The Foreign Policy Centre

FPC Briefing: Time to reappraise the sanctions/diplomacy imbalance?
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In April 2013 the European Union lifted all remaining sanctions against Burma with the exception of the arms embargo.[1] At the same time it made some derogations to the sanctions against Syria to reflect some member states' (including the UK's) feeling that the existing regime put constraints on their ability to help rebel fighters.

Both moves had their critics. They almost coincided with footage of horrific sectarian violence from Burma, and new concerns about the use of chemical weapons in Syria. And yet the imposition of economic embargoes is also typically contentious: do they achieve their intended objectives that they are intended to? Do they impose undue hardship on innocents? Are they, indeed, smart foreign policy tools, or clumsy bellwethers of a state's, or several states' current worldview?

The use of economic embargoes is by no means new. But since the invasion of Iraq in 2003 they've become ever more readily seized upon as the response of first resort to foreign policy crises: the proliferation threats in North Korea and Iran; the Arab Spring uprisings; Islamist rebellion in Mali. But there are real and as yet unresolved problems with sanctions: especially where what they reflect is less a carefully calculated and calibrated attempt to achieve a foreign policy breakthrough, than it is a statement of blunt political sentiment.

In 2008 (the year of his 90th birthday), President Nelson Mandela finally ceased to be a terrorist in the eyes of US officialdom: or at least, that was when he was removed from the US Treasury's Terrorist list. Of course, the listing had long ceased to be a reflection of what the United States really thought about Mandela. Successive presidents since his release from Robben Island had lauded, feted – trembled in the revered presence of – a man who unanimously inspires hope, has no public enemies, and amongst his former foes is revered for his magnanimity. The listing was only the product of bureaucratic lag and stubbornness[i] - an anachronism, not an expression of lingering doubt.

And yet that's the trouble with these designations: their intention and effect are entirely unambiguous and wholly definitive. Once defined as a terrorist, the designee has imposed up him, her, or it all the requisite attributes of one deserving of the designation (whether that be evil intent, venality, cowardice or fanaticism). The designation is absolute, the designee beyond redemption.
It is of course, right that bad people who perpetrate, aid or abet acts of violence or repression should be starved the oxygen of funds, and that the rest of the world not do business with them.
And yet the listing system (UNSCR lists, US OFAC and BIS lists, and EU lists) present some not insurmountable ethical and political challenges – as the Nelson Mandela example illustrates.
The first issue is one of fairness: because a Designation is as good as worthless unless implemented with immediate effect, the subject of the listing is given no advance warning or opportunity to challenge the listing before it happens (for obvious reasons).

But the information on which the listing is based could come from any number of sources; e.g. while it could originate from the intelligence files of a western government, so could it also have been sourced from the files of a non-democratic country enjoying ally or strategic partner status with, for example, the EU or the US: in other words, there is little to prevent political opponents of non-

[1] EurLex, Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP, April 2013 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:111:0075:01:EN:HTML

democratic regimes being sanctioned by those countries that consider themselves champions of human rights. i.e. as the noted British lawyer Monty Raphael has noted:

"Sanctions are an entirely asymmetric politico-legal weapon: the targeted individual has no right of access to the information that is laid before the decision-making body: there is no requirement within the imposition process that this information has to be subjected to scrutiny in a court, by a judicial authority, or rebuttal from that individual."[2]

Of course, posterity will not lump all sanctions regimes together. The Apartheid system was so unconscionable that maintaining full trade relations with the country would have been callous, regardless of the economic effects of some of its poorest inhabitants. United Nations sanctions against Iraq have been estimated as having caused between 300,000 and 500,000 child deaths – countless long term diseases, and culminated in nothing more positive than the country's invasion and its ugly aftermath (although of course, it is arguable that it wasn't the sanctions themselves that lead to the deaths, so much as the regime's response to them). Continuing US Cuba sanctions (with which European and Canadian businesses are prohibited from complying) are largely seen by the rest of the world as mildly bonkers. The sanctions against Pyongyang are inevitable, given the DPRK's extreme bellicosity.

Policy makers no longer refer to economic embargoes (with all their Cold War undertones), but to 'smart sanctions' – imposed not against countries per se, but individuals within those countries. Nonetheless, the collective impact can be pretty much the same.

Currently, the most significant sanctions are those imposed upon Iran. In addition to the relevant UNSCR resolutions, the United States, European Union, Canada and others have imposed embargoes on Iranian government entities, banks, oil companies, state shipping company, media, academic institutions, airlines, and military with the intention of bringing Iran to heel over its nuclear development program which, many fear Iran is working to toward endowing with military capacity.

So extensive are the sanctions that companies banks and insurers have in many cases decided that even where the letter of the law permits them to undertake business with Iran, the administrative burden (including licensing applications), and potential risk of facing crippling fines and reputational damage if they get it wrong is sufficient incentive to discontinue their trading relations.

This issue is most acute – as it was under the Iraq sanctions – when it relates to drugs and medical supplies. As a Woodrow Wilson Center-published report found in February 2013:[3]

"Iranian patients find it increasingly difficult and expensive, if not impossible, to obtain some of the medicines they need. When they do fill a prescription, they risk amplified side effects and reduced effectiveness because Iran is forced to import more and more medicines, or their chemical building blocks, from India and China, thereby replacing the higher quality products from Western manufacturers. Imports from American and European drug makers were down by an estimated 30 percent in 2012 and falling. In the highly patented world of pharmaceuticals, substitution is often unfeasible, particularly when it comes to advanced medicines used to fight diseases such as cancer and multiple sclerosis."

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[2] 'The Trouble With Sanctions' – *WorldECR, July 2012 (www.worldecr.com)*

[3] Sanctions and Medical Supply Shortages in Iran, Wilson Centre, February 2013, http://www.wilsoncenter.org/sites/default/files/sanctions_medical_supply_shortages_in_iran.pdf

The outlook, it said "is bleak, and, without further targeted sanctions relief, the humanitarian predicament caused by these shortages will intensify."

Depending on your viewpoint, this may be an acceptable price to pay – and I have met Iranian critics of the regime who are prepared to see their own people suffer in the short term if it leads to a change in government. Nonetheless, it is worthy of very significant moral consideration. Yes, the US government has introduced license and exemptions[4] – but so successfully has it induced public and Congressional anxiety about Iran – and the prospect of huge penalties for business – that their palliative effect is muted.

And that anxiety is contagious: many EU companies are equally averse to Iranian transactions, less fearing their own laws than they do US extra-territoriality.

In truth, even some of those that are highly critical of Iran's appalling human rights record, sponsorship of terrorist groups or meddling in Iraqi and Syrian affairs are agnostic as to whether Iran is actively striving to develop a fully formed nuclear weapon[5]. Either way, since the passing of the CISADA in the US – and a subsequent ratcheting up of EU restrictions against Iran, the *rightness* of the sanctions has become an article of faith of the EU-US 'axis of good.'

But half buried in this sense of righteousness there lurks an age old danger: that in purporting to stand for our values we lose sight of them. Here is an example: Currently, a slew of cases are being heard by the EU courts in which 'designated entities' are challenging their listed status. Recently, two Iranian banks, Saderat[6] and Mellat[7], were successful in doing so. Both had been listed by the Council of the EU because of their alleged role in financing the Iranian nuclear program. But in both cases the General Court of the EU (part of the Court of Justice of the European Union-ECJ) overturned the listings on all most all of the grounds on which the banks had appealed.

In the Bank Saderat case, the General Court established that the Council had acted on a mistaken factual premise by asserting that the bank was 94% held by the Iranian state, when in fact the state was only a minority shareholder.

Second, the General Court held in both cases that the fact that the Iranian state holds shares in the banks did not imply, in itself, that they were facilitating nuclear proliferation. Furthermore, the

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[4] US Treasury, Office of Foreign Assets Control, The Iranian Transactions and Sanctions Regulations, 31 C.F.R. Part 560 (the "ITSR"), October 2012 http://www.treasury.gov/resource-center/sanctions/Programs/Documents/med_supplies_10222012.pdf

[5] James Clapper, US Director of National Intelligence states "We assess Iran is developing nuclear capabilities to enhance its security, prestige, and regional influence and give it the ability to develop nuclear weapons, should a decision be made to do so. We do not know if Iran will eventually decide to build nuclear weapons. Tehran has developed technical expertise in a number of areas—including uranium enrichment, nuclear reactors, and ballistic missiles—from which it could draw if it decided to build missile-deliverable nuclear weapons. These technical advancements strengthen our assessment that Iran has the scientific, technical, and industrial capacity to eventually produce nuclear weapons. This makes the central issue its political will to do so."http://www.dni.gov/files/documents/Intelligence%20Reports/UNCLASS_2013%20ATA%20SFR%20FINAL%20for%20SASC%2018%20Apr%202013.pdf. Similarly former IAEA chief Mohamed El Baradei has raised similar points http://news.bbc.co.uk/1/hi/world/middle_east/8611864.stm

[6] EurLex, Judgment of the General Court, (Fourth Chamber) 5th February, in Case T-494/10, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TJ0494:EN:HTML

[7] EurLex, Judgment of the General Court, (Fourth Chamber), 29th January 2013 In Case T-494/10 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TJ0496:EN:HTML

Council did not present any evidence that the banks were providing illicit services to entities that were engaged in proliferation.

Third, the General Court had asked the Council to submit evidence to support its claims, but the Council failed to do so. On the contrary, the Council argued that the burden was on the bank to produce evidence that it was not involved in facilitating nuclear proliferation. The General Court swiftly dismissed this argument: the burden of proof was upon the Council and the absence of evidence should not be held against the banks.

Amongst the many repercussions of the case were the reproaches of a number of US commentators (and European) outraged at the fact that the court had overturned the designations: the law, they argued, was scarcely the point – the point was to "act strong on Iran."

Ironically, in the US, the law is pedantically adhered to when it comes to sanctions: The US Treasury recently publicized the fine paid by a Californian health food company for exporting a body-building supplement to Iran without the requisite license. In *this* case, there was no argument that a tub of high protein whey powder would accelerate Iran's nuclear enrichment program – but it was a breach of the (hugely complex and unwieldy) US Iran sanctions laws and thus demanded to be punished. Indeed, US regulators are now imposing massive penalties and fines on businesses which they allege to be in breach of sanctions (most often the accused banks or companies are persuaded to settle – the reputational risks of a challenge being formidable). Last year, Dutch bank ING paid $619 million to settle allegations of sanctions violations, Standard Chartered paid $327 million, and HSBC $1.9 billion, to settle allegations that included sanctions violations as well as money laundering breaches. And while these terrifying sums have certainly proved effective in scaring business off transactions with sanctioned parties, there is little or no evidence that they are making the world a safer place – which, of course, is the point of the sanctions in the first place. It is as if the law, once in place, has gathered its own momentum and heading in its own direction.

Clearly there are circumstances in which sanctions are morally appropriate and/or effective. Yet compare the vast quantity of enforcement resources, legislative time, compliance spend and, increasingly, penalties arising out of the sanctions legislation, with time at the negotiating table. In the case of the Iran sanctions, the former massively outweighs the all-too few hours of talks between representatives of the UN Security Council and Germany, and Iran, which, evidently, are too hurried and brief to yield meaningful results. Is it possible that a rebalancing of the current formula (more speaking softly, less heavy stick),l might stand a better chance of delivering the safer world we want.

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[i] Contrasted with the Catholic Church's formal apology in 1992 to Galileo Galilei, who had died in 1642, OFAC's action appears timely