Governing Proliferation Finance: Multilateralism, Transgovernmentalism and Hegemony in the Case of Sanctions Against Iran

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As the critical sanctions against Iran’s nuclear program demonstrate, the implementation of sanctions against nuclear proliferators has led to the creation of a global system of surveillance of the financial dealings of all states, banks and individuals, fostered by United Nations Security Council (UNSC) resolutions—a new and unprecedented development in transnational governance. This chapter applies a socio-historical perspective to the study of this new “transnational legal order” by analyzing how new actors, institutions and legal technologies shape the processes of norm-creation and rules-implementation in the regulation of nuclear trade and finance. This chapter asks: Which actors have been in charge of designing and implementing sanctions against nuclear proliferators? Which legal technologies and which discursive practices have they developed to impose their authority and their legitimacy on the regulation of global financial transactions? Answering these questions will generate a better understanding of key processes in global governance: 1) the increasing role of the UNSC as a global legislator through top-down processes of norms diffusion; 2) the “financialization” of global regulation, with the increasing role played by international and US domestic financial institutions that were historically foreign to the field of nuclear nonproliferation; and 3) the “judicialization” of the enforcement of sanctions and the associated reconfiguration of relations between executive and judicial authorities in charge of punishing nuclear proliferators and sanctions-evaders at the domestic level, which is accompanied by the multiplication of “secondary sanctions” against sanctions-evaders, as well as challenges to this designation heard by domestic and international courts.
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The 2015 Joint Comprehensive Plan of Action (JCPOA) signed by Iran and the five veto powers of the United Nations Security Council (UNSC) plus Germany (P5+1) in July 2015 has set up a framework that commits the international community to lift the nuclear-related sanctions that the UNSC has imposed on Iran since 2006, after the Director General of the International Atomic Energy Agency (IAEA) reported concerns about Iran’s “non-compliance” with the Safeguards Agreement that Iran had signed with the IAEA following its signature of the Nuclear Nonproliferation Treaty (NPT). In the JCPOA, Iran agreed to reduce by two-thirds the number of centrifuges in operation in its territory, to ship to Russia 98% of the enriched uranium that it had in excess of its energy needs, and to accept strengthened controls by the IAEA on its territory (by implementing the IAEA “Additional Protocol”) and future R&D plans; in exchange, the international community agreed to gradually lift all nuclear-related sanctions, and passed this decision into law with UNSC Resolution (UNSCR) 2231. The latter asks all UN member-states to lift UNSC-mandated sanctions passed against Iran since 2006 (e.g. UNSCRs 1696, 1737, 1747, 1803, 1929, 2224), as well as the additional sanctions adopted by the European Union (EU) and United States (US), which targeted trade and financial institutions in Iran (including insurance to the oil and shipping companies, specific banks in charge of financing Iran’s missile and nuclear programs, and the Central Bank of Iran). Thus, with the JCPOA, the international community agreed to allow the world’s banking and trading communities to engage again in transactions with many of Iran’s companies and banks—although not all of them.

According to this narrative, the kind of governance that the Iran sanctions case illustrates seems to conform to the Westphalian principles of international law. First, a regime of rules is set up with the NPT, to which member-states have freely decided to accede. Second, when member-states are found in “non-compliance”—a term that differs substantially from the term “violation” (Dupont 2013), which is more often used by the media to refer to Iran’s case—with rules they have freely accepted, they are to be sanctioned. Those states which sit outside the NPT (like Pakistan) are not to be sanctioned, as treaties can only bind states which sign them, according to the classical rules of the Vienna Convention on Treaties (art. 34). Indeed, the P5+1 reacted forcefully to the perceived non-compliance of Iran (one of the NPT member-states) when it was revealed that the latter had engaged in undeclared trade of centrifuge technologies with Pakistan, a de facto nuclear weapon state which sits outside the NPT. Third, quite classically, the sanctioning and de-sanctioning mechanisms have been decided by a Concert of great powers (the P5+1), which acted under the framework of an international organization (in contrast to the nineteenth century Concert of Vienna), which gives privileged authority to the UNSC over other UN forums to deal with cases affecting the security of its member-states. In this case, the signature of the JCPOA proved that the international community, guided by the P5+1 working both inside and outside the UNSC (by directly engaging with Iran in diplomatic talks and by engaging the rest of the
international community within the UNSC), could enforce one of the major regulatory frameworks in the global commodity trade markets: the NPT, which regulates international trade in nuclear-related commodities and technologies.

In this chapter, I want to evaluate the validity of this narrative. First, I will piece together the elements that fit with such a story of Westphalian governance. Second, I will amend this narrative by highlighting the new role that international organizations played as global norms-issuers, which, in this case, shows how the emergence of a new transnational regime has blurred one of the distinctions central to the Westphalian model of governance: that between public and private actors. Primary in the identification of “transnational legal orders” and “transnational governance” is the notion that regulation no longer relies on a mechanism directly and exclusively associated with state authority and sanctioning power (Halliday and Shaffer 2015), as such regulation is characterized “by a blurring of the distinctions between public and private actors, states and markets” (Djelic and Sahlin Andersson 2006). The existence of a transnational legal order created by UNSCRs against Iran shows that we have moved away from a world in which international rules were created through an orderly process of consultation, negotiation and ratification among equal sovereign nation-states (the Westphalian order) to a world in which many heterogeneous actors—states and international organizations in search of new jurisdictional authority, as well as experts and private actors—claim authority on the formalization of new rules and their implementation. Here, I will point to the role of the UNSC, the EU as well as other organizations, like the Financial Action Task Force (FATF) or the International Monetary Fund (IMF), in the adoption and diffusion of norms of “good governance” in nuclear nonproliferation.

Third, I will enter into the details of the sanctioning machinery put in place against Iran’s nuclear-related trade, and this exploration will lead me to test a third hypothesis: that the United States, by lobbying the UNSC to impose sanctions against Iran, has asserted hegemonic claims for its legal and judicial rules. Thus, so the “hegemonic governance” thesis goes, the Iran sanctions case was less about creating a set of multilateral sanctions to force a NPT member-state like Iran to comply with its express commitments thanks to a global coordinated response, but more a way for the United States to impose its interpretation of NPT commitments and to force worldwide acceptance of the hegemony of domestic US laws and administrative regulations restricting nuclear trade, as well as the extraterritoriality of its courts in the litigation of disputes about nuclear-related sanctions evasion cases. According to this alternative perspective, the United States is trying to claim the role that the British empire had carved out for itself in the nineteenth century, when commodity trade markets were ruled out of British courts and according to British law: when governance was “both local (English) and global at the same time” (Mallard and Sgard 2016:11). But in contrast to the nineteenth century, the singularity of the moment in which the governance of nuclear trade markets is situated is that their governance is made up of a superposition of the three competing logics (Westphalian, transnational and hegemonic), which, as I will show, are appropriated strategically by different sets of actors. This uneasy coexistence of exclusive ordering principles in the field of governance creates a kind of “multi-lensed governance,” which raises challenges for social scientists and historians of governance similar to those addressed by Akira Kurosowa in his movie Rashomon, in which the same
episode is narrated from three different viewpoints without one clearly dominating the other two.

1. Sanctions in the Classical Westphalian Sense

The prevalence of Westphalian conceptions of international law today—with its emphasis on norms of equality of states and sovereign state independence—dominates many analysts’ understanding of how UNSC sanctions are supposed to work against Iran (Esfandiary and Fitzpatrick 2011). According to this view, sanctions aim to restore the legitimacy and effectiveness of agreed-upon treaty rules. Their one and unique function is restorative in the sense that sanctions are not meant to create new laws and rules for the international community, rather, they are only meant to restore the existing legal order: in this case, the regime of rules enshrined in the NPT and IAEA, which was threatened by Iran’s violations—or rather, signs of “non-compliance.”

Thus, explanations in this vein for why Iran was sanctioned for nuclear-related trade issues (rather than for acts of terrorism, for which it had been previously sanctioned) center on the fact that Iran had breached obligations stemming from a contractual (treaty) agreement, which it had freely signed with an international organization (the IAEA), as a consequence of its accession to a treaty regime it had also freely accepted—whereas neither Israel nor Pakistan were sanctioned, although these two countries have engaged in nuclear trades leading to their acquisition of nuclear weapons, as these two countries have never contracted nonproliferation commitments. In this narrative, sanctions can only be referred to breaches of treaties freely accepted by a member-state. In many ways, sanctions punish liars: those who claim to act according to treaty rules but do not in practice, rather than those who publicly live outside the treaty rules.

Thus, the Westphalian understanding of international governance leads us to view the governance of the nuclear trade regime (and many other trade regimes) as a gradual succession of complementary phases—the process that Abbott and Snidal (2001) call “legalization”—in which nuclear-related sanctions occur some time after treaty creation. Four successive steps (see figure 1) have logically complemented one another:

1) A process of voluntary creation of soft and hard law, which sets up technical agencies (EURATOM and the IAEA) in charge of monitoring the peaceful character of, respectively, European and nuclear commodity markets (Mallard 2014);

2) A hardening of the institutional framework, achieved by the successful negotiation of a multilateral treaty (the NPT), which strengthened the role of existing monitoring organizations (like the IAEA) and other institutions in charge of issuing guidelines about the proliferation risks associated with certain commodities (like the Nuclear Suppliers Group or NSG);

3) The quasi-universalization of the NPT regime (with new entrants like France, China and Eastern European countries) and the detection of the first violations (by Iraq, Iran and North Korea) followed by the implementation of the first sanctions through a series of UNSCRs (in particular, UNSCR 687 against Iraq);

4) The reform of the main governance architecture of both the NPT-regime and the new sanctions adopted by the UNSC against Iran from 2006 to 2013 to close the loopholes

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1 It remains ambiguous whether Iran’s “non-compliance” is with respect to the NPT (as many politicians claimed in the media) or only with its IAEA Safeguards Agreement (Dupont 2013).
exploited by violators. In this context, three main legal technologies were adopted to improve the physical inspection of exchange and production sites where nuclear-related commodities circulated: a) the IAEA “Additional Protocol” adopted by Iran in the context of the JCPOA, which put an end to the prior “honor code” philosophy of IAEA inspection rules in order to avoid future detection failures; b) the strengthening of domestic export control agencies by multilateral voluntary initiatives like the Proliferation Security Initiative (PSI), which strengthened state capabilities for inspection of transport systems, etc.; and c) UNSCR 1540 which targeted nuclear proliferation by “private” individuals (especially those in the supposedly “private” network of Pakistani scientist A.Q. Khan, responsible for the sale of centrifuge technologies to countries like Iran, Libya and North Korea), and UNSCRs 1696, 1737, 1747, 1803, 1835, 1929 and 2231, passed since 2006 against Iranian companies and individuals involved in WMD-proliferation, and the banks that facilitate sanctions-evasion (as well as UNSCRs against North Korea).

![Figure 1: The Restorative View of Sanctions in Nuclear Trade Governance](image)

As we can see from this broad historical sketch, the case of nuclear-related sanctions against Iran makes sense from the Westphalian perspective because it comes after a hardening of the rules of governance of international nuclear trade itself, and because “international law violated with impunity must soon cease to exist” (Elihu Root cited in Kitttrie 2007). Thus, Iran’s non-compliance with the regime’s rules needed to be acted upon in order to preserve their credibility.

At the same time, the technical specifics of the sanctions adopted by the UNSC against Iran must be understood against the background of technical changes adopted over the last twenty years to refine the sanctioning technologies used against international law violators (whether those breaches concern human rights law, nuclear trade law, or state support of terrorism) (Cortright and Lopez 2000). In this context, an important aspect of the governance of sanctions has been the increased reliance on applied financial analysis produced by intelligence agencies and UNSC Sanctions Committees (Solingen 2012). The use of expertise to assess the effectiveness of sanctions for upholding treaty-based rules and changing state behavior (Baldwin 1985; Drezner 1999; Pape 1999), has turned global flows of commodities and financial assets into “legible” charts in a characteristically Foucauldian manner. Such policymaking process was meant to design “better” sanctions, e.g. sanctions that minimize the targets’ ability to adapt by pushing their illegal activities underground (Andreas 2008:ix; Cortright and Lopez 2000), or sanctions that minimize unintended humanitarian consequences, in contrast to the sanctions passed against Iraq in the 1990s (Biersteker 2009; Mueller and Mueller 1999),
which surpassed established boundaries of tolerance for collateral damage and turned sanctions into collective punishment (Clawson 1993).

It is in the context of this global “governmentality” project that sanctions specialists have increasingly relied on financial targets (designated accounts in banks’ records or the whole bank itself) to force compliance with treaty rules, so as to limit the damage done by comprehensive commodity trade sanctions to the civilian populations’ well-being. One of the first nuclear-related UNSCRs (1737 and 1747) against Iran designated very limited targets, like individuals and companies directly related with Iran’s centrifuge and missile programs, and banned trade in weapons and nuclear-related goods. However, Iran’s continued defiance of the UNSCRs (which, since UNSCR 1696, required its immediate suspension of all enrichment activity) proved that such “targeted” financial sanctions did not work and that only massive and comprehensive sanctions would. Thus, subsequent UNSC Resolution 1929 as well as the 2010 US and EU sanctions took on such central institutions as the Central Bank of Iran and the entire insurance and re-insurance sector (central to the trade of oil) as their main targets: these sanctions indeed worked, to the extent that they “dramatically diminished” Iran’s ability to trade with the world (Esfandiary and Fitzpatrick 2011:149). From this perspective, sanctions are purely an executive instrument, of varying effectiveness (Miller 2014), whose usefulness is the subject of continued assessment and re-assessment. They are comparable with, and substitutes for, alternative measures by which the P5 could have restored the credibility of regime rules after observed treaty violations, like diplomatic bargaining:. In the next section I will challenge this underlying hypothesis.

2. Sanctions and Transnational Governance of Nuclear Trade and Finance

According to the Westphalian perspective, sanctions against Iran have participated in stabilizing the NPT regime. But at the same time, these UNSCRs have also furthered the emergence of a new “transnational legal order” (Halliday and Shaffer 2015), a concept that aims to capture key processes of norms-creation, rules-monitoring and authority-sharing (between private and public actors) at work in transnational governance (Djelic and Sahlin Andersson 2006), which no longer operates according to the Westphalian model of norm-creation.

Indeed, if we adopt briefly Iran’s point of view on the sequence of events which started with the public revelation of the existence of a centrifuge program in Iran and ended in 2013 with the adoption of the harshest UNSCRs against Iran, we first reveal the auto-referential character of the UNSC process of norms-creation. As Iranian diplomats argue, the nuclear-related sanctions against Iran never sought to restore the credibility of NPT rules, which Iran supposedly violated (Mousavian 2014). In fact, the first of the UNSCRs (1696) created a new legally-binding rule with which Iran had to comply, but which Iran refused to consider it binding: that Iran should stop all enrichment work on its territory as a precondition to diplomatic talks with the international community. UNSCR 1696 was foundational in the sense that all the later nuclear-related UNSCRs against Iran referred to Iran’s “violation” of this (new) no-enrichment rule (set by UNSCR 1696 rather than by the NPT) in order to justify the amplification of UNSC sanctions against Iran. After UNSCR 1696, Iran’s violation was not of a NPT commitment (Dupont 2013), but a violation of a new political rule imposed by the majority of decision-making states.
in the UNSC (with Qatar voting against UNSCR 1696). The imposed suspension of enrichment activities in Iran had the appearance of being a legal rule because it was decided under Chapter VII, so all UN member-states had to help the UNSC prevent Iran from conducting further enrichment activities. But it was not a legitimate rule in the eyes of Iran’s leadership, who abided by a Westphalian understanding of the process of norms-creation: as Iran had no say in its adoption, they contended that they could not be obligated by UNSCR 1696.

The series of nuclear-related sanctions against Iran not only created a new ad hoc legally-binding (although contested) rule for Iran, which went beyond what states had agreed to when they signed the NPT, but they also created a new set of rules for all states, whether they were NPT member-states or not. Nuclear-related UNSCRs against Iran reflected the new role that the UNSC had claimed for itself at the world level since 9/11, which departed from the Westphalian understanding of the UN as a society of independent sovereign states. Indeed, shortly after 9/11, the UNSC adopted UNSCR 1373 which required that all UN member-states change their legislation and criminal code so as to create new crimes related to terrorism like “assistance to terrorism” (however ambiguous), and that they report such legislative changes to a specific UNSC committee in charge of ensuring compliance with the new rule. Legal scholars who focus on the UNSCRs passed in the wake of 9/11 to target terrorists, freeze their assets, and ban their travel and financial operations insist that these new counter-terrorist UNSCRs no longer follow a Westphalian understanding of sanctions and they question whether the UNSC had the authority to claim this new role as global legislator. Indeed, they wonder whether, in that process, the UNSC has not threatened the sovereign legislative independence of UN member-states as well as constitutional norms of “due process” (Halberstam and Stein 2009; de Bürca 2010). This top-down UNSC-led process of legal innovation and criminal code reform, which imposes the will of the P5 to all UN member-states who do not participate in UNSC deliberations, has thus been the object of intense debate (Schepele 2006).

The UNSC has claimed a similar role regarding nuclear non-proliferation with the UNSCRs targeting the international trade network extending from Pakistani sellers of centrifuge technologies to Iran. These UNSCRs no longer sanction specific states to force them into compliance with regime rules (like those of the NPT), but assume a new role for the UNSC as a global legislator. Indeed, after the revelations about A.Q. Khan’s dealings with Iran, the UNSC again adopted resolutions that forced all UN member-states to enact new laws regarding specific crimes (like “assistance to WMD proliferation”), irrespective of the principles of formal sovereignty and equality among states. With UNSCR 1540, the UNSC “decided” (its most binding language under UN Charter Chapter VII) that all UN-member-states shall “adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use” WMD “as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.” UNSCR 1540 thus blur the distinction between public and private international law, adopting rules that directly target private actors without asking UN member-states to agree with how these affect relations between citizens and their states.

The post-2006 nuclear-related UNSCRs against Iran greatly surpass the conditions for policing one country, creating the foundation for a global system of
surveillance and monitoring of the financial dealings of states, companies, banks and individuals wherever they are located. In this aspect they depart even more from the Westphalian model of norms-creation, as they involve both top-down process of norms-creation and the blurring of the distinction between private and public actors. For instance, with UNSCR 1737, the UNSC again “decided” that all UN member-states shall exercise “vigilance”—a concept whose meaning is subject to many interpretations—and “restraint” regarding the entry into or transit through their territories of goods and “individuals who are engaged in, directly associated with or providing support for Iran’s proliferation sensitive activities or for the development of nuclear weapon delivery systems.” Obligations created by UNSCRs against Iran have fallen not only upon state actors, as UNSCR 1803 calls on states to be vigilant “in entering new commitments for public provided financial support for trade with Iran,” but also on private actors, as UNSCR 1803 also calls on states to “exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran,” so as to prevent such activities from funding Iran’s nuclear program.

This group of UNSCRs gave essential legal authority to the public financial institutions of the P5 (mostly, their Treasury Departments and Finance Ministries) to directly lobby their counter-parts in the Middle East and elsewhere to apply UNSCR 1540 and UNSCR 1803 by enacting new banking regulations (like “know your customer” guidelines, which raised the level of information banks requested from their clients), which had the direct effect of identifying and punishing banks involved in covert trade with Iran (Mallard 2017). Sometimes, the pressure was exerted directly by the US Treasury on foreign banks without going through the public Finance Ministries (a move that many countries felt uncomfortable with): as Stuart Levey, who headed the US Treasury Department’s Office of Foreign Assets Control (OFAC), acknowledged, his office as well as Federal and state-level judicial actors have used UNSCRs against Iran to directly “pressure a number of foreign banks to stop dealing with Iran” (Fayazmanesh 2008:198). Furthermore, the list of designated individuals and companies associated with Iran’s WMD proliferation activities used to monitor compliance with the UNSCRs by UN member-states was established and has kept expanding based on intelligence provided by Western powers—and in particular, by US intelligence agencies—to the Iran UNSC Sanctions Committee.

Top-down legislative processes aimed at opening private financial circuits to the scrutiny of public authorities and at punishing “bad banks” involved in deceptive practices (e.g. hiding illicit transactions with Iran) were highly visible in the fields of counter-terrorism and nuclear proliferation: only a few years separated the UN Convention for the Suppression of the Financing of Terrorism of 1999 and UNSCR 1373 that called on all UN member-states to criminalize the activity of “terrorism financing” and of “assistance to terrorism,” including by banks. Since then, international financial institutions like the Financial Action Task Force (FATF) and the International Monetary Fund (IMF) have promoted banking reforms with the goal of improving compliance with reporting requirements, like those imposed by the UNSCR 1803. These international organizations coalesced around an agenda aimed at strengthening the “rule of law” through “transparency” and anti-corruption initiatives in the 1990s (Mehrpouya and Djelic 2015).
These actors claimed the authority and power to sanction first money-launderers, then terrorism financiers (Halliday, Levi and Reuter 2014), and now nuclear proliferators. The OECD’s FATF has produced a “typologies report,” by which they claim to help states adapt their banking regulations to the new requirements imposed by UNSCRs, showing for instance how nuclear proliferators “typically” operate to cover their financing schemes (FAFT 2008). The expertise and advice to produce these reports has generally come from the same P5 Treasury officials who participated in the design of UNSCRs (Zarate 2013). These FATF guidelines have gained the force of (soft) law, carried by the force of the FATF’s grades—assigned by the FATF after country-per-country audits of legislative and administrative reforms. In many ways, the FATF has thus compelled states to integrate these new counter-proliferation measures in their legislative arsenal just in the same way as credit rating agencies have compelled states to adopt specific budgetary policies in anticipation of the markets’ response to their grades. Private “independent” financial actors thus exert an influence on the process of legislative reform: governments comply with their standards because of their ability to assign grades. The reciprocal influences that these public and private actors exert on one another thus fuel a process of self-reinforcement of expectations that tends to buttress the legitimacy of the new transnational legal order.

3. Sanctions and US Hegemony

Nuclear-related sanctions against Iran raise other pressing political questions related to governance: in particular, whether the US has overreached its power by asking the UNSC to turn itself into a global lawmaker (Schepele 2006) and whether in doing so it has changed (and possibly undermined) rather than restored the legitimacy of the multilateral institutions in charge of monitoring compliance in treaty-based regimes (in particular, the IAEA in the NPT regime). The rapid creation and operation of a global system of financial monitoring of nuclear-related transactions is indeed a major change in how the US has exercised its power on the world scene (Zarate 2013), but it is important to understand how the domestic and transnational dimensions of the US sanctioning machinery have worked together.
Figure 2: How US Sanctions Influence the UN and EU Designations

A focus on US actors is key as many of the new legal technologies used to open global financial flows related to nuclear proliferation have found their origins and application in the US context: US Treasury experts largely wrote the legally binding UNSCRs like UNSCR 1540 and all the UNSCRs against Iran; the US government initiated information sharing practices at the level of intelligence agencies (especially British and French ones); the US President used Executive Orders to add banks, companies and individuals to US sanctions lists; the US Treasury Department capitalized on article 311 of the US Patriot Act to force the international banking community to choose between trading in the US and trading with “bad banks” placed on its sanction lists (Zarate 2013); the US Congress passed unilateral legislative acts claiming extraterritorial competence (like the 1995 Sanctions Act against Iran); and the Justice Department and the New York prosecutor have undertaken criminal investigations against banks (especially European banks) for assisting sanctions evaders (Baumard et al. 2012:112) (see figure 2).

In many ways, the UNSCRs that imposed sanctions against Iran’s nuclear-related activities from 2006 up to 2013 have aimed (and largely succeeded) at imposing the worldwide hegemony of US laws. At the domestic level, beginning in 1994 the US passed the Nuclear Proliferation Prevention Act (NPPA) and Executive Order (EO) 12938 instituting a ban on US procurement from any person who, on or after June 30, 1994, knowingly and materially contributes, through the export of nuclear-related goods or technology, to the efforts of any individual, group, or non-nuclear weapon state to acquire a nuclear explosive device or unsafeguarded special nuclear material. Through EO 12938, President Clinton declared a “state of emergency” with respect to the proliferation of WMD. Then, the Export-Import Bank Act (EXIM) of 1996 instituted a
ban on access to credit to any person who, after September 23, 1996, knowingly aided or abetted a non-nuclear weapon state to acquire a nuclear explosive device or unsafeguarded material. Taken together, these “emergency” measures banned credit, guarantees, or insurance in support of US exports to sanctioned individuals; forbade US imports from sanctioned entities; and froze the assets of sanctioned entities within US jurisdiction even before a trial could be held. The adoption of UNSCR 1540 expanded these US domestic laws to the whole world, mandating that all states change their legislation and criminal code to the requirements present in US law (in a similar way as UNSR 1373 imposed legislative changes to align all UN member-states’ legislation with the counter-terrorism rules embedded in the US Patriot Act).

Not only in the counter-proliferation field but also in the sanctions field we find the same process of universalization of US laws through a top-down process of UN reform. The US was instrumental in passing through UNSCR 1196, which called on UN member-states to enact criminal legislation against UN-mandated sanctions-evasion activities. Responding to a 1997 UN General Assembly resolution on sanctions (which called for some prudence in the application of sanctions), in April 2000 the UNSC created an informal working group charged with elaborating a code of best practices for sanctions implementation (Baumard et al. 2012:36). This US-led effort in favor of the judicialization and criminalization of sanctions-evasion practices is highly visible in the case of terrorism: from the UN Convention for the Suppression of the Financing of Terrorism of 1999, to UNSCR 1373 which called on UN member-states to criminalize the activity of terrorism financing and of assistance to terrorism, including banks that may help terrorism financing escape sanctions, to UNSCR 1540 of 2003 which required UN-member-states to criminalize nuclear proliferation activities of their private citizens. As a result, countries that had failed to define sanctions-evasion as a crime, like France—whose various codes (criminal code, defense code, customs code) criminalized some activities but not all—, prepared new bills in the mid-2000s to place all sanctions-evasion activities (especially in the financial sector) under the category of crimes against the “authority of the state” (Baumard et al. 2012:106).

Not only has US diplomacy successfully universalized its domestic counter-proliferation and sanctions-evasion laws thanks to the adoption of the nuclear-related UNSCRs against Iran, but various departments in the US government (State, Treasury and Justice) have also worked to claim extraterritoriality to US judicial proceedings and US administrative rules. US judicial authorities have indeed turned US courts into the center of governance of global trade with Iran. Such judicial hegemony over the governance of trade markets has been helped by the rise of New York City as the heart of American capitalism, where banks process billions of dollars daily on behalf of international clients, and where US prosecutors can then claim jurisdiction to prosecute multinational companies who engage in illicit transactions.

One could say that the reliance on US courts as a tool of hegemony has solved many collective action problems related to the dispersed nature of sovereignty in the Westphalian order. Previous US judicial campaigns launched against financial criminality

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2 There is great disparity between European states on that matter. For instance, if “all violations of embargo measures are considered as criminal offenses subject to imprisonment for up to 7 years in prison [in the United Kingdom], in Italy, such violations are considered as administrative offenses, punishable with a fine” (Pavoni 1999:598).
and Iranian sanctions-evassion in the 1980s and 1990s stumbled on this issue of sovereignty. One of the most famous cases of the 1980s demonstrates the difficulty that prosecutors faced. The federal prosecutor and future NY mayor, Rudolph Giuliani, charged Marc Rich, a US citizen operating a highly profitable oil trading business from Switzerland, of 65 counts including fraud, tax evasion, and most importantly embargo busting: in particular for selling Iranian oil to South Africa and Israel, in defiance of the US embargoes against Iran as well as UNSC-mandated sanctions against South Africa and OPEC sanctions against Israel (Amman 2010). Still, the prosecution led nowhere as Rich never came back to the US, and he was pardoned by President Clinton in his final hours in office in 2001. In the 1990s, many European prosecutors faced similar hurdles to investigating transnational criminal activities: inter-judicial cooperation between the Swiss and other European countries in cases of political corruption against active politicians had to pass through the diplomatic route, which slowed down or even buried the process (Bertossa 2009:33). Transnational criminal justice in the Westphalian order was thus bound by the constraints placed on inter-judicial cooperation by the process of “diplomatization” of judicial proceedings—e.g. the submission of judicial procedure to the tempo and goals of each country’s foreign policy administration—, which has led the Geneva state prosecutor, Bernard Bertossa (2009:26), and the prosecutor of the Tessin, Carla del Ponte (Mitsilegas and Gilmore 2007), to openly criticize the system.

Since the passing of UNSCRs sanctioning Iran’s nuclear-related activities, financial regulators (at international and domestic levels) have increasingly worked hand in hand with prosecutors (mostly in the US) to facilitate the interception of suspicious financial activities—as in the recent EU-US 2010 Agreement, which improves the monitoring of financial transactions recorded in the SWIFT system by US authorities (Baumard et al. 2012:127). Judicial US hegemony was also made possible by the fact that oil-related deals are denominated in US currency, which means that US Federal authorities can claim jurisdiction over oil transactions between two foreign traders (as in the sanctions-evassion case against BNP-Paribas), as they happen to cross US territorial jurisdiction when the transaction is momentarily dollarized. At the same time, the acceptance of US judicial hegemony has not been devoid of jurisdictional conflicts and ambiguities in the US itself. In the case against BNP, which continued to deal with Iran in the 1990s (despite US embargoes), the prosecution involved “a collaboration among the Justice Department in Washington, the United States Attorney’s Office and the district attorney’s office in Manhattan, the Federal Reserve, Treasury Department and Benjamin M. Lawsky, New York State’s financial regulator” (Silver-Greenberg and Proess 2014). In other sanctions-evassion cases against European banks like Credit Suisse, many actors have acknowledged the high degree of uncertainty over jurisdictional authority. As the New York Times reported:

The [NY] district attorney’s role in the case [against BNP], which began under Robert M. Morgenthau was not always clear. Adam Kaufmann, a prosecutor who helped lead the investigation, once travelled to Washington to meet with officials from the Treasury Department’s Office of Foreign Assets Control [OFAC], the primary enforcer of American sanctions against Iran. The Treasury Department, he recalled,

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3 Their focus on Swiss-based banks can be explained by the fact that many sanctions have imposed embargos on oil trade, and that Geneva is the world’s leading platform for oil trade and oil trade financing.
was baffled as to why a Manhattan prosecutor was investigating the case [against Lloyds and Credit Suisse] at all. … [Furthermore] unbeknown to the prosecutors in Manhattan, the Justice Department’s criminal division in Washington had its own investigation into Credit Suisse. (Silver-Greenberg and Protess 2014).

However, the US alone could not have imposed the worldwide hegemony of its court system. The EU played a determining role when it reversed policy on the issue. In the 1990s, the EU reacted to US claims of extraterritoriality for sanctions legislation by shielding European companies (like Total) and banks (like BNP-Paribas) that continued to massively invest in the development of the Iranian oil fields. The European Council reversed position in 2006, first endorsing the US efforts and then launching a massive financial war against companies trading with Iran—with the active support of the French and British ministries (see figure 2)—, adding more than 350 companies and banks to the UNSCR designations. In parallel, the European Council and the EU High Representative orchestrated the negotiations between Iran and first the EU3 and later the P5+1 (Pouponneau 2013), which aided in writing the rules of the new sanctions regime against WMD proliferators. In so doing, the EU gained a role as a foreign policy actor in the sanctions field (Giumelli 2013)—a role it had rarely been able to play in other foreign policy fields (like humanitarian interventions). At the same time, the complicity of the EU Council in extending US hegemony over the global trade with Iran (by going along with the US in designating additional sanctions targets in Iran) led to more jurisdictional claims and interpretive battles over the future of judicial process in the EU. In contrast to the US case, clashes appeared in the judiciary and executive branches at the EU level when the ECJ and the European General Court started revoking sanctions designations of Iranian banks: the EU judicial institutions thus engaged in a direct confrontation with the European Council as they alleged that the sanctions designations subverted prior constitutional rules of due process. The confrontation between the EU executive and judicial authorities accelerated to the point that half of the court-ordered sanctions-revocations in the EU now concern Iran targets. But the adoption of the JCPOA will certainly decrease tensions.

Other branches of government (the Treasury in particular) have also worked to diffuse US administrative rules (especially regarding sanctions) globally. The US Treasury Department’s Office of Foreign Assets Control (OFAC) has produced designation lists targeting Iranian front or cover companies doing business in missile or nuclear-related trade—threatening the private businesses thus designated not only with criminal law proceedings, but also with barring from the US banking system (Baumard et al. 2012:112). After 9/11, the OFAC directly lobbied European banks to alert them to the risk of prosecution for the new crime of sanctions-evasion under US law, even outside of its territory. As a result, Stuart Levey, who headed the office, acknowledged that OFAC was “seeing banks and other institutions reassessing their ties with Iran” from 2005 onwards (Fayazmanesh 2008:198). Indeed, due to the emergence of a cooperative network of Federal and state-level judicial actors, OFAC under Levey successfully pressured a number of foreign banks to carefully watch the designation lists (which included more than 400 names of Iranian companies and individuals in addition to the names already listed in the nuclear-related UNSCRs sanctioning Iran).
Such US administrative hegemony in the governance of global trade with Iran was driven by new patterns in the careers of sanctions experts. In particular, US sanctions experts have opened new revolving doors with large multinational banks, bringing with them their focus on US administrative tools (like OFAC lists) and judicial resources (like trials of sanctions-evasion cases). Many former US regulators have entered the compliance offices of the multinational private banks that they targeted while holding US public office. For instance, Stuart Levey, who first served as the Deputy Assistant Attorney in the Department of Justice before becoming the first Under Secretary for Terrorism and Financial Intelligence within the Treasury Department (directly in charge of OFAC) under the Bush administration, was very active in recycling the social and legal capital he accumulated from his experience in Counter-Terrorism Financing (CTF) at the Treasury Department and converting it to the nonproliferation field. In 2012, Levey joined the private bank HSBC as its Chief Legal Officer, further reinforcing the US administrative approach to sanctions in the private sector. Others have joined this trend: former NY district prosecutor, Robert Morgenthau—whose father had been Roosevelt’s Secretary of the Treasury—worked with OFAC to litigate the sanctions-evasion case against BNP-Paribas, and also partners with the law firm Wachtell, Lipton, Rosen & Katz (Silver-Greenberg and Protess 2014). US federal prosecutor David O’Neil recently partnered with Debevoise and Plimpton, the firm in charge of defending BNP in the case that cost the bank $8.9 billion (Protess 2015). The circulation of US sanctions elites between US domestic public institutions and multinational private companies has accelerated the diffusion of the US viewpoint on sanctions within the private world.

The new UNSCR-based counter-proliferation regime majorly targeting Iran has thus furthered two underlying processes associated with a growing US hegemony over the regulation of public and private compliance with nonproliferation norms. First, a process of “financialization” of the monitoring of WMD-counter-proliferation activities, which has empowered domestic financial institutions (like OFAC and its counterparts in other countries) at the expense of international organizations in charge of monitoring nuclear proliferation, in particular, the IAEA. Second, a process of judicialization of the enforcement of WMD-counter-proliferation rules—in general terms “the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies” (Hirschl 2006:721)—, as US courts extended their jurisdiction to extraterritorial transactions.

The JCPOA will not alter these socio-historical trends, quite the contrary. As the current Director of OFAC recently pointed out (Szubin 2015:1, 3),

The JCPOA does not in any way affect our [US] sanctions that touch on Iran’s support to terrorist groups such as Hizbollah and other destabilizing proxies such as the Islamic Revolutionary Guards Corps (IRGC). […] Despite some public confusion, the US embargo on Iran remains nearly entirely intact as it is today. US investment in Iran will be prohibited across the board. Iran will not be able to open bank accounts with US banks, nor will Iran will be able to access the US banking sector, even for that momentary transaction to, what we call, dollarize a foreign payment. It was once referred to as a U-turn license. That is not in the cards. […] More than two hundred Iranian-linked companies and individuals will remain designated, will remain on the OFAC list. And secondary sanctions
continue to apply to all of these individuals and entities [like the Aerospace Industries Organization]. […] This means that a foreign bank—a German bank, a Chinese bank—that does business with any of those companies or individuals that I just mentioned faces a total cutoff from the US financial system. It is a very stark threat, and one that our foreign counterparts do not take lightly.

Thus, far from reducing the effects of the US administrative instruments which two decades of sanctions against Iran have imposed on global business, the JCPOA continues and even increases the demands placed on multinational companies to comply with the lists produced by OFAC. Compliance is the price they have to pay in order to avoid civil and criminal procedures for sanctions violations in US courts and administrative exclusion from US markets. In so doing, the UNSC’s monitoring and enforcement of nuclear trade governance relies more and more heavily on the worldwide hegemony of the US judicial and administrative system.

4. Conclusion

By focusing on UNSCR 1540 and the six resolutions adopted against Iran by the UNSC from 2006 to 2010 as well as on the process of sanctions-lifting that ended with the adoption and implementation of the JCPOA, this chapter captures some of the legal complexities created by a new transnational system of surveillance and monitoring of individuals and states accompanying a sanctions-based approach to nuclear proliferation. It shows that the JCPOA does not erase ten years of sanctions against Iran: rather, its implementation continues important trends in the institutionalization of a new “transnational legal order” (with its own institutions and actors) sitting at the intersection of the governance of global trade and finance. To arrive at this conclusion, we have had to reject the Westphalian view of the process of norms-creation and implementation, which sanctions specialists traditionally have used to analyze sanctions as simple instruments of treaty enforcement. As the chapter shows, today it is unclear whether UNSC sanctions against nuclear proliferators (Iran in particular) have worked to enforce the norms and rules adopted by states when they signed the NPT or whether they have created new nonproliferation norms whose affinity with the NPT rules is far from certain. Indeed, our analysis shows that the sequence of UNSCRs adopted against Iran is instead orthogonal to the NPT regime, and UNSCRs have been used as a legal technology for producing new general norms and rules. Our focus on sanctions against Iran is justified by the fact that it is in the post-2006 UNSCRs against Iran that we find embedded general financial rules that affect the global financial sector, as these UNSCRs against Iran do not just apply specific sanctions to Iran but also create new banking regulations with which all states must comply (like UNSCR 1803).

This top-down process of norms-creation, which has strengthened the centrality of US courts and administrative tools extraterritorially in the governance of global trade markets, has raised concerns among international law scholars not only because it strengthens the hegemony of the US in the making of international law, but also because it may increase legal fragmentation, e.g. the “increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries” (Koskeniemi 2002; Benvenisti and Downs 2007:596; Shaffer and Pollack 2010). It is one
of my central assumptions that in fact, the emergence of a transnational sanctions field has not reinforced institutions created in the first nonproliferation age but has increased some of their vulnerabilities. Two examples can be briefly evoked here. First, the new international institutions created to administer sanctions have sidelined existing nonproliferation institutions like the IAEA, whose Director General is informed by member-states (like the US) of suspicious transactions only when it suits the latter’s purpose. Second, whereas the NPT regime has been conceived as a political “grand bargain” involving three pillars (nonproliferation, enhanced civilian trade and disarmament), which must all be pursued at the same time, sanctions specialists have tended to reduce the NPT to only one dimension—nonproliferation—which reflects a unilateral and biased reading of its history. Therefore, even though the JCPOA can be hailed as a great success of multilateral diplomacy, its effects on the dynamics of the NPT regime are not as unambiguously positive as one would think. But the dies are now cast, and only time will reveal how the new UNSC-based governance of global trade and finance will be re-shaped as a result of its implementation.

5. Bibliography


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4 Suspicions based on the analysis of large chunks of financial data (as has been allowed by SWIFT for some time) are now directly acted upon either by domestic institutions—like the US Treasury, which has the authority to revoke trading and banking licenses to companies which trade with “bad banks” suspected of nuclear proliferation activities (effectively imposing “secondary sanctions”)—, or by international institutions—like the UNSC or the European Council—, where sanctions lists are negotiated without any input from the IAEA.


