International Finance, Spring 2024
Caroline Bradley[1]
Sanctions: Materials for Class on Wednesday April 17

Economic sanctions measures are designed to put pressure on a government, or on individuals, to change their behavior. Economic sanctions may be agreed multilaterally, through the UN Security Council, may be the product of a formal or less formal coalition of states which agree on the need for sanctions measures, or, as we saw in Libyan Arab Foreign Bank v Banker's Trust, they may be imposed unilaterally by one state.

The US has issued many sanctions measures in the past, sometimes in conjunction with other countries and sometimes independently. And sanctions measures relate to a range of different concerns, including threats to US national security, corruption, human rights abuses, the undermining of democracy, terrorism, narcotics trafficking, interference with US elections, illicit cyber activities and other transnational criminal activity.[2] A Sanctions Review by the Treasury in 2021 stated:

> After the September 11, 2001 attacks, economic and financial sanctions ("sanctions") became a tool of first resort to address a range of threats to the national security, foreign policy, and economy of the United States. This tool rests on the formidable strength of, and trust in, the U.S. financial system and currency. At their core, sanctions allow U.S. policymakers to impose a material cost on adversaries to deter or disrupt behavior that undermines U.S. national security and signal a clear policy stance. Treasury's work on sanctions is conducted in close partnership with other parts of the Executive Branch, in particular the Department of State and the National Security Council, which lead the formulation of the foreign policy and strategic goals that sanctions serve, as well as the Department of Justice. The Department of State also implements certain sanctions authorities in consultation with the Treasury.[3]

Note the reference to the idea of sanctions measures as a tool of first resort, and the significance of the US financial system and the US dollar. Many sanctions measures involve the sorts of restrictions on payments we saw in LAFB v Bankers' Trust as well as restrictions on other types of financial activity. The Strategic Review also noted challenges to the effectiveness of US sanctions measures:

---

[1]

[2] Congressional Research Service, U.S. Sanctions: Overview for the 118th Congress (updated Mar. 4, 2024).

[3] The Treasury 2021 Sanctions Review (Oct. 2021), at 1.

> When used effectively, sanctions have the capacity to disrupt, deter, and prevent actions that undermine U.S. national security. However, the United States now faces new, emerging challenges to the efficacy of sanctions as a national security tool: cybercriminals; strategic economic competitors; and a workforce and technical infrastructure under pressure from growing financial complexity and competing demands from policymakers, market participants, and others. To ensure sanctions continue to support U.S. national security objectives, the U.S. government must adapt and modernize the underlying operational architecture by which sanctions are deployed.
>
> These changes are also needed to keep pace with the evolution of the global financial architecture, which has a profound impact on the efficacy of U.S. financial sanctions. American adversaries—and some allies—are already reducing their use of the U.S. dollar and their exposure to the U.S. financial system more broadly in cross-border transactions. While such changes have multiple causes beyond U.S. financial sanctions, we must be mindful of the risk that these trends could erode the effectiveness of our sanctions.
>
> In addition, technological innovations such as digital currencies, alternative payment platforms, and new ways of hiding cross-border transactions all potentially reduce the efficacy of American sanctions. These technologies offer malign actors opportunities to hold and transfer funds outside the traditional dollar-based financial system. They also empower our adversaries seeking to build new financial and payments systems intended to diminish the dollar's global role. We are mindful of the risk that, if left unchecked, these digital assets and payments systems could harm the efficacy of our sanctions.[4]

The EU states that restrictive measures, or sanctions, are "[a]n 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."[5] For the EU, sanctions measures are not punitive, but are targeted at countries, entities and individuals to encourage policy changes, or deter disfavoured behaviors.[6]

Some characterize economic sanctions as legitimate means to affect behavior whereas others consider economic sanctions to be a way of waging war.[7] There is a debate about whether

---

[4] *Id*. at 2.

[5] *See* https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures_en .

[6] *See* https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en.

[7] *Cf.* Aaron Klein, Economic Warfare: Four Takeaways from Being in China When the Trade War Started (Jul. 31, 2018) at

sanctions are effective, and specific examples suggest different possible answers.[8] Sanctions are seen as contributing to the end of apartheid, but sanctions against Cuba were offset by Russian aid.[9] The threat of the imposition of sanctions may change behavior.[10]

Characterizing economic sanctions as acts of war is a significant move, because Article 2(4) of the UN Charter prohibits the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." States may use force in collective (e.g. Nato) or individual self-defence against an imminent or actual attack, or under peacekeeping measures authorized by the UN Security Council.[11] In imposing sanctions measures relating to the coup in Myanmar, the US characterized the coup as "an unusual and extraordinary threat to the national security and foreign policy of the United States." This is both an invocation of authority under US domestic legislation and an attempt to characterize the sanctions as relating to some conception of self-defence, although Professor Haque has stated that the standard view is that "an insufficiently grave use of force does not constitute an armed attack and does not trigger the right of self-defense."[12] Russia's invasion of Ukraine is an armed attack prohibited by the UN Charter,[13] and has led to an investigation relating to war crimes at the International Criminal Court,[14] and to Ukraine's case before the International Court of Justice to halt military action in Ukraine on the basis that the

---

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.")

[8] 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.

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

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

[11] *See, e.g.*, Adil Ahmad Haque, The United Nations Charter at 75: Between Force and Self-Defense — Part One (Jun. 24, 2020) at https://www.justsecurity.org/70985/the-united-nations-charter-at-75-between-force-and-self-defense-part-one/.

[12] *Id.*

[13] Statement by Members of the International Law Association Committee on the Use of Force (Mar. 4, 2022) at https://www.justsecurity.org/80454/statement-by-members-of-the-international-law-association-committee-on-the-use-of-force/.

[14] *See, e.g.* Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022); ICC Press Release, Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov (Mar. 5, 2024).

Russian claim that the action is to prevent genocide is false.[15] The ICJ directed Russia to suspend military operations in Ukraine.[16] More recently the ICJ has decided that its review of the litigation will focus on whether Ukraine committed genocide, rather than on Russia's invasion.[17]

Sanctions can have negative humanitarian impacts.[18] In December 2022 the UN Security Council recognized this negative aspect of sanctions in Resolution 2664 (2022) which establishes an exception to UN financial sanctions for funds or assets necessary for humanitarian assistance and activities to meet basic human needs.[19] The Resolution states that the Security Council decides:

> "that without prejudice to the obligations imposed on Member States to freeze the funds and other financial assets or economic resources of individuals, groups, undertakings, and entities designated by this Council or its Sanctions Committees, the provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs by the United Nations, including its Programmes, Funds and Other Entities and Bodies, as well as its Specialized Agencies and Related Organizations, international organizations, humanitarian organizations having observer status with the United Nations General Assembly and members of those humanitarian organizations, or bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plans, Refugee Response Plans, other United Nations appeals, or OCHA-coordinated humanitarian "clusters," or their employees, grantees, subsidiaries, or implementing partners while and to the extent that they are acting in those capacities, or by appropriate others as added by any individual Committees established by this Council within and with respect to their respective mandates, are permitted and are not a violation of the asset freezes imposed by this Council or its Sanctions Committees."

In February 2021, the UN Special Rapporteur on unilateral coercive measures and human rights, Alena Douhan, asked the US, the EU and other states to drop sanctions against Venezuela,

---

[15] *See, e.g.*, Request for the Indication of Provisional Measures submitted by Ukraine (Feb. 27, 2022).

[16] Ukraine v Russian Federation, Provisional Measures Order (Mar. 16, 2022).

[17] *See, e.g.*, Oona A. Hathaway, *Taking Stock of ICJ Decisions in the 'Ukraine v. Russia' Cases—And implications for South Africa's case against Israel*, Just Security (Feb. 5, 2024).

[18] 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).

[19] United Nations Security Council Resolution 2664 (2022) (Dec. 9, 2022).

after a two week visit to the country 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 and to development". [20]

Alena Douhan also noted that sanctions measures often hurt women, children and other vulnerable groups and that humanitarian aid may not reach these groups even if sanctions measures contain exemptions for humanitarian aid.[21] In early 2023 Alena Douhan and Obiora Okafor said that thalassemia patients in Iran were suffering as a result of over-compliance with US sanctions measures against Iran and linked the over-compliance issue to the complex and unclear nature of the sanctions measures.[22]

So, concerns relating to economic sanctions include on the one hand, the question whether the measures are effective and, on the other, the problem of the adverse humanitarian impact of sanctions measures. Both the US and the EU have recognized the need to minimize adverse humanitarian impacts of sanctions measures,[23] but these adverse impacts continue to occur. One way of minimizing adverse impact is to structure sanctions measures as targeted measures, focusing on individuals, and another is to provide tor exclusions in sanctions measures for transactions to provide humanitarian aid.[24] This second approach is complicated because of

---

[20] UN human rights expert urges to lift unilateral sanctions against Venezuela (Feb. 12, 2021) at https://www.ohchr.org/en/press-releases/2021/02/un-human-rights-expert-urges-lift-unilateral-sanctions-against-venezuela.

[21] Unilateral sanctions particularly harmful to women, children, other vulnerable groups (Dec. 8, 2021) at https://news.un.org/en/story/2021/12/1107492 (""The complexity of sanctions regulations, combined with extraterritorial enforcement and heavy penalties, have led to widespread over-compliance with unilateral sanctions by entities out of fear of the consequences of inadvertent violations breaches," Ms. Douhan added.")

[22] UN Office of the High Commissioner for Human Rights, Iran: Over-compliance with unilateral sanctions affects thalassemia patients say UN experts (Feb. 14, 2023).

[23] *See*, *e.g.*, The Treasury 2021 Sanctions Review, at 4.

[24] *See*, *e.g.*, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/humanitarian-assistance-environments-subject-eu-sanctions_en.

the tendency of some financial institutions to engage in derisking (or over-compliance), which involves a decision to avoid a broad range of actions which might involve violations of the rules rather than engaging in specific and detailed analysis of the legality of specific transactions. The idea that governmental authorities may police compliance with sanctions measures enthusiastically encourages derisking.[25]

After the military coup in Myanmar, the US responded with sanctions.[26] The sanctions blocked 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 included 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 and EU sanctions already because of human rights abuses against the Rohingya.[27] The EU also issued sanctions and both the EU and the US issued new

---

[25] *See*, *e.g.*, Bryan R. Early & Timothy M Peterson, *The Enforcement of U.S. Economic Sanctions and Global De-risking Behavior*, Journal of Conflict Resolution (forthcoming) https://doi.org/10.1177/00220027231214748 (The abstract states "we theorize that, the greater the frequency and severity of sanctions enforcement penalties imposed by the U.S. against sanctions violators, the more thirdparty trade with U.S. sanction targets will decline. Analyzing data from 2003 to 2015, we find that U.S. sanctions enforcement actions correlate with significant declines in dyadic trade between third-party states and U.S. sanctions targets, even when enforcement actions target parties external to that dyad. This suggests that the U.S.'s enforcement of its sanctions magnifies the harm that U.S. sanctions inflict on target economies.") In 2023, the US Treasury announced a derisking strategy, which focused on derisking in the context of AML/CFT rules. See Department of the Treasury, The Department of the Treasury's De-risking Strategy (Apr. 2023).

[26] Executive Order 14014 of February 10, 2021, Blocking Property With Respect To The Situation In Burma, 86 Fed. Reg. 9429 (Feb. 12, 2021) ("I, Joseph R. Biden Jr., President of the United States of America, find that 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.")

[27] *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).

sanctions measures in 2022,[28] 2023,[29] and 2024.[30]

Many people and organizations advocated for the implementation of multilateral sanctions by the UN,[31] and for the cessation of arms sales to Myanmar.[32] The original sanctions measures were criticized for allowing transactions relating to oil and gas to be carried out.[33] The UN Security Council, the United Nations organ which is responsible for addressing threats to international peace and security, issued statements expressing concern about the situation in Myanmar but did not approve sanctions.[34] The Security Council has 15 members, 5 of which are permanent members with a veto (China, France, Russia, the UK and the US), and the veto power frequently means the Security Council fails to take action with respect to situations such as the Myanmar coup and the Russian invasion of Ukraine.[35]

After 9/11 the UN Security Council began to develop multilateral sanctions measures

---

[28] *See, e.g.*, Council of the EU Press Release, Myanmar/Burma: EU imposes restrictive measures on 22 individuals and 4 entities in fourth round of sanctions (Feb. 21, 2022); US Department of the Treasury, Treasury Sanctions Regime Officials and Military Affiliated Cronies in Burma on One-Year Anniversary of Military Coup (Jan. 31, 2022).

[29] Council of the EU Press Release, Myanmar/Burma: EU Imposes Sixth Round of Sanctions Against 9 Individuals and 7 Entities (Feb. 20, 2023); US Department of State, Marking Two Years Since the Military Coup in Burma (Jan. 31, 2023).

[30] Council of the EU Press Release, Myanmar: Statement by the High Representative on behalf of the European Union on the 3rd Anniversary of the Military Coup (Jan. 31, 2024); US Department of State, Treasury Sanctions Military Cronies and Companies in Burma Three Years after Military Coup (Jan. 31, 2024).

[31] *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.

[32] Stop weapons supply to Myanmar, rights expert urges (Feb. 22, 2022) at https://news.un.org/en/story/2022/02/1112422 .

[33] International Federation for Human Rights, Myanmar: EU oil and gas sanctions risk being ineffectual (Feb. 25, 2022) at https://www.fidh.org/en/region/asia/myanmar/myanmar-eu-oil-and-gas-sanctions-risk-being-ineffectual .

[34] Security Council Press Statement on the Situation in Myanmar (Feb. 2, 2022) at https://www.un.org/press/en/2022/sc14785.doc.htm ; Louis Charbonneau, UN Security Council Should Act on Myanmar Atrocities (Jan. 25, 2022) at https://www.hrw.org/news/2022/01/25/un-security-council-should-act-myanmar-atrocities; Security Council Resolution 2669 (2022) (Dec. 21, 2022).

[35] Council on Foreign Relations Backgrounder, The UN Security Council, at https://www.cfr.org/backgrounder/un-security-council; Said Benarbia, Syria and the UN Security Council: A Decade Of Abysmal Failures (Apr. 28, 2021) at http://opiniojuris.org/2021/04/28/syria-and-the-un-security-council-a-decade-of-abysmal-failures/ .

which targeted individuals, rather than states. However, 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.[36] The Security Council adopted Resolution 1730 (2006) to ask the UN Secretary-General to establish a "focal point" to consider requests for de-listing. An Ombudsperson considers requests for delisting, and some of these requests have been granted,[37] although those who have held the position have argued that the office of the Ombudsperson needs to be made institutionally independent.[38]

Many of the sanctions measures that relate to individuals relate to terrorism, but it is also the case that sanctions measures to address human rights violations and other issues of state policy are being targeted at individuals within the regimes whose acts are being challenged. These targeted sanctions are supposed to avoid some of the negative consequences for the civilian populations that would be affected by more general economic sanctions. But sometimes the sanctions targeting individuals are part of a broader economic sanctions regime (i.e. the targeting is designed to maximize the impact of sanctions rather than to reduce the harmful effects).

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.[39] The EU courts use the language of fundamental rights rather 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.[40] And the invocation of fundamental rights in the EU courts has

---

[36] *Cf.* Devikah Hovell, *Due Process in the United Nations*, 110 Am. J. Int'l L. 1, 9 (2016) (noting that the Ombudsperson does not deal with all of the Council's targeted sanctions regimes).

[37] *See*, *e.g.*, 223 Informal Report of the Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006).

[38] Outgoing Ombudsperson's Resignation Letter to the Secretary-General (Daniel Kipfer Fasciati) (Jun. 3, 2021); Letter dated 12 September 2023 from the Ombudsperson addressed to the President of the Security Council, Twenty-fifth report of the Office of the Ombudsperson to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015), S/2023/662 (Sep. 12, 2023).

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

[40] "[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

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. This possibility of an indirect legal challenge to Security Council acts is strange from the perspective of a hierarchy of legal rules in which international law has a higher status than domestic law.

The challenges are not always successful. For example, Rosneft challenged EU sanctions aimed at Russia with respect to its earlier actions in Ukraine,[41] 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.[42] 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.[43] These claims were rejected.[44] A second Rosneft attempt to challenge the sanctions was rejected by the EU's General Court in September 2018,[45] and by the Court of Justice in September 2020.[46]

In April 2024 the EU General Court annulled EU restrictive measures against Petr Aven and Mikhail Fridman, major shareholders of Alfa Group, a conglomerate including Alfa Bank, one of Russia's major banks.[47] They were subjected to EU sanctions on the basis of their associations with other sanctioned persons, including Vladimir Putin. The EU General Court

---

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.

[41] 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).

[42] PJSC Rosneft Oil Company, R. (on the application of) v Her Majesty's Treasury & Ors [2017] EUECJ C-72/15 (28 March 2017).

[43] Id.at ¶ 35.

[44] Rosneft and Others v Council [2018] EUECJ T-715/14 (13 September 2018).

[45] Rosneft and Others v Council [2018] EUECJ T-715/14 (13 September 2018).

[46] Rosneft and Others v Council, [2020] EUECJ C-732/18P (17 September 2020).

[47] Aven v Council French Text [2024) EUECJ T-301/22 (10 April 2024) at http://www.bailii.org/eu/cases/EUECJ/2024/T30122.html ; Fridman v Council French Text [2024] EUECJ T-304/22 (10 April 2024) at http://www.bailii.org/eu/cases/EUECJ/2024/T30422.html .

concluded that the reasons given for the sanctions, in essence that Aven and Fridman were involved in efforts to undermine Ukraine, had not been substantiated.[48] The decision raises questions about the possibility of successful challenges in the EU to other sanctions decisions.[49]

US courts have tended to defer to the Executive with respect to foreign affairs, and to be disinclined to scrutinize executive action.[50] 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) overturned a sanctions regime approved by Congress, and scholars have suggested that this action violated the separation of powers.[51] In 2018 President Trump reimposed US sanctions on Iran.

Sanctions against Iran included a freeze of assets belonging to the Iranian Central Bank, Bank Markazi. Iran sued the United States before the International Court of Justice, claiming that the sanctions breached US obligations under the US-Iran Treaty of Amity, a Treaty which entered into force in 1957.[52] In March 2023 the ICJ found that the US had breached its obligations under the Treaty in some respects but not in others.[53] The ICJ ordered the US to compensate Iranian companies for sanctions and for seizure of some assets, but the Court found that it did not have

---

[48] Both are still subject to EU sanctions as a result of subsequent decisions not at issue in the litigation.

[49] Javier Espinoza, Henry Foy & Max Seddon, *EU Court Rules in Favour of Russian Oligarchs Fridman and Aven in Blow to Sanctions Regime*, Financial Times (Apr. 10, 2024).

[50] 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.")

[51] 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.")

[52] The US terminated the Treaty after Iran invoked it in this litigation. Cf. U.S. Citizenship and Immigration Services, Notice Concerning Termination of Eligibility for E–1 and E–2 Nonimmigrant Classification Based on Treaty of Amity With Iran, 85 Fed. Reg. 3938 (Jan. 23, 2020).

[53] Certain Iranian Assets (Iran v US) Judgment, (Mar. 30, 2023).

jurisdiction over the claims with respect to the Bank Markazi assets, on the basis that Bank Markazi should not be considered to be a company under the Treaty:

"49. The Court will thus confine itself, at present, to ascertaining whether Iran has established that Bank Markazi was carrying out, at the relevant time, activities of a nature such that the bank should be characterized as a "company" for the purposes of the Treaty of Amity.
The Court notes in this regard that the only activities on which Iran relies to found the characterization of Bank Markazi as a "company" consist in the purchase, between 2002 and 2007, of 22 security entitlements in dematerialized bonds issued on the United States financial market and in the management of proceeds deriving from those entitlements (see paragraph 37 above).
50. In the opinion of the Court, these operations are not sufficient to establish that Bank Markazi was engaged, at the relevant time, in activities of a commercial character. Indeed, the operations in question were carried out within the framework and for the purposes of Bank Markazi's principal activity, from which they are inseparable. They are merely a way of exercising its sovereign function as a central bank, and not commercial activities performed by Bank Markazi "alongside [its] sovereign functions", to use the words of the 2019 Judgment ...
51. Contrary to Iran's contentions... it does not follow from the 2019 Judgment that, in order to determine whether an activity is commercial, it is necessary only "to focus on the activity as such, and not on the function with which that activity has a link of some kind". In its 2019 Judgment, the Court merely indicated that the decisive question was whether Bank Markazi was carrying out, alongside its sovereign activities, other activities, of a commercial nature. It did not state that, in determining whether particular activities were of a commercial nature, there was no need to take into account any link that they may have with a sovereign function. On the contrary, the Court considers this latter criterion to be relevant. Indeed, in establishing whether a given entity may be characterized as a "company", consideration cannot be limited to a transaction — or series of transactions — "as such", carried out by that entity. That transaction — or series of transactions — must be placed in its context, taking particular account of any links that it may have with the exercise of a sovereign function.
52. To reach the conclusion set out in paragraph 50 above, i.e. that the transactions performed by Bank Markazi are part of the usual activity of a central bank and inseparable from its sovereign function, the Court does not consider the statements made in United States court proceedings by counsel for Bank Markazi and relied on by the United States ... to be decisive.
Such statements are not opposable to Iran, which, moreover, did not make them, and they can be explained by the fact that the bank was seeking, in that context, to obtain the immunity to which it believed it was entitled. Iran rightly notes that both the United States political authorities and courts rejected Bank Markazi's claims at the time and declared instead that a number of its activities were of a commercial nature. As the Court recalled earlier, the question of immunity is not before it today.
The Court nevertheless considers that the assertions made by Bank Markazi in the judicial proceedings in the Peterson case... accurately reflect the reality of the bank's activities.
53. The Parties cited before the Court various arbitral decisions in support of their opposing arguments regarding the commercial nature of Bank Markazi's activities. The Court notes that

none of the decisions cited is wholly relevant to the present proceedings. Iran relies on an arbitral decision rendered in the Èeskoslovenská Obchodní Banka, A.S. v. The Slovak Republic case (Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ICSID Case No. ARB/97/4). In that case, however, the tribunal had to respond to the question whether a commercial bank should be considered as a national of the State by which it is owned or merely as an agency of that State, for the purposes of the applicable convention. The arbitral award in Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (Award on Jurisdiction and Liability, 28 April 2011), relied on by the United States, appears to be more similar to the present case. In that case, the tribunal had to determine whether certain contractual operations of the central bank of Mongolia were of a commercial nature or had been carried out de jure imperii; it found the latter to be the case, based on the purpose of the transactions at issue. However, what the tribunal had to decide was whether the actions of the central bank were attributable to the State of Mongolia itself for the purpose of invoking the international responsibility of the State, which is a different question from the one now before the Court. In sum, the decisions relied on are of little relevance.
54. For the reasons set out above, the Court concludes that Bank Markazi cannot be characterized as a "company" within the meaning of the Treaty of Amity. Consequently, the objection to jurisdiction raised by the United States with regard to Iran's claims relating to alleged violations of Articles III, IV, and V of the Treaty of Amity predicated on treatment accorded to Bank Markazi must be upheld. The Court has no jurisdiction to consider those claims."

Sanctions measures can give rise to conflicts between states which have different views about the appropriateness of imposing sanctions. Sanctions measures may also involve issues relating to extraterritoriality as we saw in the LAFB v Bankers' Trust case. 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).[54] 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

[54] 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".[55]

After the US renewed sanctions against Iran, Telekom Deutschland canceled contracts for telecoms services with Bank Melli Iran, without giving reasons or obtaining authorization from the EU Commission. Bank Melli sued, arguing that the termination of the contracts was prohibited under the EU's Blocking Regulation. The German court made a preliminary reference to the EU's Court of Justice (CJEU) as to the applicability of the Blocking Regulation. The preliminary reference procedure allows courts in the EU Member States to ask the CJEU for clarification of the meaning and applicablility of EU law, in a procedure similar to that in which federal courts in the US refer questions of state law to state Supreme Courts.

In Bank Melli Iran[56] the CJEU stated that it was not necessary for there to be a specific indirect or direct official or court order on the part of the US to trigger the EU Blocking

[55] 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).

[56] Bank Melli Iran [2021] EUECJ C-124/20 (21 December 2021).

Regulation, and that firms did not need to give reasons for terminating a contract with a sanctioned entity but that the termination could be reviewed in courts in the Member States and the terminating entity had the burden of proving that the termination was not in compliance with the US sanctions:

"55 According to settled case-law, it is for the national courts, whose task it is, in areas within their jurisdiction, to apply the provisions of EU law such as those in Regulation No 2271/96, to ensure that they take full effect..
56 It must be recalled in addition that, pursuant to the second paragraph of Article 288 TFEU, regulations are of general application and are directly applicable in all Member States...
57 It must be held that the first paragraph of Article 5 of Regulation No 2271/96 provides that no person referred to in Article 11 thereof is to comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, based on or resulting, directly or indirectly, from the laws specified in the annex. The reason for that prohibition, which is drafted in clear, precise and unconditional terms, lies in the fact that the persons referred to in Article 11, in the exercise of their activities, in particular commercial activities, including by their possible decisions to terminate contacts, are capable of giving extraterritorial effect to the laws specified in the annex, which that regulation seeks specifically to counteract.
58 Moreover, the sole derogation from that prohibition is laid down in the second paragraph of Article 5 of Regulation No 2271/96, which allows persons referred to in Article 11 of the regulation to request an authorisation not to comply with it.
59 Since... it is for the national courts to ensure the full effectiveness of Regulation No 2271/96, it must be possible to ensure compliance with the prohibition laid down in the first paragraph of Article 5 of the regulation by means of civil proceedings, such as those of the main proceedings, instituted by a person against a person to whom that prohibition is addressed...
60 It is true that Article 9 of Regulation No 2271/96 entrusts to the Member States the task of determining the sanctions to be imposed in the event of infringement of the regulation, which must effective, proportional and dissuasive. That competence must not, however, have the effect of altering the scope of the other provisions of Regulation No 2271/96, which lay down clear, precise and unconditional requirements or prohibitions, the full effectiveness of which...the national courts are obliged to ensure in proceedings before them.
61 That interpretation of Article 5 of Regulation No 2271/96 cannot be called into question, contrary to Telekom's submissions, by the Commission Guidance Note ... That note does not establish binding rules or legal interpretations. Regulation No 2271/96 alone is binding, as stated in paragraph 5 of the preamble to that note, and only the Court has the power to give legally binding interpretations of the acts of the institutions, as stated in paragraph 6 of the preamble to that same note.
62 Those clarifications having been made, it must be held that it is not clear from either the first paragraph of Article 5 of Regulation No 2271/96 or from any other provision of that regulation that a person referred to in Article 11 thereof is required to provide reasons for the termination of a commercial contract with a person included in the SDN list.
63 In those circumstances, it must be held that the first paragraph of Article 5 of Regulation No

2271/96 does not preclude a national law pursuant to which a person referred to in Article 11 of that regulation, and who does not have an authorisation within the meaning of the second paragraph of that Article 5, may terminate contracts that it has agreed with a person on the SDN list, and may do so without providing reasons for that termination.

64 In the present case, it is apparent from the documents before the Court that, subject to verification by the referring court, Paragraph 134 of the Civil Code applies to the dispute in the main proceedings. That court states in that regard that, if the termination at issue infringes the first paragraph of Article 5 of Regulation No 2271/96, it is rendered null and void, by virtue of that Paragraph 134. Furthermore, in response to a question put by the Court, the German Government clarified the relevant rules on the burden of proof for the purposes of establishing, in civil proceedings, infringement of a statutory prohibition within the meaning of that Paragraph 134. Thus, a party which claims that a legal act, including the termination of a contract, is void on account of the breach of a legal prohibition, such as that laid down in the first paragraph of Article 5 of Regulation No 2271/96, may rely on that nullity before the courts. To that end, it must set out the facts showing the alleged infringement. If the other party to the proceedings disputes the correctness of those facts, the party claiming that the legal act is null and void bears the burden of proving that the conditions of that infringement are met. Thus, in the present case, the burden of proof lies entirely with the person alleging infringement of Article 5 of Regulation No 2271/96.

65 It should be noted, however, in that regard, that the application of such a general rule relating to the burden of proof is liable to make it impossible or excessively difficult for the referring court to make a finding that there was an infringement of the prohibition laid down in the first paragraph of Article 5 of Regulation No 2271/96, thereby undermining the effectiveness of that prohibition.

66 The evidence capable of showing that conduct on the part of a person referred to in Article 11 of Regulation No 2271/96 is motivated by that person's intention of complying with the laws specified in the annex is not normally available to any other private individual, to the extent that, in particular, as the Advocate General stated in point 95 of his Opinion, such evidence may be covered by business secrecy.

67 Therefore, in order to ensure that the first paragraph of Article 5 of Regulation No 2271/96 is fully effective, it must be held that, where, in civil proceedings relating to the alleged infringement of the requirements laid down in that provision, all the evidence available to a national court tends to indicate prima facie that, by terminating the contracts in question, a person referred to in Article 11 of that regulation, who does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, complied with the laws specified in the annex, it was for that person to establish to the requisite legal standard this his or her conduct did not seek to comply with those laws.

68 It follows from the foregoing that the answer to the second question is that the first paragraph of Article 5 of Regulation No 2271/96 must be interpreted as not precluding a person referred to in Article 11 of that regulation, who does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, from terminating contracts concluded with a person on the SDN list without providing reasons for that termination. Nevertheless, the first paragraph of Article 5 of that regulation requires that, in civil proceedings relating to the alleged

infringement of the prohibition laid down in that provision, where all the evidence available to the national court suggests prima facie that a person referred to in Article 11 of Regulation No 2271/96 complied with the laws specified in the annex, without having an authorisation in that respect, it is for that person to establish to the requisite legal standard that his or her conduct did not seek to comply with those laws."

The EU has now adopted an Anti-Coercion Instrument.[57] I am going to ask you to read this Regulation.

[57] Regulation (EU) 2023/2675 on the Protection of the Union and its Member States from Economic Coercion by Third Countries, OJ L 2023/2675 (Dec. 7, 2023).