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SANCTIONS

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Beginning to think about sanctions

In February 2021, after the military coup in Myanmar, the US imposed sanctions.[2] The Executive order states:

> I, JOSEPH R. BIDEN JR., President of the United States of America, findthat the situation in and in relation to Burma, and in particular the February 1, 2021, coup, in which the military overthrew the democratically elected civilian government of Burma and unjustly arrested and detained government leaders, politicians, human rights defenders, journalists, and religious leaders, thereby rejecting the will of the people of Burma as expressed in elections held in November 2020 and undermining the country's democratic transition and rule of law, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States. I hereby declare a national emergency to deal with that threat.[3]

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[2] Executive Order 14014 of February 10, 2021, Blocking Property With Respect To The Situation In Burma, 86 Fed. Reg. 9429 (Feb. 12, 2021).

[3] *Id.*

The sanctions block transactions in property in the US or in the possession of control of US persons if the property is of people determined to operate in the defense sector of Myanmar, to be involved in undermining democratic processes in Myanmar, or human rights abuses or a range of other activities. The definition of US persons includes foreign branches of entities organized under the laws of the US or any jurisdiction within the US. Some of the individuals targeted by the sanctions had been subject to US sanctions because of human rights abuses against the Rohingya.[4] As of early March 2021 the UN Security Council has not resolved to impose sanctions relating to Myanmar, although many people and organizations have advocated for the implementation of multilateral sanctions.[5]

These sanctions are a recent example of the use of sanctions measures by an administration to put pressure on a foreign government to change its behavior. The recent change in administration in the US means that there is a new process for evaluating sanctions measures already in place.[6]

The EU states that "[r]estrictive measures (sanctions) are an essential tool in the EU's common foreign and security policy (CFSP), through which the EU can intervene where necessary to prevent conflict or respond to emerging or current crises."[7] For the EU, sanctions measures are not punitive, but are targeted at countries, entities and individuals to encourage policy changes, or deter disfavoured behaviors.[8] Some characterize economic sanctions as legitimate means to affect behavior whereas others

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[4] *See, e.g.*, Eleanor Albert & Lindsay Maizland, The Rohingya Crisis, Council on Foreign Relations Backgrounder (updated Jan. 23, 2020) at https://www.cfr.org/backgrounder/rohingya-crisis . Cf. Council Regulation (EU) 2018/647 amending Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma, OJ. No. L 108/1 (Apr. 27, 2018).

[5] *See, e.g.*, Myanmar crisis: 'All options should be on the table', UN Human Rights Council hears, Feb. 12, 2021 at https://news.un.org/en/story/2021/02/1084512.

[6] *See, e.g.*, Mengqi Sun, *Biden Administration's Review of Sanctions Programs Could Take Months, White House Official Says*, Wall Street Journal (Mar. 2, 2021).

[7] See https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en .

[8] Id.

consider economic sanctions to be a species of war.[9] There is a debate about whether sanctions are effective, and specific examples suggest different possible answers.[10] Sanctions are seen as contributing to the end of apartheid, but sanctions against Cuba were offset by Russian aid.[11] The threat of the imposition of sanctions may change behavior.[12]

Sanctions can have negative humanitarian impacts.[13] In February 2021, the UN UN Special Rapporteur on unilateral coercive measures and human rights, Alena Douhan, asked the US, the EU and other states to drop sanctions ag ainst Venezuela, after a two week visit to the coutry where she saw the devastating effect they have had:

> The devastating effect of sanctions imposed is multiplied by extra-territoriality and over-compliance adversely affecting public and private sectors, Venezuela citizens, non-governmental organizations, third country national and companies", said Douhan, -- "humanitarian exemptions are lengthy, costly, ineffective and inefficient".
>
> "Lack of necessary machinery, spare parts, electricity, water, fuel, gas, food and medicine, growing insufficiency of qualified workers many of whom have left the country for better economic opportunities, in particular medical personnel, engineers, teachers, professors, judges and policemen, has enormous impact over all categories of human rights, including the rights to life, to food, to health

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[9] Cf. Aaron Klein, Economic Warfare: Four Takeaways from Being in China When the Trade War Started (Jul. 31, 2018) at https://www.brookings.edu/blog/up-front/2018/07/31/economic-warfare-four-takeaways-from-being-in-china-when-the-trade-war-started/ ("If warfare in the 20th century was often cold, then in the 21st century the struggle between major nations will be fought on the field of trade, capital markets, and finance.")

[10] We should perhaps distinguish between sanctions designed to achieve economic objectives and sanctions aimed at changing undesirable behavior such as repression and violations of human rights.

[11] See, e.g., Vladislav Inozemtsev, Yes, Sanctions Work at https://www.the-american-interest.com/2015/02/02/yes-sanctions-work/ .

[12] *See, e.g.*, Daniel Drezner, *The Hidden Hand of Economic Coercion*, 57 International Organization 643 (2003).

[13] See, e.g., Anatoly Kurmanaev & Clifford Krauss, U.S. Sanctions Are Aimed at Venezuela's Oil. Its Citizens May Suffer First. New York Times (Feb. 8, 2019); Rachael Gosnell, Economic Sanctions: A Political, Economic, and Normative Analysis, 6:3 International Relations and Diplomacy 152 (2018).

and to development". [14]

Sanctions may be multilateral or unilateral. The US sanctions at issue in Libyan Arab Foreign Bank v Banker's Trust were unilateral. Unilateral sanctions, such as the Libyan asset freeze can be problematic for the gatekeepers, such as banks and other financial institutions that are required to implement them: a bank might find that the laws of one jurisdiction where it carries on business require it to act in ways which are inconsistent with the laws of another jurisdiction whose laws bind it. Multilateral freezes should be easier for banks with cross-border operations to manage, as they can avoid the problems Bankers Trust faced in the Libyan Arab Foreign Bank case. But unilateral sanctions can be drafted to reduce such compliance problems.

In addition to sanctions measures that apply to states and state owned entities (such as Petroleos De Venezuela SA or PDVSA) sanctions may be targeted at individuals and firms that are important in implementing a country's policies, or that are engaged in corruption or other criminal activities, such as terrorism. In the post 9/11 period the idea of targeting individuals with sanctions measures took hold. But there are reasons to worry. Fionnuala Ní Aoláin has written:

> For civil society, the international primacy of security over human rights translated itself into polarising political rhetoric of "with us or with the terrorists", which led to targeting civil society members questioning the legitimacy of these measures. Loose international frameworks, requiring national implementation, provided governments the means to secure their own power by silencing voices questioning their legitimacy or their policies on human rights grounds. As the phenomena being tackled are undefined or vaguely defined, existing matrixes allow States to qualify threats to themselves as terrorism, violent extremism, extremism, or even more broadly threats to national security. [15]

The idea that an international organization such as the UN Security Council

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[14] UN human rights expert urges to lift unilateral sanctions against Venezuela (Feb. 12, 2021) at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26749&LangID=E.

[15] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders, A/HRC/40/52 Advance unedited version (Feb. 18, 2019) at https://www.ohchr.org/Documents/Issues/Terrorism/SR/A_HRC_40_52_EN.pdf .

began to adopt measures which have an impact on individuals raises other questions. Devikah Hovell writes:

> The expanding assumption of decision-making authority over individuals by international institutions might be viewed as the next important shift in governmental authority, this time from the domestic to the international sphere. This shift in the locus of decision-making authority has certainly sparked similar concerns to those emerging during the rise of the modern administrative state, namely fears about the exercise of power over individuals by an unaccountable body and the absence of judicial review. Perceived against the backdrop of other historical shifts in governmental decision-making authority, failure by the UN to establish adequate due process safeguards regulating its assumption of decision-making authority over individuals can be recognized as something of an historical anomaly. [16]

The United Nations Security Council adopts multilateral sanctions to maintain or restore international peace and security.[17] To the extent that multilateral freezes can be made effective some argue that they may also operate more effectively as sanctions or to inhibit the financing of terrorism.[18]

Some multilateral sanctions target countries, and others target named individuals. But individuals and firms have no standing to challenge a decision by the Security Council to impose an asset freeze in court, although there is an administrative procedure to evaluate some sanctions targeted at individuals.[19] The Security Council adopted resolution 1730 (2006)[20] to ask the UN Secretary-General to establish a "focal

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[16] Devikah Hovell, *Due Process in the United Nations*,110 Am. J. Int'l L. 1, 4 (2016).

[17] *See generally, e.g.*, https://www.un.org/securitycouncil/sanctions/information ("Security Council sanctions have taken a number of different forms, in pursuit of a variety of goals. The measures have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. The Security Council has applied sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.")

[18] *See, e.g.*, Navin A. Bapat & T Clifton Morgan, *Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data*, 53 International Studies Quarterly 1075 (2009).

[19] Cf. Hovell, supra note 16, at 9 (noting that the Ombudsperson only deals with one of the Security Council's targeted sanctions regimes).

[20] *See* http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730%282006%29.

point" to consider requests for de-listing.[21] An Ombudsperson considers requests for delisting:

Cumulatively, since the Office was established, 77 cases involving requests made to the Ombudsperson from an individual, an entity or a combination of both have been resolved through the Ombudsperson process or through a separate decision of the Committee.[22] In the 74 cases fully completed through the Ombudsperson process, 57 delisting requests have been granted and 17 have been refused. As a result of the 57 petitions which have been granted, 52 individuals and 28 entities have been delisted and 1 entity has been removed as an alias of a listed entity. In addition, three individuals were delisted by the Committee before the Ombudsperson process was completed and one petition was withdrawn following the submission of the comprehensive report.... Through various resolutions, the Security Council provides sanctioned individuals and entities with an institutionalized instrument for reviewing the application of the sanctions measures. The Ombudsperson takes the view that this function should always be operational. The procedure to appoint a new Ombudsperson after the former Ombudsperson, Catherine Marchi-Uhel, left inmid-2017 lasted more than nine months. It thus became apparent that prolonged vacancies for the Ombudsperson's post were possible. No timeframe for replacement of the Ombudsperson is provided for under the relevant resolutions... The Ombudsperson would welcome a solution to prevent such prolonged vacancies in the future. For example, in the event of a vacancy, an acting Ombudsperson or another person with delegated authority to temporarily represent the Ombudsperson should always be available to consider delisting requests. The Security Council set very strict, specific timelines for the consideration of Ombudsperson cases in annex II to resolution 2368 (2017), and for good reason: it is central to the fairness of the process for a petitioner's request to be considered expeditiously... obtaining relevant and usable information from Member States is often very difficult and has proved to be one of the main challenges in the consideration of delisting requests. It is not uncommon that Member States explicitly oppose the delisting of a petitioner without giving any reasons or providing any recent information which would support their objection to delisting. The Ombudsperson urges Member States to share all relevant information in their possession. In doing so, the Ombudsperson notes that, pursuant to paragraph 20 of resolution 1904 (2009), the Ombudsperson shall neither seek nor receive

[21] On the delisting process see https://www.un.org/securitycouncil/sanctions/delisting/delisting-requests .

[22] As of February 2021 this number was 89. Report of the Office of the Ombudsperson submitted pursuant to Security Council resolution 2368 (2017), Twentieth report of the Ombudsperson to the Security Council S/2021/122 (Feb. 8, 2021).

instructions from any Government. If, in one way or another, sufficient information cannot be obtained to justify imposition of the sanctions measures, the Ombudsperson is bound to recommend that the petitioner be delisted...

In Ombudsperson proceedings the principle of fairness has the potential to be compromised in two respects: (1) when the decision is based on confidential information which cannot be disclosed to the petitioner, i.e., which the petitioner does not know and on which she or he cannot comment; (2) if the reasons letter cannot disclose to the petitioner all the reasons which, in the opinion of the Ombudsperson, are necessary for understanding the Committee's decision, especially in cases where the listing is retained...

The abstract possibility of a future threat can never be completely excluded. However, without any concrete, recent information substantiating this threat, the fact that a person was once listed cannot justify the listing in perpetuity. Moreover, such a threat can be mitigated if a petitioner has undergone a positive evolution and has credibly distanced himself or herself from a formerly held radical position.[23]

Those who have acted as Ombudsperson have commneted that the institutional arrangements do not provide adequately for the Ombudsperson's independence:

> 44. During the reporting period, it was possible in cases 91 and 92 to travel to each petitioner's country of residence to conduct in-person interviews and to meet with the relevant authorities. Two separate trips were necessary, and the organization of each required some flexibility from the Ombudsperson and from the Secretariat. Owing to the travel restrictions in place, each trip was only possible if taken in conjunction with a limited stay in the Ombudsperson's home country. In the planning and execution of those trips, it became manifest that the structures and clerical requirements of the United Nations administration were not favourable to pragmatic solutions in the interest of an independent proceeding. On the contrary, they were an obstacle to independent execution of the mandate, especially in times of crisis. Although a satisfactory conclusion was ultimately reached, the Ombudsperson felt pressured by a United Nations policy whereby his ability to work from outside the duty station – in this case, a necessary measure for the execution of his mandate – could be made conditional on a partial waiver of his contractual claims.
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> 45. Ultimately, the situation demonstrates what the Ombudsperson himself as

[23] Report of the Office of the Ombudsperson pursuant to Security Council Resolution 2368 (2017), Sixteenth report of the Ombudsperson to the Security Council, S/2019/112 (Feb. 6, 2019) at https://undocs.org/en/S/2019/112 .

> well as both his predecessors have emphasized at length: that the way the Office is integrated into the Secretariat, the Ombudsperson's contractual arrangement and the resultant working conditions are not appropriate for the function of the Ombudsperson as an independent reviewer. The Ombudsperson invites the Council to address the inappropriate contractual arrangement and the lack of institutional independence afforded to the Office. The Ombudsperson has recorded his reflections on the major achievements of the Office and the challenges regarding fairness, institutional independence and transparency. He has shared these reflections with a few interested Member States and members of the Secretariat. He is prepared and willing to discuss these considerations with the Council or its members, should they be of interest.[24]

The lack of judicial proceedings to evaluate sanctions decisions with respect to individuals is not in itself a problem, if the administrative procedures are adequate, and if they extended to all cases where individuals are sanctioned.[25] Hovell argues that adding an instrumentalist (judicial) model of judicial review to Security Council sanctions-making would reinforce the apparent legitimacy of a body that is lacking legitimacy because it is dominated by 5 permanent representatives on the Council for historic reasons.[26] She says that "the ombudsperson is superior to a court process as it offers the most appropriate response to legitimacy gaps in Security Council sanctions decision- making."[27] But the system has weaknesses.

The EU and sanctions

The EU engages in three different major types of sanctions activities: 1. implementing UN sanctions measures within the EU,[28] 2. EU autonomous sanctions

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[24] Report of the Office of the Ombudsperson submitted pursuant to Security Council resolution 2368 (2017), Twentieth report of the Ombudsperson to the Security Council S/2021/122 (Feb. 8, 2021).

[25] See, e.g., Hovell, supra note 16 at 9-10.

[26] Hovell, supra note 16 at 11.

[27] Id. at 23.

[28]Thomas Biersteker & Clara Portela, EU Sanctions in Context: Three Types Research Collection School of Social Sciences. Paper 1688 (2015) http://ink.library.smu.edu.sg/soss_research/1688 at 1 ("The EU sanctions on Liberia, Angola, Guinea Bissau, Somalia, the Democratic Republic of the Congo (DRC),

going beyond the UN sanctions,[29] and 3. autonomous EU sanctions where there is no UN action.[30] In 2020 the EU adopted a new human rights sanctions regime,[31] including provisions for financial sanctions and travel restrictions but not arms embargoes or economic sanctions such as import or export bans. Financial sanctions include asset freezes and prohibitions on making funds and resources available to the targets of the measures. With respect to extraterritorial effect the EU Commission's guidance note states:

> "EU sanctions create legal obligations for all EU operators, and in respect of any business conducted within the EU. Article 19 of the Regulation defines the scope of this jurisdiction...EU sanctions are expected to produce effects in third countries through pressure on the listed persons. However, they do not apply extra-territorially. In other words, they do not create obligations for non-EU operators, unless the business is conducted at least partly within the EU."[32]

The new regime for human rights sanctions specifically focuses on individuals as the targets of sanctions. In this way it is a departure for the EU, although in practice it reflects what the EU has been doing already. And more targeted sanctions measures may avoid some of the harms broader sanctions measures cause for the broader population.

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the Central African Republic (CAR), and South Sudan are all examples of this type of EU sanction. The EU measures are thus 'embedded' in universally applicable UN sanctions, legitimated by the UN Security Council and, at least in theory, implemented by all member states of the UN.")

[29] Id. at 1-2 (when the UN Security Council urges member states to 'exercise vigilance' with regard to the implementation of sanctions taken under Chapter VII, the EU may decide to add supplementary sanctions. The EU sanctions on Iran since 2010, the Democratic People's Republic of Korea (DPRK), Libya in 2011, and Côte d'Ivoire in 2011 are examples of this type of EU sanction.")

[30] Id. at 2 ("The EU sanctions on Syria, Russia, Ukraine, Burma/Myanmar, Zimbabwe, Belarus, China, Uzbekistan or the Comoros are examples of this category of EU sanction. The EU sanctions are typically applied in conjunction with unilateral measures by the United States or by other countries or regional organisations.")

[31] Council Decision 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ No. L 410I/13 (Dec. 7, 2020) and Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ No. L 410I/1 (Dec.7, 2020).

[32] Commission Guidance Note on the Implementation of Certain Provisions of Council Regulation (EU) 2020/1998, C (2020) 9432 final (Dec. 17, 2020).

As of January 2021 the EU Commission has identified ensuring that its Member States apply EU sanctions as a priority:

...implementation is not as uniform across the EU as it ought to be. This creates distortions in the Single Market as EU companies, including EU subsidiaries of foreign companies, can circumvent prohibitions. This also creates uncertainty among operators. Inconsistent enforcement undermines the efficacy of sanctions and the EU's ability to speak with one voice....

EU sanctions must be targeted to achieve the EU's policy goals, while avoiding any unintended consequences. The Commission, as the institution in charge of monitoring and co-ordinating the implementation of EU sanctions... will from 2021 contribute to the assessment of the effectiveness of EU sanctions. This will consist of examining the economic impact of sanctions on the entities subject to them, on trade patterns between the EU and the country concerned, on EU businesses and on the provision of humanitarian aid. Based on this assessment, the Commission will coordinate with the High Representative to propose to improve the effectiveness of EU sanctions regulations.

In 2021, the Commission will also conduct a review of practices that circumvent and undermine sanctions, including the use of cryptocurrencies and stablecoins. The results of this will inform possible legislative proposals or implementation guidelines from 2022.

EU sanctions are most effective when information about their impact is promptly available. In 2021, the Commission will develop a database, the Sanctions Information Exchange Repository. This will enable prompt reporting and exchange of information between Member States and the Commission on the implementation and enforcement of sanctions. The Commission will consider obtaining specialised information, including data collected by EU agencies and bodies. The Commission will work in coordination with the High Representative as appropriate. Moreover, the Commission will assess the need to review existing reporting obligations for Member States.

In parallel to the adoption of this Communication, the Commission is setting up an expert group of representatives of Member States on sanctions and extra-territoriality. Representatives of the European External Action Service shall be invited to assist to the meetings of the Group. The group's mandate will cover issues related to the technical implementation of EU sanctions and of Regulation (EC) No 2271/96 (Blocking Statute).46 In addition, the group will serve as a forum to carry out further work on the EU's resilience to the effects of the unlawful application of extra-territorial unilateral sanctions adopted by third countries. Non-governmental organisations (NGOs) and civil society may be invited as appropriate to ensure that humanitarian aspects are to the fore.

Further coordination on certain cross-border sanctions-related matters is needed. Currently,

Member States' authorities that deal with requests for authorisation from EU businesses or humanitarian operators that are active in multiple Member States are often not informed of parallel requests to, or decisions issued by, other national authorities. This could result in the uncoordinated enforcement of EU sanctions and forum shopping. The Commission will work with Member States to set up a system to centralise notifications and the dissemination of information across Member States, and to help coordinate Member States' replies, in full compliance with the division of competences in the treaties.
The Commission will also discuss the implementation of EU sanctions with Member States to ensure a harmonised approach in this regard. Applicable standards and respective best practices could also be discussed in the expert group mentioned above.
Finally, the EU is a leading provider of assistance to third countries. The Commission will work with Member States and its international partners to further secure the highest levels of due diligence to ensure that EU funds and economic resources, including guarantees, are used in full compliance with EU sanctions The Commission stands ready to continue working with partners who need to increase capacity in this area....
In its role of guardian of the treaties, the Commission monitors and collects information on possible breaches of EU law by Member States. To address the confidential nature of information on violations of EU sanctions and potential implications for those who report illicit activities, the Commission will create a dedicated tool to facilitate anonymous reporting.
In the first half of 2022, the Commission will draw up a roadmap (including criteria and a timetable) for moving from detection of systematic non-compliance with EU sanctions to action before the Court of Justice of the European Union.
Finally, the Commission will work with Member States, including within the framework of the expert group on sanctions and extra-territoriality, to ensure that national penalties for breaching EU sanctions are effective, proportionate and dissuasive. [33]

When the EU implements sanctions against individuals and firms, EU courts have held that the persons designated under sanctions regimes have rights to due process under EU law, which they can invoke before EU courts and the domestic courts of EU Member States.[34] The EU courts use the language of fundamental rights rather

[33] EU Commission, The European Economic and Financial System: Fostering Openness, Strength and Resilience, COM (2021) 32 final (Jan. 19, 2021).

[34] *See, e.g.* Commission v Yassim Abdullah Kadi Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Jul. 18, 2013) at http://www.bailii.org/eu/cases/EUECJ/2013/C58410.html . See also, e.g. Clemens A Feinäugle, Commission v Kadi, 107 Am. J. Int'l L 878 (2013); Conor Gearty, In praise of awkwardness: Kadi in the CJEU, 10. European Constitutional Law Review15-27 (2014), Peter Margulies,

than the term due process. These fundamental rights include the rights of the defence ("the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality") and the right to effective judicial protection.[35] And the invocation of fundamental rights in the EU courts has meaning: in a number of cases individuals and firms have successfully invoked their EU due process rights to invalidate the EU measures which designated them as subject to sanctions. A possibility of challenging measures in EU and domestic courts provides some protection of the rights of people designated that can address the lack of legal rights for non-states at the international level.

However, the challenges are not always successful. For example, Rosneft challenged EU sanctions aimed at Russia with respect to its actions in Ukraine,[36] contesting the validity of the sanctions measures and also the implementation of the sanctions in the UK. Rosneft's arguments were rejected by the Court of Justice in 2017.[37] Rosneft's claims included infringement of provisions of the EU-Russia Partnership Agreement; non-compliance with the obligation to state reasons, and the right to a fair hearing and to effective judicial protection; conflict with the principle of equal treatment and a misuse of powers, that the provisions did not conform to the principle of proportionality and that they interfered with Rosneft's freedom to conduct business and right to property and were contrary to the principles of legal certainty.[38]

Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After Kadi II, 6 Amsterdam Law Forum 51 (2014).

[35] "[T]he person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question." Kadi at ¶ 100.

[36] Council Regulation 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, O.J. No. L229/1 (Jul. 31, 2014) at https://publications.europa.eu/en/publication-detail/-/publication/65b043ca-18c2-11e4-933d-01aa75ed71a1/language-en

[37] PJSC Rosneft Oil Company, R. (on the application of) v Her Majesty's Treasury & Ors [2017] EUECJ C-72/15 (28 March 2017) http://www.bailii.org/eu/cases/EUECJ/2017/C7215.html

[38] Id.at ¶ 35.

111 Under Article 99(1)(d) of the EU-Russia Partnership Agreement, nothing in that agreement is to prevent a party from taking measures that it considers necessary for the protection of its essential security interests, particularly in time of war or serious international tension constituting a threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.
112 Further, the wording of that provision does not require that the 'war' or 'serious international tension constituting a threat of war' refer to a war directly affecting the territory of the European Union. Accordingly, events which take place in a country bordering the European Union, such as those which have occurred in Ukraine and which have given rise to the restrictive measures at issue in the main proceedings, are capable of justifying measures designed to protect essential European Union security interests and to maintain peace and international security,... with due regard to the principles and purposes of the Charter of the United Nations.
113 As regards the question whether the adoption of the restrictive measures at issue in the main proceedings was necessary for the protection of essential European Union security interests and the maintenance of peace and international security, it must be borne in mind that the Council has a broad discretion in areas which involve the making by that institution of political, economic and social choices, and in which it is called upon to undertake complex assessments...
114 As stated by the Advocate General... at the time when the restrictive measures at issue in the main proceedings were adopted, the Council stated, in the preambles of the contested acts, that the Heads of State or Government of the European Union condemned the unprovoked infringement of Ukrainian sovereignty and territorial integrity by the Russian Federation, that the Council urged the Russian Federation actively to use its influence over the illegally armed groups in order, inter alia, to permit full, immediate, safe and secure access to the site of the downing of the Malaysia Airlines flight MH17 in Donetsk (Ukraine), and that the Union had previously adopted measures in response to the illegal annexation of the Crimea and Sebastopol (Ukraine). In view of those factors, the Council concluded ... that the situation remained grave and that it was appropriate to adopt restrictive measures in response to the Russian Federation's actions destabilising the situation in Ukraine.
115 Further, as is stated in recital (2) of Regulation No 833/2014, it is apparent from those statements that the aim of the restrictive measures prescribed by the contested acts was to promote a peaceful settlement of the crisis in Ukraine. That objective is consistent with the objective of maintaining peace and international security, in accordance with the objectives of the Union's external action set out in Article 21 TEU.
116 In those circumstances, taking into consideration the broad discretion enjoyed by the Council in this area, that institution could take the view that the adoption of the restrictive

measures at issue in the main proceedings was necessary for the protection of essential European Union security interests and for the maintenance of peace and international security, within the meaning of Article 99 of the EU Russia Partnership Agreement.
117 Consequently, an examination of the contested acts in the light of that agreement has disclosed nothing capable of affecting their validity.

– The obligation to state reasons and respect for the rights of the defence, the right to effective judicial protection and the right to access to the file
120 ... in accordance with settled case-law, the extent of the requirement to state reasons depends on the nature of the measure in question, and that, in the case of measures intended to have general application, the statement of reasons may be limited to indicating the general situation which led to the measure's adoption, on the one hand, and the general objectives which it is intended to achieve, on the other..
121 As regards restrictive measures affecting individuals, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and which is relied on as the basis of its decision...
122 ...it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question and, in particular, in the light of the interest which the addressees of the measure may have in obtaining explanations. Consequently, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him...
123 It is clear that recitals 1 to 8 of Decision 2014/512 set out the relevant factors of the political context within which the restrictive measures at issue were adopted. Further, it is apparent from recital 2 of Regulation No 833/2014 that the declared objective of the contested acts was to increase the costs of the actions of the Russian Federation designed to undermine Ukraine's territorial integrity, sovereignty and independence and to promote a peaceful settlement of the crisis. The contested acts accordingly describe the overall situation that led to their adoption and the general objectives they were intended to achieve.
124 Likewise, the Court must hold ... that Rosneft, a major player in the Russian oil sector, whose share capital, on the date of adoption of Decision 2014/512, was predominantly owned by the Russian State, could not reasonably have been unaware of the reasons why the Council adopted measures targeted against it. In accordance with the objective of increasing the costs of the actions of the Russian Federation vis à vis Ukraine, Article 1(2)(b) of Decision 2014/512

establishes restrictions against certain oil sector entities controlled by the Russian State on the basis of, inter alia, their total assets, with an estimated value of 1 000 billion Russian Roubles. Since both the political background at the time of the adoption of those measures and the importance of the oil sector for the Russian economy were also well known, the fact that the Council chose to adopt restrictive measures against the players in that industry can be readily understood in the light of the declared objective of those acts.
125 Consequently, the Council has, in this case, stated reasons for the contested acts that are sufficient....

– The principle of equal treatment
131 Rosneft has claimed before the referring court and in its written observations submitted to the Court that the Council infringed the principle of equal treatment when it targeted, by means of Articles 3 and 3a and Article 4(3) and (4) of, and Annex II to, Regulation No 833/2014, undertakings operating in certain parts of the oil sector but not undertakings operating in other sectors, and the declared objective of those restrictive measures does not explain or justify that difference in treatment.
132 ... , the Council has a broad discretion when it determines the purpose of restrictive measures, particularly where such measures prescribe, in accordance with Article 215(1) TFEU, the interruption or reduction, in whole or in part, of economic and financial relations with one or more third countries. In that regard, the Court concurs with the United Kingdom Government and holds that, with respect to the restrictive measures at issue in the main proceedings which target the oil sector, it is open to the Council, inter alia, to impose, if the Council deems it appropriate, restrictions which target undertakings active in specific sectors of the Russian economy in which products, technologies or services imported from the European Union are particularly significant. The choice of targeting undertakings or sectors that are reliant on cutting edge technology or expertise mainly available within the European Union is consistent with the objective of ensuring the effectiveness of the restrictive measures at issue in the main proceedings and ensuring that the effect of those measures is not offset by the importation, into Russia, of substitute products, technologies or services from third countries.
133 In the light of the above, an examination of the contested acts in the light of the principle of equal treatment has disclosed nothing capable of affecting the validity of those acts.

– Misuse of powers
134 Rosneft has claimed before the referring court and in these proceedings that the Council, by adopting the restrictive measures at issue in the main proceedings, misused its powers when it stated that those measures were adopted, according to recital 2 of Regulation No

833/2014, with a view 'to increasing the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis', whereas the objective of those measures was, in reality, to cause long-term harm to the energy sector of the Russian Federation and thereby to reduce its power to threaten countries which depend on it for their energy supplies.

135 According to the Court's settled case-law, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case...

136 It is however clear that, in this case, with the exception of a reference by Rosneft, in its written observations, to a Commission Working Document, which is held to be irrelevant for the reasons stated by the Advocate General in points 180 to 182 of his Opinion, Rosneft has in no way substantiated its argument that the restrictive measures at issue in the main proceedings were adopted for ends other than those stated in the contested acts, still less provided objective, relevant and consistent evidence to that effect.

137 In the light of the foregoing, an examination of the question of an alleged misuse of powers by the Council has disclosed nothing capable of affecting the validity of the contested acts....

– The principle of proportionality and Rosneft's fundamental rights...

146 ... with regard to judicial review of compliance with the principle of proportionality, the Court has held that the European Union legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The Court has concluded that the legality of a measure adopted in those areas can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue...

147 Contrary to what is claimed by Rosneft, there is a reasonable relationship between the content of the contested acts and the objective pursued by them. In so far as that objective is, inter alia, to increase the costs to be borne by the Russian Federation for its actions to undermine Ukraine's territorial integrity, sovereignty and independence, the approach of targeting a major player in the oil sector, which is moreover predominantly owned by the Russian State, is consistent with that objective and cannot, in any event, be considered to be manifestly inappropriate with respect to the objective pursued.

148 Second, the fundamental rights relied on by Rosneft, namely the freedom to conduct a business and the right to property, are not absolute, and their exercise may be subject to restrictions justified by objectives of public interest pursued by the European Union, provided

that such restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the rights guaranteed...
149 In that regard, it is clear, as the Court stated in the context of the implementation of the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro), that restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions ... That is a fortiori the case with respect to the consequences of targeted restrictive measures on the entities subject to those measures.
150 In the main proceedings, it must be observed that the importance of the objectives pursued by the contested acts, namely the protection of Ukraine's territorial integrity, sovereignty and independence and the promotion of a peaceful settlement of the crisis in that country, the achievement of which... is part of the wider objective of maintaining peace and international security, in accordance with the objectives of the Union's external action stated in Article 21 TEU, is such as to justify the possibility that, for certain operators, the consequences may be negative, even significantly so. In those circumstances, and having regard, inter alia, to the fact that the restrictive measures adopted by the Council in reaction to the crisis in Ukraine have become progressively more severe, interference with Rosneft's freedom to conduct a business and its right to property cannot be considered to be disproportionate....

[financial assistance]
171 ... the referring court seeks to ascertain whether the expression 'financial assistance', in Article 4(3)(b) of Regulation No 833/2014,[39] must be interpreted as including the processing of payments by a bank or other financial institution.
172 Rosneft and the German Government consider that, in using that expression, Regulation No 833/2014 refers not to acts which involve the mere processing of payments, but to acts of financing which provide active and substantive support. In that regard, the German Government argues, in particular, that payment services are services supplied to carry out payments on behalf of third party payers,.... By contrast, services the supply of which requires authorisation under Article 4(3) of Regulation No 833/2014, such as the provision of grants, loans and export

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[39] Art 4(3)(b) provides: "The provision of the following shall be subject to an authorisation from the competent authority concerned:... (b) financing or financial assistance related to technologies referred to in Annex II, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of those items, or for any provision of related technical assistance, directly or indirectly, to any natural or legal person, entity or body in Russia or, if such assistance concerns technologies for use in Russia, to any person, entity or body in any other country."

credit insurance, are services which the bank concerned provides using its own funds to the benefit of a third party.

173 The German Government considers, moreover, that financial institutions do not have sufficient information... to assess whether a payment does or does not in fact pursue an objective that is contrary to Regulation No 833/2014.

174 In the view of the United Kingdom Government, the Estonian Government and the Commission, the expression 'financial assistance' encompasses, on the contrary, payment services provided by a bank or other financial institution, and those services are prohibited where they are linked to a commercial transaction that is prohibited under Regulation No 833/2014. Referring to the Commission's Guidance Note of 16 December 2014 on the implementation of certain provisions of Regulation (EU) No 833/2014 (C(2014) 9950 final), those interested parties consider that that expression must be interpreted broadly.

175 The French Government, for its part, considers that the concept of 'financial assistance' must be confined solely to transactions that constitute the provision of fresh resources by a financial institution. That concept may, however, include the processing of payments where those payments are linked to a commercial transaction that is prohibited under Regulation No 833/2014, provided that such processing of payments leads to the transfer of fresh resources by financial institutions to the recipients of those payments.

176 It must be noted that, pursuant to the restrictive measures established by Article 3 and Article 4(3) of Regulation No 833/2014, not only is any export to Russia of products intended for the oil industry... subject to the requirement of prior authorisation, but any supply of certain associated services in connection with the products concerned, including, inter alia, financing or financial assistance for the export of such products, must also be authorised by the competent authority. The restrictions concerning such associated services are addressed therefore, in particular, to financial institutions capable of providing financial assistance, including, inter alia, grants, loans and export credit insurance, to the exporters of those products.

177 Accordingly, in the light of the purpose of the restrictive measures at issue in the main proceedings, the Court must hold that, by Question 3(a), the referring court seeks, in essence, to ascertain whether Article 4(3) of Regulation No 833/2014, where it refers to 'financial assistance', must be interpreted as meaning that it imposes, on financial institutions among others, an obligation to obtain authorisation for the processing of any payment related to a transaction involving the sale, supply, transfer or export to Russia of products listed in Annex II to that regulation, particularly where those institutions find that the payment, the processing of which is requested, is related to such a transaction.

178 In that regard, it must be observed that none of the language versions of Article 4(3)(b) of Regulation No 833/2014 expressly refers to the 'processing of payments'. That being the case,

reference must be made to the general structure and objectives of that regulation.
179 The contextual interpretation of Article 4(3)(b) of Regulation No 833/2014 shows, as argued in particular by the German Government in its written observations, that, by the use of the expression ‘financial assistance’, the European Union legislature envisaged measures comparable to grants, loans and export credit insurance. While those measures require the financial institution concerned to use its own resources, payment services are provided, by contrast, by that institution acting as an intermediary, transmitting third party client funds to a particular recipient, without any commitment of that institution’s own resources.
180 In those circumstances, Article 4(3) of Regulation No 833/2014 cannot be interpreted as imposing on financial institutions an obligation to obtain, for the processing of any payment related to a sale, supply, transfer or export to Russia of products listed in Annex II to that regulation, an authorisation in addition to that required, under Article 3 of Regulation No 833/2014, for such transactions, where those institutions find that the payment, the processing of which is requested, constitutes, in whole or in part, the consideration for such a transaction.
181 Taking into consideration the fact that it is not the aim of Article 4(3)(b) of that regulation either to establish a freezing of assets or restrictions on the transfer of funds, the Court must hold that if the European Union legislature had intended that the processing of any bank transfer related to the products referred to in Annex II to Regulation No 833/2014 should be subject to a request for a further authorisation in addition to that required under Article 3 of Regulation No 833/2014 for a transaction of the kind mentioned in the preceding paragraph of the present judgment, it would have used an expression other than ‘financial assistance’ in order to establish and define such an obligation.
182 Finally, if one of the objectives of Regulation No 833/2014 is to increase the costs of the actions of the Russian Federation vis à vis Ukraine, it is clear that Article 4(3)(b) of that regulation is consistent with the pursuit of that objective by establishing restrictions on financial assistance for the export to Russia of products to be used in the oil industry, yet without subjecting the processing of payments as such to the prior authorisation requirement.
183 The foregoing interpretation is without prejudice to the prohibition that applies to any processing of payments that is related to a commercial transaction that is itself prohibited under Article 3(5) of Regulation No 833/2014.
184 In the light of the foregoing, the answer to Question 3(a) is that the expression ‘financial assistance’ in Article 4(3)(b) of Regulation No 833/2014 must be interpreted as meaning that it does not include the processing of a payment, as such, by a bank or other financial institution.

Rosneft made a second attempt to challenge the sanctions, which was rejected by the

EU's General Court in September 2018,[40] and by the Court of Justice in September 2020.[41]

The prospect of legal challenges to sanctions measures may affect the EU's willingness to adopt sanctions.[42] Also, within the EU, there is a debate about the costs and benefits of sanctions. One article from 2017 argues that the EU's sanctions on Russia have had a redistributive impact within the EU: whereas some Member States saw decreases in exports to Russia, others saw increases.[43]

Challenges to EU measures implementing Security Council resolutions involve an implicit challenge to the Security Council resolutions themselves. And this idea that the EU courts and domestic courts hear challenges to Security Council sanctions measures is a shock from the perspective of ideas of a hierarchy of legal rules with international rules at the top of the hierarchy. Hovell argues:

> When courts engage in the review of international decision-making, they need to be cognizant of their role in the broader international legal system. In the international legal sphere, domestic and regional courts are repositioned within a more political forum, wherein they provide not a check or balance, but legal counsel. When domestic and regional courts engage in review of Security Council decision-making, judicial decisions are not so much relevant in terms of their 'bindingness', but rather their level of persuasiveness, which will generally be tied to broader conceptions of an institution's legal reasoning and reputation...Where a judicial decision resonates with a 'broader movement for change,'it will be influential in motivating reform; where it fails to resonate more broadly, it will be marginalized, seen as exceptional and have limited law-making

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[40] Rosneft and Others v Council [2018] EUECJ T-715/14 (13 September 2018) http://www.bailii.org/eu/cases/EUECJ/2018/T71514.html .

[41] Rosneft and Others v Council, Case C-732/18 P (Sep. 17, 2020).

[42] *See, e.g.*, Gabriele Steinhauser & Benoît Faucon, EU Wary of Imposing Harsh Sanctions on Russians After Court Setbacks, Wall Street Journal (Mar. 20, 2014) at http://www.wsj.com/articles/SB10001424052702304026304579451603170136942

[43] Francesco Giumelli, *The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia*, 55 Journal of Common Market Studies 1062, 1063 (2017) ("the argument of the article is that sanctions have created winners and losers in the EU. By looking at the concentration of economic sectors that increased exports since sanctions, this article shows that the most frequent trade expansions, and therefore the greater number of business opportunities available to firms and companies, took place in Greece, Sweden, Luxembourg and Bulgaria.")

> effect. As courts and the Council develop a greater understanding of each other's role, there is the potential for a legal culture to develop in which they come to see themselves as involved in a dialectical partnership or dialogue in which they are both working toward an appropriate balance between human rights and international security.[44]

Some of the issues relating to sanctions imposed on individuals relate to identity: ensuring that the people identified as subject to sanctions are in fact the people who should be sanctioned. **The EU has developed best practices** with respect to sanctions:

In order to improve the effectiveness of financial restrictive measures and restrictions on admission, and to avoid unnecessary problems caused by homonyms or near-identical names (possibility of "mistaken identity"), as many specific identifiers as possible should be available at the moment of identification and published at the moment of adoption of the restrictive measure. With regard to natural persons, the information should aim to include, in particular, surname and first name (where available also in the original language), with appropriate transliteration as provided for in travel documents or transliterated according to the International Civil Aviation Organisation (ICAO) standards, aliases, sex, date and place of birth, nationality, address, identification or passport number. In any case, ICAO-standard transliteration should be present at all times and in all language versions of the legal act imposing the restrictive measures. With regard to entities, the information should aim to include in particular the full name, principal place of business, place of registration of office, date and number of registration.
After designation of a (natural or legal) person or entity, a constant review of identifiers should take place in order to specify and extend them, involving all those who can contribute to this effort. Procedures should be in place to ensure this constant review, involving all those who can contribute to this effort, in particular the EU Heads of Mission in the third country concerned, Member States' competent authorities and agencies, and financial institutions. With regard to measures targeting foreign regimes, each incoming Presidency could invite the relevant EU Heads of Missions to review, and where possible amend and/or complement, the identifying information of the designated persons or entities. Updates of the lists with additional identifying information will be adopted as provided for in the basic act...
..If the information on a designated person or entity is limited to that person's/entity's name,

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[44] Hovell, supra note 16, at 17-18

implementation of designation may in practice prove to be problematic due to the potentially lengthy list of possible positive targets. This highlights the urgency of further identifiers. However, even if additional identifiers are provided, distinguishing between designated and non-designated persons or entities may still be difficult. It cannot be excluded that in some cases the funds of a person/entity who was not the intended target of the restrictive measures will be frozen, or a person excluded from the territory of the Member States of the EU, due to identifiers that match with those of a designated person/entity. Member States and the Commission should have procedures in place that ensure that their findings on claims concerning alleged mistaken identity are consistent in this regard. Members States, the Commission, the EEAS and the Council should cooperate to refute a positive match that is due to the lack of sufficient identifiers..

.. it is .. important to make sure that natural persons whom the available identifiers fully match, but who claim they are not the intended target of the restrictive measures, are not deprived of funds necessary to their basic needs while .. investigations .. are being carried out. A different approach would lead to treating persons who may eventually prove not to be targeted by the restrictive measures more strictly than persons who are actually targeted by such measures, to the extent that the latter can benefit from the usual derogations to satisfy their basic needs... Such natural persons should e.g. be permitted to open a new bank account, but their funds in this account should proactively be treated as frozen by the respective economic operators while further investigations are carried out .. as to whether the natural person is designated. During this interim period, the natural persons concerned should be in a position to obtain the relevant authorisations from the national competent authority. However, if it turns out at a later date, that they are not designated and an authorisation is not required, then the asset freeze will fall away and authorisations will no longer be necessary. The economic operators can invoke the protection of the non-liability clause ... against possible claims that they wrongly froze the assets of a non-designated person...

No person or entity carrying out freezing, while acting without negligence and in good faith that such action is in accordance with a Regulation, shall be held liable11 vis-à-vis the affected person or entity. Actions of persons and entities may not give rise to liability if the persons or entities did not know or did not have reasonable cause to suspect that it would infringe restrictive measures. To this effect a non-liability clause has been included in most Regulations... [45]

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[45] Council of the EU, Foreign Relations Counsellors Working Party, Restrictive Measures (Sanctions)-Update of the EU Best Practices for the Effective Implementation of Restrictive Measures (Dec. 14, 2016)

The US: IEEPA

The International Emergency Economic Powers Act (IEEPA), 50 U. S. Code Chapter 35 authorizes the President of the United States to impose sanctions:

§1701 (a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

§ 1702 (a) In general

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and.

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the

interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.
(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.
(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.
(b) Exceptions to grant of authority
The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—
(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;
(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or
(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 4604?[3] of this title, or under section 4605?[3] of this title to the extent that such controls promote the nonproliferation or

antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or
(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.
(c) Classified information
In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

President Carter responded to the Iranian hostage crisis by freezing Iranian assets in the US; after the release of the hostages the President agreed that Iranian assets should be returned to Iran and that legal proceedings against the Iranian Government should be terminated, and that an Iran-US Claims Tribunal would resolve claims.[46] In **Dames & Moore v. Regan** the Supreme Court addressed challenges to these actions:[47]

Although Congress intended to limit the President's emergency power in peacetime, we do not think the changes brought about by the enactment of the IEEPA in any way affected the authority of the President to take the specific actions taken here. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury Regulations provided that "unless licensed" any attachment is null and void... , and all licenses "may be amended, modified, or revoked at any time."... As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets. This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." ... Such orders

[46] See http://www.iusct.net/ .

[47] 453 US 654, 101 S. Ct. 2972 (S. Ct. 1981).

permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments, or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result....

although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An in personam lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts....

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially. . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive... On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," Youngstown, 343 U. S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President....

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns...the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate...

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress'

enactment of the International Claims Settlement Act of 1949... as amended,..The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds...
Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority...
the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "[n]othing in this act is intended . . . to interfere with the authority of the President to [block assets], or to impede the settlement of claims of U. S. citizens against foreign countries." ...
where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

US courts have tended to defer to the Executive with respect to foreign affairs, and to be disinclined to scrutinize executive action.[48] But both Congress and the President may exercise powers with respect to foreign affairs, and separation of powers issues can arise. Sometimes the views of Congress and the President may diverge. President Obama's 2015 agreement with Iran, the Joint Comprehensive Plan of Action (JCPOA)

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[48] See, e.g., Curtis A. Bradley, *A New American Foreign Affairs Law*, 70 U. COLO. L. REV. 1089, 1091 (1999) ("Under the twentieth-century view, the U.S. foreign affairs powers are centered in the Executive. In order for the United States to speak with "one voice" in foreign affairs, courts defer heavily to the Executive's views and exercise little scrutiny of executive action.") Cf. Chichakli v. Szubin, 546 F. 3d 315 (5th Cir. 2008))("Chichakli's final challenge is to the sufficiency of the evidence that he was purporting to act on behalf of Viktor Bout. We review OFAC's designation of him as someone who was assisting Bout for whether the determination was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."... . Chichakli's specific challenge is to the relevance and reliability of certain information utilized by OFAC to justify the blocking order. The district court pointed out that the evidence supports the conclusions that Chichakli held senior level positions in several businesses connected with Bout, that Chichakli had a close relationship with Bout, and that he had intimate knowledge of Bout's businesses. Therefore, the district court correctly held that OFAC did not act in an arbitrary and capricious manner in determining that Chichakli acted for or on behalf of Viktor Bout.")

overturned a sanctions regime approved by Congress, and scholars have suggested that this action violated the separation of powers.[49]

In 2018 President Trump reimposed US sanctions on Iran, and Iran responded by suing the United States before the International Court of Justice, claiming that the sanctions breach US obligations under the US-Iran Treaty of Amity. Here is an excerpt from the ICJ's provisional measures order in the case:[50]

20. On 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of the participation of the United States in the JCPOA and directing the reimposition of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President of the United States indicated that "Iranian or Iran-backed forces have gone on the march in Syria, Iraq, and Yemen, and continue to control parts of Lebanon and Gaza". He further stated that Iran had publicly declared that it would deny the IAEA access to military sites and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. The Presidential Memorandum determined that it was in the national interest of the United States to reimpose sanctions "as expeditiously as possible", and "in no case later than 180 days" from the date of the Memorandum....
21. Simultaneously, the United States Department of the Treasury Office of Foreign Assets Control announced that "sanctions" would be reimposed in two steps. Upon expiry of a first wind-down period of 90 days, ending on 6 August 2018, the United States would reimpose a certain number of "sanctions" concerning, in particular, financial transactions, trade in metals ,the importation of Iranian-origin carpets and foodstuffs, and the export of commercial passenger aircraft and related parts. Following a second wind-down period of 180 days, ending on 4 November 2018, the United States would reimpose additional "sanctions"...
22. On 6 August 2018, the President of the United States issued Executive Order 13846 reimposing certain "sanctions" on Iran and Iranian nationals. In particular, Section1 concerns "Blocking Sanctions Relating to Support for the Government of Iran's Purchase or Acquisition of U.S.Bank Notes or Precious Metals; Certain Iranian Persons; and Iran's Energy, Shipping, and Shipbuilding Sectors and Port Operators". Section 2 concerns "Correspondent and

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[49] Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: the Iran Nuclear Agreement and the Separation of Powers*, 86 Fordham L. Rev 1199, 1205 (2017) ("The President's exercise of unilateral authority evidenced in the Iran nuclear agreement violates the constitutional separation of powers. Altering the governing legal framework set by Congress requires an exercise of legislative power, and the President is not a lawmaker.")

[50] See https://www.icj-cij.org/en/case/175 .

Payable-Through Account Sanctions Relating to Iran's Automotive Sector; Certain Iranian Persons; and Trade in Iranian Petroleum, Petroleum Products; and Petrochemical Products". Sections 3, 4 and5 provide for the modalities of "'Menu-based' Sanctions Relating to Iran's Automotive Sector and Trade in Iranian Petroleum, Petroleum Products, and Petrochemical Products". Section6 concerns "Sanctions Relating to the Iranian Rial". Section 7 relates to "Sanctions with Respect to the Diversion of Goods Intended for the People of Iran, the Transfer of Goods or Technologies to Iran that are Likely to be Used to Commit Human Rights Abuses, and Censorship". Section8 relates to "Entities Owned or Controlled by a United States Person and Established or Maintained Outside the United States". Earlier Executive Orders implementing United States commitments under the JCPOA are revoked in Section 9.23. Section 2(e)of Executive Order 13846 provides that certain subsections of Section 3 shall not apply with respect to any person for conducting or facilitating a transaction for the provision (including any sale) of agricultural commodities, food, medicine or medical devices to Iran...

38.The Court considers that the fact that the dispute between the Parties arose in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in and of itself exclude the possibility that the dispute relates to the interpretation or application of the Treaty of Amity ... In general terms, certain acts may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. To the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute violations of certain obligations under the 1955 Treaty, such measures relate to the interpretation or application of that instrument....

43. The Court considers that the 1955 Treaty contains rules providing for freedom of trade and commerce between the United States and Iran, including specific rules prohibiting restrictions on the import and export of products originating from the two countries, as well as rules relating to the payment and transfer of funds between them. In the Court's view, measures adopted by the United States, for example, the revocation of licences and authorizations granted for certain commercial transactions between Iran and the United States, the ban on trade of certain items, and limitations to financial activities, might be regarded as relating to certain rights and obligations of the Parties to that Treaty. The Court is therefore satisfied that at least the aforementioned measures which were complained of by Iran are indeed prima facie capable of falling within the material scope of the 1955 Treaty...

67. The Court notes that the rights whose preservation is sought by Iran appear to be based on a possible interpretation of the 1955 Treaty and on the prima facie evidence of the relevant facts. Further, in the Court's view, some of the measures announced on 8 May 2018 and partly implemented by Executive Order 13846 of 6 August 2018, such as the revocation of licences

granted for the import of products from Iran, the limitation of financial transactions and the prohibition of commercial activities, appear to be capable of affecting some of the rights invoked by Iran under certain provisions of the 1955 Treaty ..

68. However, in assessing the plausibility of the rights asserted by Iran under the 1955 Treaty, the Court must also take into account the invocation by the United States of Article XX, paragraph 1, subparagraphs (b)and (d),of the Treaty. The Court need not carry out at this stage of the proceedings a full assessment of the respective rights of the Parties under the 1955 Treaty. However, the Court considers that, in so far as the measures complained of by Iran could relate "to fissionable materials, the radio-active by-products thereof, or the sources thereof" or could be "necessary to protect...essential security interests" of the United States, the application of Article XX, paragraph1, subparagraphs (b)or (d), might affect at least some of the rights invoked by Iran under the Treaty of Amity.

69. Nonetheless, the Court is of the view that other rights asserted by Iran under the 1955Treaty would not be so affected. In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph1, subparagraphs (b) or (d)...

78. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision...

89.... the Court notes that, while the importation of foodstuffs, medical supplies and equipment is in principle exempted from the United States' measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment. In this regard, the Court observes that, as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks. Some of these banks also refuse to accept transfers or to provide corresponding services. It follows that it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment.

90. The Court considers that certain rights of Iran under the 1955 Treaty invoked in these proceedings that it has found plausible are of such a nature that disregard of them may entail irreparable consequences. This is the case in particular for those rights relating to the importation and purchase of goods required for humanitarian needs, such as (I) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated

services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft...

91. The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment may have a serious detrimental impact on the health and lives of individuals on the territory of Iran.

92. The Court notes that, during the oral proceedings, the United States offered assurances that the United States Department of State would “use its best endeavours” to ensure that “humanitarian or safety of flight-related concerns which arise following the reimposition of the United States sanctions” receive “full and expedited consideration by the Department of the Treasury or other relevant decision-making agencies”. While appreciating these assurances, the Court considers nonetheless that, in so far as they are limited to an expression of best endeavours and to co-operation between departments and other decision-making agencies, the said assurances are not adequate to address fully the humanitarian and safety concerns raised by the Applicant. Therefore, the Court is of the view that there remains a risk that the measures adopted by the United States, as set out above, may entail irreparable consequences.

93. The Court further notes that the situation resulting from the measures adopted by the United States, following the announcement of 8 May 2018, is ongoing, and that there is, at present, little prospect of improvement. Moreover, the Court considers that there is urgency, taking into account the imminent implementation by the United States of an additional set of measures scheduled for after 4 November 2018.

94. The indication by the Court of provisional measures responding to humanitarian needs would not cause irreparable prejudice toany rights invoked by the United States....

98.The Court considers that the United States, in accordance with its obligations under the 1955 Treaty,must remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of goods required for humanitarian needs, such as (I) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. To this

end, the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above.
99... In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute..

In February 2021 the ICJ held that it had jurisdiction in the case, rejecting the US' objections that the subject matter of the dispute related to the JCPOA rather than the Treaty of Amity, and Iran's claim was an abuse of process and raised questions of judicial propriety. In addition the court held that other objections by the US raised issues that were merits issues rather than preliminary issues.

Transnational Conflicts over Sanctions

Extraterritorial application of law can be problematic, and sanctions measures are an example of a situation where these issues arise. In 1996 the EU adopted blocking legislation with respect to foreign extraterritorial measures, and specifically identified US sanctions measures (Cuban Liberty and Democratic Solidarity Act of 1996, Iran and Libya Sanctions Act of 1996).[51] Here are some of the provisions of the **EU Blocking Regulation**:

Whereas the Community endeavours to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries, including the removal of any restrictions on direct investment - including investment in real estate - establishment, the provision of financial services or the admission of securities to capital markets;
Whereas a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State;
Whereas by their extra-territorial application such laws, regulations and other legislative instruments violate international law and impede the attainment of the aforementioned objectives;
Whereas such laws, including regulations and other legislative instruments, and actions based

[51] Regulation 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, O.J. L 309/1 (Nov. 29, 1996)

thereon or resulting therefrom affect or are likely to affect the established legal order and have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community;
Whereas, under these exceptional circumstances, it is necessary to take action at Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons, in particular by removing, neutralising, blocking or otherwise countering the effects of the foreign legislation concerned....

Article 1: This Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex of this Regulation, including regulations and other legislative instruments, and of actions based thereon or resulting therefrom, where such application affects the interests of persons, referred to in Article 11, engaging in international trade and/or the movement of capital and related commercial activities between the Community and third countries.
Acting in accordance with the relevant provisions of the Treaty ... the Council may add or delete laws to or from the Annex to this Regulation.

Article 2: Where the economic and/or financial interests of any person referred to in Article 11 are affected, directly or indirectly, by the laws specified in the Annex or by actions based thereon or resulting therefrom, that person shall inform the Commission accordingly within 30 days from the date on which it obtained such information; insofar as the interests of a legal person are affected, this obligation applies to the directors, managers and other persons with management responsibilities ....

Article 4 :No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner.

Article 5:No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.
Persons may be authorized, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their

interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation.

Article 6: Any person referred to in Article 11, who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom.
Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary....

Article 9: Each Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive.

Article 11: This Regulation shall apply to:
1. any natural person being a resident in the Community and a national of a Member State,
2. any legal person incorporated within the Community,
3. any natural or legal person referred to in Article 1 (2) of Regulation (EEC) No 4055/86 (5),
4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national,
5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.

During 2018 the EU extended the application of the provisions of the Blocking Regulation to US sanctions against Iran, stating "On 8 May 2018, the United States announced they will no longer waive their national restrictive measures relating to Iran. Some of those measures have extra-territorial application and cause adverse effects on the interests of the Union and the interests of natural and legal persons exercising

rights under the Treaty on the Functioning of the European Union.”.[52] Guidance on the application of these new rules states:

Requesting from the U.S. authorities an individual license granting a derogation/ exemption from the listed extra-territorial legislation would amount to complying with the latter. Indeed, this would necessarily imply recognising the U.S.' jurisdiction over EU operators which should be subject to the jurisdiction of the EU/Member States.
EU operators may, nevertheless, request the Commission to authorise them to apply for such a license with the U.S. authorities...
However, the Commission does not regard as compliance with the listed extra-territorial legislation the simple pursuit of conversations with the U.S. authorities in order for EU operators to ascertain its exact extent, how it might impact on them and whether not complying with it might entail serious damage on their interests in the sense of Article 5, second paragraph. Such conversations could precede the EU operators' request of an authorisation to the Commission, in accordance with the aforementioned Article, but would not require an authorisation in order to be carried out.[53]

In January 2019 France, Germany and the UK announced the establishment of a mechanism (**INSTEX**) to support EU trade with Iran which was meant to avoid the use of US dollars or any interaction with the US financial system:

France, Germany and the United Kingdom, in accordance with their resolute commitment and continued efforts to preserve the Joint Comprehensive Plan of Action (JCPOA) endorsed by United Nations Security Council resolution 2231, announce the creation of INSTEX SAS (Instrument for Supporting Trade Exchanges), a Special Purpose Vehicle aimed at facilitating legitimate trade between European economic operators and Iran.
The E3 reaffirm that their efforts to preserve the economic provisions of the JCPOA are conditioned upon Iran’s full implementation of its nuclear-related commitments, including full and timely cooperation with the IAEA.

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[52] Commission Delegated Regulation 2018/1100 Amending the Annex to Council Regulation No 2271/96 Protecting Against the Effects of Extra- Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, O.J. No L 199I/1 (Aug. 7, 2018).

[53] Guidance Note -Questions and Answers: adoption of update of the Blocking Statute, O.J. No. CI 277/4 (Aug. 7, 2018).

INSTEX will support legitimate European trade with Iran, focusing initially on the sectors most essential to the Iranian population – such as pharmaceutical, medical devices and agri-food goods. INSTEX aims in the long term to be open to economic operators from third countries who wish to trade with Iran and the E3 continue to explore how to achieve this objective.
The creation of INSTEX is a major first step taken by E3 countries today. The operationalisation of INSTEX will follow a step-by-step approach:
The E3 together with INSTEX will continue to work on concrete and operational details to define the way the company will operate.
The E3 will also work with Iran to create an effective and transparent corresponding entity that is required to be able to operationalise INSTEX.
INSTEX will function under the highest international standards with regards to anti-money laundering, combating the financing of terrorism (AML/CFT) and EU and UN sanctions compliance. In this respect, the E3 expect Iran to swiftly implement all elements of its FATF action plan.
The E3 underline their commitment to pursue the further development of INSTEX with interested European countries to make this instrument in support of trade exchanges with Iran operational by following the steps set out above.[54]

A Morrison Foerster analysis expressed some concerns about the instrument, noting business risks relating to the differences in approach of the US and the EU, suggesting that "European companies with U.S. business will likely remain hesitant to trade with Iran over concerns they could be hit with U.S. penalties."[55] Although Instex facilitated some transactions,[56] in January 2021 the EU and Iran were blaming each other for the ineffectiveness of the system.[57] Meanwhile, in a Communication in January

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[54] Joint statement on the creation of INSTEX, the special purpose vehicle aimed at facilitating legitimate trade with Iran in the framework of the efforts to preserve the Joint Comprehensive Plan of Action (JCPOA) (Jan.31, 2019)

[55] John E. Smith, Kevin Roberts, Felix Helmstädter, Michael V. Dobson & Shruti Chandhok, INSTEX and Europe's "Legitimate Trade" with Iran - Skepticism Prevails as Instrument for Supporting Trade Exchanges (INSTEX) Is Created but Still Not Operational Yet (Feb. 21, 2019) at https://www.mofo.com/resources/publications/190221-instex-trade.html .

[56] Laurence Norman, EU Ramps Up Trade System With Iran Despite U.S. Threats, Wall Street Journal (Mar. 31, 2020).

[57] Iran blames EU on INSTEX ineffectiveness, Tehran Times (Jan. 18, 2021).

2021 the EU Commission proposed more comprehensive action against extraterritorial sanctions:

Over recent years, certain third countries have increased their use of sanctions or other regulatory measures to determine the conduct of EU operators, whether individuals or companies. The EU considers that the extra-territorial application by third countries of measures against EU operators is contrary to international law. These measures threaten the integrity of the Single Market and the EU's financial systems, reduces the effectiveness of the EU's foreign policy and puts strain on legitimate trade and investment in violation of basic principles of international law.

Sustained close coordination with allies and like-minded partners, to align sanctions regimes to the largest possible extent, partly prevents the adoption of third country sanctions that differ in scope or substance to those of the EU and that are applied extra-territorially also to EU operators. Regular dialogue and cooperation on sanctions with third partners, in particular with G-7 partners, will be pursued by the High Representative and the Commission, in line with their respective competencies, to ensure better alignment of decisions on sanctions and implementation issues, and to raise potential concerns regarding the extraterritorial application of third countries' sanctions...

The Blocking Statute is the EU's unified response to the extra-territorial application of third countries' measures, in particular secondary sanctions, on EU operators. To fulfil its potential, the Blocking Statute must be part of a more comprehensive EU policy against extra-territoriality, for which the Commission will put in place the following measures to make a better use of existing tools and create new tools, as appropriate, through:

(i) clearer procedures and rules for applying Article 6 (in particular, to facilitate the recovery of defendants' assets across the EU);

(ii) strengthened national measures to block the recognition and enforcement of foreign decisions and judgments based on the listed extra-territorial measures (Article 4);

(iii) streamlined processing for authorisation requests pursuant to Article 5, second paragraph, including a review of the information requested;

(iv) possible involvement in foreign proceedings to support EU companies and individuals.

When assessing the impact of foreign direct investments into the EU on security and public order, the Commission will also consider the likelihood that the transaction results in the unlawful extra-territorial application of sanctions adopted by any third country to the EU target. For example, when reviewing the acquisition of control over EU companies by a foreign investor, the Commission may need to assess, in cooperation with the Member States' national authorities, whether this would render the EU target company more prone to abide by such extra-territorial sanctions, regardless of the country that imposed them. Such an outcome could

thereby endanger the capacity of the EU target company to maintain critical infrastructure in the EU, or to ensure security and continuity of supply of critical inputs into the EU.
Historically, the Blocking Statute has provided for a unified EU response to the extra-territorial application of sanctions. However, the proliferation of such sanctions requires a deeper debate on possible additional measures to increase deterrence and, if needed, to counteract them. The Commission will launch a general reflection on policy options to modernise the EU's toolkit to counter the effects of the unlawful extra-territorial application of third-country unilateral sanctions to EU individuals and entities. In addition to reflecting on an amendment to reinforce the Blocking Statute focusing on non-trade related measures of retorsion, the Commission will consider further tools to shield EU operators' legitimate operations under EU law. Stakeholders will be involved as appropriate.
In parallel, the Commission is carrying out a review of its trade policy and will bring forward a proposal to deter and counteract coercive actions by third countries no later than the fourth quarter of 2021 (or earlier should the need arise).[58]

Sanctions and Financial Institutions

Sanctions measures can involve a broad range of legal issues, as we have seen. In addition sanctions measures may identify financial institutions as targets or focus on financial institutions as gatekeepers when they are required to respect asset freezes (for example the issues in the Libyan Arab Foreign Bank case), or where they are prevented from providing services to sanctioned persons. Financial institutions need to be aware of their compliance obligations. Some financial institutions may react to sanctions measures and AML rules by deciding to avoid dealing with risky customers and counterparties (derisking); others may decide that non-compliance is profitable. With respect to the gatekeepers issue consider the comments of Fionnuala Ní Aoláin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism:

Financial institutions have been similarly burdened by measures that address access to banking services for the purpose of countering the financing of terrorism. In many countries, governments have turned to financial institutions for the implementation of new standards, drastically increasing the levels of regulatory compliance for financial institutions. Typically,

[58] EU Commission, The European Economic and Financial System: Fostering Openness, Strength and Resilience, COM (2021) 32 final (Jan. 19, 2021).

these processes involve an administrative decision against a financial institution, while the implementing decision that impacts on the right to access resources for civil society result from the operation of a private contract between the financial institution and its customer. As failure to comply can be very costly for financial institutions leading to punitive action, many risk-averse banks have implemented protocols shielding them from any risk of liability under counter-terrorism legislation. Over-regulation has translated into refusing to deal with civil society actors operating in or with "high-risk" environments or actors, limiting access to financial services, refusal to open or arbitrary closure of bank accounts, inordinate delays or termination of transactions, and onerous administrative requirements.[59]

The US authorities have taken enforcement action against a number of banks with respect to sanctions-busting activities. For example, in December 2012 the Federal Reserve announced "the issuance of a consent order to cease and desist and a civil money penalty assessment of $100 million against Standard Chartered PLC, London, Standard Chartered Bank, London, and the bank's branch in New York." The consent order related to Standard Chartered's compliance failures with respect to economic sanctions and anti-money-laundering requirements and failures to respond to bank examiner questions.[60] The order required the bank to improve its compliance program. Standard Chartered entered into a settlement agreement with the New York Department of Financial Services,[61] and deferred prosecution agreements with the DOJ and the District Attorney for New York County,[62] and a settlement agreement with the Treasury's Office of Foreign Assets Control.[63]

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[59] Report, supra note 15.

[60] Federal Reserve Press Release (Dec. 10, 2012) at http://www.federalreserve.gov/newsevents/press/enforcement/20121210a.htm.

[61] Department of Financial Services, Statement from Benjamin M. Lawsky, Superintendent of Financial Services, Regarding Standard Chartered Bank (Aug. 14, 2012).

[62] Department of Justice, Standard Chartered Bank Agrees to Forfeit $227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012) at http://www.justice.gov/opa/pr/2012/December/12-crm-1467.html .

[63] The settlement agreement is at https://home.treasury.gov/system/files/126/121210_SCB_Settlement.pdf .

Here is an excerpt from the **Standard Chartered Settlement Agreement**:

3. In February 2001, Bank Markazi Jomhouri Islami ("Markazi") approached SCB about the possibility of opening an account to receive the proceeds of oil sales by the National Iranian Oil Company and certain additional Markazi funds. SCB and Markazi began to develop operating procedures to mask the involvement of Iranian entities in payment instructions sent to SCB's New York Branch ("SCBNY"). When the beneficiary bank of a payment from Markazi was a non-Iranian bank, for example, SCB's London Branch ("SCBLondon") would send a single MT202 payment message to SCBNY with full details of the beneficiary bank; however, when the beneficiary bank was an Iranian bank, SCB London would send an MT100 or MT103 to the beneficiary bank's non-U.S.,non-Iranian correspondent bank with full details of the Iranian beneficiary bank, and a separate MT202 to SCBNY with no mention of the Iranian beneficiary bank.
4.SCB London set up routing rules within its payment system to route all incoming Society for Worldwide Interbank Financial Telecommunication ("SWIFT") messages from Markazi to a repair queue, meaning that the payment was subject to manual review and processing by wire operators, to prevent SCB London from automatically processing outbound payment instructions cleared through the United States with a reference to Markazi in the payment message. SCB London's payment processing team initially instructed Markazi to insert SCB London's Bank Identifier Code ("BIC") in field 52 (ordering institution) of its incoming payment instructions so that SCB's payment system would not populate that field with Markazi's BIC. In cases where Markazi failed to do so, SCB London wire operators would manually change field 52 to reference SCB London's BIC in order to mask Markazi's involvement in the payments.
5.As early as February 2002, several additional Iranian banks approached SCB London to discuss the possibility of opening new accounts. SCB London's Legal, Compliance, and Cash Management groups identified the need for written procedures for the operation of the Iranian banks' USD accounts. SCB London memorialized the procedures to process payments sen tthrough the United States from the Iranian banks in a document entitled "Standard Chartered Bank Cash Management Services UK- Quality Operating Procedure: Iranian Bank Processing" (the"QOP"). The final draft of the QOP, first issued to SCB London payments staff on February 20, 2004, included detailed instructions regarding the omission of the Iranian remitting bank's BIC:

> Ensure that if the field 52 of the payment is blank or that of the remitting bank that it is overtyped at the repair stage to a"." (Note: if this is not done then the Iranian Bank SWIFT code may appear- depending on routing- in the payment message being sent to [SCBNY]).

6.In addition to inserting a "." in field 52, the QOP also instructed staff to use cover payments to effect Iranian bank payments, which resulted in SCB London omitting any reference to the involvement of Iranian beneficiaries or beneficiary banks in SWIFT payment messages sent to SCB NY. To prevent transactions that did not qualify for a then-existing OFAC general license (the"U-Turn General License") - which authorized transfers to or from Iran where the only involvement of a U.S. person was as an intermediary bank not debiting or crediting an Iranian bank - from being sent through the United States, the QOP also instructed its payments staff to "ensure that the payment is a'U-Turn,'" to reject payments that did not comply with the U-Turn General License and to screen outgoing payment messages against a list of OFAC-sanctioned entities maintained by SCB London.

7.The above-referenced controls notwithstanding, in October 2005... SCB Group's Head of Legal & Compliance, Wholesale Bank expressed his concern over the procedures used to process payments for the Iranian banks in an email to the Group Head of Compliance and Regulatory Risk and other managers:

> I feel that I must record in writing my serious concern over the current written guidance and instructions in London relating to Iran sanctions, and the need to take urgent action to change them... The 'Quality Operating Procedure- Iran Bank Processing' document, read in isolation, is clearly a process designed to hide, deliberately, the Iranian connection of payments. I am concerned that, in the absence of any other effective, coherent, operational instructions, it would be difficult to resist the inference that the intention of the process is to enable payments to be made that are prohibited by the sanctions. Even if we have robust, detailed, procedures for checking that all the criteria for a permitted U-turn payment are fulfilled, I do not believe that we should continue the repair process, in view of its potential for misuse to mislead our New York branch, and the perception that it was designed for such purpose

.8.While SCB's omission of information affected approximately 60,000 payments related to Iran totaling $250 billion, the vast majority of those transactions do not appear to have been violations of the IranianTransactions Regulations,31C.F.R.Part560 due to authorizations and exemptions which were in place a tthe time.

9.In August 2003,SCB NY sent a letter to OFAC addressing a then-blocked libya payment that had been re-effected using a cover payment. That letter stated in part: "SCB (London) has advised us that... the use of cover payments was contrary to Standard Chartered Bank's global instruction relating to OFAC sanctioned countries that would have precluded the initiation of such cover payment instructions." SCB maintains that this statement was accurate when made in connection with the libya-related transaction in question, a program for which there was no

analogue to the U-Turn General license. OFAC, however, finds the statement to be misleading in light of the large number of Iran-related transfers that were processed using cover payments. SCB also appears to have used cover payments when processing transactions involving Sudanese entities, where U-Turns were similarly not allowed and despite warnings that standard payment methods should not have the "unintended consequence of avoiding...OFAC regulations." A more complete explanation of SCB's use of cover payments in its August 2003 letter to OFAC may have led OFAC to inquire further regarding the sanctions implications of the bank's procedures.

10.In October 2004,SCB NY entered into a Written Agreement with the Federal Reserve Bank of New York ("FRBNY") and the New York State Banking Department to correct deficiencies relating to, among other things, the bank's USD correspondent banking business. Despite the explicit interest of these regulators regarding SCB NY's processing of cover payments and payments with special characters specifically, which had the potential to concea lillicit financia lactivity, SCB NY chose not to make its regulators aware of the procedures in use by SCB London to send payment messages through the United States.

11.In October 2006, the CEO of SCB Americas, in an email to a Group Executive Director at SCB London entitled "Business with Iran- USA Perspective," stated his view on SCB's provision of banking services, specifically U-Turn payments, to Iranian banks: "Firstly, we believe this [strategy] needs urgent reviewing at Group level to evaluate if the returns and strategic benefits are... commensurate with the potential to cause very serious or even catastrophic reputational damage to the Group. Secondly, there is equally importantly potential risk of subjecting management in US and London (e.g. you and I) and elsewhere to personal reputational damage and/or serious criminal liability."

12.In addition to the USD clearing activity undertaken for Iranian banks at SCB London, SCB's Dubai Branch ("SCB Dubai") operated USD accounts for a number of Iranian banks and other Iranian corporate customers beginning no later than 2001, and handled much of the trade finance business involving SCB's Iranian customers. Furthermore, SCB Dubai maintained USD accounts for customers who transacted with individuals and entities in Sudan .and Libya, and sent USD payments through the United States destined for such individuals and entities in apparent violation of U.S.sanctions in place at the time.SCB Dubai used cover payments to process wires through the United States for these customers when destined for beneficiaries outside the United States. It appears that SCB Dubai utilized the same payment practice regardless of whether the payments involved interests of parties subject to U.S. sanctions or not. The practice resulted in banks in the United States being unaware of the possible U.S.sanctions implications of such payments. SCB Dubai processed USD payments where the beneficiary was located in the United States with serial payments that did not identify

information implicating sanctions.

The settlement identified a number of specific transactions where SCB entities had apparently violated different sanctions, and that the apparent violations had "undermined US. national security, foreign policy, and other objectives of U.S. sanctions programs." SBC agreed to terminate the conduct specified in the settlement and to adopt policies to address compliance for the future.

The New York Department of Financial Services subsequently criticized Promontory Financial for its efforts to help Standard Chartered engage with regulators in the lead up to the various consent decrees and settlements,[64] and also criticized Deloitte which had been chosen to be the monitor of Standard Chartered to facilitate regulatory compliance:

DFS's investigation into Deloitte's conduct during its consultant work at Standard Chartered found that the company:
Did not demonstrate the necessary autonomy required of consultants performing regulatory work. Based primarily on Standard Chartered's objection, Deloitte removed a recommendation aimed at rooting out money laundering from its written final report on the matter to the Department. The recommendation discussed how wire messages or "cover payments" on transactions could be manipulated by banks to evade money laundering controls on U.S. dollar clearing activities.
Violated New York Banking Law § 36.10 by disclosing confidential information of other Deloitte clients to Standard Chartered. A senior Deloitte employee sent emails to Standard Chartered employees containing two reports on anti-money laundering issues at other Deloitte client banks. Both reports contained confidential supervisory information, which Deloitte FAS was legally barred by New York Banking Law § 36.10 from disclosing to third parties.[65]

On 21 March 2013 John Peace, the Chairman of Standard Chartered made the

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[64] New York State Department of Financial Services Report on Investigation of Promontory Financial Group, LLC (August 2015).

[65] Cuomo Administration Reaches Reform Agreement with Deloitte over Standard Chartered Consulting Flaws (Jun. 18, 2013).

following statement:

On 5 March 2013, I, together with Chief Executive Officer Peter Sands and Group Finance Director Richard Meddings, representing Standard Chartered Bank (the "Group"), held a press conference where certain questions were asked concerning individual employee conduct and compensation in light of the deferred prosecution agreements made with the US Department of Justice and the New York County District Attorney's Office in December 2012. During that press conference, which took place via phone, I made certain statements that I very much regret and that were at best inaccurate.

In particular, I made the following statements in reference to a question regarding the reduction of bonuses for SCB executives:

We had no willful act to avoid sanctions; you know, mistakes are made - clerical errors - and we talked about last year a number of transactions which clearly were clerical errors or mistakes that were made…

My statement that SCB "had no willful act to avoid sanctions" was wrong, and directly contradicts SCB's acceptance of responsibility in the deferred prosecution agreement and accompanying factual statement.

Standard Chartered Bank, together with me, Mr. Peter Sands and Mr. Richard Meddings, who jointly hosted the press conference, retract the comment I made as both legally and factually incorrect. To be clear, Standard Chartered Bank unequivocally acknowledges and accepts responsibility, on behalf of the Bank and its employees, for past knowing and willful criminal conduct in violating US economic sanctions laws and regulations, and related New York criminal laws, as set out in the deferred prosecution agreement. I, Mr. Sands, Mr. Meddings, and Standard Chartered Bank apologize for the statements I made to the contrary.

In February 2019, Standard Chartered announced it was making provision for $900 million relating to the US sanctions issues and other compliance issues in the UK:

Standard Chartered continues its discussions relating to the potential resolution of the previously disclosed investigation by the US authorities relating to historical violations of US sanctions laws and regulations.

Standard Chartered has received a decision notice from the UK Financial Conduct Authority’s Regulatory Decisions Committee (RDC) relating to the previously disclosed investigation by the Financial Conduct Authority concerning the group’s historical financial crime controls, and is considering its options in relation to this decision notice. The decision notice imposes a penalty

of £102,163,200 (net of a 30% early settlement discount) on the group.
Standard Chartered's 2018 fourth quarter results will include a provision totalling USD900 million for potential penalties relating to the above US investigation and FCA decision, and for previously disclosed investigations relating to FX trading issues, including the January 2019 settlement announced last month. This provision reflects management's current view of the appropriate level of provision. Resolution of the US investigation and of the FCA process might ultimately result in a different level of penalties. [66]

OFAC recently announced settlements with UBAF with respect to breaches of Syria-related sanctions, [67] and Deutsche Bank Trust Company Americas.[68] Although the Trump Administration was very active in imposing sanctions, commentators have suggested it was not so active in sanctions enforcement.[69]

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[66] Standard Chartered, Provision in Respect of Legacy Financial Crime Control and FX Trading Issues (Feb. 21, 2019).

[67] OFAC Press Release, Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Union de Banques Arabes et Françaises (Jan. 4, 2021).

[68] OFAC Press Release, Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Deutsche Bank Trust Company Americas (Sep. 9, 2020) ("DBTCA failed to stop the 61 payments because it had not included in its sanctions screening tool the designated financial institution's Society for Worldwide Interbank Financial Telecommunication (SWIFT) Business Identifier Code (BIC), and DBTCA's screening tool was calibrated so that only an exact match to a designated entity would trigger further manual review.")

[69] *See, e,g.*, Bryan Early & Keith Preble, The Past, Present and Future of US Sanctions Enforcement (Feb. 23, 2021) at https://warontherocks.com/2021/02/the-past-present-and-future-of-u-s-sanctions-enforcement/.