.75.

[313] On the Russian import ban on EU products, see European Commission, 'Russian Import Ban on EU Products' <https://ec.europa.eu/food/safety/international_affairs/eu_russia/russian_import_ban_eu_products_en>.

[314] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1 (as amended).

[315] Consider, in a similar vein, Viterbo, 'Extraterritorial Sanctions and International Economic Law': 'The author contends that, while a plausible nexus can be established for secondary restrictions concerning arm trafficking or the handling of nuclear materials, it is far more questionable to maintain that the trading of power tools, hardware and utensils may threaten the national security of a faraway country'.

sanctioning state. The same may be true for a number of pending WTO proceedings where the 'security exception' again takes centre stage.[316]

Finally, on a related note, one could argue that secondary sanctions, inasmuch as their impact is not limited to the direct source of the threat to the state's 'essential security interests', but rather deliberately extends to third states, are inherently incapable of satisfying the necessity test sketched above. This argument remains as yet untested at the level of international judicial proceedings. Still, it is noteworthy that in its written submission in *Russia – Measures Concerning Traffic in Transit*, the EU insisted that when assessing the necessity of a measure under article XXI(b) GATT, 'and ... in particular the existence of reasonably available alternatives, the Panel should ascertain whether the interests of third parties which may be affected were properly taken into consideration, as required by the preamble of the Decision of 30 November 1982'.[317] Several commentators have effectively argued that secondary sanctions must fail the test of article XXI(b) GATT, even where primary sanctions might satisfy it, on account of the fact that 'the threat posed by [the] target's trading partners—potentially, "the world at large"—is necessarily "too attenuated and remote"' to satisfy the necessity test.[318]

An analogy with the treatment of self-help in international law more generally supports the idea that the secondary dimension of economic sanctions is problematic from a necessity perspective. For instance, as far as countermeasures are concerned, the ILC Articles on State Responsibility (ARSIWA) not only indicate that they must be

[316] See the WTO proceedings referred to in note 154. Reference can also be made to the numerous disputes relating to the US imposition of tariffs on steel and aluminium imports, under s 232 of the Trade Expansion Act of 1962, Pub L No 87-794 (1962). See, for instance, *United States – Certain Measures on Steel and Aluminium Products*, Request for the Establishment of a Panel by Norway, WT/DS552/10 (19 October 2018).

[317] *Russia – Measures Concerning Traffic in Transit*, Third-Party Written Submission by the European Union (8 November 2017) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf> para 69. Note that the preamble of the Decision Concerning art XXI GATT of 30 November 1982 (Doc No L/5426, 2 December 1982) states as follows: 'Recognizing that in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected'.

[318] AD Mitchell, 'Sanctions and the World Trade Organization' in L Van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017) 301 (providing further references). In respect of the (aborted) WTO complaint against the Helms-Burton Act, Mitchell suggests that the 'consensus' among commentators was that the panel would likely have struck down the secondary sanctions: ibid. See also Viterbo, 'Extraterritorial Sanctions and International Economic Law', 170–71: '[I]t is easy to see how far extraterritorial sanctions are from the alleged emergency. Trading counterparts of a country targeted by primary sanctions ... can in fact pose only a very indirect and remote threat to the sanctioning State.... [C]ontracting parties should refrain from taking action against members that are not directly involved in a war or other international relations emergency.' Viterbo concludes that it is 'very unlikely that extraterritorial sanctions can be found to fall within the scope of the security exception and withstand the scrutiny of a [WTO] panel.'

proportionate,[319] but that they can, moreover, only be taken 'against a State which is responsible for an internationally wrongful act'.[320] The commentary emphasizes more explicitly that countermeasures 'may not be directed against States other than the responsible State'.[321] Importantly, the above requirements also explain why—even if secondary sanctions were to constitute a reaction to prior unlawful conduct by the primary sanctions target (eg, human rights violations, illegal annexation, etc)—a generic reliance on the doctrine of countermeasures under international law could not serve to preclude the wrongfulness of secondary sanctions.[322] In a similar vein, as far as the use of force in self-defence is concerned, the necessity requirement dictates that the action undertaken should, in principle, be directed against the source(s) of the armed attack(s).[323] An analogous restriction could—and should—arguably be read into the 'security exception', whether in the WTO Agreements or in bilateral agreements.

In the end then, even where an 'international emergency' can objectively be said to exist, and even if a State can make a bona fide claim that its essential security interests are at stake, the 'security exception' cannot serve as a hall pass for measures that present no plausible connection to these interests, including measures of a purely secondary nature.

V. Judicial Challenges to the Wide Reach of US Secondary Sanctions

Having examined the compatibility of secondary sanctions with the law of jurisdiction and with various treaty instruments, this section explores how affected third parties might challenge their legality under these rules in the context of judicial proceedings. Section A first examines the potential for judicial challenges before US courts. Section B subsequently explores the various options to trigger contentious proceedings at the international level, while also tackling the possibility of advisory proceedings before the ICJ. Indirect judicial challenges of US secondary sanctions before EU-based courts under the EU Blocking Statute will be addressed in Part VI.

[319] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) (2001) II(2) Yearbook of the International Law Commission 26, art 51: 'Countermeasures must be commensurate with the injury suffered'.

[320] ibid, art 49(1).

[321] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) with Commentaries Thereto (2001) II(2) Yearbook of the International Law Commission 30, 130(4).

[322] That is, even if one were to accept the legality of third-party countermeasures, which nonetheless remains the subject of debate. See further, eg, M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017).

[323] See further, T Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 108–10.

A. Judicial challenges before US courts

Some authors have identified US courts as a promising route to challenge extraterritorial US sanctions.[324] According to Lohmann, for instance, European policy-makers ought to systematically encourage and assist EU-based companies to challenge the extraterritorial reach of US sanctions in US courts.[325]

At the outset, a distinction should be drawn between challenges based on US conventional obligations, on the one hand, and potential breaches of customary law on the other. With regard to the first scenario, two important hurdles can be identified for potential claimants. First, as is well-known, while treaties are considered part of the supreme law of the land under the US Constitution, they are not always enforceable in US courts.[326] Specifically, enforceability is limited to those treaty provisions that are self-executing in nature. Several of the instruments discussed above in Part IV do not meet this test. In particular, it is settled practice in US case law that no private or other person, other than the US, has standing within a US court to invoke a provision of a WTO Agreement to challenge actions of the federal government or its agencies.[327] The situation would seem to be different in respect of, for instance, FCN treaties, which have routinely been assumed to be self-executing.[328] At the same time, even for those treaty provisions that are self-executing, the fact remains that, in accordance with the last-in-time rule, a later domestic statute will override conflicting provisions in an earlier treaty.[329] Thus in *Weinstein v Iran*, which concerned US sanctions against Bank Melli Iran, the US District Court of New York held that 'to the extent that [Terrorism Risk Insurance Act (TRIA)] § 201(a) may conflict with Article III(1) of the [Iran-US] Treaty of Amity', the TRIA would 'trump' the Treaty of Amity.[330]

Would a challenge before a US domestic court based on the customary rules of jurisdiction fare any better? Suggestions to 'take the fight' to the US judiciary are inspired by two important tenets of US

[324] The authors would like to thank Ashley Deeks for providing helpful input. All errors remain our own.

[325] Lohmann, 'Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad', 7–8.

[326] See further CA Bradley, *International Law and the U.S. Legal System* (2nd edn, OUP 2015) 41.

[327] This is explicitly asserted in the Uruguay Round Agreements Act, Pub L No 103-465 (1994). See further JC Barceló III, 'The Status of WTO Rules in U.S. Law' (2006) Cornell Law School Research Paper 06-004, 3–5 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lsrp_papers>.

[328] For an in-depth analysis, see JF Coyle and JW Yackee, 'Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts' (2017) 49 Arizona State Law Journal 61. For BITs, the question of whether they are enforceable before domestic courts is ultimately less crucial, since foreign investors will normally have access to investment arbitration at the international level.

[329] See, eg, *Breard v Greene*, 523 US 371, 376 (1998). See further Bradley, *International Law and the U.S. Legal System*, 52–54.

[330] *Weinstein v Iran* 624 F Supp 2d 272 (EDNY 2009) 275.

jurisprudence, namely the so-called '*Charming Betsy*' presumption and the 'presumption against extraterritoriality'. The *Charming Betsy* canon of construction holds that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[331] Specifically, in the present context, it could be invoked to insist on an interpretation of US legislation that is compatible with the customary limitations on the exercise of jurisdiction, discussed in Part III. The 'presumption against extraterritoriality', for its part, stipulates that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none'.[332]

In light of their oftentimes tense relationship with the customary principles of jurisdiction and their potential to cause international friction, it may appear surprising that non-US persons have rarely, if ever, questioned the legality of extraterritorial sanctions before US courts.[333] Financial institutions charged with breaching US sanctions have all favoured damage control in the form of a settlement agreement with OFAC over a full-blown battle in court.[334]

A rare case where a defendant directly questioned the extraterritorial application of US secondary sanctions on the basis of the presumption against extraterritoriality is the case of *US v Reza Zarrab*,[335] a case that was referred to earlier in the context of customary law justifications for US jurisdiction.[336] *Zarrab* is not the only case relating to US economic sanctions,[337] however it may be unique, insofar as it tackles the question of the extraterritoriality of sanctions head-on,[338] and rests on

[331] *Murray v The Charming Betsy* 6 US 64 (1804). See further Bradley, *International Law and the U.S. Legal System*, 15–18.

[332] *Morrison v National Australia Bank*, 6. In the wake of the *Morrison* decision, some have even suggested that US extraterritorial legislation was becoming a 'paper tiger': see SB Burbank, 'International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?' (2012) 33 University of Pennsylvania Journal of International Law 663. The presumption has been applied in numerous cases: see Bradley, *International Law and the U.S. Legal System*, 179–86; *Morrison v National Australia Bank*, 24; *United States v Vilar* 729 F 3d 62 (2d Cir 2013) 98; *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) 14; *RJR Nabisco v European Community* 195 L Ed 2d 476 (2016).

[333] Note that the present analysis is not concerned with cases where persons or entities subject to financial sanctions have sought to challenge these sanctions on the basis of due process grounds, nor is it concerned with cases where such persons or entities have challenged the constitutionality of US sanctions. See further R Gordon, M Smyth, and T Cornell, *Sanctions Law* (Hart 2019) chapter 9 ('challenging sanctions in the US').

[334] S Emmenegger and T Döbeli, 'Extraterritorial Application of U.S. Sanctions Law' in A Bonomi and K Nadakavukaren Schefer (eds), *US Litigation Today: Still a Threat for European Businesses or Just a Paper Tiger?* (Schulthess Verlag 2018) 245.

[335] *United States v Reza Zarrab*.

[336] Parts II.B.3 and II.B.5.

[337] See the cases cited in the following footnote.

[338] By way of comparison, in *United States v Ehsan* 163 F 3d 855 (4th Cir 1998), the Court looked into the alleged 'ambiguity' of the export limitations in Executive Order No 12,959 and its implementing regulations, eventually rejecting the allegation. In *United States v Homa International Trading Corp* 387 F 3d 144 (2d Cir 2004) and *United States v Banki* 685 F 3d 99 (2d Cir 2011), the courts affirmed that the term 'service' in Executive Order No 12,959 extended to 'the provision of money transfers' (*Homa*), even if the transfer of funds on behalf of another was 'not performed for a fee' (*Banki*). Neither of these cases tackled questions of extraterritoriality: Homa International

correspondent account jurisdiction as a stand-alone jurisdictional basis.[339] Because of its uniqueness, it warrants a somewhat longer discussion, albeit one focused on the application (or non-application) of the presumption against extraterritoriality.

The case involved a Turkish-Iranian businessman who was at the centre of a scheme to ship Iranian gas to Turkey in exchange for Turkish Lira, which was exchanged into gold before reaching Iran.[340] Crucially, the scheme involved a series of dollar transactions between non-US persons and entities that were routed through US correspondent bank accounts. In March 2016, Reza Zarrab was arrested when travelling to Florida on a family holiday. He was charged with several crimes, including, most notably, conspiracy to violate the IEEPA and the ITSR. Interestingly, Zarrab sought to have the motion against him dismissed as a form of 'prosecutorial overreach of the first order'.[341] In particular, in spite of the presumption against extraterritoriality, he noted that he stood 'accused of violating U.S. law for agreeing with foreign persons in foreign countries to direct foreign banks to send funds transfers from foreign companies to other foreign banks for foreign companies'. Zarrab therefore argued that the US Government had 'manufactured' charges against him 'out of the incidental involvement of a U.S. bank at some mid-point in the payment chain of a transaction that originated from a foreign country and occurred between two foreign entities'.[342]

Ultimately, however, *Zarrab* illustrates the limits to challenging US sanctions on grounds of jurisdictional overreach. First, by applying a broad understanding of territoriality, US domestic courts can in many cases avoid dealing with the presumption against extraterritoriality. In particular, significant case law exists asserting that the deliberate (and recurrent) movement of dollars through US bank accounts (including correspondent banks) creates a sufficient nexus with the US to exercise jurisdiction, and that the exercise of personal jurisdiction on such a basis does not offend due process protection under the US Constitution.[343] Specifically, in the context of US economic sanctions, earlier cases confirmed that the execution of a money transfer by a US person originating

Trading Corp was a Manhattan business, whereas Mahmoud Reza Banki was a naturalized US citizen living in the US.

[339] Emmenegger and Döbeli, 'Extraterritorial Application of U.S. Sanctions Law', 245.

[340] See further ibid 232.

[341] *United States v Reza Zarrab*, 3.

[342] ibid. Similar questions of jurisdiction were also raised in the related case of *United States v Mehmet Hakan Atilla* involving a Turkish banker at Halkbank who allegedly had been involved in Reza Zarrab's 'gold for gas' scheme: see *United States v Mehmet Hakan Atilla* 15 Cr 867 (RMB) (SDNY, 7 February 2018) (Decision and Order).

[343] See, eg, with respect to 18 USC § 371 (conspiracy to defraud the US): *United States v Budovsky* 2015 WL 5602853 (SDNY 2015); *United States v Yousef* 327 F 3d 56 (2d Cir 2003); in relation to the Anti-Terrorism Act: *Licci v Lebanese Canadian Bank SAL* 2016 WL 4470977 (2d Cir 2016). On the due process test for the exercise of personal jurisdiction, see also: *Securities and Exchange Commission v Straub*.

from a US bank account entails the 'exportation' of a 'service' in the sense of the IEEPA and ITSR, regardless of whether this service is provided for a fee or not.[344] *Zarrab* establishes that the same is true for the mere clearing of payments through a US correspondent account. Zarrab's contention that 'the mere fact that a U.S. bank cleared a payment originating and terminating at foreign banks without any involvement of Zarrab ... does not somehow transform the payment into a "U.S. export" by Zarrab' was ultimately dismissed as unpersuasive.[345]

Second, US case law indicates that the presumption against extraterritoriality does not apply 'where the law at issue is aimed at protecting the right of the government to defend itself'.[346] This is of particular relevance in the sanctions context, inasmuch as economic sanctions are used to confront threats to the national security, foreign policy, or economy of the US.[347] By way of illustration, in *Zarrab*, the Court held that, even assuming, *arguendo*, that the issue of extraterritoriality were to be relevant, the presumption of extraterritoriality would be overcome by the US's interest in defending itself.[348] In particular, the Court noted how the enactment and promulgation of the IEEPA and the ITSR reflected the US's interest in protecting and defending itself, among other things, against 'Iran's sponsorship of international terrorism, Iran's frustration of the Middle East peace process, and Iran's pursuit of weapons of mass destruction'.[349] Whether such security-based arguments would pass the jurisdictional test under the customary international law of jurisdiction, or the test under the security exception of various international agreements, such as the GATT, is a different matter altogether.[350]

Third, the presumption against extraterritoriality is irrelevant where it is clear, having regard to the context of a statutory provision as well as its text, that Congress intended the legislation concerned to apply extraterritorially.[351]

Fourth, and on a related note, where relevant sanctions instruments expressly provide for their extraterritorial application, contrary rules of

[344] See, eg, *United States v Homa*; *United States v Banki*.

[345] *United States v Reza Zarrab*, 15–17.

[346] *United States v Bowman* 260 US 94 (1922) 98. Applying this reasoning, see, eg, *United States v Vilar*; *United States v Reza Zarrab*, 5.

[347] 50 USC § 1701(a): 'Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual or extraordinary threat, which has its sources in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States'.

[348] *United States v Reza Zarrab*, 18.

[349] ibid 19.

[350] See Part III.F.

[351] See further Bradley, *International Law and the U.S. Legal System*, 179–86.

customary international law cannot be invoked to curtail their reach. In accordance with the US Supreme Court's *Paquete Habana* case, US courts will uphold a Congressional statute that Congress clearly intended to apply extraterritorially even if it violates customary international law.[352] The same holds true if an Executive Order were to be in tension with customary international law.[353]

It follows from the foregoing that the presumption against extraterritoriality is of no avail to contest the *explicit* extension of the personal scope of application of certain sanctions to 'foreign financial institutions' (eg, section 2 of Executive Order 13846 concerning transactions with Iran) or to 'entities owned or controlled by a United States person and established or maintained outside the United States' (eg, section 8 of Executive Order 13846).[354]

By the same token, the presumption against extraterritoriality would be of no avail where sanctions instruments otherwise contain clear indications of their envisaged extraterritorial scope. Title III of the Helms-Burton Act, for instance, which seeks to provide US nationals with a judicial remedy to claim damages from any person who 'traffics' in property which was confiscated by the Cuban Government, leaves no doubt as to its extraterritorial scope.[355] In order to remove any lingering doubt as to Congress's intent, the Act expressly claims, in section 301(10), that '[i]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory'.[356]

In the end, the above considerations suggest that recourse to the US judicial system is unlikely to result in a major overhaul of US secondary

[352] *The Paquete Habana* 175 US 677 (1900). See also Bradley, *International Law and the U.S. Legal System*, 187–88: '[I]t is well settled that, when there is a clear conflict between a federal statute and customary international law, U.S. courts will apply the statute. This means that, as a matter of U.S. law, Congress can exceed the limitations on prescriptive jurisdiction described above'. On the role of customary international law in the US legal order, see further ibid 139–67.

[353] Bradley, *International Law and the U.S. Legal System*, 139–67. For an illustration, see *Garcia-Mir v Meese* 788 F 2d 1446 (11th Cir 1986).

[354] At times, the extension of the personal scope of application is implicit, notably when a single sanctions instrument contains both restrictions that apply to 'United States persons' only, as well as restrictions that apply to any 'person', the underlying idea being that the latter term covers third-state nationals and companies. See, eg, the simultaneous use of 'a person' and a 'United States person' in 'Reimposing Certain Sanctions with Respect to Iran', Exec Order No 13,846, or in the Iran Sanctions Act of 1996.

[355] Abundant evidence to this end can be gleaned, inter alia, from the definition of the terms 'person' (see, eg, s 4(11) of the Act that defines 'person' as 'any person or entity, including any agency or instrumentality of a foreign state'), the expressed concern that the Cuban Government is seeking to attract 'foreign investors' (s 301(5)) and that the 'transfer to third parties of properties confiscated by the Cuban Government' would complicate their return to the original owners (s 301(7)), or the declared aim to 'deter' trafficking in wrongfully confiscated property (s 301(11)).

[356] Numerous other restrictions similarly leave little doubt as to their extraterritorial scope. For instance, s 5(7) of the Iran Sanctions Act of 1996 foresees the possibility of menu-based sanctions in respect of any person that 'owns, operates, or controls, or insures, a vessel that ... was used to transport crude oil from Iran to another country'. Or consider § 560.205 of the ITSR which effectively 'prohibits' 'the re-exportation from a third country' to Iran 'by a person other than a United States person, of any goods, technology, or services' exported from the US under certain conditions.

sanctions. Apart from the fact that several secondary sanctions would not seem to contravene customary international law in the first place (see Part III.A), invoking the presumption against extraterritoriality or the *Charming Betsy* doctrine will not produce the desired results where the extraterritorial scope of the relevant sanctions is clear from the sanctions instruments themselves. Even in a hypothetical case where a person successfully invokes the presumption against extraterritoriality or the *Charming Betsy* doctrine before a US court to limit the scope of application of a secondary sanctions instrument, nothing would prevent the legislative or executive branch from amending the instrument so as to expressly reaffirm a broad extraterritorial scope in response.

That is not to say that raising jurisdictional challenges in litigation before US courts is simply meaningless. Indeed, there have only been a few cases so far where extraterritoriality was tackled in the sanctions context.[357] Thus, the extraterritorial application of several sanctions instruments remains untested before the domestic courts.[358] Importantly, the US Supreme Court itself has yet to directly address correspondent account jurisdiction, including on the question of whether so-called 'U-Turn transactions' may indeed entail an 'exportation of services' in the sense of section 560.204 of the ITSR[359] and other sanctions instruments. A hopeful sign can be found in the 2018 *Jesner v Arab Bank* judgment of the US Supreme Court.[360] In this case, the Court dealt with a petition against a Jordanian bank under the Alien Tort Statute (ATS) based on claims that the bank had used its New York branch to clear dollar-dominated transactions that benefited terrorists through the Clearing House Interbank Payments System (CHIPS). According to Justice Kennedy, writing for the majority, '[i]t could be argued … that … the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS'.[361] Elsewhere, pointing inter alia to the significant diplomatic tension with Jordan resulting from the case, Justice Kennedy held that '[a]t a minimum, the relatively minor connection

[357] In *United States v Reza Zarrab*, the matter was not further pursued as Zarrab pleaded guilty and testified as a government witness: B Weiser, 'Reza Zarrab, Turk at Center of Iran Sanctions Case, Is Helping Prosecution' *The New York Times* (28 November 2017) <www.nytimes.com/2017/11/28/world/europe/reza-zarrab-turkey-iran.html>.

[358] For instance, the first proceedings pursuant to Title III of the Helms-Burton Act were only initiated in 2019.

[359] § 560.204 prohibits 'the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran'. Note that Emmenegger and Döbeli rightly critique the court's approach in *United States v Reza Zarrab* inasmuch as the court's assertion that the ITSR also covers conduct 'emanating' from the US does not of itself shed any light on the question of whether the term 'exportation' can be construed broadly in order to include the clearing, in the US, of a payment originating and terminating at foreign banks. While the court implicitly answers the question in the affirmative, the reasons are not further explained: see Emmenegger and Döbeli, 'Extraterritorial Application of U.S. Sanctions Law', 244.

[360] *Jesner v Arab Bank* 200 L Ed 2d 612 (2018).

[361] ibid 11.

between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank'.[362]

The above dictum suggests a critical attitude towards establishing jurisdiction exclusively on the basis of the clearing of payments by US banks (as the sole nexus to the US), although the context remains very different from that examined here. In *Jesner*, the Supreme Court ascertained the extent to which private litigants can use the ATS and US courts to obtain damages for violations of the *law of nations*. US secondary sanctions instruments, by contrast, are inextricably entwined with US foreign policy, and concerns over the need to protect US foreign policy and national security interests might inspire US courts to adopt a more deferential approach. Whether, as some suggest,[363] the nomination of conservative judges to the federal bench will render US courts more averse to jurisdictional overreach remains to be seen.

B. Judicial challenges at the international level

1. International dispute settlement on the basis of the WTO Agreements, friendship, commerce, and navigation treaties, or bilateral investment treaties

In Part IV, it was suggested that specific secondary sanctions may violate a range of multilateral or bilateral treaties to which the US is a party. Some of these instruments, however, do not provide for a judicial remedy or other enforcement mechanism. Under article XXVI(2) of the IMF Articles of Agreement, for instance, if a member fails to fulfil its obligations under the Agreement it can be declared ineligible to use the general resources of the Fund. In case of persistent failure, the voting rights of a member can be suspended by a 70% majority of the total voting power, and can ultimately be required to withdraw by a majority of 85% of the total voting power.[364] However, no binding dispute settlement mechanism is provided for.

That said, at least some US secondary sanctions sit uneasily with a variety of treaties that *do* provide for some form of judicial dispute

[362] ibid 25–26.

[363] Lohmann, 'Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad', 8. But see Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 65: 'While no case has been brought before the US Supreme Court, several legal experts believe it highly likely to favour executive discretion on sanctions policy'.

[364] Given the pivotal role of the US within the IMF, as well as its voting power (16.52% as of May 2019: see IMF, 'IMF Members' Quotas and Voting Power, and IMF Board of Governors' <www.imf.org/external/np/sec/memdir/members.aspx#U>), it is unrealistic to expect any significant action against the US. This is so even if secondary sanctions may have an enormous impact on a State's monetary stability: see, eg, A Shahine, 'IMF Sees Risk of 50% Iran Inflation on More U.S. Sanctions' *Bloomberg* (29 April 2019) <www.bloomberg.com/news/articles/2019-04-29/imf-sees-risk-of-50-iran-inflation-as-u-s-tightens-sanctions>.

settlement. For instance, various bilateral treaties discussed above in Part IV contain compromissory clauses providing for binding dispute settlement. Thus, the FCN treaties concluded by the US[365] generally assert that disputes pertaining to the interpretation or application of the treaty, and which are not satisfactorily adjusted by diplomacy, can be brought before the ICJ.[366] In a similar vein, the BITs concluded between the US and several Central and Eastern European countries[367] envisage inter-state arbitration of disputes relating to the treaty concerned, and which cannot be resolved through consultation or diplomatic negotiations.[368] Moreover, as is common for BITs, these treaties allow natural or legal persons from one state party to initiate investor-state dispute settlement (ISDS) against the other party.[369]

As for the multilateral level, reference must of course be made to the compulsory (quasi-)judicial dispute settlement mechanism provided for in the WTO Dispute Settlement Understanding.[370] Indeed, the substantive analysis above tentatively concluded that specific secondary sanctions may be at odds with WTO obligations owed to affected third states (including EU Member States). Moreover, even if this were not so, the Dispute Settlement Understanding contains neither an explicit nor an implicit requirement that a complainant have a 'legal interest' as a prerequisite for requesting the establishment of a WTO panel[371] and, in practice, complainants have been allowed to bring complaints regarding violations of the WTO Agreements even where such violations were to the detriment of other members.[372] Specifically, in *EC – Bananas III*, the Appellate Body was satisfied that the US was justified in bringing claims under the GATT against the EC banana regime since the US was a producer and potential exporter of bananas, and the claims were interwoven with those under the GATS, for which the US's standing had not been challenged.[373] The Appellate Body also agreed that 'with the increased interdependence of the global economy ... Members have a greater stake in enforcing WTO rules than in the past'.[374] It follows that, even if the ramifications of the Appellate Body's conclusion remain to some extent uncertain,[375] the EU could potentially have standing to

[365] See note 149.
[366] See, eg, US-Belgium FCN Treaty, art 19.
[367] See the overviews of BITs in note 150.
[368] See, eg, US-Croatia BIT, art XI.
[369] See, eg, ibid, art X.
[370] See further, WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (CUP 2017).
[371] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para 132.
[372] See WTO, 'Legal Issues Arising in WTO Dispute Settlement Proceedings' <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s1p1_e.htm>.
[373] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, paras 134–38.
[374] ibid, para 136.
[375] See, eg, T Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 EJIL 723, 735–37.

challenge WTO violations caused by US sanctions whose primary target is another WTO member such as Cuba.[376] On a related note, for those restrictions that do not strictly speaking entail a breach of WTO rules, it may still be possible to lodge a non-violation complaint (article XIII(1)(b) GATT; article XXIII(3) GATS) or a situation complaint (article XXIII(1)(c) GATT) to challenge the 'nullification or impairment' of the benefits accruing directly or indirectly under those agreements as a result of the US secondary sanctions policy.[377] The underlying idea is to limit the possibility of circumventing one's WTO obligations by taking measures that systematically offset a state's market access commitments without constituting a formal violation of the rules.[378] It should be noted, however, that proceedings of this type have been few and far between, and rarely successful.[379]

If different options for judicial dispute settlement at the international level exist, then why have states (or non-US companies) not used the available options, and does this abstention not reflect a certain irrelevance of international law in the sanctions domain? While this is an important question, which also raises broader concerns relating to the force and compliance pull of international law in international relations, the reality is more nuanced than one might be led to believe. First, it must be noted that several proceedings have recently been brought before the ICJ or before a WTO panel by primary sanctions targets.[380] In addition, some proceedings have also been launched over the legality of *secondary* sanctions. In particular, back in 1996, the (then) EC did request the creation of a WTO panel to scrutinize a range of secondary restrictions introduced by the Helms-Burton Act.[381] The triggering of WTO

[376] Note that no such possibility exists when the primary target has not joined the WTO (as is the case for Iran).

[377] See, eg, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para 137. See also the EC's request for the establishment of a panel to examine the Helms-Burton Act (*United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2), which also identifies several non-violation complaints (points (vi), (vii) and (viii)).

[378] See further G Cook, 'Non-Violation Complaints: Dispute Settlement at the World Trade Organization (WTO)', Max Planck Encyclopaedia of International Procedural Law Online (last updated October 2018).

[379] ibid, paras 45ff (Cook also suggests that a non-violation complaint might be more likely to succeed 'where there is a close nexus between the timing, product/sectoral coverage, and effect of the challenged measure and market access commitment at issue' (para 51), which might be less obvious in respect of secondary sanctions); Y Tanaka, *The Peaceful Settlement of international Disputes* (CUP 2018) 283.

[380] As for the ICJ, reference can be made to the *Certain Iranian Assets (Iran v United States)* <www.icj-cij.org/en/case/164> and *Alleged Violations of the 1955 Treaty of Amity* cases (both of which were brought on the basis of the 1955 Treaty of Amity between the two countries), as well as the case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v United Arab Emirates)* <www.icj-cij.org/en/case/172>. All of these cases were pending at the time of writing. Reference can also be made to the WTO proceedings identified in note 154 above.

[381] See *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2. Curiously, Cuba itself has never directly challenged the Helms-Burton Act before the WTO Dispute Settlement Body, even though it is a member of the WTO and has initiated other WTO proceedings in the past.

proceedings was one of the factors that led the US to agree to the lifting of secondary sanctions vis-à-vis the EC, in turn resulting in the suspension of the proceedings.[382] Reference could also be made to the WTO proceedings lodged by the EU and Japan against procurement restrictions introduced by the State of Massachusetts, and which appeared to indirectly influence the Supreme Court judgment in *Crosby v National Foreign Trade Council*, in which the Act was struck down.[383]

Conversely, a variety of factors may explain the reluctance to challenge secondary sanctions before a WTO panel or arbitral tribunal. For starters, the legality of secondary sanctions under specific treaty instruments is a complex exercise: establishing a breach is less straightforward than it is with respect to primary sanctions. In addition, the omnipresent 'security exception' may have deterred potential applicants from bringing proceedings at the international level, whether because of a *belief* that the exception can cover a wide range of primary and secondary sanctions, or because of a strategic *unwillingness* to question the broad scope of the security exception.[384] While conventional security exceptions remain an obstacle to be reckoned with, the unequivocal rejection in 2019 of the supposedly self-judging character of article XXI GATT in *Russia – Measures Concerning Traffic in Transit* [385] could make states more inclined to bring judicial challenges, not just against primary sanctions, but also against secondary sanctions.

Additional factors may explain the non-reliance on compromissory clauses in bilateral treaties. States may simply fear that the use of the dispute settlement clause will lead the US to terminate the treaty concerned altogether.[386] For BITs, the requirement to establish a link to a 'covered investment' provides an additional hurdle.[387] The fact that secondary sanctions primarily function through deterrence—incentivizing non-US companies not to trade with primary sanctions target(s) for fear of being subject to an import ban, asset freeze, etc—also plays a role; as long as no menu-based sanctions are actually imposed on it, a company/foreign investor is unlikely to utilize the ISDS mechanism. Moreover, the bilateral character of the instruments concerned means that it is

[382] *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 and WT/DS38/6.

[383] See notes 227–30 and accompanying text.

[384] As an active 'sanctions sender', the EU itself, for instance, could be said to have an interest in not undermining the possible reliance on the 'security exception' (as illustrated, for instance, by the CJEU's *Rosneft* judgment – see note 288 and accompanying text). At the same time, in its third-party written submission in the *Russia – Measures Concerning Traffic in Transit* case, the EU clearly argued against the position that the GATT's security exception is self-judging in nature.

[385] *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R.

[386] As the US did following the ICJ's order of provisional measures in *Alleged Violations of the 1955 Treaty of Amity*: see, eg, 'US terminates 1955 "Treaty of Amity" with Iran' *DW* (4 October 2018) <www.dw.com/en/us-terminates-1955-treaty-of-amity-with-iran/a-45742464>. Note that it is clear that such termination has no impact on the jurisdiction of the court/tribunal concerned in cases that were previously initiated, yet the treaty will of course cease to have effect for the future.

[387] See notes 261, 262, and 277 and accompanying text.

ultimately up to one individual state or foreign investor to stick out its neck and directly challenge the US secondary sanctions regime in international proceedings. Such exposure—and the fear of further repercussions at the diplomatic or economic level, or, for private litigants, at the US domestic level—may give potential applicants pause.

Admittedly, the fear of retaliatory measures by the US would not work at the WTO level; that is, if the EU—itself a powerful economic block—were to initiate the panel procedure. Hence, submitting a new WTO complaint, similar to that lodged in 1996, would appear to be a viable course of action for the EU. While some deem it 'likely' that a new request for consultations 'will soon be filed before the WTO by the [EU]',[388] the prospect of such a démarche may have considerably diminished due to the broader institutional crisis which the WTO dispute settlement system is currently experiencing. In particular, as is well-known, the US has blocked appointments of Appellate Body members to force WTO members to negotiate new rules that address US concerns and limit the scope for what the US regards as judicial overreach.[389] As this article was finalized, the number of members of the Appellate Body had fallen below the minimum required to consider a case, thus de facto resulting in the shutdown of the Appellate Body.[390] While WTO members can still request the creation of new panels to consider trade disputes, the effectiveness of WTO dispute settlement hangs in the balance. Unless the Appellate Body deadlock is resolved, respondent states can simply prevent a panel report from becoming final by lodging an appeal (which the Appellate Body cannot hear for lack of members).

In short, each of the treaty-based dispute settlement mechanisms comes with its own limitations. To this must be added the fact that international dispute settlement mechanisms may take considerable time to produce a decision,[391] and that states may well refuse to comply with the outcome, the legally binding nature of proceedings being no guarantee of its effective implementation. Even so, there is certainly merit in

[388] Viterbo, 'Extraterritorial Sanctions and International Economic Law', 166.

[389] See, eg, E-U Petersman, 'How Should WTO Members React to Their WTO Crises?' (2019) World Trade Review 1; R McDougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' (2018) 52 Journal of World Trade 867; J Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?' (Institute of International Economic Law, December 2018) <www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>.

[390] J Keaten and P Wisemann, 'World trade without rules? US shuts down WTO appeals court' *Washington Post* (10 December 2019) <www.washingtonpost.com/politics/courts_law/world-trade-without-rules-us-shuts-down-wto-appeals-court/2019/12/10/995ca116-1b46-11ea-977a-15a6710ed6da_story.html>.

[391] For a poignant critique of the WTO dispute settlement system, see J Weiler, 'Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System' (*EJIL:Talk!*, 25 July 2018) <www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>, referring not just to the time factor ('In reality it can take years'), but also to the 'original sin', namely that the only remedy provided for is cessation of the wrongful act (as opposed to restitution/compensation), the result being that the non-compliant state has every incentive 'to play it out'.

exploring these judicial options. Indeed, while legal uncertainty pertaining to the (in)compatibility of specific secondary sanctions with conventional obligations, or over the scope of security exceptions, may be factors that discourage states (or private actors) from pursuing international judicial proceedings, achieving greater normative clarity is precisely what such proceedings can offer. A well-argued judicial precedent could contribute to clarifying the legal benchmark against which state recourse to secondary sanctions should be tested, thereby strengthening international law's compliance pull in this domain.

Finally, it should be noted that alternative paths exist which permit states to challenge secondary sanctions before an international court or tribunal without having to confront—or rather overcome—the security exception. Two such paths are briefly discussed in the next section.

2. Circumventing the security exception: What alternatives?

a. The advisory jurisdiction of the International Court of Justice

As a matter of principle, one option to challenge secondary sanctions while circumventing conventional 'security exceptions' is to have the UN General Assembly request an advisory opinion from the ICJ pursuant to article 96 of the UN Charter and article 65 of the ICJ Statute.[392]

An important advantage of challenging the legality of secondary sanctions through an advisory procedure is that the underlying legal questions

[392] Practice confirms that a simple majority suffices to adopt a UNGA resolution requesting an advisory opinion. See further P d'Argent, 'Article 65' in A Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1789–90. Note that advisory opinions may also be sought by the UN Security Council. This hypothesis does not seem relevant here, inasmuch as the US could of course use its veto power to block such a request. A request from a specialized agency of the UN also seems unlikely, as such agencies can only ask legal questions 'arising within the scope of their activities' (art 96(2) of the UN Charter). See also Perben and others, 'The American Withdrawal from the Vienna Agreement on the Iran Nuclear Programme'. Note that while in theory the Court has discretion whether or not to respond to a request for an advisory opinion so as to protect the integrity of the Court's judicial function, it is part of its constant jurisprudence that it will only refuse to do so when there are 'compelling reasons': *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, paras 30 and 35. Admittedly, the Court has previously held that, as a matter of principle, the advisory procedure should not be used to 'circumvent' the principle that a state is 'not obliged to allow its disputes to be submitted to judicial settlement without its consent': *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, paras 32–33. Given the Court's prior practice, however, it is clear that it would regard a request pertaining to the legality of secondary sanctions as more than a mere bilateral or plurilateral dispute between the US and the EU, especially given the UNGA's prior interest in the matter (note that the UNGA's practice has been a relevant factor in previous cases: see, eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 49–50; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, paras 87–90), as evidenced by its periodic resolutions on unilateral coercive measures or on the Helms-Burton Act. For an example, see 'Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba', UNGA Res 73/8 (1 November 2018) (adopted by 198 votes in favour and two against (US, Israel)). Accordingly, it is most unlikely that a request for an opinion pertaining to the legality of secondary sanctions would result in the first ever refusal by the ICJ to answer a request stemming from the UNGA.

need not be construed in terms of a possible breach of a specific treaty clause. Instead, it would be possible to directly challenge their legality under customary international law, specifically in light of the customary rules on the exercise of jurisdiction which we have discussed above. Admittedly, an advisory opinion is not legally binding as such on individual states, but its authority—reflecting, as it does, the legal understanding of the highest judicial organ of the UN—can hardly be ignored.

Given the broad opposition to US secondary sanctions throughout the international community—including, for instance, at the level of the G77 and the Non-Aligned Movement[393]—an attempt to trigger an advisory procedure before the ICJ is likely to muster the necessary votes among UN General Assembly members. Still, a certain degree of caution is warranted. First, while many states have consistently, and in broad terms, denounced secondary sanctions as contrary to customary rules on jurisdiction, the reality may be more complex in that—as explained above—depending on the underlying jurisdictional link (use of the US dollar, trade in US-origin goods, etc) and the consequence linked to the specific secondary sanctions (criminal prosecution, exclusion from the US financial market, etc), certain measures will breach customary international law while others will not. The implication is that the precise phrasing of a (hypothetical) request for an advisory opinion should be considered carefully in order to reduce the likelihood of producing an ICJ opinion that could legitimate certain sanctions based on a loose jurisdictional nexus. Second, while countries from the Global South may be inclined to support the idea of an advisory proceeding before the ICJ, one should not ignore the fact that many of these countries are opposed not only to *secondary* sanctions, but also to 'non-UN' or 'autonomous' primary sanctions more generally, as the periodic debates at the UN General Assembly level regarding 'unilateral economic coercion' demonstrate.[394] As a result, such countries may be inclined to broaden the scope of the question to be put before the Court so as to invite more general scrutiny of autonomous sanctions under customary international law. Inasmuch as the EU itself has become an active sanctioning state in recent years, this may not be in the EU's own interest. It follows that, while a request for an ICJ advisory opinion offers a potentially useful instrument, it may also be a 'blunt' instrument, and one which may take a life of its own in light of the divergent legal convictions and political agendas of UN members. A potential solution to find a middle ground between the competing views on the legality of economic coercion in the Global South and the West could be to confine a possible request for an ICJ advisory opinion to the legality, under international law, of the Helms-Burton Act; an act with obvious

[393] See note 8.

[394] For an analysis, see Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?'.

extraterritorial features and which is condemned on a near-universal basis by the UN General Assembly year after year.[395]

b. Contentious litigation on the basis of the post-WWII Economic Cooperation Agreements

Last but not least, reference must be made to a final set of bilateral treaties concluded between the US and individual European countries in the wake of the Second World War, and which lack the 'security exception' traditionally found in FCN treaties and BITs: the so-called 'Economic Cooperation Agreements'.[396] These treaties, which technically remain in force today, relate to relief operations and economic assistance to post-WWII Europe. Interestingly, while the substantive rights and obligations are different from those ordinarily found in FCN treaties and BITs and ostensibly have no relevance in a sanctions context, the treaties also contain complex compromissory clauses, which potentially provides for broad access to ICJ dispute settlement. For instance, article X of the 1948 Cooperation Agreement between the US and Belgium ('Settlement of claims of nationals') states that:

> 1. The Governments of the [US] and of Belgium agree to submit to the decisions of the [ICJ] any claim espoused by either Government on behalf of one of its nationals against the other Government for compensation for damage arising as a consequence of Governmental measures ... taken after April 3, 1948, by the other Government and affecting property or interests of such national, including contracts with or concessions granted by duly authorized authorities of such other Government. It is understood that the undertaking of each Government in respect of claims espoused by the other Government pursuant to this paragraph is made in the case of each Government under the authority of and is limited by the terms and conditions of such effective recognition as it has heretofore given to the compulsory jurisdiction of the [ICJ] under Article 36 of the Statute of the Court. The provisions of this paragraph shall be in all respects without prejudice to other rights of access, if any, of either Government to the [ICJ] ...
> 3. It is further understood that neither Government will espouse a claim pursuant to this Article until its national has exhausted the remedies

[395] See, eg, 'Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba', UNGA Res 73/8 (1 November 2018) (adopted by 198 votes in favour and two against (US, Israel)). See in particular preambular para 4, stating that the extraterritorial effects of the Act 'affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation'.

[396] The ICJ's indicative list of treaties containing compromissory clauses on the website of the ICJ (see note 149) mentions Economic Co-operation Agreements concluded by the US with the following EU Member States: Italy (28 June 1948), France (28 June 1948), Denmark (29 June 1948), Austria (2 July 1948), the Netherlands (2 July 1948), Greece (2 July 1948), Belgium (2 July 1948), Luxembourg (3 July 1948), Sweden (3 July 1948), the UK (6 July 1948), and Portugal (28 September 1948).

> available to him in the administrative and judicial tribunals of the country in which the claim arose.[397]

In essence, this clause—and the parallel provisions in several other Economic Cooperation Agreements—enable each party to initiate contentious proceedings before the ICJ, as part of its right to exercise diplomatic protection, when one of its nationals suffers damage as a result of a governmental measure of the other party. The type of 'governmental measures' is not circumscribed, and could potentially encompass a range of secondary sanctions instruments. A critical observer might object that recourse to the ICJ is excluded due to the fact that the clause itself refers to the extent to which the parties have accepted the compulsory jurisdiction of the ICJ under article 36 of the ICJ Statute, and that—as is well-known—the US has long since revoked its declaration accepting compulsory jurisdiction.[398] This may well be so, yet the word 'heretofore' in the cited clause could arguably be read as referring to the extent to which the respective parties agreed to ICJ compulsory jurisdiction *at the time of* adoption of the Economic Cooperation Agreement (in this case, in 1948). If this interpretation is adopted, it would in principle be possible to invoke the 1946 US declaration recognizing compulsory jurisdiction[399] (in combination with the parallel declaration of the other party, eg Belgium[400] or France[401]) to trigger ICJ proceedings, notwithstanding the US having subsequently revoked this declaration. In any case, it must be recalled that even if one adopts this interpretation, recourse to the ICJ still presupposes that a Belgian company (for example) suffers damage pursuant to US secondary sanctions, and that it first raises a challenge before the US domestic courts and exhausts local remedies.[402] In addition, subsequent ICJ proceedings would be limited to alleged internationally wrongful conduct vis-à-vis the company concerned, albeit the outcome of such proceedings could, of course, set an

[397] Economic Cooperation Agreement between the United States of America and the Kingdom of Belgium (adopted 2 July 1948, entered into force 29 July 1948) 19 UNTS 127. See also art X of the Economic Cooperation Agreement between the United States of America and France (adopted 28 June 1948, entered into force 10 July 1948) 19 UNTS 9.

[398] In 1984, the US modified its declaration (1354 UNTS 452). A year later, it gave notice of the termination of its declaration accepting compulsory jurisdiction (1408 UNTS 270). The termination constituted a response to the ICJ's affirmation of jurisdiction in the case brought against the US by Nicaragua.

[399] Declaration of the United States of America Recognizing as Compulsory the Jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice (14 August 1946) 1 UNTS 9.

[400] For the original Belgian declaration of 13 July 1948 (valid for a period of five years), see 16 UNTS 203. For the modified declaration, see 302 UNTS 251.

[401] For the original French declaration of 18 February 1947, see 26 UNTS 91. The declaration was modified in 1959 (337 UNTS 65) and 1966 (562 UNTS 71). The declaration was terminated in 1974 (907 UNTS 129).

[402] On the exhaustion of local remedies, see arts 14–15 of the ILC Draft Articles on Diplomatic Protection.

important precedent and provide useful guidance on the outer limits of the exercise of jurisdiction by states in the sanctions context.

VI. Challenging US Secondary Sanctions through Non-Judicial Means: The EU Blocking Statute

The previous part sought to identify the various ways in which third states or private persons could raise a judicial challenge against secondary sanctions. Faced with the slow grinding of the wheels of justice, however, and the uncertain implementation of an international judgment or award, third states adversely affected by US sanctions may be tempted to respond more swiftly by taking unilateral self-help measures.

One of the legal means available to third states to counteract (US) secondary sanctions (regardless of the illegality of such sanctions) is the enactment of *blocking statutes*. The enactment of statutes which 'block' foreign states' extraterritorial legislation is not unique to the context of secondary sanctions. In fact, the first blocking statutes were aimed at mitigating the adverse effects of the extraterritorial application of US antitrust law, but they were later applied to secondary sanctions.[403] In the context of secondary sanctions, the best-known example is undeniably the 1996 EU Blocking Statute,[404] which was triggered by the US enactment of the Helms-Burton Act and the Iran Libya Sanctions Act in that same year.[405] The EU Blocking Statute prohibits EU persons from complying with US sanctions legislation and allows them to recover damages suffered as a result of the application of this legislation ('clawback'). The Regulation lay dormant for a long time as successive US presidents suspended the controversial Title III of the Helms-Burton Act, and as EU and US sanctions regarding Iran started to converge after 2006.[406] However, the Blocking Statute was reactivated after President Trump denounced the JCPOA and reimposed the full range of US sanctions against Iran, including secondary sanctions affecting

[403] See, eg, the UK's Protection of Trading Interests Act 1980; The Protection of Trading Interests (US Reexport Control) Order 1982, SI 1982/885; The Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, SI 1992/2449; The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996; and The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) (Amendment) Order 2018, SI 2018/1357. See also Canada's Foreign Extraterritorial Measures Act and Mexico's, Ley de Protección al Commercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional.

[404] 1996 EU Blocking Statute.

[405] ibid, annex.

[406] For EU restrictive measures against Iran following the UN Security Council's adoption of resolutions requiring Iran to stop enriching uranium with nuclear proliferation purposes, see European Council and Council of the EU, 'EU Restrictive Measures Against Iran' <www.consilium.europa.eu/en/policies/sanctions/iran/>.

EU economic and financial interests.[407] In 1996–97, the EU's enactment of the Blocking Statute, combined with its threat to start proceedings against the US at the WTO, were arguably instrumental in the US rolling back its secondary sanctions. In the current political climate, however, it is unlikely that the US Government will be deterred by the Blocking Statute. This raises the prospect that the Regulation may be applied, although it remains to be seen whether the Regulation will effectively protect EU economic interests from US secondary sanctions.

In this part, the EU Blocking Statute's potential to mitigate the effect of (US) secondary sanctions will be discussed.[408] The analysis is admittedly somewhat speculative, as since 1996 there has only been limited practice of the Regulation actually being applied. That being said, the EU has given guidelines regarding the application of the Regulation,[409] and there is some case law and doctrine available.[410] Lobbying organizations, particularly from the financial sector, have voiced their concerns over the consequences of the application of the Regulation for EU businesses,[411] while think-tanks have shed light on the political context of the Regulation, as well as its compliance challenges.[412]

The Blocking Statute is a form of EU self-help in the face of internationally wrongful, or at least economically injurious, US acts.[413] Technically, the provisions of the Regulation are *retorsions*, ie, unfriendly measures which are not internationally wrongful as such (unlike countermeasures),[414] but are nevertheless aimed at persuading the state

[407] Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] OJ L199/I/1. The relevant US secondary sanctions are listed in the annex of the Regulation.

[408] This part is based in part on C Ryngaert, 'De Europese "Blocking Statute": Een Probaat Middel om het Europese Bedrijfsleven te Beschermen tegen de Amerikaanse Secundaire Sancties tegen Iran?' (2019) SEW Tijdschrift voor Europees en Economisch Recht 157.

[409] European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute' [2018] OJ C277/I/4, I/8.

[410] For case law, see, eg, Mamancochet Mining Limited v Aegis Managing Agency Ltd & Others [2018] EWHC 2643 (Comm); *PAM International NV v Exact Software Nederland BV* NL:RBDHA:2019:6301 (District Court (The Hague), 25 June 2019). For doctrine, see, eg, Van Haute, Nordin, and Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place'; M Lieberknecht, 'Die Blocking-Verordnung: Das IPR als Instrument der Außenpolitik' (2018) 38 Praxis des Internationalen Privat- und Verfahrensrechts 573.

[411] See, eg, European Banking Federation (EBF), 'EBF comments on the EU Blocking Regulation' (Doc No EBF_033606, 1 August 2018); UK Finance, 'The EU Blocking Regulation – Issues and Considerations for the Financial Services Sector' (11 July 2018) <www.ukfinance.org.uk/policy-and-guidance/reports-publications/eu-blocking-regulation-%E2%80%93-issues-and-considerations-financial-services-sector>; FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty'.

[412] See, in particular, the publications of the MENA programme of the European Council on Foreign Relations: <www.ecfr.eu/mena/iran>.

[413] See 1996 EU Blocking Statute, which considers secondary sanctions to be both internationally unlawful and to have an adverse impact on EU economic interests.

[414] On the concept of 'retorsion', distinguished from 'sanction' and 'countermeasure', see T Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework'

against which they are directed (the US) to change course. At the very least, they are aimed at mitigating, or even neutralizing, the adverse effects of secondary sanctions on EU economic interests.

In terms of its scope of application *ratione personae*, the Blocking Statute applies to natural persons who are EU residents and nationals of an EU Member State, as well as to legal persons established in the EU.[415] It applies to EU subsidiaries of US corporations, but not to US subsidiaries of EU corporations.[416] It does not apply to EU affiliates (branches) of US corporations, but does apply to EU nationals working for such affiliates.[417] It is unclear whether the Regulation also applies to EU nationals working abroad. The Commission believes it does,[418] but that does not appear to follow from the text of the Regulation.[419]

In essence, the Blocking Statute sets out four legal measures: a duty of notification, a prohibition of recognition, a prohibition of compliance, and a clawback right.

Pursuant to the duty of notification, EU persons whose economic and/or financial interests are affected by US secondary sanctions legislation are required to inform the Commission.[420] There is considerable uncertainty as to the scope of this duty. Notably, the meaning of 'affected' or 'economic and/or financial interests' is not entirely clear.[421] Still, there have been a substantial number of notifications and even more requests from companies for informal guidance (exact numbers have not been made public).[422] Companies may at times be reluctant to

in L Van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017). The distinction between 'retorsions' and 'countermeasures' can be difficult to make in practice, in light of uncertainties over the precise substance of customary international law (eg, the scope of the non-intervention principle) and the wide range of applicable treaty law. Sossai has argued that the Blocking Statute is a countermeasure within the meaning of art 49 of the Draft Articles on State Responsibility: see M Sossai, 'Legality of Extraterritorial Sanctions' in M Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2019) 62, 69. However, while the Blocking Statute evidently counters the effects of secondary sanctions, its provisions do not amount to internationally wrongful acts, the wrongfulness of which needs to be precluded under the doctrine of countermeasures.

[415] 1996 EU Blocking Statute, art 11. This article also applies to a number of specific categories, eg, in the shipping sector. All relevant persons have a strong connection to the EU.

[416] European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', I/10 (question 21). It is not entirely clear whether the Blocking Statute would be violated if a US parent applies with OFAC for its EU subsidiary.

[417] Van Haute, Nordin, and Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place', 499. A Commission official admitted that this is potentially far-reaching, but that in practice it has not yet led to major problems: Interview with Commission representative (16 May 2019).

[418] European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', I/10 (question 22).

[419] Van Haute, Nordin, and Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place', 499.

[420] 1996 EU Blocking Statute, art 2.

[421] FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', paras 3.25–26.

[422] Interview with Commission official (16 May 2019).

notify the EU because their notification is communicated to the EU Member States concerned, which may possibly put them on a watch-list at the national level. Where companies notify the Commission, the Commission does not give final answers on whether there might be a breach or not, but may refer them to national sanctions authorities.[423] Some doubts have been raised as to the applicability of the notification obligation to directors, managers, or other persons with management responsibilities without EU nationality, and who may even be based outside the EU while serving as officers of EU persons subject to the Blocking Statute.[424]

Pursuant to the prohibition of recognition:

> [n]o judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting therefrom, shall be recognized or be enforceable in any manner.[425]

This is the 'blocking' provision from which the Regulation takes its name.[426] The prohibition of recognition potentially affects a broad range of measures.[427] It implies a duty for Member States not to honour an extradition request from the US that is at least partly based on a charge that the sought person has violated US secondary sanctions covered by the Blocking Statute. [428] Only if the extradition request is also based on other grounds may the request be granted by EU Member States.[429]Non-recognition under the Blocking Statute also implies that EU Member States' courts cannot honour US requests to produce documents located in the EU, or provide other mutual legal assistance to the US, to the extent that such assistance relates to US enforcement of secondary sanctions.[430] For example, in August 2019, Gibraltar's Ministry of Justice considered itself unable to honour a US legal assistance request in support of a US application for the restraint of the departure

[423] ibid.

[424] The FMLC has signalled that the Blocking Statute is likely to apply to these persons (FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', para 3.49). Art 2 of the 1996 EU Blocking Statute provides in general terms that the notification obligation 'applies to the directors, managers and other persons with management responsibilities'.

[425] 1996 EU Blocking Statute, art 4.

[426] Also, the EU uses the term in its communication: see European Commission, 'Updated Blocking Statute in Support of Iran Nuclear Deal' (6 August 2018) <http://europa.eu/rapid/press-release_IP-18-4805_en.htm>.

[427] European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', section 4.

[428] Interview with Commission official (16 May 2019) (also suggesting that applicants against whom an extradition decision has been taken in relation to US secondary sanctions violations could appeal to EU courts for protection).

[429] Judgment of the Supreme Court of the Netherlands NL:HR:2020:623 (Supreme Court, 7 April 2020), ruling that a defendant cannot invoke the Blocking Statute to block extradition to the US in relation to acts which are also punishable in EU Member States, in this case the export of dual use goods to Iran.

[430] Interview with Commission official (16 May 2019) (noting that so far this has remained a theoretical question).

from Gibraltar of a vessel transporting Iranian oil, inter alia on the basis of the Blocking Statute.[431] It remains the case, of course, that the blocking provision offers little solace to EU persons with assets in the US, against which US authorities can simply take territorial enforcement action.

Apart from the duties of notification and non-recognition, the Regulation also provides for two other measures which in practice have a major impact on the position of EU persons doing business with targeted states, and whose activities are threatened by US secondary sanctions: (1) the prohibition on EU persons complying with secondary sanctions laws;[432] and (2) EU persons' entitlement to recover any damages caused to them by the application of secondary sanctions laws ('clawback').[433] Below, the legal scope and possible implementation problems of these measures are discussed in greater detail. Section A addresses the compliance prohibition and Section B addresses the clawback right. We end this part with an exploration of whether the US Government itself, which has after all enacted the impugned secondary sanctions, could be directly challenged before EU-based courts (Section C).

A. The compliance prohibition

Pursuant to article 5 of the Blocking Statute, no EU person 'shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from' US secondary sanctions legislation.[434] This means that EU persons are barred from complying with US sanctions law, even if in so doing they expose themselves to US sanctions. The Commission gives a wide interpretation to the prohibition; even the mere filing of a request with US authorities for a derogation or exemption from US sanctions law is covered by the EU prohibition, unless the person obtains prior permission from the Commission.[435] Still, it is not entirely clear yet precisely what transactions are covered by the

[431] HM Government of Gibraltar, 'Further Mutual Legal Assistance Requests from the United States of America – 604/2019' (18 August 2019) <www.gibraltar.gov.gi/press-releases/further-mutual-legal-assistance-requests-from-the-united-states-of-america-6042019-5198>. However, the rejection of the US request was mainly based on the double criminality requirement not being satisfied.

[432] 1996 EU Blocking Statute, art 5.

[433] 1996 EU Blocking Statute, art 6.

[434] 1996 EU Blocking Statute, art 5.1.

[435] Simply discussing the scope of US sanctions with US authorities is not covered by the ban: European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', I/10 (question 23).

compliance prohibition, which is bound up with lack of clarity as to which US sanctions have 'extraterritorial' effect or application.[436]

In this section, four specific issues raised by the compliance prohibition will be discussed: (1) the options for EU persons to obtain authorization to comply from the Commission; (2) direct enforcement of the prohibition by public authorities; (3) incidental enforcement of the prohibition by courts hearing contractual disputes; and (4) the deterrent effect of the prohibition on EU persons' compliance with US sanctions.

1. Compliance authorization

The prohibition from complying with US sanctions law can have a major impact on EU persons, who risk ending up between a rock and a hard place.[437] If they comply with US sanctions law, they may be sanctioned in Europe. If they comply with the EU prohibition, they may be penalized in the US.[438] To some extent, the Council of the EU is aware of this: the Regulation provides that '[p]ersons may be authorized ... to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community'.[439] The Commission grants the authorization,[440] assisted by a committee consisting of representatives of the Member States and chaired by a Commission representative.[441] The criteria for the granting of an authorization were only made explicit in a 2018 implementing regulation,[442] prompted by the re-imposition of US sanctions against Iran and the reactivation of the Blocking Statute. This implementing regulation summarizes a large number of non-cumulative criteria which can be used to assess whether non-compliance would seriously damage EU persons' interests or those of the EU, eg, 'whether the protected interest is likely to be specifically at risk, based on the context, the nature and the origin of a damage to the protected interest'.[443] However, it stands to reason that the Commission will grant authorization to comply with US

[436] While art 5 of the Blocking Statute does not refer to extraterritoriality, art 1 does. On this basis, it has been argued that 'Article 5 should not, in principle, apply to situations when there is no extra-territorial application of the specified U.S. sanctions', although it has also been noted that it is not fully clear what measures are precisely extraterritorial: FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', para 3.5.

[437] On the comparable situation of Canadian persons being caught between the rock of US law and the hard place of Canadian blocking legislation, see H Scott Fairley, 'Between Scylla and Charybdis: The US Embargo of Cuba and Canadian Foreign Extraterritorial Measures Against It' (2010) 44 The International Lawyer 887.

[438] In one recent settlement notice, OFAC even appears to suggest that a company's reliance on the EU Blocking Statute may qualify as an 'aggravating factor' for the purposes of applying OFAC's Economic Sanctions Enforcement Guidelines: see OFAC, 'Enforcement information for December 9, 2019' <www.treasury.gov/resource-center/sanctions/CivPen/Documents/20191209_ace.pdf> (relating to Swiss insurance company ACE Limited).

[439] 1996 EU Blocking Statute, art 5.2.

[440] ibid, art 7(b).

[441] ibid, art 8.

[442] Commission Implementing Regulation (EU) 2018/1101.

[443] Commission Implementing Regulation (EU) 2018/1101, art 4(a).

sanctions law only sparingly lest the effectiveness of the Blocking Statute be undermined. Thus, when assessing the 'serious' risk, the Commission is likely to use a high threshold.[444] Decisions of the Commission are not made public. As of mid-2019, there had been 15 requests for authorization. The content of these requests is known only to the sanctions team, the College of Commissioners, and the Extraterritorial Legislation Committee. The Commission does not communicate the success ratio of the requests.[445]

2. Direct enforcement under public law

In most cases, EU persons' compliance with US secondary sanctions will result in a violation of the EU Blocking Statute. It remains unclear, however, to what extent these persons will be sanctioned in the EU. The Commission itself does not have the mandate to impose sanctions. Pursuant to the Blocking Statute this is within the competence of the Member States, which 'shall determine the sanctions to be imposed in the event of breach of any relevant provisions', sanctions which must be 'effective, proportional and dissuasive'.[446] However, the Commission can request that Member States initiate an investigation; something which has occurred at least once.[447]

Even if they start an investigation, it is not likely that Member States will readily impose sanctions on corporations which comply with US sanctions, out of fear of US enforcement or exclusion from the US market,[448] and certainly not if such corporations are 'national

[444] See European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', I8/9 (question 16). Compare the legal standard urged by the European Banking Federation: '[G]lobally, all situations that automatically lead to submission to the US laws should be considered to characterise a serious damage to a person's interests' (EBF, 'EBF comments on the EU Blocking Regulation', 8).

[445] Interview with Commission official (16 May 2019). According to this official, the requests stem from a mixture of sectors and involve both large and small companies.

[446] 1996 EU Blocking Statute, art 9. For Member States' implementing legislation see, eg, The Netherlands (Wet van 24 December 1998 tot uitvoering van verordening (EG) nr 2271/96 van de Raad van de Europese Unie van 22 November 1996; Wet van 22 Juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten; Ministerie van Buitenlandse Zaken, 'Kamerbrief over Instelling Sancties door de Verenigde Staten tegen Iran en Gevolgen voor het Nederlandse Bedrijfsleven' (BZDOC-403887767-56, 2 November 2018)); Belgium (Wet houdende diverse financiële bepalingen, Belgisch Staatsblad, 21 May 2019, No 2019012449, p 48120, Title VII); and Germany (s 82(2) of the Außenwirtschaftsverordnung of 2 August 2013). It is not clear in all Member States which domestic authority is responsible for the implementation of the Blocking Statute. See, notably, the situation in the UK: FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', paras 3.71–77.

[447] C Driessen, 'Douane Kijkt naar Overtreding Europese Boycotwet door Exact' *NRC* (12 June 2019) <www.nrc.nl/nieuws/2019/06/11/douane-kijkt-naar-overtreding-europese-boycotwet-door-exact-a3963321>, reporting that the Commission had requested the Dutch Customs Authority to start an investigation into apparent compliance of a Dutch software corporation with US sanctions.

[448] For enforcement differences across EU Member States, see, eg, UK Finance, 'The EU Blocking Regulation – Issues and Considerations for the Financial Services Sector'. For this reason, the EBF called on the Commission to develop an EU-wide enforcement strategy: EBF, 'EBF comments on the EU Blocking Regulation', 2. The EU has requested information on national legislation, to which most Member States have replied. Most states have general legislation that would also

champions'.[449] Also, if it is the aim of the Blocking Statute to protect EU persons from US secondary sanctions, it is somewhat incongruent to impose sanctions on these same persons. Moreover, Member States' enforcement agencies may not easily be able to establish that EU persons who wind down their business activities with sanctions targets have done so with a view to complying with US secondary sanctions. Clearly, EU persons will refrain from officially stating that the termination of their activities was the result of the threat of US sanctions; rather, they will tend to state that the termination was based on other considerations.[450] It is striking that in 2015, Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy and Vice-President of the European Commission, admitted that '[i]t is not usually possible to establish that the decision [of EU persons or entities not to engage in certain activities in relation to the effects of the US legislation in the EU] is a direct result of the US legislation rather than commercial considerations'.[451] It appears that it suffices for a person covered by the Blocking Statute to evade the compliance prohibition provided that *one of the considerations* of a person terminating its activities was commercial (or even regulatory in nature, to the extent that it does not relate to compliance with US sanctions law, eg, compliance with regulations regarding money-laundering and terrorist financing).[452] This means that, in practice, 'commercial motivations' can always be used to evade the compliance prohibition.

At the time of writing, only one case has been reported of a Member State taking public enforcement measures for breach of the Blocking Statute.[453] In 2007, Austrian authorities initiated proceedings against Austrian bank BAWAG on the basis of Austrian legislation

encompass breaches of the Blocking Statute. Some states have administrative penalties, some four or five states also have criminal penalties: Interview with Commission official (16 May 2019).

[449] On national champions and industrial policy, see OECD, 'Roundtable on Competition Policy, Industrial Policy, and National Champions' (Doc No DAF/COMP/GF(2009)9, 19 October 2009) 9.

[450] In legal advisory practice, this is called 'technical alignment': see Allen & Overy, 'Iran Sanctions and the EU Blocking Regulation: Navigating Legal Conflict' (Legal & Regulatory Risk Note, 2018) <www.allenovery.com/publications/en-gb/lrrfs/cross-border/Pages/Iran-sanctions-and-the-EU-Blocking-Regulation-Navigating-legal-conflict.aspx>. However, according to the Commission, companies are often quite open that they halt their business in or with Iran because of US sanctions, noting also that circumstantial evidence might be relevant: Interview with Commission official (16 May 2019).

[451] European Parliament, 'Answer given by Vice-President Mogherini on behalf of the Commission' (Parliamentary Questions, Doc No E-007804/2014(ASW), 1 April 2015).

[452] FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', para 3.12. It has even been suggested that the compliance prohibition may not extend to a determination by an EU person 'that it would be economically risky to engage in certain activities given the active prosecution environment and high fines under U.S. law' (ibid, para 3.18).

[453] Also, apparently no enforcement action has been taken under the reactivated Blocking Statute. Member States have to inform the EU if they start proceedings over a breach of the Blocking Statute. So far, nothing has been reported, nor have any cases been reported pursuant to information requests from the EU: Interview with Commission official (16 May 2019).

implementing the Blocking Statute.[454] BAWAG was about to be taken over by a US investor, Cerberus Capital. Because US corporations cannot have direct contacts with Cuba on the basis of US sanctions against Cuba, BAWAG closed the accounts of one hundred Cuban nationals. In so doing, BAWAG in fact complied with US sanctions legislation with a view to facilitating the take-over, and thus appeared to breach the Blocking Statute. Eventually, however, the Austrian authorities discontinued the case against BAWAG after US authorities granted an exemption to BAWAG.[455] The Cuban nationals could maintain their account and Cerberus could take over BAWAG.

3. Incidental enforcement by courts hearing contractual disputes

The compliance prohibition may not only be directly enforced by law-enforcement agencies which can impose public law penalties (administrative fines and criminal penalties), but could also be invoked in contractual, commercial, or other private law disputes before the civil and commercial courts of EU Member States. A typical scenario would involve Party A withdrawing from a contractual arrangement lest it fall foul of US sanctions, with Party B asking a domestic court to enjoin Party A to honour the contract, citing the compliance prohibition in the Blocking Statute. This scenario came before the District Court of The Hague in June 2019, in a case pitting Dutch software producer Exact against Curaçao-based company PAM, which distributes the software in Cuba. After Exact was taken over by US investment corporation KKR, it halted its distribution contract with PAM. Reasons were not given, but apparently Exact feared the long of arm of the Helms-Burton Act. PAM subsequently sued Exact for breach of contract, and alleged that Exact, being incorporated in an EU Member State, is prohibited from complying with US sanctions pursuant to the Blocking Statute. In its decision of 25 June 2019, the Hague District Court found Exact to be at fault and enjoined it to honour its contract with PAM.[456] The Court nevertheless stopped short of finding Exact to be in violation of the Blocking Statute. Rather, it considered that Exact could not invoke *force majeure* to justify its breach of contract, as it ended up in the situation as a result of a deliberate choice of its new shareholder KKR. Still, the Court reminded Exact of the possibility that, by complying with the Helms-Burton Act, it violated Dutch *criminal* law implementing the Blocking Statute.[457] As Exact has now been enjoined by the Court to

[454] 'Austria Charges Bank after Cuban Accounts Cancelled' *Reuters* (27 April 2007) <www.reuters.com/article/austria-bawag/austria-charges-bank-after-cuban-accounts-cancelled-idUSL27114468200704 27>.

[455] Austria, Foreign Ministry, 'Foreign Ministry Ceases Investigations against BAWAG Bank' (21 June 2007) <www.bmeia.gv.at/en/the-ministry/press/announcements/2007/foreign-ministry-ceases-investigations-against-bawag-bank/>.

[456] *PAM International NV v Exact Software Nederland BV*, para 4.11.

[457] ibid, para 4.10.

continue selling software to PAM and, ultimately, Cuba, Exact may technically be in violation of US sanctions law. Should US law-enforcement agencies pursue Exact for this violation, it remains to be seen whether they would accept the company's likely defence of foreign sovereign compulsion. Judging by recent OFAC and US court decisions, the chances of success of such a defence may not be very high.[458]

In contractual disputes, the question may also arise as to whether the compliance prohibition under the Blocking Statute extends to standard contractual clauses which provide, in general terms, for compliance by the contracting parties with sanctions regulations, including US sanctions regulations. For instance, is the prohibition engaged in cases where a US lender extends credit to an EU borrower and imposes sanctions-related requirements on the borrower so as to comply with US primary sanctions (eg, refraining from using the funds to deal with persons on US sanctions lists)?[459] Likewise, would the prohibition be engaged by the fairly typical clause in insurance contracts pursuant to which an insurer shall not be liable to pay any claim to the extent that payment of such a claim would expose that insurer to any sanction, prohibition, or restriction under US trade or economic sanctions, laws, or regulations?

[458] See note 438 above. See also *In re Sealed Case* No 19-5068 (DC Cir, 6 August 2019) (ruling that the US Department of Justice has the authority to require foreign financial institutions to disclose transactions from non-US accounts insofar as these transactions are related to these institutions' US correspondent accounts, and rejecting the argument that foreign governments may bar their institutions from disclosing information to the US). Foreign courts sometimes believe, however, that a foreign sovereign compulsion defence may well be successful: see 'Brazil court orders Petrobras to refuel Iran grain vessels' *Reuters* (25 July 2019) <www.reuters.com/article/us-brazil-iran-sanctions/brazil-court-orders-petrobras-to-refuel-iran-grain-vessels-idUSKCN1UK2PK> (Petrobras source stating that the risk of consequences from US sanctions is reduced if the company is simply obeying a Brazilian Supreme Court ruling order it to refuel Iranian vessels). For a discussion from 1999, see HL Clark, 'Dealing with US Extraterritorial Sanctions and Foreign Countermeasures' (1999) 20 University of Pennsylvania Journal of International Economic Law 61, 92–93.

[459] FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', para 3.44, suggesting that article 5 of the Blocking Statute is not engaged as this transaction does not have an extraterritorial dimension. Such standard contractual clauses are quite common in the banking sector. Pursuant to 'Ultra High Risk Country' (UHRC) clauses, banks may reserve the right to suspend banking relations in case of the client's involvement with persons on (US) sanctions lists. This has led to litigation, but courts have not yet taken a clear position regarding the legality of such suspensions, including in light of the EU Blocking Statute. In the Netherlands, a trader brought a case against ING Bank after the latter suspended the former's account on the grounds that he was involved with Cuban clients, who feature on a US sanctions list. The case was more or less discontinued, however, after the bank reinstated its banking relationship: see *Claimant v ING Bank NV* NL:RBAMS:2020:893 (District Court (Amsterdam), 6 February 2020). In the absence of a UHRC clause, it is more likely that a court will consider the suspension of a banking relationship to be unlawful: see, for instance, *Importadora Gran Roque CA v South American Internatioanl Bank Curaçao NV* NL:OGEAC:2019:264 (Court of First Instance of Curaçao, 22 November 2019) (giving priority to the interests of the account holder doing business with Venezuela). In the UK there is currently a case pending between Metro Bank and some of its Iranian account holders: see K Makortoff, 'Metro Bank hit with fresh lawsuit by Iranian customers' *The Guardian* (17 March 2020) <www.theguardian.com/business/2020/mar/17/metro-bank-hit-with-fresh-lawsuit-by-iranian-customers>.

The latter issue recently arose before the English courts. In a 2018 case involving a maritime insurer who refused to pay out an insurance claim concerning theft of a shipload,[460] the insurance policy holder argued that, if the insurer were to comply with this sanctions clause in the contract he would give effect to US sanctions and thus violate the EU Blocking Statute. The English High Court, however, considered that the Regulation did not apply insofar as the insurer who refuses to pay out a claim on the basis of a sanctions clause gives effect to contractual policy rules not to pay out in specific cases.[461]

At first sight, such an interpretation undermines the European *ordre public* on which the Regulation is based, as statutory EU-based obligations should normally prevail over contractual arrangements.[462] At the same time, there is some merit in the view of van Haute et al, for whom 'broad commitments not to violate US sanctions may be acceptable' and only an 'act (or omission) that is driven primarily by the specific intention to bring their business activities into line with the specific US sanctions against Iran' amounts to prohibited compliance.[463] It remains the case, however, that standard contractual clauses by virtue of which parties commit to comply with US sanctions, and which are adopted *after* the enactment (or at least after the reactivation) of the EU Blocking Statute, may be much more problematic. Parties will probably have to formulate these clauses in such a way that compliance with US law should not lead to non-compliance with EU law (carve-out clauses), to the extent that this is possible at all.[464] In addition, after the reactivation of the Blocking Statute and the full imposition of US sanctions in November 2018, it might be more difficult for a EU-based bank to justify its termination of a customer's accounts on the grounds that US cor-

[460] *Mamancochet Mining Limited v Aegis Managing Agency Ltd & Others*.

[461] ibid. After all was said and done, however, the court did not have to take a decision on this as, according to the court, the insurers were not subject to US or European sanctions to the extent that they paid out before 4 November 2018; only after that date did the relevant US sanctions entered into force. In a 2019 judgment pertaining to the interpretation of a sanctions clause in a loan agreement, the High Court held, somewhat similarly, that a borrower would not be in default if it refused to make repayments 'in order to comply with any mandatory provision of law', in this case a provision of US sanctions law. The High Court did not consider the EU Blocking Statute to be relevant, however, as '[t]he laws giving rise to the issue in this case are not included within the Appendix to Regulation 2271/96'; hence there would be no 'mandatory rule' of UK or EU law: *Lamesa Investments Limited v Cynergy Bank Limited* [2019] EWHC 1877, para 30.

[462] For a private law analysis of the Regulation, see Lieberknecht, 'Die Blocking-Verordnung: Das IPR als Instrument der Außenpolitik'.

[463] Van Haute, Nordin, and Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place', 498.

[464] See EBF, 'EBF comments on the EU Blocking Regulation', 4. For some examples of how a carve-out clause might look like in practice, see FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', annex A.

respondent banks may refuse to cooperate, or that the EU-based bank may be exposed to US secondary sanctions.[465] Such justifications were, in the past, accepted by European courts.[466]

4. Deterrence

It is doubtful whether European sanctions will have a strong deterrent effect. Companies may harbour the reasonable belief that Member States will not be willing to take enforcement against them for breach of the compliance prohibition, or that the compliance prohibition is not likely to be successfully invoked in contractual disputes. They may even take for granted exposure to EU enforcement action as a result of compliance with US law. Commercial logic may well dictate that the risk of exposure to US sanctions outweighs the risk of exposure to European sanctions: companies may not want to risk heavy US fines or denial of access to the US market (which may well be considered an even more severe penalty).[467] An EU person's strategic choice to comply with US law may obviously undermine the effectiveness of the Blocking Statute.

There is indeed an unsurprising tendency of EU-based financial institutions and other corporations to comply with US sanctions, and not to be too bothered by the EU Blocking Statute[468] (as SWIFT's decision to drop all but a few of its Iranian customers clearly illustrates).[469] Steps to divest from Iran had often already been taken before the actual reinstatement of US sanctions against Iran and the reactivation of the Blocking Statute. Examples of EU corporations halting, or severely restricting, business with Iran are rife.[470] For instance, the European Investment Bank, of which EU Member States are shareholders, discontinued its investments in Iran, apparently for fear that otherwise it would be denied access to the US capital market.[471] Likewise, Deutsche Telekom closed the phone and Internet connections of a number of Iranian banks established in Germany, apparently lest the US impose sanctions on the

[465] See an Italian judgment reported in M Lester, 'Italian Judgments on the EU Blocking Regulation' (*EU Sanctions*, 2 October 2019) <www.europeansanctions.com/2019/10/italian-judgments-on-the-eu-blocking-regulation/> (relating an Italian's court's injunction to prevent a bank from terminating its banking services to an Italian company controlled by partners in Iran, relying in on art 5 of the Blocking Statute).

[466] Courts tended to accept exposure to US secondary sanctions as a valid reason for termination: see Judgment of 15 October 2018, 318 O 330/18 (LG Hamburg 18, Zivilkammer); Decision of 17 October 2017, C/13/634420 / KG ZA 17-966 AB/DP (District Court (Amsterdam)).

[467] RL Denton, 'EU Blocking Regulation' (*Sanction & Export Control Updates*, 18 May 2018) <http://sanctionsnews.bakermckenzie.com/eu-blocking-regulation>.

[468] In respect of the financial sector, FMLC limits itself to noting the effect of the Blocking Statute on the drafting of contracts, on the internal compliance systems of EU lenders, and on individual senior employees of US businesses (or their subsidiaries) operating within the EU (FMLC, 'U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty', paras 4.2–4.3).

[469] See Part VI.D.

[470] See, eg, US Congressional Research Service, 'Iran Sanctions', 50–51.

[471] R Emmott and A de Carbonnel, 'European Investment Bank Casts Doubt on EU Plan to Salvage Nuclear Deal' *Reuters* (18 July 2018) <www.reuters.com/article/us-iran-nuclear-eu/european-investment-bank-casts-doubt-on-eu-plan-to-salvage-nuclear-deal-idUSKBN1K81BD>.

US segment of its mobile phone subsidiary T-Mobile.[472] Deutsche Telekom's compliance with US sanctions may be surprising, since Germany—which holds stock in Deutsche Telekom—supported (or at least did not object to) the reactivation of the Blocking Statute in 2018.[473] A court in Hamburg finally ordered Deutsche Telekom to re-connect the banks, albeit not on the basis of the EU Blocking Statute but rather because the banks had so far discharged their obligations and had sufficient resources at their disposal.[474] In any event, economic contacts between EU corporations and Iran have been drastically reduced as a consequence of the re-imposition of US sanctions in 2018.[475]

B. Clawback

The Blocking Statute entitles an EU person to recover any damages, including legal costs, caused to that person by the application of US secondary sanctions.[476] This is a private enforcement or 'clawback' right, which is inspired by a similar right in the 1980 British Protection of Trading Interests Act, which entitled a UK person to recover from the party in whose favour a foreign (US) judgment was given so much of the amount as exceeds the part attributable to compensation.[477] With this clawback right, the UK hoped to mitigate the extraterritorial application of US antitrust law vis-à-vis UK corporations, and in particular the granting of multiple (punitive or treble) damages in the US.[478] Somewhat similarly, with the clawback right, the EU hopes to mitigate the extraterritorial application of US secondary sanctions by giving EU persons the right to obtain recovery 'from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary'.[479] Pursuant to the Regulation, such recovery 'could take the form of seizure and sale of assets held by those persons,

[472] M Brüggmann, 'Telekom stellt iranischer Bank in Hamburg die Telefone ab' *Handelsblatt* (22 November 2018) <www.handelsblatt.com/politik/international/bank-melli-iran-telekom-stellt-iranischer-bank-in-hamburg-die-telefone-ab/23669904.html>.

[473] M Brüggmann, 'Deutschland sollte in der Iran-Politik seine Souveränität verteidigen' *Handelsblatt* (22 November 2018) <www.handelsblatt.com/meinung/kommentare/kommentar-deutschland-sollte-in-der-iran-politik-seine-souveraenitaet-verteidigen/23665050.html>. But see B Jennen and B Groendahl, 'Doubts Emerge Over Attempts to Counter U.S.-Iran Sanctions Threat' *Bloomberg* (3 May 2018) <www.bloomberg.com/news/articles/2018-05-23/doubts-emerge-at-eu-steps-to-counter-u-s-iran-sanctions-threat>.

[474] Judgment of 28 November 2018, 319 O 265/1 (LG Hamburg 19, Zivilkammer) .

[475] Between 2017 and 2018, EU exports to Iran decreased from 10.8 billion to 8.9 billion euros, and Dutch exports to Iran from 1.06 billion euros to 718 million euros. See The Netherlands, Ministry of Foreign Affairs, 'Beantwoording vragen van de leden Karabulut (SP) en Ploumen (PvdA) over maatregelen tegen Amerikaanse sancties tegen Iran', question 4, 50–51.

[476] 1996 EU Blocking Statute, art 6.

[477] Protection of Trading Interests Act 1980, s 6.

[478] For a comment, see AV Lowe, 'Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980' (1981) 75 AJIL 257.

[479] 1996 EU Blocking Statute, art 6.

entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community'.[480] The clawback right appeared to be a response to the private enforcement right laid down in Title III of the Helms-Burton Act, which allows civil actions by US persons against every individual or entity 'trafficking' in properties confiscated by the Cuban Government after the Cuban Revolution.[481]

The precise scope of the clawback right is unclear, and there is no judicial precedent as yet.[482] The right likely lends itself mainly to proceedings against parties who withdraw from financing agreements and supply contracts.[483] In this context, law firms and corporate lobby groups have already suggested some doom scenarios of EU persons filing a clawback action.[484] One hypothetical scenario would be a contractual arrangement between two EU-based corporations to export gold to Iran, the parent of one of them being US-based. Fearing US sanctions, the subsidiary corporation withdraws from the arrangement. In such a case, its contractual counterpart could demand recovery. In another scenario, an EU-based bank is not able to grant a European customer's request to wire money to Iran because the US correspondent bank refuses the transaction as a result of US sanctions against Iran. The European customer could attempt to obtain recovery from the European bank.[485]

Clawback may also possibly be used against a US company which has brought proceedings against an EU-based company in the US over alleged trafficking in Cuban confiscated goods pursuant to Title III of the Helms-Burton Act, especially if that company has assets in the EU. It remains to be seen, however, whether in this scenario EU Member State courts would be able to establish jurisdiction over such a company. After all, EU Member State courts can only exercise jurisdiction on the basis of the jurisdictional bases listed in the Brussels Regulation or in

[480] ibid.

[481] 22 USC §§ 6021–91.

[482] EU Member States are required to provide information on the use of the clawback clause to the Commission (1996 EU Blocking Statute, art 10), but at the time of writing nothing had been reported.

[483] On whether clawback can be relied on to claim damages from the US itself, see Part IV.A.1 (discussing possible exceptions to state immunity).

[484] See, eg, M Jones and E Bailes, 'US Iran Sanctions and the EU Blocking Regulation – Private Law Claims for Damages' (*Lexology*, 31 July 2018) <www.lexology.com/library/detail.aspx?g=e1639b35-4d6a-406b-99ee-f9728e799d2b>; EBF, 'EBF comments on the EU Blocking Regulation', 5; UK Finance, 'The EU Blocking Regulation – Issues and Considerations for the Financial Services Sector'.

[485] For an argument against liability in this scenario, see UK Finance, 'The EU Blocking Regulation – Issues and Considerations for the Financial Services Sector', 10.

their domestic law.[486] As it happens, some Member State codes of civil procedure provide for asset-based jurisdiction (notably Germany, Austria, and Sweden),[487] although the Brussels Regulation itself does not.

Insofar as jurisdiction can be established, and a judgment is issued against a person, it may be possible for such a judgment to be enforced abroad where the person has (more sizable) assets. Such *exequatur* proceedings are most likely in third states with similar blocking statutes, such as Canada or Mexico, even if they do not necessarily provide for clawback themselves.

Use of the clawback right is not illusory. Moreover, the entitlement may not necessarily disappear where the Commission authorizes an EU person to exceptionally comply with US sanctions.[488] After all, such compliance can still cause damage to a counterparty, which may want to seek recovery from the person causing the damage.[489]

Nonetheless, for clawback to be successful, the claimant will always have to prove the causal connection between the damage suffered and another person's compliance with US sanctions legislation. Moreover, use of the clawback right is by no means a magic bullet. An EU person could possibly recover pursuant to the right, but should they continue to maintain commercial transactions with a target state, they would remain exposed to US secondary sanctions.[490] These sanctions may dwarf the compensation sought under the clawback provision.

C. Directly challenging US secondary sanctions before European courts: The hurdle of state immunity

As explained in Section B, the EU Blocking Statute has created a specific cause of action enabling natural and legal persons to recover damages caused to them by the application of secondary sanctions.[491] This 'clawback' right is likely to be used mainly in proceedings against commercial parties who withdraw from financing agreements and supply

[486] Art 6(3) of the 1996 EU Blocking Statute, provides that the 1968 Brussels Convention 'shall apply to proceedings brought and judgments given' pursuant to clawback. In the meantime, Regulation (EU) No 1215/2012 has replaced the Brussels Convention.

[487] Germany, Code of Civil Procedure (*Zivilprozessordnung*) of 5 December 2005, BGBl I 3202 § 23; Austria, Court Jurisdiction Act (*Jurisdiktionsnorm*) of 1 August 1895, Reichsgesetzblatt No 111/1895 § 99; Swedish Code of Judicial Procedure (*Rättegangsbalken*) of 1 January 1948, Ds 1998:000, chapter 10, s 3.

[488] 1996 EU Blocking Statute, art 5. Still, the Commission believes that authorization does shield a person from application of the clawback clause: Interview with Commission official (16 May 2019).

[489] For the concerns of the European Banking Federation in this respect, see EBF, 'EBF comments on the EU Blocking Statute', 9.

[490] European Parliament Research Service, 'Updating the Blocking Regulation: The EU's answer to US extraterritorial sanctions' (Report PE 623.535, June 2018) 6.

[491] 1996 EU Blocking Statute, art 6.

contracts.[492] The question arises, however, as to whether the US Government itself, which enacted the secondary sanctions, can directly be challenged before the courts of EU Member States (or any foreign court, for that matter).

Interestingly, the Commission's Guidance Note on the Blocking Statute explicitly raises the question of whether 'EU operators [can] sue the U.S. authorities in order to recover damages'.[493] No explicit answer is provided, however. On the one hand, the Guidance Note stresses that the wording of the Blocking Statute is 'very broad'. On the other hand, it asserts that questions such as who may be the defendant, what damage can be recovered, etc, are matters for the competent court, the identification of which is, in turn, to be determined by reference to the Brussels I Regulation.[494] Yet article 1(1) of that Regulation clarifies that its scope is limited to 'civil and commercial matters', and that its rules on the exercise of jurisdiction do not extend to 'the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'. It follows that an actual right of action against the US in respect of damages caused by secondary sanctions cannot be found in the EU Blocking Statute, nor is such right of action easily found in national legislation.

Even assuming a right of action could be found in the domestic law of an EU Member State that would allow proceedings to hold the US liable, a number of obstacles render such a démarche highly unlikely to succeed. Possible obstacles include, for instance, the domestic doctrines of non-justiciability (or 'international act of state')[495] or *forum non conveniens*. However, the most obvious hurdle stems from the customary international law on state immunity.

As is well known, 'state immunity' constitutes a procedural bar against the exercise of jurisdiction by domestic courts in proceedings where a foreign state is impleaded. The doctrine is generally seen as a corollary of the principle of sovereign equality under international law, as reflected in the Latin maxim '*par in parem non habet imperium*'. It is firmly established in customary international law.[496] A majority of states nowadays accept that state immunity is no longer absolute, and applies

[492] Part V.B.

[493] European Commission, 'Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute', I/8.

[494] Regulation (EU) No 1215/2012. Note: the Brussels I Regulation has replaced the 1968 New York Convention to which the original Blocking Statute refers.

[495] This doctrine entails that domestic courts will not adjudicate upon the acts of foreign states, even beyond their own territory, which are done on the international plane. The act of state doctrine is mostly known in common law jurisdictions, yet partial analogues exist in the 'local procedural patois' of most jurisdictions: T Ruys, 'The Role of State Immunity and Act of State in the *NM Cherry Blossom* case and the Western Sahara Dispute' (2019) 68 ICLQ 80.

[496] See, eg, *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits) [2012] ICJ Rep 99, paras 55–57; *Belhaj and another v Straw and others; Rahmatullah (No 1) v Ministry of Defence and another* [2017] UKSC 3 [12] (Lord Mance); *Benkharbouche v Secretary of State* [2017] UKSC 62 [17] (Lord Sumption).

only to '*acta jure imperii*' (acts in the exercise of sovereign authority) as opposed to '*acta jure gestionis*', ie, commercial acts or other conduct that can equally stem from private persons.[497] In the present context, however, it is beyond question that the application and enforcement of the contested secondary sanctions—even if contrary to international law—involve an exercise of state authority. This creates a strong, virtually insurmountable, presumption that the US authorities benefit from immunity from jurisdiction in domestic proceedings before non-US courts relating to its secondary sanctions. The case law of the ICJ confirms that state immunity for *acta jure imperii* must be upheld, even if the contested state conduct entails 'grave' violations of international law, and even violations of peremptory norms of international law.[498]

A rare exception to this far-reaching immunity is the so-called 'territorial tort' exception. This exception finds expression in the European Convention on State Immunity[499] and the UN Convention on State Immunity,[500] and deals with tort liability for acts that have taken place within the territory of the forum state. However, leaving aside uncertainties pertaining to its precise scope,[501] the 'territorial tort' exception is of no use in connection with damage resulting from US secondary sanctions since, among other things, the required territorial nexus—according to which the facts occasioning damage to property must have occurred in the territory of the forum state[502]—is manifestly lacking.

In conclusion, under the current state of customary international law it seems impossible to overcome the procedural obstacle of immunity from jurisdiction with a view to holding the US liable for damage caused by secondary sanctions in European courts. In light of their respective scope, copying the (controversial) exceptions of the US Foreign Sovereign Immunities Act with respect to state-sponsored terrorism or unlawful expropriation at the European level does not seem conducive to confronting US secondary sanctions.[503] Furthermore, the creation of

[497] For a critical analysis of the distinction between the two, see A Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis* v. *Jus Imperii* Divide' in T Ruys and N Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

[498] *Jurisdictional Immunities*, para 91. In a similar vein, see *Jones and Others v United Kingdom* App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 198; *Belhaj* [14] (Lord Mance).

[499] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181 (ECSI).

[500] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/RES/59/38 (16 December 2004) (UNCSI).

[501] See further S El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts' in T Ruys and N Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

[502] Paraphrasing the language of ECSI, art 11.

[503] The so-called 'terrorism exception' holds that state immunity be set aside in respect of so-called 'state sponsors of terrorism' (designated as such by the US Department of State) when US nationals claim damages for personal injury or death caused by certain terrorist acts abroad: 28 USC § 1605(a)(1). For a detailed analysis, see DP Stewart, 'Immunity and Terrorism' in T Ruys and N Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019). The exception seems difficult, if not impossible, to reconcile with the ICJ's findings in *Jurisdictional*

another novel and tailor-made exception to immunity from jurisdiction in respect of secondary sanctions would probably run counter to international law, and threaten to undermine the delicate equilibrium upon which state immunity is premised. Last but not least, even if immunity from jurisdiction were to be cast aside, immunity from execution still prevents enforcement measures against state property other than property 'specifically in use or intended for use by the state for other than government non-commercial purposes'.[504]

D. Concluding observations

At the time of writing, the EU Blocking Statute has mainly proved to be a paper tiger that has had little deterrent effect.[505] Apart from one Austrian case in 2007, EU Member State authorities have not yet

Immunities (eg, para 88). The exception has been condemned by the Non-Aligned Movement ('Communiqué of the Coordinating Bureau of the Non-Aligned Movement in rejection of unilateral actions by the United States in contravention of international law, in particular the principle of State immunity' (6 May 2016) UN Doc S/2016/420). Canada remains the only country so far to have adopted a similar terrorism exception (State Immunity Act, RSC 1985, c S-18, s 6). Apart from the fact that the exception is extremely controversial and is seen by many as contrary to customary international law, it is inconceivable—given its specific scope—that it could somehow be helpful in confronting unlawful extraterritorial sanctions. Nor would a European version of the US exception to state immunity in respect of 'property taken in violation of international law' (28 USC § 1605(a)(3)) seem capable of facilitating direct challenges of US secondary sanctions in domestic courts. Even if secondary sanctions may entail a form of (indirect) expropriation (see Part III.C), one should not lose sight of the limited scope of the FSIA's 'expropriation exception'. First, the exception has generally been interpreted as applying only to the wrongful taking of 'tangible' property, as opposed to intangible property such as bank accounts (see X Yang, *State Immunity in International Law* (CUP 2012) 305–307; but see, for a judgment to the contrary, *Nemariam v Ethopia* 491 F 3d 470, 475 (DC Cir 2007)). Second, art 1605(a)(3) FSIA still requires a territorial nexus to the US. Thus, the property concerned should be present in the US or should be owned or operated by an agency or instrumentality of the foreign State that is active in the US. Third, the property must be used in connection with a *commercial* activity.

[504] UNCSI, art 19(c); *Jurisdictional Immunities*, para 116. See further J-M Thouvenin and V Grandaubert, 'The Material Scope of State Immunity from Execution' in T Ruys and N Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

[505] See also L Gussetti, 'Extraterritorial Sanctions and the EU: Challenges and Legal Counter-Instruments' in ECB, *Building Bridges: Central Banking Law in an Interconnected World* (ECB 2019), 185 (the author, a member of the Legal Service of the European Commission, argues that the Blocking Statute does not have deterrent effect). That is not to say the EU Blocking Statute has had no impact on the conduct of EU companies whatsoever. By way of illustration, when the US Department of State threatened to prohibit the CEO of Melia from entering the US unless the hotel group accepted certain conditions related to the activities of subsidiary companies in Cuba, the company responded that the conditions were 'not acceptable', and that 'compliance with them would also have been contrary to European regulations (known as the Blocking Statute) which considers the Helms Burton Act a violation of the most elementary principles of international law': 'Statement by Melia Hotels International'. The statement further indicates that the issue 'has been placed in the hands of the Spanish and community institutions and authorities' (ibid). A Spanish court had previously dismissed a claim by a US company accusing Melia of profiting off confiscated land in Cuba in light of Cuba's immunity from jurisdiction with respect to *acta jure imperii*: A Pastor, 'Spanish Court Decision following end of suspension of the US Helms-Burton Act: jurisdiction declined in claim concerning assets nationalized by Cuba' (*Herbert Smith Freehills Public International Law Notes*, 14 November 2019) <https://hsfnotes.com/publicinternationallaw/2019/11/14/spanish-court-decision-following-end-of-suspension-of-the-us-helms-burton-act-jurisdiction-declined-in-claim-concerning-assets-nationalized-by-cuba/#page=1>.

initiated any public enforcement proceedings. Application of the Blocking Statute is, in particular, hampered by issues of causality, particularly the difficulty of proving that EU persons unwound business in order to comply with US secondary sanctions rather than out of commercial considerations. Even if public enforcement were to come about, EU Member State sanctions may not have a meaningful impact on EU persons' willingness to comply with the Blocking Statute, as the US sanctions which corporations face in case of non-compliance with US law are more draconian. To remedy these problems, EU Member States could allocate more resources to their enforcement agencies and raise fines. Better coordination with EU institutions could also be beneficial.[506] Increased indirect enforcement by courts hearing contractual disputes appears to be the more likely avenue, however. As the *Exact* case in the Netherlands demonstrates, such courts, applying the Blocking Statute's compliance prohibition, may enjoin parties to honour their contractual arrangements, even if this may expose them to US secondary sanctions.

VII. Challenging US Secondary Sanctions through Non-Judicial Means: Other Options

It is doubtful whether the EU Blocking Statute can effectively counteract the adverse effects of US secondary sanctions. In reality, enacting a blocking statute may be like bringing a knife to a gunfight. As argued in the previous part, the Blocking Statute may punish rather than protect EU persons affected by secondary sanctions, and in any event, actual enforcement and use of the Blocking Statute leave much to be desired. Ultimately, the Statute has hardly dented the effectiveness of US secondary sanctions, as borne out by EU corporations' large-scale divestment from Iran after the reinstatement of US sanctions. If the Blocking Statute ultimately only gives limited protection against US sanctions, other non-judicial responses to US secondary sanctions may have to be explored. One viable course of action, discussed above (see Part IV.A), would be for EU Member States to voice their opposition within the IMF to secondary restrictions on international payments, or to push for a broader review of the IMF's approach to security restrictions. In this part, a number of other non-judicial responses are explored.

[506] It has also been suggested to focus enforcement on instances of *overcompliance* rather than compliance with US sanctions, overcompliance meaning abiding by US secondary sanctions legislation even if such legislation does not apply to the relevant transactions (eg, related to trade in humanitarian goods): Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 9. Limiting enforcement to instances of overcompliance rather than compliance may also prevent tensions arising with the US. At the same time, it is not entirely clear how the Blocking Statute can sanction overcompliance, as overcompliance is not an 'application' of US secondary sanctions legislation. Accordingly, instances of overcompliance may well be beyond the scope of the Blocking Statute and national enforcement of the Statute.

As most possible responses are of a political rather than legal nature,[507] it exceeds the scope of this legal contribution to explore all possible strategies in detail. Nevertheless, without aspiring to be exhaustive, four options will briefly be elaborated on. A first possible strategy involves swapping the dollar for the euro (or another currency) in international transactions. This 'de-dollarization' of the world economy may allow traders to evade being subjected to US jurisdiction simply on the basis of their use of the US financial system; an almost automatic consequence of denominating a contract in US dollars (Section A). A second strategy is to set up a ledger-based 'special purpose vehicle' to facilitate international business transactions without using the US financial system. At the time of writing, a version of such a vehicle was being developed to protect trade between the EU and Iran (Section B). A third option consists of establishing an EU sanctions body that mirrors OFAC, and which could take a united European stand against US secondary sanctions (Section C). Finally, the fourth and most aggressive option would be for the EU or states affected by US secondary sanctions to retaliate against the US. Retaliation involves taking unfriendly measures, whether retorsions or countermeasures, against the US and US persons doing business in the EU with a view to forcing the US to reconsider the reach of its sanctions legislation (Section D).

A. Boosting the position of the euro

One suggestion that is sometimes put forward as a possible way to counter the weaponization of the dollar and the US financial system for US foreign policy purposes is to boost the position of the euro in the global economy, specifically as an international reserve currency, as an international payment currency, and as an international investment currency. In recent years, there have been increasing calls from high-level officials within Europe for a stronger role for the euro.[508] At times, these calls have been expressly linked to the US's use of secondary sanctions in the financial domain and the resulting erosion of Europe's economic and monetary sovereignty.[509] The idea of gradually supplanting the dollar

[507] See also Bonnecarrère, 'Extraterritorialité des sanctions américaines: Quelles réponses de l'Union européenne?', 27: 'l'action de l'Union européenne et de ses États membres doit aussi et surtout être politique'.

[508] Consider, eg, the statements by several EU officials in the following European Commission Press Release: 'Commission Presents Ways to Further Strengthen the Euro's Global Role' (5 December 2018) <http://europa.eu/rapid/press-release_IP-18-6643_en.htm>, or see the speech by Benoît Coeuré, member of the Executive Board on 'The Euro's Global Role in a Changing World: A Monetary Policy Perspective' (Council on Foreign Relations, New York, 15 February 2019) <www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190215~15c89d887b.en.html>.

[509] European Commission, 'Communication from the Commission to the European Parliament, the European Council (Euro Summit), the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Towards a Stronger Role of the Euro' (Doc No COM/2018/796 final, 5 December 2018) 4–5, 12.

with the euro has also been promoted by renowned policy think-tanks.[510] Meanwhile, other countries (such as China) are similarly toying with the idea of elevating the role of their respective currencies, while still others are ostensibly exploring greater use of cryptocurrencies as a way to 'escape' the reach of the omnipresent US dollar.[511] Conversely, within the US, some officials have begun warning that excessive use of secondary sanctions threatens to undermine the position of the dollar in the long run.[512]

Greater use of the euro as opposed to the dollar would certainly go some way in reducing the exposure of European (and other) countries to US secondary sanctions. What is more, the euro is already the second most important currency in the global economy. Recent consultations by the European Commission confirm that it stands out as the only candidate that has all the necessary attributes of a global currency that market participants could use as an alternative to the US dollar.[513] Interestingly, the ECB's 18th 'Annual Review of the International Role of the Euro' notes how

> [t]entative evidence suggest that concerns about unilateral sanctions may have been another factor supporting diversification of the reserve portfolios of some central banks, such as the Central Bank of Russia. To some extent, these concerns may also have contributed to a 0.5 percentage point increase in the share of the euro in international deposits. [514]

At the same time, it is clear that the euro has certain weaknesses in comparison to the US dollar. The share of the dollar in foreign exchange

[510] See, eg, Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 78–80. See also Bonnecarrère, 'Extraterritorialité des sanctions américaines: Quelles réponses de l'Union européenne?', 25–26.

[511] See, eg, M Lester, 'Venezuela Converts Airport Taxes into Bitcoin to Evade US Sanctions' (*EU Sanctions*, 30 July 2019) <www.europeansanctions.com/2019/07/venezuela-converts-airport-taxes-into-bitcoin-to-evade-us-sanctions/>.

[512] See in particular: US Department of the Treasury, 'Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace' (30 March 2016) <www.treasury.gov/press-center/press-releases/pages/jl0398.aspx>: 'The risk that sanctions overreach will ultimately drive business activity from the U.S. financial system could become more acute if alternatives to the United States as a center of financial activity, and to the U.S. dollar as the world's preeminent reserve currency, assume a larger role in the global financial system. … If foreign jurisdictions and companies feel that we will deploy sanctions without sufficient justification or for inappropriate reasons—secondary sanctions in particular—we should not be surprised if they look for ways to avoid doing business in the United States or in U.S. dollars. And the more we condition use of the dollar and our financial system on adherence to U.S. foreign policy, the more the risk of migration to other currencies and other financial systems in the medium-term grows.'

[513] European Commission, 'Commission Staff Working Document – Strengthening the International Role of the Euro: Results of the Consultations' (Doc No SWD(2019)/600 final, 12 June 2019) 1.

[514] European Central Bank, '18th Annual Review of the International Role of the Euro' (13 June 2019) <www.ecb.europa.eu/pub/ire/html/ecb.ire201906~f0da2b823e.en.html#toc1>. Elsewhere, the report explains how '[a]necdotal evidence suggests that developments in international deposits in US dollars in the review period reflected concerns about unilateral sanctions, among other factors'.

reserves, in international debt, and in international loans is still a multiple of that held by the euro.[515] And in the energy sector, the position of the dollar remains as dominant as ever, a finding illustrated by the fact that EU Member States pay 80% of their energy import bills in dollars, even though just 2% of their energy comes from the US.[516] More specifically, in the oil industry (which is most affected by sanctions against Iran), market participants are reluctant to switch to another currency as oil benchmarks are denominated in US dollars and all oil derivative products depend on these benchmarks.[517]

There appears to be an emerging consensus among EU institutions that a further deepening of the European Monetary Union is necessary to strengthen the international role of the euro.[518] Whether the required political will exists on the part of Member States, however, is a different matter altogether. Even so, the international role of the euro is determined first and foremost by market forces.[519] In sum, as a report by the European Council on Foreign Relations rightly concludes, there are no 'quick fixes' for the euro, and 'even if the euro gains strength globally, it will not replace the dollar but rather coexist with it in a more multipolar monetary system for many years to come'.[520]

B. Facilitating international transactions by means of a special purpose vehicle

De-dollarization is a long-term project, and requires the confidence of traders in the stability of other currencies. A short-term alternative consists of the creation of a 'special purpose vehicle' (SPV) to facilitate financial transactions and maintain trade between third countries and US sanctions targets. On 31 January 2019, the UK, France, and Germany effectively revealed an 'Instrument in Support of Trade Exchanges' (INSTEX), an SPV which allows for the 'bartering' of goods between Iranian and European corporations without direct financial transactions

[515] ibid, chart 2 and table 1.

[516] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 79. See also F Guarascio and D Zhdannikov, 'EU Brings Industry Together to Tackle Dollar Dominance in Energy Trade' *Reuters* (13 February 2019) <www.reuters.com/article/us-eu-oil-usa/eu-brings-industry-together-to-tackle-dollar-dominance-in-energy-trade-idUSKCN1Q21WB>.

[517] European Commission, 'Commission Staff Working Document – Strengthening the International Role of the Euro: Results of the Consultations', 4.

[518] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 79; European Central Bank, '18th Annual Review of the International Role of the Euro', Foreword.

[519] European Central Bank, 'The International Role of the Euro: Interim Report' (June 2018) 2.

[520] See, eg, Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 79.

or the use of the US dollar.[521] The vehicle will clear the price to be paid by European importers to Iranian exporters, and the price to be paid by Iranian importers to European exporters.[522] Under INSTEX, European corporations will be paid out of funds based in the EU, whereas Iranian importers will be paid out of funds based in Iran, without US dollars or international bank transactions being involved. Other countries, such as China, have adopted comparable initiatives.[523] In due course, these parallel payment systems could be integrated.

It remains the case, however, that the US may consider an SPV like INSTEX to be an evasion construction, and could yet impose sanctions on the participating corporations with a stroke of the pen.[524] Also, European central banks which cooperate with an SPV could possibly be denied access to US capital markets on the grounds that they facilitate sanctionable activity with Iran.[525] The appointment of senior European diplomats to the INSTEX supervisory board may possibly give the US pause,[526] but ultimately, participation in an SPV only appears safe for smaller corporations which have no connections with the US and which are, accordingly, not exposed to US sanctions.

INSTEX would be used first (and perhaps only) for humanitarian purposes, as humanitarian goods are, in principle, not covered by US

[521] UK Foreign and Commonwealth Office, 'New Mechanism to Facilitate Trade with Iran: Joint Statement' (31 January 2019) <www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran>. See also P Wintour, 'Europe Sets Up Scheme to Get Round US sanctions on Iran' *The Guardian* (31 January 2019) <www.theguardian.com/world/2019/jan/31/europe-sets-up-scheme-to-get-round-us-sanctions-on-iran>. For the first announcement of the promise held by such a SPV, see EU External Action, 'Remarks by High Representative/Vice-President Federica Mogherini following a Ministerial Meeting of E3/EU + 2 and Iran' (24 September 2018) <https://eeas.europa.eu/headquarters/headquarters-homepage/51040/remarks-hrvp-mogherini-following-ministerial-meeting-e3eu-2-and-iran_en>.

[522] P Wintour, 'EU's Dependence on Dollar to Be Reduced under New Proposals' *The Guardian* (5 December 2018) <www.theguardian.com/world/2018/dec/05/european-union-dependence-on-dollar-to-be-reduced-under-new-proposals>.

[523] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 68.

[524] See the reaction of US National Security Adviser John Bolton, as cited in R Campos and J Irish, 'Bolton Says U.S. Will Be Aggressive, Unwavering on Iran Sanctions' *Reuters* (25 September 2018) <www.reuters.com/article/us-iran-nuclear-bolton-sanctions/bolton-says-u-s-will-be-aggressive-unwavering-on-iran-sanctions-idUSKCN1M52V7>; the reaction of the US Department of State to the announcement of INSTEX: S Erlanger, '3 European Nations Create Firm to Trade With Iran, but Will Anyone Use It?' *The New York Times* (31 January 2019) <www.nytimes.com/2019/01/31/world/europe/europe-trade-iran-nuclear-deal.html>; and a letter from the US Treasury to the president of INSTEX, cited in J Stearns and H Fouquet, 'U.S. Warns Europe That Its Iran Workaround Could Face Sanctions' *Bloomberg* (29 May 2019) <www.bloomberg.com/news/articles/2019-05-29/u-s-warns-europe-that-its-iran-workaround-could-face-sanctions>. Similar risks threaten parallel financial systems set up by China.

[525] E Geranmayeh and E Batmanghelidj, 'Bankless Task: Can Europe Stay Connected to Iran?' (*European Council on Foreign Relations*, 10 October 2018) <www.ecfr.eu/article/commentary_bankless_task_can_europe_stay_connected_to_iran>.

[526] At the same time, the appointment of diplomats instead of officials of finance ministries or central banks has been criticized as Iran may consider INSTEX to be 'a political move rather than an effort to create a viable trade mechanism': see M Tavakol, 'INSTEX: More About Politics Than Economics?' (*Atlantic Council*, 7 June 2019) <www.atlanticcouncil.org/blogs/iransource/instex-more-about-politics-than-economics>.

sanctions.[527] It could be particularly useful for European corporations active in the pharmaceutical and nutrition sectors, which have had the longest presence in Iran anyway.[528]

On 28 June 2019, the EU announced that INSTEX was finally operational and available to all EU Member States.[529] Cooperation with the corresponding Iranian entity, the 'Special Trade and Finance Instrument' (STFI), was difficult to establish, however, reportedly because the STFI failed to satisfy financial transparency requirements.[530] Loss of confidence in INSTEX may have contributed to Iran's decision to increase uranium enrichment in breach of the JCPOA, to put pressure on the EU to achieve 'full rights' to an economic relationship under the JCPOA.[531] In an effort to revive the mechanism and incentivize Iran to return to compliance with the JCPOA, six European countries joined INSTEX as shareholders in December 2019.[532] In February 2020, at a meeting of the Joint Commission of the JCPOA, the EU and Iran

[527] Countering America's Adversaries Through Sanctions Act, Pub L No 115-44 (2017) s 111(a)(3). It may thus not engender fierce US opposition: E Batmanghelidj and A Hellman, 'How Europe Could Blunt U.S. Iran Sanctions Without Washington Lifting A Finger' *Foreign Policy* (3 December 2018) <https://foreignpolicy.com/2018/12/03/how-europe-can-blunt-u-s-iran-sanctions-without-washington-raising-a-finger-humanitarian-spv/>. This does not mean that international trade in these goods is self-evident. On 3 October 2018, the ICJ decided that the US is required to 'remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation': *Alleged Violations of the 1955 Treaty of Amity* (Provisional Measures) para 98. In 2019, OFAC announced a new mechanism to 'ensure unprecedented transparency into humanitarian trade with Iran': see US Department of the Treasury, 'Treasury and State Announce New Humanitarian Mechanism to Increase Transparency of Permissible Trade Supporting the Iranian People' (25 October 2019) <https://home.treasury.gov/news/press-releases/sm804>.

[528] Batmanghelidj and Hellman, 'How Europe Could Blunt U.S. Iran Sanctions Without Washington Lifting A Finger'. The authors refer in particular to Nestle, Novo Nordisk, Sanofi, and Unilever. As US sanctions do not apply to humanitarian goods, the question may arise whether an SPV is necessary in the first place. In reality, however, few European banks may be willing to accept payments from Iranian importers, rendering it difficult to trade with Iran. On how INSTEX could work in practice, see E Geranmayeh and E Batmanghelidj, 'Trading with Iran via the Special Purpose Vehicle: How it Can Work' (*European Council on Foreign Relations*, 7 February 2019) <www.ecfr.eu/article/commentary_trading_with_iran_special_purpose_vehicle_how_it_can_work>.

[529] EU External Action, 'Chair's Statement Following the 28 June 2019 Meeting of the Joint Commission of the Joint Comprehensive Plan of Action' (28 June 2019) <https://eeas.europa.eu/headquarters/headquarters-homepage/64796/chairs-statement-following-28-june-2019-meeting-joint-commission-joint-comprehensive-plan_en>.

[530] ibid.

[531] The EU defended itself by attributing the slow progress in setting up INSTEX to technical and legal difficulties: see P Wintour, 'Iran Refuses to End Breach of Nuclear Deal Until It Gets "Full Rights"' *The Guardian* (10 July 2019) <www.theguardian.com/world/2019/jul/10/iran-enrichment-breach-to-go-on-until-nuclear-deal-rights-achieved>. It did not help that the UK, one of the promoters of INSTEX, seized an Iranian tanker suspected of carrying oil to Syria in breach of EU sanctions against Syria: D Sabbagh and P Wintour, 'Iran Fury as Royal Marines Seize Tanker Suspected of Carrying Oil to Syria' *The Guardian* (5 July 2019) <www.theguardian.com/world/2019/jul/04/royal-marines-gibraltar-tanker-oil-syria-eu-sanctions>.

[532] 'Six more countries join Trump-busting Iran barter group' *The Guardian* (1 December 2019) <www.theguardian.com/world/2019/dec/01/six-more-countries-join-trump-busting-iran-barter-

reaffirmed the importance of INSTEX.[533] Eventually, in March 2020, it was announced that INSTEX had successfully concluded its first transaction (a transaction for about EUR 500,000 worth of medical equipment in the midst of the COVID-19 pandemic).[534] The difficulties surrounding the creation of INSTEX and its exposure to US sanctions have led some to argue instead for the ECB to step in, and to act as a type of clearing house for euro transactions between EU and Iranian trading partners.[535] It is not clear, however, whether the ECB would be willing to take on such a role.

C. A European Office of Foreign Assets Control

A third option is to mirror OFAC at the EU level, at least to some extent. This might enable Europe to form a united and more effective front against US secondary sanctions. Currently, OFAC is described by some as a genuine 'war machine'.[536] In contrast, the coordination of the entire panoply of EU restrictive measures, including the EU Blocking Statute, rests in the hands of no more than a dozen officials of the European External Action Service and the European Commission. In turn, the enforcement of these measures is a matter for the national

group>. The six countries joining the initial three shareholders (France, Germany, and the UK) included Belgium, Denmark, Finland, the Netherlands, Norway, and Sweden.

[533] European External Action Service, 'JCPOA: Chair's Statement following the meeting of the Joint Commission' (26 February 2020) <https://eeas.europa.eu/delegations/vienna-international-organisations/75190/jcpoa-chairs-statement-following-meeting-joint-commission_en>. It was also announced that further EU Member States would soon join INSTEX.

[534] UK Foreign and Commonwealth Office, 'INSTEX successfully concludes first transaction' (31 March 2020) <www.gov.uk/government/news/instex-successfully-concludes-first-transaction>; M Peel, A England, and N Bozorgmehr, 'European trade channel with Iran facilitates first deal' *Financial Times* (31 March 2020) <www.ft.com/content/5a647865-85e1-4919-9a55-e852ac06f67e>. Interestingly, the Central Bank of Iran had requested the IMF to process loans via INSTEX, but the US opposed the loan, to the EU's dismay: see the press conference of the EU's High Representative for Foreign Affairs, who imparted the information: European Council and Council of the EU, 'Video Conference of Foreign Affairs Ministers' (22 April 2020) <https://newsroom.consilium.europa.eu/events/20200422-video-conference-of-foreign-affairs-ministers-22-april-2020/127568-5-press-conference-part-5-q-a-20200422>.

[535] See, in particular, L Gussetti, 'Extraterritorial sanctions and the EU', 186–89. The author (a member of the Legal Service of the European Commission) concludes that 'INSTEX is not a mechanism which provides a sufficient degree of certainty in the processing of the transactions with Iran'. Apart from the exposure to US sanctions, the author observes that INSTEX is based on the voluntary participation of Member States and is not an EU-wide system, thus '[impinging] on the EU competences and the functioning of its internal market, creating a potential institutional risk'. Instead, Gussetti suggests that the ECB could act as a type of clearing house, by recording 'the legitimate transactions and/or claims between EU and Iran trade partners using for example existing infrastructure (such as TARGET 2)'. Operators on both sides would 'need to make payments in euro, without exception, so as to create a real currency "Chinese Wall" or firewall insulating transactions from triggers based on dollar-usage in US sanctions' (ibid 187–88). According to the author, such an approach would be compatible with the objectives of the ECB and the Union, and would allegedly be further removed from the reach of US sanctions, eg because of the ECB's 'limited direct interests in the US'.

[536] J Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (PublicAffairs 2013).

sanctions authorities in EU Member States, many of whom lack the resources, and at times the know-how, to perform this task. The current fragmentation of EU sanctions enforcement not only reduces the effectiveness of the EU's own sanctions toolbox, but also makes it vulnerable to divide and rule tactics, and undermines its capacity to respond to the adverse effects of secondary sanctions.[537] This fragmentation at the EU level, and the manifest understaffing of the EU's sanctions department, are matters to be addressed. Ultimately, they require the creation of an entity similar to OFAC, which might facilitate a dialogue of equals in this domain between Europe and the US.

Such an EU sanctions entity could give diplomatic, legal, and financial support to EU persons subject to US secondary sanctions,[538] such as EU gateway banks which act as intermediaries between the EU and Iran.[539] The entity could, for instance, assist EU persons applying for exemptions with OFAC, or challenging secondary sanctions in the US. So far, EU persons have more or less been left to their own devices in their dealings with OFAC, which has limited their leverage. However, in the face of a powerful EU sanctions entity, OFAC may possibly be more willing to relent. If it does not relent, and imposes penalties on EU persons after all, the EU sanctions entity could consider partly compensating EU persons for their losses, an idea earlier suggested by French Economy Minister Bruno Le Maire.[540] Given the sometimes astronomical amounts of US settlement and fines, such a compensation scheme may have to be limited to those EU persons certified by the EU entity to have conducted themselves in accordance with due diligence guidelines established by the entity.[541]

In addition, an EU sanctions entity could be given the power to directly enforce EU sanctions legislation, including the Blocking Statute, instead of relying on EU Member States. A system of shared enforcement (at the national and European level) could possibly be devised, along the lines of the system of enforcement for EU competition law.[542] Central enforcement may level the playing field for sanctions compliance and prevent some Member States from failing to take vigorous enforcement action against their own corporations. However, this will

[537] See Mark Rutte, 'The EU: From the Power of Principles towards Principles and Power' (Churchill Lecture, Europa Institut, University of Zurich, 13 February 2019) <www.government.nl/documents/speeches/2019/02/13/churchill-lecture-by-prime-minister-mark-rutte-europa-institut-at-the-university-of-zurich>

[538] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 6.

[539] E Batmanghelidj and A Hellman, 'OFAC Off' *Foreign Policy* (15 June 2018) <https://foreignpolicy.com/2018/06/15/ofac-off/>.

[540] J Barigazzi, 'French Minister Suggests EU Compensate Firms Hit by US Sanctions' *Politico EU* (20 May 2018) <www.politico.eu/article/bruno-le-maire-iran-deal-eu-compensate-firms-hit-by-us-sanctions/>.

[541] Batmanghelidj and Hellman, 'OFAC Off'.

[542] See for the respective powers of the Commission and the national authorities: Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

require that Member States give up their own enforcement powers, at least in part, which might mean that they are no longer able to give their national champions favourable treatment. The problems dogging the establishment of a European Public Prosecutor's Office, with the competence to investigate, prosecute, and bring to judgment crimes against the EU budget, such as fraud, corruption, or serious cross-border VAT fraud,[543] demonstrate that transferring law-enforcement powers to the EU does not come easy.

D. Retaliatory measures

Another suggestion that is sometimes put forward is for the EU to take *retaliatory measures* in response to US secondary sanctions. The underlying idea is that 'offence is the best defence', and that Europe should therefore raise the costs for the US of enforcing secondary sanctions so as to make the US reconsider its current jurisdictional overreach. In the trade domain, the EU has both the competence (under the EU Treaties) and the leverage (as the world's largest economy) to respond to unlawful trade restrictions with retaliatory measures. Thus, in May 2018, the EU decided to raise duties on the import of a broad range of products from the US in reaction to the Trump administration's earlier tariff increase on imports of certain steel and aluminium products.[544] It did so having identified imports into the EU vulnerable to tariff increases so as to maximize pressure on the US. The EU measures were notified to the WTO under article 12(5) of the WTO Agreement on Safeguards.[545] The EU's position was that the US's tariff increase was unrelated to the GATT 'security exception' (as the US contended), but instead qualified as a 'safeguard measure'; that is, an import restriction seeking to protect a domestic industry facing a threat of serious injury due to foreign competition.[546] The Safeguards Agreement exceptionally permits such

[543] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1 (the EPPO). For a discussion, see W Geelhoed, LH Erkelens, and AWH Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2017). There are currently 22 participating Member States. The Commission has not yet set the starting date for the EPPO's operations, but the aim is for the EU prosecutor to assume his tasks by the end of 2020.

[544] Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures originating in the United States of America [2018] OJ L122/14.

[545] WTO, 'Immediate Notification under Articles 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concession and Other Obligations referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards: European Union' (Doc No G/L/12337, 18 May 2018).

[546] More specifically, under art 2(1) of the Agreement on Safeguards Annex 1B to Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 154, a member may apply a safeguard measures to a product 'only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products'. See further A Raina, 'What Is A Safeguard

measures under certain conditions (eg, notification). Specifically, when a safeguard measure adversely affects other Members exporting the product concerned, the latter must be granted adequate trade compensation to remedy these effects (article 8(1)). When consultation over such compensation is fruitless, article 8(2) permits affected exporting members to suspend the application of 'substantially equivalent concessions or other obligations under GATT 1994' vis-à-vis the WTO member applying the safeguard measure.[547] Such unilateral suspension of concessions or other obligations—which is what the EU claimed to do—constitutes a rare exception to the principle that states cannot adopt trade sanctions in the context of a WTO dispute until the (quasi-)judicial dispute settlement procedure has run its course. Thus, the Safeguards Agreement exceptionally allows proportionate trade restrictions without expecting WTO members to wait out the—sometimes lengthy—proceedings before the Dispute Settlement Body.[548] This exceptional route does not, however, seem to be available in the present context. Indeed, even though US secondary sanctions have undeniably adversely affected EU companies, it is less clear whether they have adversely affected EU exports to the US. What is more, the sanctions do not seek to protect US domestic industries but rather pursue US foreign policy objectives. Consequently, if the EU is serious about its attachment to the (international) rule of law[549] and is keen on preserving the integrity of the WTO framework, unilateral trade sanctions, especially in the form of tariff increases, are in principle off the table. Apart from the foregoing factors, the risk of an escalating trade war and the fact that the EU has a substantial trade surplus in its trade with the US[550] suggest that caution is required.

That is not to say that any retaliatory action is automatically excluded. Third states remain free to have recourse to so-called 'retorsions'.[551] Such action could, for instance, take the form of measures in the

Measure under WTO Law?' (2019) Leuven Centre for Global Governance Studies Working Paper 208 <https://ghum.kuleuven.be/ggs/publications/working_papers/2018/wp208-rainax.pdf>.

[547] Agreement on Safeguards, art 8(3) adds that '[the right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement'.

[548] This is all the more important inasmuch as the only remedy provided for under the WTO framework is the cessation of the wrongful and/or harmful conduct.

[549] cf art 2 of the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 which mentions the 'rule of law' as one of the founding values of the EU.

[550] See, eg, Office of the US Trade Representative, 'European Union' <https://ustr.gov/countries-regions/europe-middle-east/europe/european-union> (referring to an EU surplus of 169 billion US dollars for trade in goods in 2018 and a US surplus of 60 billion US dollars for trade in services).

[551] On the concept of 'retorsions' and the distinction with 'countermeasures', see note 414.

diplomatic arena (eg, *persona non grata* declarations with respect to certain diplomatic staff) or the halting of various forms of cooperation, eg in the military or trade domain, that rest on political agreements or courtesy rather than legally binding instruments. Also, as mentioned above (Part VI), the measures foreseen in the EU Blocking Statute may constitute examples of retorsions.

As a vast array of legal obligations govern US-EU relations, however, the room for adopting (additional) 'retorsions' remains limited. This invites the question of whether the EU or its Member States can have recourse to the residual regime concerning 'countermeasures' under general international law? To the extent that specific secondary sanctions give rise to a breach of the customary law on the exercise of jurisdiction, or of bilateral treaties,[552] the answer is presumably yes. It is recalled that in order to be permissible, countermeasures must be properly notified to the adverse party and should be targeted only at the state responsible for the initial wrongful act.[553] They should, moreover, be proportionate to the latter act, although this does not require exact equivalence.[554] Also, in accordance with article 50 ARSIWA, countermeasures may not affect certain obligations, including 'obligations for the protection of fundamental human rights'.[555]

It is beyond the scope of this contribution (and the authors' expertise) to suggest what specific retorsions or countermeasures might be taken to counter secondary sanctions. A few tentative observations can nonetheless be made. First, one could imagine retaliatory measures (whether retorsions or countermeasures) focusing primarily on those sectors affected by US secondary sanctions against Cuba or Iran, eg tourism as regards Cuba, or the aviation, automotive, or energy sectors as regards Iran. Measures might potentially take the form of denials of access, such as denial of licences, exclusion from procurement within Europe, etc. Targeted sanctions against individual natural or legal persons may also enter the picture. Interestingly, in mid-2019, China responded to the US black-listing of Huawei and its affiliates by announcing the implementation of an 'unreliable entities list' that would include foreign entities and individuals damaging the interests of Chinese companies, eg by imposing blockades or discriminatory measures.[556] A more modest, but potentially effective, step which Europe could undertake would be to impose targeted sanctions on companies bringing claims for damages against EU-established companies on the basis of Title III of the

[552] The WTO Agreements have their own *lex specialis* regime for trade sanctions.

[553] Commentary to ARSIWA, 135–36.

[554] ibid 134 (art 51).

[555] ibid 131–34. The Commentary suggests that this must be interpreted as referring to non-derogable human rights: ibid 132. *A contrario*, it would seem that countermeasures are not automatically excluded from restricting, for example, the right to property of natural or legal persons (a right which, in any case, is not absolute).

[556] M Lester, 'China to Implement an "Unreliable Entities List"' (*EU Sanctions*, 4 June 2019) <www.europeansanctions.com/2019/06/china-to-implement-an-unreliable-entities-list/>.

Helms-Burton Act.[557] Such an option could arguably be integrated in a revised EU Blocking Statute. It could be more effective to protect the legitimate interests of EU companies rather than threatening them with penalties for complying with US sanctions law, which has turned out to be relatively ineffective and counterproductive. These targeted sanctions could serve as a deterrent against US claims targeting EU companies, and could signal to US authorities that Europe is serious in its resistance to jurisdictional overreach in the sanctions domain.

Some have also focused on ways to counter US leverage over SWIFT, the world's leading provider of global financial messaging services. Indeed, even though SWIFT is a Brussels-based company established under Belgian law, its exposure to US sanctions[558] has led it to exclude most Iranian banks from its customer base,[559] notwithstanding the fact that this move sits uneasily with the compliance prohibition under the EU Blocking Statute. The instrumentalization of SWIFT—which the EU itself has also practiced in the past with regard to Iran[560]—has proved to be a powerful tool to isolate Iran from the global financial market. It has already led some disgruntled countries to promote alternative financial messaging services parallel to SWIFT.[561] Still, given its unique position and network, an organization such as SWIFT is not easily replicated, nor are financial institutions themselves keen on having a more fragmented (and perhaps less efficient) market for financial messaging services.[562] Some have argued that to counter US leverage over SWIFT, the EU Blocking Statute should be strengthened so as to expressly prohibit financial messaging providers from complying with a

[557] One could also entitle EU companies to sue such companies in private law proceedings. An amendment of the clawback provision of the Blocking Statute to this effect may be called for to ensure that EU Member States' courts have jurisdiction over such claims. This amendment could take its cue from s 6 of the UK's Protection of Trading Interests Act 1980 which, situated in its historic context, allowed UK corporations to sue, in UK courts, US companies which had earlier successfully enforced US antitrust law as private attorney-generals, and obtained punitive damages. Section 6 entitles 'qualifying defendants' to recover from the party in whose favour a judgment for multiple damages was given by 'a court of an overseas country'.

[558] See in particular s 220 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub L No 112-158 (2012) (which envisages sanctions for persons that provide specialized financial messaging services to the Central Bank or other designated Iranian banks). SWIFT's exposure to US sanctions primarily concerns the risk of being cut off from the US financial market and/or losing its US customers (financial institutions). Additional factors include the presence of US nationals on its board and among its staff, or the fact that it holds assets (specifically a data centre) within the US.

[559] 'EU says SWIFT decision on Iran banks regrettable' *Reuters* (7 November 2018) <www.reuters.com/article/us-usa-iran-swift-commission/eu-says-swift-decision-on-iran-banks-regrettable-idUSKCN1NC1I1> (SWIFT stated that the decision was 'taken in the interest of the stability and integrity of the wider global financial system'); M Peel, 'Swift to comply with US sanctions on Iran in blow to EU' *Financial Times* (5 November 2018) <www.ft.com/content/8f16f8aa-e104-11e8-8e70-5e22a430c1ad>.

[560] See Council Regulation (EU) 267/2012, art 23(4).

[561] See, eg, 'Russian Banks Join Chinese Alternative to SWIFT Payment System' *RT* (30 March 2019) <www.rt.com/business/455121-russian-banks-chinese-swift/>.

[562] Such a fragmented system would entail that banks need to hook up to multiple financial messaging providers, each using different standards: Interview with SWIFT (4 June 2019).

third country's secondary sanctions.[563] Another retaliatory approach would be for the EU to order SWIFT to suspend access to its network for selected US financial institutions until US authorities agree not to enforce secondary sanctions against SWIFT. Neither option, which both place SWIFT at the centre of a game of chicken between the US and the EU, is particularly attractive.[564] Yet a more aggressive EU stance vis-à-vis the instrumentalization of SWIFT for US foreign policy purposes could contribute to forging a new international pact (a *pax moneta* as it were), possibly at the IMF level, stating that SWIFT will not be restricted by any unilateral sanctions (as opposed to UN sanctions), even if justified on the basis of national security.[565]

VIII. Concluding Observations

The wide extraterritorial reach of US secondary sanctions legislation is a well-known phenomenon that has increasingly left its mark on international trade, foreign investment, and global finance. It has long been a thorn in the side of the EU and its Member States, as well as various non-EU countries. In previous decades, US sanctions against communist China (in the 1960s) and the Soviet Union (in the 1980s) already caused tension between the US and Europe. In 1982, for instance, the EC denounced the US's 'Soviet Pipeline Regulations' as running counter to the generally accepted bases of jurisdiction under international law.[566] Tension resurfaced with renewed vigour in the mid-1990s with the adoption of ever more far-reaching sanctions instruments, in particular the Helms-Burton Act and the Iran and Libya Sanctions Act. In the end, however, a political compromise was reached between the US and Europe, as the US agreed not to enforce secondary sanctions and to suspend some of its most controversial sanctions provisions.

The agreement signalled a return to normality and, in 2008, one of the present authors observed how '[t]he last decade has been remarkably quiet on the secondary boycott front'.[567] In hindsight, this period may rather have been the proverbial lull before the storm. The subsequent adoption of sweeping secondary sanctions, particularly targeting Iran, has indeed resulted in a deep rift between the US and the rest of the international community, including Europe. The situation remained under control as long as the EU had in place far-reaching import and export restrictions of its own targeting Iran and its petroleum industry, as

[563] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 76.

[564] Threats to this end might also encourage the US to set up its own alternative to SWIFT in the longer run.

[565] This is indeed the proposal of Geranmayeh and Rapouil: see Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 75.

[566] 'European Communities: Comments on the US Regulations Concerning Trade with the USSR', 891.

[567] C Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)', 627.

well as in the subsequent period (2015–18) when the US and the EU *both* agreed to suspend their respective sanctions against Iran in accordance with the JCPOA (the so-called 'Iran nuclear deal'). Yet the Trump administration's decision to unilaterally pull out of the nuclear deal and reactivate the full panoply of its sanctions arsenal has again put it at loggerheads with the EU; all the more since the Trump administration has consistently refused pleas to exclude European companies from the scope of the US sanctions regime.

The reality today is that European companies are increasingly caught in the cross-fire of US sanctions, as is illustrated by the many settlements with the notorious US OFAC, in which European banks have agreed to pay enormous amounts, as well as by the fact that many European companies have unwound transactions with, or investments in, Iran, including several billion-dollar deals. Even if the exact economic cost to European companies remains unknown, it is clear that the US has successfully weaponized access to its market and currency to pursue its foreign policy agenda. By forcing foreign companies to either trade with the US or with the state subject to primary US sanctions, the US has succeeded in imposing its foreign policy agenda on non-nationals at the expense of the economic sovereignty of third states.

The assertive use of secondary sanctions has also eroded the political sovereignty of third states, and of the EU. Back in 2015, the adoption of the JCPOA, in which the US and Europe agreed to sanctions relief in return for Iranian concessions in respect of its nuclear programme, was hailed as a major tour de force and a rare success for European diplomacy. Yet the US withdrawal from the (political) agreement and the reactivation of harsh secondary sanctions have fundamentally crippled Europe's leverage to use the promise of investment and trade with Iran as a 'carrot' to keep Iran's nuclear programme in check. As a result, at the time of writing, the future of the JCPOA hangs in the balance, in spite of European attempts to save it from oblivion.[568]

The resort to secondary sanctions will not disappear in the near future. The 2020 US presidential elections are unlikely to make a difference, as the use of secondary sanctions appears to enjoy widespread bipartisan support in the US Congress. Furthermore, while US secondary sanctions have hitherto been focused on smaller countries of limited importance in global trade and finance, the next target could well be a country with which Europe has much closer trade relations, such as China or Russia. This may potentially result in far greater economic damage for the EU. The signing into law of a US act seeking to

[568] Possibly because the JCPOA could not be salvaged without US cooperation, on 18 July 2019, Iran 'offered a deal with the US in which it would formally and permanently accept enhanced inspections of its nuclear programme, in return for the permanent lifting of US sanctions': see J Borger, 'Iran Makes "Substantial" Nuclear Offer In Return For US Lifting Sanctions' *The Guardian* (18 July 2019) <www.theguardian.com/world/2019/jul/18/iran-nuclear-deal-trump-mohammad-javad-zarif-sanctions>.

impose sanctions on persons involved in the construction of a new pipeline to transport Russian gas into Europe does not bode well for the future.[569] Meanwhile, other states such as China are becoming increasingly active in the sanctions domain as well, and may be tempted to employ similar forms of economic statecraft to achieve foreign policy goals in the future.[570]

Against this background, this article has sought to tentatively answer two pressing questions. First, are secondary sanctions compatible with international law? Second, how can third states, and in particular EU Member States, respond to secondary sanctions, whether through judicial or non-judicial means?

With regard to the first question, a complex picture emerges. We argued that sanctions taking the form of 'denials of access' normally fall within the sanctioning state's sovereignty and are thus incapable of breaching the customary international law rules on the exercise of state jurisdiction. By contrast, the application of prohibitive norms triggered by the involvement of non-US companies owned or controlled by US persons, the re-exportation of US items, or the mere use of US dollars, would seem hard to justify from a jurisdictional angle, given the tenuous nexus to the US. What is more, irrespective of the compatibility with established jurisdictional principles, specific secondary sanctions would appear to be at odds with conventional obligations under a range of multilateral and bilateral treaty instruments. Sanctions resulting in a restriction on international payments will not breach the IMF Articles of Agreement as long as the relevant measures are notified to the IMF and are not objected to. Under WTO law, secondary sanctions are unlikely to contravene the national treatment or MFN principles, but may entail breaches of specific WTO rules, including article XI(1) GATT, the revised GPA, or the GATS 'mode 4' commitments pertaining to the movement of persons. Specific secondary sanctions may equally contravene obligations under FCN treaties or BITs, although, in the latter context, this presupposes that there is a link with a covered investment. Even if virtually all of these bilateral treaties, as well as the WTO Agreements, contain a so-called 'security exception', recent case law nonetheless confirms that the invocation of the security exception is subject to judicial review. Moreover, even in situations where *primary* sanctions could hypothetically be justified on the basis of a security exception, it is doubtful whether *secondary* sanctions could also be so justified.

Given the doubtful legality of various secondary sanctions, this article subsequently examined what room exists for challenging them at the judicial level. Domestic proceedings before European courts do not offer a

[569] See above. Some European energy companies already appear to be considering suspending projects in the Russian Federation because of other US sanctions (unrelated to the Nord Stream 2 project): see, eg, M Kiselyova, 'Rosneft and Eni Discuss Freezing Barents Sea Projects – Ifax' *Reuters* (24 October 2018) <https://af.reuters.com/article/energyOilNews/idAFL8N1X40WT>.

[570] Geranmayeh and Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', 71.

meaningful route, given US immunity from jurisdiction in respect of *acta jure imperii*. Challenges before US courts may be a more promising alternative, albeit one that is relevant only for (the minority of) sanctions instruments that leave room for interpretation as to their geographical reach. Interestingly, the US Supreme Court has yet to pronounce on whether the mere clearing of dollars through a US correspondent bank provides a sufficient jurisdictional nexus in the sanctions context. At the international level, a plausible démarche would be for the EU to initiate proceedings at the WTO (just as it did in 1996), even if such a step may put some additional strain on the already frail Dispute Settlement Body. Alternatively, individual states or foreign investors could employ the dispute settlement clauses in applicable FCN treaties or BITs. An important limitation here is that proceedings would remain limited to possible breaches of the treaty concerned, while the applicant would additionally have to overcome the omnipresent security exception. To circumvent these limitations, European states might alternatively seek to trigger advisory proceedings before the ICJ—although it is possible that such effort could backfire—or they could explore the dispute settlement potential of the post-WWII Economic Cooperation Agreements. Reliance on compromissory clauses in bilateral treaties presupposes that individual states or foreign investors will take the initiative to confront the US sanctions regime. In turn, the advantage of commencing WTO proceedings or advisory proceedings at the ICJ level would be that this would constitute a more *collective* effort,[571] signalling broad disapproval amongst states of the use of far-reaching secondary sanctions. ICJ proceedings—possibly targeted against the Helms-Burton Act—would have the further benefit of ensuring full transparency, and therewith maximizing pressure on the US.

While the launching of judicial proceedings at the international level would be a welcome step towards much-needed clarity with respect to the legality of secondary sanctions, it is evident that the wheels of justice move slowly and that states do not always comply with adverse rulings. That leaves the question as to what possible 'non-judicial' means are at the EU's disposal to confront secondary sanctions. Until now, the EU has essentially placed its hopes in the reactivation of the 1996 EU Blocking Statute. While this tactic may have worked in the mid-1990s, the Statute has not produced any meaningful deterrent effect post-2018. The flaws of the Statute's central provision—the prohibition for EU companies to comply with secondary sanctions—are manifold. Apart from the obvious fact that the prohibition unfairly places EU companies between a rock and a hard place (forcing some to choose between breaching either US law or EU law), it leaves much to be desired in

[571] The collective nature is most evident in advisory proceedings before the ICJ at the initiative of the UNGA. WTO proceedings could in turn be initiated by the EU, with other WTO members either joining the consultations and the request to establish a panel, or instead acting as third-party interveners in the proceedings.

terms of legal clarity, comes with a nigh on impossible evidentiary burden, and is unevenly implemented in EU Member States (who have little interest in enforcing it). Still, in contractual disputes, some Member State courts have proved willing to give effect to the Blocking Statute, and have ordered parties to comply with contractual obligations, even if compliance might expose them to US sanctions.[572]

If the Blocking Statute has proved to be mostly a paper tiger—a mere symbol of the EU's disagreement with the wide reach of US sanctions—this begs the question of what other options remain for the EU. The EU's efforts to create an SPV to allow for the bartering of goods, thereby facilitating trade with Iran without getting caught in the net of US sanctions, have hitherto hardly been impressive. Setting up the INSTEX mechanism has proved cumbersome, and its scope remains modest, as it is limited to goods that are not covered by US sanctions in the first place. More importantly, INSTEX and its customers could be directly subjected to US sanctions with a single stroke of the pen. That leaves the spectre of EU retorsions or countermeasures to raise the cost to the US of imposing secondary sanctions. One possible course of action would be for the EU to impose financial sanctions on natural or legal persons benefitting from US secondary sanctions, in particular those seeking to obtain damages from EU companies on the basis of the contested Title III of the Helms-Burton Act. All in all, however, confronting sanctions with more sanctions is not a particularly alluring prospect for an organization supposedly committed to 'effective multilateralism' and the rule of law. The establishment of an EU-style OFAC has also been mooted as a possible counterweight to the US OFAC, but it is not obvious that EU Member States would transfer a part of their sanctions powers to the EU. In addition, EU Member States may wish to reconsider their position within the IMF, specifically with regard to the IMF's tacit approval procedure for payment restrictions based on security grounds.

Even if there is no easy, one-size-fits-all solution at hand, some steps are nonetheless conceivable. For one thing, reliance on INSTEX or similar bartering mechanisms may expand in the future[573] as states and economic operators adapt to US secondary sanctions[574] and look for alternative mechanisms to continue trade with sanctions targets.[575] More

[572] *PAM International NV v Exact Software Nederland BV*; Italian judgment reported in M Lester, 'Italian Judgments on the EU Blocking Regulation'.

[573] PE Harrell, 'Trump's Use of Sanctions Is Nothing Like Obama's' *Foreign Policy* (5 October 2019) ('[INSTEX and similar] efforts do have the potential to scale up over the long-term, however, if countries make large-scale investments in them').

[574] See T Biersteker and PAG van Bergeijk, 'How and When Do Sanctions Work? The Evidence' in I Dreyer and J Luengo-Cabrera (eds), *On Target? EU Sanctions as Security Policy Tools* (EU Institute for Security Studies 2015) 17, 21. On adaptation to economic sanctions, see also M Smeets, 'Can Economic Sanctions Be Effective?' (Staff Working Paper ERSD-2018-03, WTO Economic Research and Statistics Division, 15 March 2018).

[575] JJ Lew and R Nephew, 'The Use and Misuse of Economic Statecraft: How Washington is Abusing its Financial Might' *Foreign Affairs* (November/December 2018) 139, 148–49.

fundamentally, US aggression may encourage states to avoid economic contact with the US altogether, and the attendant exposure to US sanctions, thereby undermining the latter's effectiveness.[576] There is some evidence that such avoidance moves have already proved effective.[577] At some point, it is possible that the US may realize that its aggressive use of secondary sanctions may harm, rather than further, US interests, particularly if economic operators pivot away from the US financial system or third states retaliate.[578] Ultimately, perhaps what is needed most is an international dialogue on the role of, and limits to, unilateral sanctions, so as to prevent further escalation to the detriment of the international legal order.

[576] US Government Accountability Office, 'Economic Sanctions: Agencies Assess Impacts on Targets, and Studies Suggest Several Factors Contribute to Sanctions' Effectiveness' (Report GAO-20-145, October 2019) 24.

[577] Sultoon and Walker, 'Secondary Sanctions' Implications and the Transatlantic Relationship', 7.

[578] See also JJ Forrer, 'Secondary Economic Sanctions: Effective Policy or Risky Business?', 9; Sultoon and Walker, 'Secondary Sanctions' Implications and the Transatlantic Relationship', 11.