THE TRUMP EFFECT: ASSERTIVE FOREIGN POLICY THROUGH EXTRATERRITORIAL APPLICATION OF LAWS

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What will the world look like following trade wars and the collapse of multilateralism? The answer might include an increasing use of extraterritorial application of laws. One of the ways the Trump Administration has impacted global dispute resolution is through endorsing and espousing a return of unilateralism, which manifests itself through the extraterritoriality of laws. This Essay explains this approach and assesses resulting legal challenges. Part I briefly discusses the Trump Administration's increasing departure from transnationalism, coupled with a similar departure on a global scale. Part II investigates how this approach will lead to the expansion of extraterritorial laws. Finally, Part III presents a case study of the impact of economic sanctions on global dispute resolution.

I. DEPARTURE FROM TRANSNATIONALISM

There is no doubt that the Trump Administration seeks to move away from transnationalism. The idea behind transnationalism is that transnational rules—derived from multilateral agreements, established international norms, and decisions by international tribunals—have higher status in transnational transactions and disputes.[1] This is why transnationalists are quick to criticize Trump's "America First" doctrine in which he "reject[s] the ideology of globalism" and "embrace[s] the doctrine of patriotism."[2] Professor

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1. *See generally* PHILIPP C. JESSUP, TRANSNATIONAL LAW (1956) (discussing legal situations in which national or transnational law might be applied); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (defining transnational law and explaining how states incorporate transnational law principles into their rules for the establishment of transnational order).

2. *US President Trump Rejects Globalism in Speech to UN General Assembly's Annual Debate*, UN NEWS (Sept. 25, 2018), https://news.un.org/en/story/2018/09/1020472 [https://perma.cc/P85S-37QV].

Harold Koh, former U.S. State Department Legal Advisor and a proponent of the transnational legal process, argues that "[t]he emerging Trump philosophy seems to be a general rejection of the Obama approach: not 'engage–translate–leverage,' but rather, 'disengage–blackhole–hard power' . . . . Under this worldview, the United States should act based on its perceived national interests, not international rules."[3]

This increasing departure from transnationalism is not unique to the United States—it is also reflected in decisions of the Court of Justice of the European Union. In *Slovak Republic v. Achmea B.V.*, the Court ruled that bilateral investment treaties have "an adverse effect on the autonomy of E.U. law."[4] Although this 2018 decision specifically concerns bilateral investment treaties, it reflects the increasing erosion of the transnationalist approach by casting doubt on the self-contained enforcement system of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The significance of the *Achmea* decision cannot be minimized. The ICSID Convention, established in 1966, marked one of the most important treaties for capital flow by binding contracting states to recognize and enforce awards as binding and "not subject to any appeal."[5] Predictably, proponents of transnationalism have been very critical of the *Achmea* decision.[6] For example, Emmanuel Gaillard, a prominent practitioner of international arbitration, has emphasized that "harmony is best served by the application of transnational rules, which are developing on the basis of comparative approach and generally lead to predictable outcomes."[7]

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3. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 420 (2017).

4. Case C-284/16, Slovak Republic v. Achmea B.V. (Mar. 6, 2008), http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=E7EBD81FE3DAF3492F07CDF432503021?docid=199968&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=8769135 [https://perma.cc/9CU2-GJAA].

5. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 53(1), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 549 U.N.T.S. 159 (entered into force Oct. 14, 1966).

6. *See, e.g.*, Deyan Dragiev, *2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration*, KLUWER ARB. BLOG (Jan. 16, 2019), http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/ [https://perma.cc/8CBL-DC94].

7. Emmanuel Gaillard, *Chaos Theory: Is Harmony in International Arbitration Overrated?*, GLOBAL ARB. REV., October 2018, at 10, 13 https://www.shearman.com/-/media/Files/Perspectives/2018/07/GaillardsChaosTheory.pdf?la=en&hash=35DB6448A2D524822AFECA54409EE985C9199437 [https://perma.cc/6EN9-JE3R].

The backlash against transnationalism, which is endorsed and espoused by the Trump Administration, will require states to increasingly act unilaterally. With the increase in unilateralism, one of the ways short of military conflicts that states engage in foreign relations is through extraterritorial laws. Therefore, it is essential to comprehend the difficulties presented by the extraterritorial application of laws to fully understand the consequences of the backlash against transnationalism.

II. The Return of Extraterritoriality: A Case of Economic Sanctions

What does the current trend mean for the future of globalization and international law? The Trumpian worldview holds that the United States should not subsidize international regimes such as international trade and investment laws. In other words, the United States should not be the "underwriter for global regimes."[8] H.R. McMaster, former White House National Security Advisor, and Gary Cohn, Trump's senior economic advisor, famously stated that "the world is not a 'global community.'"[9] The United States should instead use its economic power to act unilaterally to "obtain substantive concessions from countries," much like during the early 1990s.[10] The imposition of extraterritorial sanctions is the most palpable example. Pursuant to what are called "secondary sanctions," the United States may impose sanctions on foreign individuals and entities that have engaged in significant transactions with certain countries.[11]

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8. Doug Stokes, *Trump, American Hegemony and the Future of the Liberal International Order*, 91 Int'l Aff. 133, 135 (2018). *See also* Barry Posen, Restraint: A New Foundation for US Grand Strategy xi (2015).

9. Philip Ewing, *Trump National Security Adviser H.R. McMaster To Resign, Be Replaced By John Bolton*, NPR (Mar. 22, 2018, 6:34 PM), https://www.npr.org/2018/03/22/593283104/trump-national-security-adviser-h-r-mcmaster-to-resign-be-replaced-by-john-bolton [https://perma.cc/S7H3-RE4G].

10. Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 Yale J. Int'l L. Online 1, 10–11 (2019), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2018/12/Shaffer_YJIL-Symposium_A-Tragedy-in-the-Making_12.08.18-1zx9zvv.pdf [https://perma.cc/YV35-5YZU].

11. *See* Office of Foreign Assets Control, Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day ¶ A.2 (2016), https://www.treasury.gov/resource-center/sanctions/programs/documents/jcpoa_faqs.pdf [https://perma.cc/QW9Y-5VZK] [hereinafter JCPOA FAQs] ("Secondary sanctions generally are directed toward non-U.S. persons."). *See also* Gibson, Dunn & Crutcher LLP, The "New" Iran E.O. and the "New" EU Blocking Sanctions—Navigating the Divide for International Business 4 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/08/new-iran-e-o-and-new-eu-blocking-sanctions-navigating-the-divide-for-international-business.pdf

Embargos and economic sanctions are not new and have been around for much history. The United Nations Charter has recognized "complete or partial interruption of economic relations" as a way of "restor[ing] international peace and security."[12] The extraterritorial application of a nation's sanctions regime, however, is new. The so-called "secondary sanctions" approach of the United States is the most important sanctions regime of this sort.[13] The idea is simple: those who do not follow the U.S. mandate for sanctions will be cut from the U.S. financial system, the lynchpin of global commerce.[14] This proposal gained traction during the Obama Administration, which led to an unprecedented web of sanctions against Iran.[15] The 2015 agreement between Iran and the P5+1[16] ended the secondary sanctions regime along with the U.N. sanctions.[17] This suspension of sanctions did not last long as the Trump Administration snapped back the sanctions following its unilateral withdrawal from the agreement.[18] The latest iteration involves only U.S. sanctions, without the parallel sanctions regime by the U.N. and the E.U.[19] To combat the unilateral re-imposition of sanctions, the E.U. amended its Blocking Statute to curtail the

[https://perma.cc/YRW2-2C9H] ("[t]he New Iran [Executive Order] also authorizes the imposition of several types of secondary sanctions against foreign persons who engage in" certain transactions with Iran).

12. U.N. Charter arts. 39, 41.

13. *See* Jeffery Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. Pa. J. Int'l L. 905, 906, 926, 935 (2008).

14. *See* Christopher Smart, *The Future of the Dollar—and Its Role in Financial Diplomacy*, Nat'l Int. (Dec. 16, 2018), https://nationalinterest.org/feature/future-dollar—and-its-role-financial-diplomacy-38812 [https://perma.cc/PG5E-KG7N].

15. Hossein Mousavian, *How to Engage Iran: What Went Wrong Last Time—And How to Fix It*, Foreign Aff. (Feb. 9, 2012), https://www.foreignaffairs.com/articles/iran/2012-02-09/how-engage-iran [https://perma.cc/M2YJ-QJHN].

16. The term P5+1 refers to the five permanent members of the U.N. Security Council (China, France, Russia, the U.K., and the U.S.), plus Germany.

17. *Joint Comprehensive Plan of Action*, U.S. Dept. of State, https://2009-2017.state.gov/e/eb/tfs/spi/iran/jcpoa/index.htm [https://perma.cc/L3LV-DQ7N] (last visited June 23, 2019). *See also* JCPOA FAQs, *supra* note 11, ¶ A.2.

18. *President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal*, White House Briefings & Statements (May 8, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/ [https://perma.cc/R4PT-YBES].

19. *See* Council of the European Union Press Release 12/16, Iran: Council Lifts All Nuclear-Related Economic and Financial EU Sanctions (Jan. 16, 2016).

extraterritorial effect of the U.S. sanctions,[20] and set up a Special Purpose Vehicle to facilitate transactions with Iran.[21]

III. Case Study: Implications of Extraterritoriality of Laws Employing Sanctions

The U.S. economic sanctions and E.U. Blocking Statute may impact global dispute resolution in at least five ways:

1. The Impact of Sanctions Law on Applicable Law

Sanctions can be part of the law chosen by parties to a contract. In this case, there should not be a dispute about their applicability. Sanctions law, however, can also enter into the mix of laws through other relevant laws, including the seat of arbitration. For example, if a company engages in dollar transactions with an Iranian entity and the dispute comes to an arbitral tribunal in a European city, there will be a conflict between U.S. extraterritorial sanctions and the E.U. Blocking Statute. More complexity arises from the considerable discretion given to each European member to define the penalty for violating the Blocking Statute.[22]

2. Sanctions as Contractual Defense

In the battle of regulations and laws, the question is whether parties can invoke sanctions laws as an affirmative defense for their non-performance of a contract.[23] In the past, some courts have taken a fairly strict approach, holding on a number of occasions

20. *See* Commission Delegated Regulation 2018/110 of 6 June 2018 Amending the Annex to 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 O.J. (L199I) 1 (EC) [hereinafter *E.U. Blocking Statute*]. *See also* Council Regulation 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 O.J. (L309) 1 (EC).

21. *See* Chase Winter, *What is the EU-Iran Payment Vehicle INSTEX?*, Deutsche Welle (Jan. 31, 2019), https://www.dw.com/en/what-is-the-eu-iran-payment-vehicle-instex/a-47306401 [https://perma.cc/4VQN-T25B].

22. *See* European Commission Memorandum MEMO/18/4786, Questions and Answers: Entry into Force of the Updated Blocking Statute (Aug. 6, 2018), http://europa.eu/rapid/press-release_MEMO-18-4786_en.htm [https://perma.cc/KMD7-BRUA] ("Implementation of the Blocking Statute, including deciding on effective, proportionate and dissuasive penalties for possible breaches is the competence of Member States. It is also for Member States to enforce those penalties.").

23. *See, e.g.*, MGM Prods. Grp. v. Aeroflot Russian Airlines, 573 F. Supp. 2d 772, 776 (S.D.N.Y. 2003) (holding public policy defense did not apply to bar enforcement of an arbitral award against the airline in an arbitration held in Sweden), aff'd, 91 F. App'x 716 (2d Cir. 2004); DVB Bank SE v. Shere Shipping Co. Ltd. [2013] EWHC (Comm) 2321, [16], [22] (Eng.).

that the imposition of sanctions will not frustrate a contract where a party shows that a license to operate could be sought from the relevant authorities and was expected to be forthcoming.[24] On the other hand, the E.U. Guidance on the E.U. Blocking Statute indicates that E.U. operators are *prohibited* from even requesting a license from the United States to maintain compliance with U.S. sanctions.[25] Requesting such permission without first gaining authorization is considered tantamount to complying with U.S. sanctions.

3. Sanctions on Arbitrators and Counsels

Under the U.S. Iranian Transactions and Sanctions Regulation, receipt of payment in connection with "[i]nitiation and conduct of legal proceedings, in the United States or abroad, including administrative, judicial, and arbitral proceedings and proceedings before international tribunals" is allowed so long as "the proceeding is contemplated under an international agreement."[26] This applies to arbitrators and counsels who have a nexus to the United States, even though they are located in Europe—a large U.S. firm based in Europe, for example. These regulations are specifically listed under the E.U. Blocking Statute as extraterritorial regulations with which E.U. members should not comply.[27] Therefore, arbitrators and counsels involved in a case where a party is a sanctioned entity must navigate the conflicting regimes of Washington and Brussels.

4. Enforcement of Arbitral Awards

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), arbitral awards are enforceable in member states with a few exceptional grounds available for refusal.[28] One of these grounds for refusal is the public policy exception whereby states can deny enforcement if "the

24. *See, e.g.*, Melli Bank v. Holbud [2013] EWHC (Comm) 1506 (Eng.); DVB Bank SE [48]–[49]; Dalmia Dairy Indus. v. Nat'l Bank of Pakistan [1978] 2 Lloyd's Rep. 223 (QB) at 253, 263, 295 (Eng.).

25. Commission Notice, Guidance Note—Questions and Answers: Adoption of Update of the Blocking Statute, 2018 O.J. (C 277 I) 3, 10 [hereinafter Guidance Note].

26. 31 C.F.R. § 560.525(a)(5) (2018).

27. *E.U. Blocking Statute*, *supra* note 20, at 3.

28. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2), 330 U.N.T.S. 38 (entered into force June 7, 1959) [hereinafter New York Convention]. For more information about the public policy grounds for limiting enforcement of arbitral awards, *see* Farshad Ghodoosi, International Dispute Resolution and the Public Policy Exception (2017).

recognition or enforcement of the award would be contrary to the public policy of that country."[29] The E.U. Blocking Statute has an important carve-out for enforcement of arbitral awards: "no decision, whether administrative, judicial, arbitral or of any other nature; taken by a third country authority and based on the provisions listed in the Annex to the Blocking Statute or on acts which develop or implement those provisions, will be recognized in the E.U."[30] This means that if an arbitral award is in part based on U.S. sanctions, it will be denied recognition in Europe, and if recognition is denied in Europe and the arbitral seat was in Europe, the award will not be enforced in the U.S. either. The refusal of enforcement in the E.U. can have an impact on the enforcement of awards in the United States as some U.S. courts have held that, absent "extraordinary circumstances," awards that were set aside by the courts of the country in which they were made should not be enforced in the United States.[31]

5. Sanctions as Private Right of Action

In the United States, secondary sanctions do not allow for a private right of action. Through a series of decisions, the U.S. Supreme Court has clarified the presumption against extraterritoriality.[32] American courts are therefore of very limited availability for those affected by the extraterritorial effects of U.S. laws.[33] On the other hand, the Blocking Statute allows for E.U. operators to "recover any damages" arising out of the application of extraterritorial sanctions.[34] The private right of action extends to both "legal persons" and "natural persons."[35] The private right of action

29. New York Convention, *supra* note 28, at 42.

30. Guidance Note, *supra* note 25, at 5.

31. *See, e.g.*, TermoRio S.A. E.S.P. v. Electranta S.P., 487 F. 3d 928, 938 (D.C. Cir. 2007). *See also* Belmont Partners, LLC v. Mina Mar Group, Inc., 741 F. Supp. 2d 743, 753 (W.D. Va. 2010) (holding that claim preclusion prevented court from "deciding whether to modify or vacate" an award rendered in Virginia since a Canadian court had confirmed the award).

32. *See* Morrison v. Nat'l Australia Bank, 561 U.S. 247, 255 (2010); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (discussing the "two-step framework" established in Morrison and Kiobel).

33. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013); *Extraterritoriality* — RJR Nabisco, Inc. v. European Community, 130 HARV. L. REV. 487, 496 (2016) ("U.S. law may not rule the world, but for future litigants that turn to American courts for any number of worthy reasons, the Court has made it all the likelier that lawlessness will rule instead.").

34. Council Regulation 2271/96, *supra* note 19, art. 6.

35. *Id.* at art. 11.

arising out of the Blocking Statute presents unprecedented legal questions. Does the Blocking Statute's private cause of action supersede "sanctions clauses" in contracts should a firm decide to pull out of Iran, or should a financial firm decide to pull the plug of its services related to an Iranian business? Similarly, can a firm hedge against the Blocking Statute by including a clause in a contract stating that it can stop doing business with Iran should it decide to comply with U.S. sanctions? How are the damages assessed given that the Guidance Note states that "[t]he scope of damages" is "very broad" and extend to natural or legal persons and "any person acting on its behalf or intermediary"?[36]

IV. Conclusion

Given the interconnectedness of the world we live in, the return to unilateral application of laws, absent strong multilateral legal frameworks, presents unprecedented challenges. Unilateral imposition of economic sanctions is a case in point, presenting complex legal challenges for both courts and international tribunals. In a world where the "ideology of globalism" is rejected, the most likely outcome is the return to unilateralism where states impose their long-arm extraterritorial laws. This trend, exacerbated by the Trump Administration, will undoubtedly alter global dispute resolution as we know it today.

36. Guidance Note, *supra* note 25, at 8.