

Extraterritoriality: Issues of Overbreadth and the Chilling Effect in the Cases of Cuba and Iran

Joy Gordon*

The scope of economic sanctions and the aggressiveness of their enforcement have increased dramatically since the early 1990s. This is particularly true of sanctions imposed by the United States, and is most evident in the U.S. sanctions regimes that are extraterritorial.

One might think of extraterritoriality in U.S. sanctions regimes as having two generations. The first generation was the era of the Iran-Libya Sanctions Act (“ILSA”), the Torricelli Act, and the Helms-Burton Act, of the early and mid-1990s; the second consists of the sanctions regimes of the last decade or so. The differences between the two generations indicate a marked shift, not only in the explicit scope of extraterritorial sanctions laws, but also in the degree and nature of their overbreadth. This article will examine these issues, looking specifically at the cases of Cuba and Iran.

In the early 1990s, the scope of sanctions regimes imposed by the United States expanded considerably. Through its sanctions regimes, the United States began to assert rights of enforcement against foreign nationals in ways that created diplomatic conflicts and ran counter to international commercial law. These “extraterritorial” measures, found in the Iran-Libya Sanctions Act (“ILSA”), the Torricelli Act, and the Helms-Burton Act, were met with considerable criticism; however, in the last decade, the extraterritorial measures have been expanded further, both in their scope and in

*Ignacio Ellacuría, S.J. Chair in Social Ethics, Philosophy Department, Loyola University-Chicago, and Affiliated Scholar in Law, Loyola University School of Law

the aggressiveness of their enforcement. The result is a chilling effect that extends well beyond the actual terms of the sanctions regime. One might view this shift in terms of two distinct generations of the extraterritorial aspect of the U.S. sanctions regimes, and this shift in "generations" can be seen in the cases of Cuba and Iran.

I. THE "FIRST GENERATION" OF EXTRATERRITORIALITY

Although the United States and Cuba recently reestablished diplomatic relations, the economic embargo is mostly still in place. The most extreme measures are contained in federal legislation adopted in the 1990s, which can only be lifted or modified by Congress.

In 1992, Congress passed the Torricelli Act,¹ which made the U.S. embargo against Cuba extraterritorial in a variety of new ways. For example, the Torricelli Act provided that no ship could dock in the United States within 180 days of entering a Cuban port. This restriction made deliveries to Cuba commercially unfeasible for many European and Asian companies, as their vessels would normally deliver or take on shipments from the United States while they were in the Caribbean. The Torricelli Act also prohibited foreign subsidiaries of U.S. companies from trading with Cuba. While the embargo had been in place since the Trading with the Enemies Act in 1961, the United States had not sought to prohibit foreign subsidiaries of U.S. companies from trading with Cuba prior to the Torricelli Act.

The Helms-Burton Act,² enacted in 1996, permitted U.S. nationals to bring suit against foreign companies that were doing business in Cuba and that owned properties that had been abandoned or confiscated after the revolution. Additionally, the Helms-Burton Act prohibited third-party countries from selling goods in the United States that contained any components originating in

¹ Cuban Democracy Act, 22 U.S.C. 69 § 6001-10 (1992).

² Cuban Liberty and Democratic Solidarity (Libertad), Act 22 U.S.C. 691 § 6021-91 (1996).

Cuba. This significantly impacted Cuba's major exports, particularly sugar and nickel.

Shortly after the Torricelli Act was passed, Cuba introduced a resolution before the U.N. General Assembly, holding that the U.S. embargo violated international trade law. Because of the extraterritorial provisions of the Act, there was considerable support from other member states. The resolution passed with fifty-nine votes in favor, while only the United States and two other countries opposed. All other member states abstained. Each year since then, Cuba has introduced a new resolution objecting to the embargo on international law grounds. International support for Cuba's resolutions have grown steadily with more and more states shifting from abstention to affirmative support. In 2015, the vote was 191 to 2 with only the United States and Israel voting against the resolution.³ In addition to the votes in the General Assembly indicating opposition to the Act, diplomats from Africa, Latin America, and the Caribbean have also criticized the policy extensively.⁴

The extraterritorial provisions of these Acts were likewise met with hostility from the international community. Canada,⁵ Mexico,⁶ and the European Union (EU)⁷ passed retaliatory legislation, and the EU brought an action against the United States before the newly-minted World Trade Organization (WTO). In response, the United States agreed not to enforce the most problematic of the extraterritorial provisions.⁸ But even with U.S. agreement to suspend some aspects of the legislation, the extraterritorial measures of the U.S. embargo have had a significant impact on Cuba's overall economy, its infrastructure, and the welfare of the population as a whole.

³ G. A. Res. 70/5 (Oct. 27, 2015).

⁴ See, e.g., U.N. GAOR, 69th Sess., 30th plen. mtg. at 53–54, U.N. Doc. A/69/PV.30 (Oct. 28, 2014).

⁵ JOAQUÍN ROY, CUBA, THE UNITED STATES, AND THE HELMS-BURTON DOCTRINE: INTERNATIONAL REACTIONS 88 (2000).

⁶ *Id.* at 93.

⁷ *Id.* at 120.

⁸ Secretary of State Madeleine K. Albright, Statement on U.S.-EU Understanding on Expropriated Property (May 18, 1998).

The Torricelli and Helms-Burton laws were passed shortly after the collapse of the Soviet Union, as a result of which Cuba lost seventy-five to eighty percent of its “foreign exchange receipts.”⁹ The loss of trade with the Eastern Bloc, along with oil subsidies, triggered a severe economic crisis. During the worst of Cuba’s economic crisis, from 1990 to 1993, Cuba’s income per capita contracted by one third.¹⁰ The economic crisis continued for another decade despite incremental growth each year.

Not all of Cuba’s economic difficulties are attributable to the U.S. embargo. Cuba also suffers from a highly bureaucratized command economy, laws that restrict or burden private enterprises, and a lack of diversification.¹¹ However, the tightening of the embargo, and in particular the extraterritorial measures, made the crisis significantly more acute. For example, the shipping restrictions in the Torricelli Act have increased costs in several ways, such as Cuba sometimes having to pay for ships carrying imports from Europe or elsewhere to return empty because they cannot stop at U.S. ports to pick up goods. Shipping companies have partially responded by dedicating particular ships for Cuba deliveries; but in most cases, they tend to designate old ships in poor condition, which then leads to higher maritime insurance costs.

These measures have broadly impacted Cuba’s economy, infrastructure, and public services, contributing to Cuba’s “slow growth and low productivity.”¹² Official estimates are that the total cost of the embargo to Cuba has been about \$117 billion.¹³

There were also some losses of foreign investment in Cuba directly tied to the extraterritorial measures. For example, the Mexican company, Cemex, withdrew from a joint venture in Cuba for fear of litigation from the U.S.-based company, Lone Star Indus-

⁹ Archibald R. M. Ritter, *Cuba's Economy During the Special Period, 1990-2010*, 2 (2010).

¹⁰ *Id.*

¹¹ PAOLO SPADONI, *FAILED SANCTIONS: WHY THE U.S. EMBARGO AGAINST CUBA COULD NEVER WORK* 126 (University Press of Florida, 2010).

¹² Econ. Comm’n for Latin America and the Caribbean 2009-2010: *The Distributive Impact of Public Policies*, at 209, U.N. Doc. LC/G.2458-P, U.N. Sales No. E.10.II.G.3 (2010).

¹³ U.N. GAOR, *supra* note 4, at 28.

tries, which had owned the property prior to 1959 and was entitled to sue Cemex under the Helms-Burton law. Similarly, Redpath, a Canadian sugar refiner, withdrew from Cuba in response to the Helms-Burton legislation.¹⁴ Additionally, mergers and acquisitions in the 1990s significantly reduced Cuba's commercial space. If a foreign company that had been trading with Cuba were to be acquired by a U.S. national, it would no longer be permitted to do business with Cuba. For example, the Swedish company Pharmacia had sold medical equipment, chemicals, and medicines to Cuba since 1970. However, after it merged with the U.S. company, Upjohn, all further sales to Cuba were prohibited.¹⁵ Cuba also lost a major supplier of pacemakers when Siemens and an Australian company, Teletronics Pacing System, transferred production to the United States.¹⁶

While we generally understand extraterritoriality in sanctions to refer to national laws that interfere with the target nation's trade with third-party countries, it might be said that the U.S. sanctions on Cuba are also extraterritorial in that they interfere with Cuba's access to international financial institutions. The Helms-Burton Act contains measures to undermine Cuba's access to the International Monetary Fund, the World Bank, the International Bank for Reconstruction and Development, and the Inter-American Development Bank by requiring the U.S. representatives on their boards to oppose Cuba's admission to the organizations.¹⁷ As these organizations use weighted voting, it is unlikely that any of them would ever admit Cuba. If the United States were ever to be outvoted and any of these institutions were to approve a loan or other assistance to Cuba, the Helms-Burton law would require the United States to withhold an equal amount of certain types of payments owed to that institution.¹⁸

¹⁴ Spadoni, *supra* note 11, at 104.

¹⁵ Vilma Hidalgo & Milagros Martinez, *Is the U.S. Economic Embargo on Cuba Morally Defensible?*, 3 LOGOS 100, 109 (2000).

¹⁶ *Id.* at 109–10

¹⁷ Cuban Liberty and Democratic Solidarity (Libertad) Act § 104(a)(1), 22 U.S.C. §§ 6021–91 (1996).

¹⁸ *Id.* at § 104(b).

The U.S. measures that interfere in Cuba's access to international development agencies may also be extraterritorial. For example, in 2004, the World Health Organization was unable to buy laboratory reagents from the British company Oxoid to provide medical services in Cuba because Oxoid had been acquired by a U.S. company.¹⁹ In 2006, the United Nations Development Programme contracted with Oro Rojo, a Brazilian company, to buy canned meat for HIV-positive patients in Cuba. However, the Brazilian company that Oro Rojo contracted with to import the canned meat was acquired by a U.S. company, and Oro Rojo consequently cancelled its contract to provide goods for use in Cuba.²⁰

Thus, the sanctions imposed on Cuba in the 1990s were extraterritorial in several ways: they interfered with Cuba's trade with companies in third-party countries, with Cuba's access to international financial institutions, with direct investment by companies in third countries, and even compromised Cuba's access to international aid.

II. THE "SECOND GENERATION" OF EXTRATERRITORIALITY

The "first generation" of extraterritorial measures introduced in the 1990s were broad, but they were relatively precise in their stated scope and in their enforcement. However, the Obama Administration's reliance on "soft power" has led to a greater emphasis on economic sanctions as a tool of foreign policy. As a result, the "second generation" sanctions regimes of the last several years were much more extensive in scope; moreover, their parameters have further expanded through a secondary, if informal, chilling effect. That chilling effect is evident when banks and corporations decline to engage in legally permissible transactions simply because the regulations are unclear, as in the event of a misstep, the consequences could be catastrophic.

The Obama Administration has been much more aggressive than any prior administration in prosecuting violations and obtaining extremely large penalties. In the last few years, the Treasury

¹⁹ U.N. GAOR, 59th Sess. at 24, U.N. Doc. A/59/302 (Part II) (Oct. 5, 2004).

²⁰ U.N. GAOR, 61st Sess. at 77, U.N. Doc. A/61/132 (Aug. 8, 2006).

Department's Office of Foreign Assets Control ("OFAC") has imposed massive penalties for transactions with Cuba, Iran and other U.S.-sanctioned countries. It penalized the Dutch bank ING \$619 million,²¹ HSBC \$375 million,²² and Credit Suisse Bank half a billion dollars.²³ The German bank Commerzbank AG also agreed to a penalty of nearly \$260 million last March.²⁴ Furthermore, BNP Paribas paid state and federal agencies \$8.9 billion in penalties for sanctions violations.²⁵ Unsurprisingly, a number of major Canadian and European banks have stopped doing business with Cuba, including Barclays, Credit Suisse, Deutsche Bank, and HSBC.²⁶

Even where transactions are legally permitted, the magnitude of OFAC's penalties and the reputational damage from these penalties are significant enough that organizations such as banks, shipping companies, and manufacturers frequently refuse to engage in permitted transactions—not so much as a legal decision, but rather as a risk management decision.

Although these massive penalties are the most obvious cause of the chilling effect, OFAC's enforcement actions for violations that only occur once, inadvertent violations, or violations related to small transactions also contributes to the chilling effect. For instance, Geico was prosecuted in accordance with OFAC's sanctions regime for inadvertently accepting two car insurance pay-

²¹ Press Release, U. S. Dep't of the Treasury, U.S. Treasury Department Announces \$619 Million Settlement with ING Bank, N.V. (June 12, 2002), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx>.

²² Press Release, U. S. Dep't of the Treasury, Treasury Department Reaches Landmark Settlement with HSBC (Dec 11, 2012), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1799.aspx>.

²³ Press Release, U.S. Dep't of the Treasury, U.S. Treasury Department Announces Joint \$536 Million Settlement with Credit Suisse AG (Dec. 16, 2009), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg452.aspx>.

²⁴ OFFICE OF FOREIGN ASSETS CONTROL, FAC NO.: 713262, SETTLEMENT AGREEMENT (2015).

²⁵ Press Release, U.S. Dep't of the Treasury, Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for \$963 Million (June 30, 2014), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>.

²⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-80, ECONOMIC SANCTIONS: AGENCIES FACE COMPETING PRIORITIES IN ENFORCING THE U.S. EMBARGO ON CUBA 54 n.110 (2007).

ments from someone who was on a list of blacklisted individuals.²⁷ A nonprofit, the Association of Tennis Professionals, paid a penalty of nearly \$50,000 for making salary payments to an Iranian tennis umpire.²⁸ A homeowners association in Dallas was prosecuted for selling a piece of property belonging to someone who had once been involved in the Liberian regime of Charles Taylor; they conducted the sale in order to pay off \$9,000 of common charges.²⁹ Sandhill Scientific Inc. was prosecuted for selling \$6,700 of medical equipment to Iran,³⁰ as was Brasseler USA, for \$5,000 in medical sales to Iran.³¹ In August 2015, OFAC obtained an agreement from Production Products, Inc., a small, family-owned business with ten employees, to pay a penalty of \$78,000.³² This prosecution of unintentional, small-scale, and one-time violations surely impacts the risk management climate. Given the aggressiveness of the prosecutions and the magnitude of the penalties, it is not surprising that banks or other actors would decline to be involved in any transactions, even if they are small, occasional, or clearly legal.

The chilling effect is clear in the case of the Iran sanctions, and it can be seen at every level from large-scale banking transactions to individual consumer purchases. For example, there was an incident in which an American college student walked into an Apple store in Georgia to buy an iPad while chatting with her uncle in Farsi. The store clerk asked what language they were speaking, and then refused to sell the young woman an iPad when she replied that she was speaking Farsi, citing U.S. sanctions against Iran.³³ There

²⁷ OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR JUNE 3, 2010 (2010).

²⁸ OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR JUNE 12, 2013 (2013).

²⁹ OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR FEBRUARY 21, 2012 (2012).

³⁰ OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR APRIL 25, 2012 (2012).

³¹ OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR OCTOBER 19, 2010 (2012).

³² OFFICE OF FOREIGN ASSETS CONTROL, ENFORCEMENT INFORMATION FOR AUGUST 5, 2015 (2015)

³³ Megan Neal, *Apple Clerk Won't Sell iPad to Farsi-chatting Georgia Teen*, N.Y. DAILY NEWS, June 22, 2012, <http://www.nydailynews.com/news/national/apple-clerk-won-sell-ipad-farsi-chatting-georgia-teen-article-1.1100638>.

is no law that prohibits U.S. companies from selling to U.S. citizens of Iranian descent. In effect, what presumably happened was that the prohibition on selling technology to Iran resulted in a policy through which Apple personnel were able to decline any sales where they *speculated* the goods could *conceivably* end up in Iran.

It is due to the risk management climate, and not legal prohibitions, that Iranian-Americans, who are allowed under U.S. law to send money to elderly parents in Iran, have had difficulty finding banks in the United States or Europe to wire their funds. Charities that raised money for emergency relief in response to the earthquake in northern Iran were turned down by dozens of banks as they tried to send their funds to Iran, even though they had a license to do so from the U.S. Treasury Department. Iranians attempting to download standard consumer software, such as Adobe Acrobat or McAfee AntiVirus, are often unable to do so as the websites from which one would ordinarily download the software are blocked.³⁴ Pharmaceutical companies with contracts to sell medicines and medical equipment to Iran have had considerable difficulty finding a financial institution that can process Iran's payments.³⁵

In the case of Iran, the extraterritorial measures not only conflict with international law, but they also raise ethical concerns in that they compromise the well-being of the civilian population as a whole; the measures broadly impact public transportation, electricity, and even access to potable water and pharmaceuticals. For example, the measures targeting Iran's energy sector and access to shipping have been profoundly damaging to Iran's infrastructure and overall economy. Iran depends heavily on gasoline imports, which are the target of U.S., and more recently EU, sanctions. Major companies such as Royal Dutch Shell, Total SA, and Lukoil

³⁴ Press Release, Nat'l Iranian American Council, Beyond Apple: NIAC Calls on Tech Companies to Lift Internet Communications Blockade (June 28, 2012) (on file with author).

³⁵ INT'L CAMPAIGN FOR HUMAN RIGHTS IN IRAN, A GROWING CRISIS: THE IMPACT OF SANCTIONS AND REGIME POLITICS ON IRANIANS' ECONOMIC AND SOCIAL RIGHTS 14 (2013).

have consequently ended gasoline sales to Iran.³⁶ Companies that have not ended gasoline sales to Iran often face problems with the United States: in January 2012, the U.S. administration penalized foreign firms from China, Singapore, and the United Arab Emirates for selling gasoline to Iran.³⁷ For those that might still consider selling gasoline to Iran, problems still arose in finding ways to transport it given that the United States had penalized foreign shipping companies — including those from Monaco, Singapore, and Venezuela — for transporting gasoline to Iran.³⁸

Many of the largest shipping companies in the world have not been willing to risk the legal and financial problems caused by the sanctions, even for ordinary manufacturing or consumption goods with no relation to Iran's military. Hong Kong's NYK Line Ltd. stopped delivering goods to Iran in 2010. The following year, the Danish company, Maersk, one of the largest shipping companies in the world, stopped shipping to Iran's three largest ports after the United States sanctioned the company operating the ports.³⁹

As a result of the loss of trade and foreign investment, Iran's industrial manufacturing has been in free fall. Although this is partly because foreign companies such as Hyundai and Peugeot have withdrawn from Iran, it is also because Iranian factories cannot operate without imports of raw materials, machinery, and spare parts. Consequently, the production of automobiles in 2011 was forty percent less than it was in 2010.⁴⁰ The collapse of industry has in turn triggered a sharp increase in unemployment. In April 2012, there were reports that thirty percent of workers in manufacturing plants had been fired since March 21, 2012.⁴¹ This effect has been especially significant in the automobile industry, which employed some two million workers in either a direct or indirect capacity before plant closures and layoffs.⁴² One economist reported

³⁶ KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 57 (2015).

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ *Id.* at 45.

⁴⁰ *Id.* at 50.

⁴¹ INT'L CAMPAIGN FOR HUMAN RIGHTS IN IRAN, *supra* note 35, at 120.

⁴² *Id.* at 115.

that between September 2011 and 2012, an estimated forty percent of the men in Iran's major cities had lost their jobs. Unsurprisingly, as unemployment rose and prices increased almost daily, bankruptcies tripled between 2010 and 2013.⁴³

The Joint Plan of Action ("JPOA"), adopted in November 2013, provided that Iran would freeze certain components of its nuclear program, and in exchange, the economic sanctions against Iran would be reduced.⁴⁴ In principle, several of the provisions regarding sanctions relief have been implemented. In practice, however, there has been little movement. While the JPOA established a "financial channel" to facilitate legal trade, families and businesses reportedly continue to have difficulty finding financial institutions and shipping companies willing to facilitate transactions for them. Under the Joint Comprehensive Plan of Action ("JCPOA") agreed to in July, Iran will be able to start exporting oil again when the International Atomic Energy Agency verifies that Iran has complied with the nuclear-related provisions. This is expected to occur in 2016.

CONCLUSION

Although there have been minor changes in the U.S. embargo against Cuba, and significant changes are expected to take place this year regarding Iranian sanctions, it seems that the "chilling effect" and the broader risk management environment remain the same. The requirements for compliance have continued to expand to include Securities and Exchange Commission ("SEC") filings and other measures. At the same time, the U.S. enforcement of extraterritorial measures continues to be quite aggressive, including prosecutions for inadvertent violations, one-time acts, sales of humanitarian goods, or violations committed by small companies with little capacity to engage in the sophisticated screening necessary for compliance.

Meanwhile, the stakes continue to be quite high. Not only is OFAC continuing to pursue very costly penalties, but as we have

⁴³ *Id.* at 112–113.

⁴⁴ Joint Plan of Action, Nov. 24, 2013.

seen with BNP Paribas, there are now other players involved. In addition to the federal government's enforcement of extraterritorial measures, the New York state banking regulator limited BNP's ability to clear dollar payments for 2015. This in turn raised concerns that sanctions violations could result in revocation of bank licenses to do business. Given these consequences, it is unsurprising that large multinational companies are expanding the scope of their "hypervigilance." At least for the foreseeable future, it seems that the "chilling effect" is here to stay.