

Sanctions on Steroids: The Ukraine-/Russia-Related Sanctions

Don S. De Amicis and David P. Stewart[†]

I.	Introduction	380
II.	Economic Sanctions: The International Legal Framework	385
III.	Economic Sanctions: The Unilateral Framework in the United States and the European Union	392
	A. Sanctions in the United States	393
	B. Sanctions in the European Union	396
	C. Coordination of Unilateral Economic Sanctions	397
IV.	U.S. Economic Sanctions Related to the Russian Invasion of Ukraine	401
	A. Blocking Sanctions Against Individuals and Entities Listed on the List of Specially Designated Nationals and Blocked Persons (SDN List)	402
	B. Sectoral Sanctions Against Entities Operating in the Finance and Energy Sectors of the Russian Economy Listed on the Sectoral Sanctions Identification List (SSI List)	403
	C. Ban on New Investment	404
	D. Sanctions Relating to the Provision of Certain Services by U.S. Persons to Any Person or Entity Located or Organized in Russia	405
	1. Accounting, Trust and Corporate Formation, and Management Consulting Services.	405
	2. Certain Services by U.S. Persons in Oil Sales Transactions: the Oil Price Cap	405
	E. Ban on Imports from Russia	407
	F. Ban on Exports of Goods, Technology or Services to Russia	407

[†] Professors De Amicis and Stewart are professors at Georgetown University Law Center and co-directors of the Center on Transnational Business and the Law. They are grateful for the assistance provided by their research assistants, Alexandra Agorastou, Juan Mejia Gonzalez, and Schylar Jacobs.

V.	Economic Sanctions Compliance by the Private Sector	410
	A. Compliance and Enforcement.....	410
	B. Specific Compliance Concerns	415
	C. Conflicts Among Sanctions Regulations of the Allied Governments	416
	D. Sanctions Screening.....	419
	E. Increased Due Diligence Burdens	420
	F. Overcompliance.....	420
VI.	Conclusion	422
	Appendix	424
	Addendum	429

I. Introduction

The conflict between Ukraine and the Russian Federation (Russia) is not new, nor are the economic sanctions that the United States and other countries have imposed on Russia. In 2014, the Russian Army invaded eastern regions of Ukraine and annexed Crimea, and in response the United States (along with the European Union and other West-leaning states) imposed a series of economic sanctions.¹ These sanctions failed to pressure Russia either to retreat or to reverse the annexation. Just prior to the 2022 invasion of Ukraine, in response to U.S. intelligence indicating that the Russians were preparing to invade, the U.S. publicly stated that any invasion would be met with unprecedented economic sanctions.² That threat of sanctions did not deter Russia from launching a broader invasion, and in response, the U.S., EU and other states imposed a wide range of economic sanctions.³

¹ Economic sanctions involve the termination of customary trade and financial relations for foreign- and security- policy purposes. Sanctions include measures that restrict parties from entering into transactions, including import and export transactions, with, and measures blocking or freezing the assets of, states, individuals, and entities. See Jonathan Masters, *What are Economic Sanctions*, COUNCIL ON FOREIGN REL. (Aug. 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions> [https://perma.cc/TF5K-JBHZ].

² Shane Harris et al., *Road to War: U.S. Struggled to Convince Allies, and Zelensky, of Risk of Invasion*, WASH. POST (Aug. 16, 2022), <https://www.washingtonpost.com/national-security/interactive/2022/ukraine-road-to-war/> [https://perma.cc/69DC-YMQR].

³ See, e.g., *Russia Sanctions Database*, ATL. COUNCIL (Jan. 11 2023), <https://www.atlanticcouncil.org/blogs/econographics/russia-sanctions-database/>

The imposition of these economic sanctions was just one aspect of a multi-faceted response by Allied governments⁴ to the Russian invasion of Ukraine. Sanctions are one tool, short of armed conflict, that a state can use to put pressure on a targeted state to change its behavior, and sanctions are often used to deter, coerce, signal, and/or punish.⁵ In this case, the economic sanctions are aimed at degrading Russia's ability and willingness to wage war by restricting access to sophisticated technology, weakening the Russian economy, targeting the country's energy, financial, and military arms sectors, and blocking the overseas assets of Russia's elites and decision-makers.

Given Russia's status as a permanent member of the United Nations Security Council, with a veto over proposed Security Council resolutions, it is hardly surprising that the UN Security Council has failed to impose economic sanctions. Shortly after the February 2022 invasion, Russia vetoed a UN Security Council resolution that demanded that Russia immediately cease its attack on Ukraine and withdraw all troops.⁶

Subsequently, the UN General Assembly approved a resolution titled "Aggression Against Ukraine" in which it condemned the invasion of Ukraine, reaffirmed the principles of territorial sovereignty and international peace, and demanded Russia's immediate withdrawal from Ukraine.⁷ However, unlike a UN

[<https://perma.cc/UM5X-67LP>]; *The Brookings Sanctions Tracker*, BROOKINGS INST. (Sept. 14, 2022), <https://www.brookings.edu/research/the-brookings-sanctions-tracker/> [<https://perma.cc/S7GQ-9CBR>]; *Russia Sanctions Dashboard*, CASTELLUM.AI (Feb. 9, 2023), <https://www.castellum.ai/russia-sanctions-dashboard> [<https://perma.cc/ZR7Q-84PC>].

⁴ The term "Allied governments" refers to the states (and the EU) that are contributing supplies to the war effort, many of whom have imposed economic sanctions on Russia. This bloc includes the U.S., E.U. countries, Western-leaning governments, such as Japan, Australia, Canada, the U.K., South Korea, and some traditionally neutral countries, such as Switzerland, Finland, Sweden and Israel.

⁵ RICHARD N. HAASS, *ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY* 1-2 (1998).

⁶ Eleven of the Council's fifteen members voted in favor of the resolution, with China, India, and the United Arab Emirates abstaining. U.N. President of the S.C., Agenda of Security Council Meeting regarding letter dated Feb. 28, 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, U.N. Doc. S/PV.8979, (Feb. 25, 2022).

⁷ G.A. Res. ES-11/1, ¶ 4 (Mar. 2, 2022). The resolution was sponsored by 96 countries and passed with 141 countries voting in favor, 5 against, and 35 abstaining.

Security Council resolution, a UN General Assembly resolution does not require that states take any actions.⁸

Despite the UN Security Council's failure to impose sanctions against Russia, the U.S., EU and other Allied governments have imposed their own autonomous sanctions regimes.⁹ These governments have coordinated closely on the imposition of sanctions, both to show unity and resolve in confronting Russian aggression, and to minimize instances where conflicting sanctions regimes create friction among the Allied governments.¹⁰

Press releases by the U.S. government described the sanctions as “unprecedented and expansive” and “imposing swift and severe economic costs.”¹¹ They described the sanctions as “specifically designed to impose immediate costs and disrupt and degrade future economic activity, isolate Russia from international finance and commerce, and degrade the Kremlin's future ability to project power.”¹² Likewise, the objective of the EU economic sanctions program is to impose severe consequences on Russia for its actions and to effectively thwart Russian abilities to continue the aggression.¹³

One of the fundamental reasons why these sanctions are so “unprecedented and expansive” is the sheer size of the Russian economy. In 2021, Russia was the eleventh largest economy in the

⁸ *How Decisions are Made at the UN*, UNITED NATIONS, <https://www.un.org/en/model-united-nations/how-decisions-are-made-un> [<https://perma.cc/FQ6U-UXPN>] (last visited Mar. 15, 2023).

⁹ Richard Oscar, *The War in Ukraine: A New Paradigm of Sanctions Practice*, LAWFARE (Aug. 1, 2022), <https://www.lawfareblog.com/war-ukraine-new-paradigm-sanctions-practice> [<https://perma.cc/J7PD-87JX>].

¹⁰ Agathe Demarais, *The Kremlin's ability to wage war is already constrained, but the worst is yet to come.*, FOREIGN POL'Y (Dec. 1, 2022), <https://foreignpolicy.com/2022/12/01/382uopa382-russia-sanctions-economy-war-putin-embargo-technology-financial-energy/> [<https://perma.cc/C5XB-WJZH>].

¹¹ See Press Release, U.S. Dep't of the Treasury, U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0608> [<https://perma.cc/QWV7-FZ4J>].

¹² *Id.*

¹³ *EU sanctions against Russia explained*, COUNCIL OF THE EUR. UNION (last reviewed Mar. 15, 2023) <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions> [<https://perma.cc/H6Y4-E2TT>].

world, with a GDP of \$1.8 trillion.¹⁴ In the past 50 years, no country subjected to economic sanctions by the United States has had an economy close to the size of Russia's. For comparison purposes, Iran had a GDP of \$359.9 billion in 2021, and Cuba's 2021 GDP was \$107.3 billion.¹⁵

In addition to the size of Russia's economy, the intensity of trading between the sanctioning and sanctioned states has contributed to the design and complexity of sanctions. In 2021, the U.S. exported \$6.4 billion in goods to Russia, and imported \$29.7 billion in goods; this¹⁶ compared to trade (exports and imports) of less than \$50 million with Iran¹⁷ and \$327 million with Cuba¹⁸ in the same year.

The volume of trade between the EU and Russia is many magnitudes greater than between the U.S. and Russia, and is a major reason why sanctions have been rolled out progressively and have required substantial coordination among EU members, and between the EU and other countries. In 2021, the EU was Russia's largest trading partner, and Russia was the fifth largest trading partner of the EU.¹⁹ While the majority of trade was comprised of oil and gas exports from Russia, there was also considerable trade in other goods and services.²⁰ In designing and implementing sanctions, a great deal of concern was paid to the dependency of countries such

¹⁴ GDP (current US\$), WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> [<https://perma.cc/PXX5-X6WL>]

¹⁵ *Id.*

¹⁶ *U.S. Trade in Goods by Country*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/index.html#R> [<https://perma.cc/RB95-AE7Y>] (last visited Mar. 17, 2023).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ In 2021, Russia was the EU's fifth largest trade partner, representing 5.8% of the EU's total trade in goods with the world. In 2020, the EU was Russia's first trading partner, accounting for 37.3% of the country's total trade in goods with the world. 36.5% of Russia's imports came from the EU and 37.9% of its exports went to the EU. In 2021, the total trade in goods between the EU and Russia amounted to €257.5 billion. The EU's imports were worth €158.5 billion and the EU's exports totaled €99.0 billion. *See EU trade relations with Russia. Facts, figures and latest developments*, EURO. COMM'N, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/russia_en [<https://perma.cc/L9W8-EL4H>].

²⁰ *Id.*

as Germany on oil and gas from Russia to fuel their economies.²¹ Thus, sanctions policy has been formulated and implemented alongside frantic measures to secure energy supplies from alternative sources.²² This has led to a progressive roll-out of sanctions.²³ Since February 2022, the EU has announced ten packages of sanctions.²⁴ Similarly, the U.S. roll-out has involved escalating waves of sanctions.²⁵

Sanctions, of course, are not self-enforcing. They cannot be effective unless the private sector is actively involved in reviewing and altering its business operations and transactions with customers and suppliers to comply with sanctions regulations. Since the invasion in February 2022, over 1000 private companies have ceased or reduced operations and investments in Russia, although in some cases not as a direct result of the economic sanctions.²⁶ Given the significant number of sanctions programs administered by the UN, U.S., and EU over the past 30 years, multinational financial and business entities have established sanctions compliance functions and departments to mitigate compliance risks.²⁷ The extensive, and imperfectly aligned, sanctions imposed by the Allied governments present new challenges for business compliance. New technology and personnel are needed to conduct

²¹ Emily Kilcrease, Jason Bartlett and Mason Wong, *Sanctions by the Numbers: Economic Measures against Russia Following Its 2022 Invasion of Ukraine*, CENTER FOR A NEW AM. SEC. (June 16, 2022), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-economic-measures-against-russia-following-its-2021-invasion-of-ukraine> [https://perma.cc/489S-9N35].

²² *Id.*

²³ *See id.*

²⁴ *Timeline-EU restrictive measures against Russia over Ukraine*, COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> [https://perma.cc/5BD8-WVKL] (last visited Mar. 15, 2023).

²⁵ Kilcrease et al., *supra* note 21.

²⁶ Jeffery Sonnenfeld et al., *Over 1,000 Companies Have Curtailed Operations in Russia – But Some Remain*, YALE SCH. OF MGMT. (Feb. 12, 2023), <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [https://perma.cc/V3UA-7VR7].

²⁷ *See* Eric Young, *Focus on Foreign Banks' Sanctions Compliance Programs in the U.S. and Globally Upgrading and Empowering Compliance to Help Address National Security Risks*, GUIDEPOST (Jan. 10, 2023), <https://guidepostsolutions.com/focus-on-foreign-banks-sanctions-compliance-programs-in-the-u-s-and-globallyupgrading-and-empowering-compliance-to-help-address-national-security-risks/> [https://perma.cc/469W-MBF9].

due diligence: blocked persons and entities must be screened, and business transactions reviewed. In many ways, the numerous compliance challenges posed by the new Russian sanctions are what has truly been unprecedented.

The balance of this paper is organized in five parts. Part II analyzes the treatment of economic sanctions under the international legal framework. Part III describes the legal framework for economic sanctions in the United States and the European Union and surveys the important coordination efforts within the EU, and between the U.S. and the EU, intended to maintain a unified front and to avoid frictions created by government enforcement actions when economic sanctions diverge. Part IV looks at the important economic sanctions that have been imposed by the United States as a result of the February 2022 invasion, and highlights the scope, volume, and complexity of these sanctions. Part V examines the critical role played by the private sector in sanctions effectiveness, focusing on sanctions compliance and the methods by which regulatory agencies and the U.S. Department of Justice pressure companies to develop effective compliance programs. Finally, Part VI sets forth brief conclusory observations.

II. Economic Sanctions: The International Legal Framework

The use of sanctions as an instrument of foreign policy is hardly a new phenomenon. In addition to their diplomatic and military power, states have long leveraged their bilateral economic, commercial and trade relations with other states as a means of achieving particular policy goals—for instance, to resolve diplomatic disputes or security issues, to respond to grave violations of human rights or incidents of international terrorism, or to compel the sanctioned states to change their behavior in other ways.²⁸

At the *multilateral* level, the UN has imposed economic (and other) sanctions repeatedly throughout its history, though their use increased dramatically in the decades following the end of the so-called Cold War. In fact, the UN Security Council has used its

²⁸ For a broad background, see Charlotte Beaucillon, *An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges*, in RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 1 (Charlotte Beaucillon ed., 2021); SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALIZED WORLD (Jeremy Farnall & Kim Rubenstein eds., 2009).

authority under Chapters VI and VII of the Charter to create some 30 separate sanctions regimes since 1966.²⁹ The European Union also relies on restrictive measures as a key tool of its Common Foreign and Security Policy (CFSP), and the Organization for Security and Cooperation in Europe (OSCE) has imposed embargoes on the purchase and sale of defense and dual-use equipment.³⁰

When such measures are adopted in accordance with the rules and procedures of the relevant multilateral organization, there is little room to challenge their legality. One hears few arguments, for example, about the legality of the UN's sanctions on North Korea (DPRK) over the past 16 years for its continuing development of nuclear weapons (other than that they seem to have had scant effect).³¹

Over the past few decades, it has been the *unilateral* imposition of broad trade, financial and economic sanctions (mostly by economically-powerful Western states) that has generated increasing concern and criticism.³² While mainly directed against foreign states and their governments, those sanctions have also targeted non-state entities, such as organized groups or factions like

²⁹ For an overview of the UN Security Council's authority under Chapter VII, see *Sanctions*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/sanctions/information> [<https://perma.cc/H388-VNLB>] (last visited Mar. 15, 2023); see also Vera Gowlland-Debbas, *UN SANCTIONS IN INTERNATIONAL LAW* (2001).

³⁰ *International sanctions*, MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y COOPERACIÓN, <https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/SancionesInternacionales.aspx> [<https://perma.cc/WLH6-Y7CC>] (last visited Mar. 15, 2023). Interestingly, despite an initial approval in 1964, multilateral sanctions have found little favor within the Organization of American States, perhaps because of concerns about the humanitarian impact of unilateral U.S. sanctions against Cuba.

³¹ Cf. *What to Know About Sanctions on North Korea*, COUNCIL ON FOREIGN RELS. (July 27, 2022), <https://www.cfr.org/background/north-korea-sanctions-un-nuclear-weapons> [<https://perma.cc/JNU2-VAE2>].

³² The first significant use of unilateral sanctions (in the form of an embargo) involved those imposed by the United States on the Soviet Union in 1948, increasing in severity throughout the following decades until the collapse of the USSR and the end of the so-called "Cold War." See generally NICHOLAS MULDER, *THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR* (2022). The UN General Assembly has repeatedly called upon the United States to lift its unilateral embargo against Cuba. See, e.g., *UN General Assembly calls for US to end Cuba embargo for 29th consecutive year*, UNITED NATIONS UN NEWS (June 23, 2021), <https://news.un.org/en/story/2021/06/1094612> [<https://perma.cc/H6NE-ULMM>].

terrorist movements.³³ Some contend, of course, that international sanctions can be imposed only by international agreement and only against states, and accordingly that unilateral sanctions are *per se* impermissible under international law.³⁴ In this regard, the sanctions imposed unilaterally by the United States against Cuba and Iran have been the subject of particular criticism.³⁵ Moreover, the UN General Assembly has repeatedly expressed its concern about the effect of “unilateral economic measures” directed at developing countries in particular.³⁶

What has perhaps been the most controversial, however, is the increasing *breadth and intensity* of the sanctions—especially when they aim to pressure the target country’s leadership by disrupting its economy as a whole, for example by creating adverse economic consequences for private companies and entities, even specific individuals.

The current Russian sanctions, for example, target virtually every aspect of the country’s economy, not just the government and political leadership, but its banks and other financial institutions, its energy and transportation sectors, and the so-called “oligarchs.”³⁷

³³ See, e.g., *Explaining US Sanctions Against Taliban*, VOICE OF AM. (Feb. 5, 2022), <https://www.voanews.com/a/ready-explaining-us-sanctions-against-taliban-/6427771.html> [<https://perma.cc/7XN3-D4TS>].

³⁴ On the latter point, see, e.g., Rahmat Mohamad, *Unilateral Sanctions in International Law: A Quest for Legality*, in *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 72-73 (Ali Marossi & Marisa Bassett, eds., 2015); Aditya Raj, *Questioning the Legality of Unilateral Economic Sanctions*, YOUNG VOICES (Nov. 23, 2022) <https://www.orfonline.org/expert-speak/questioning-the-legality-of-unilateral-economic-sanctions/> [<https://perma.cc/95R9-UY7X>].

³⁵ See, e.g., Julia Schmidt, *The Legality of Unilateral Extraterritorial Sanctions Under International Law*, 27 J. CONFLICT & SEC. L. 53 (2022).

³⁶ See, e.g., G.A. Res. 76/191 ¶ 2 (Dec. 17, 2021) (urging “the international community to adopt urgent and effective measures to eliminate the use of unilateral economic, financial or trade measures that are not authorized by relevant organs of the United Nations, that are inconsistent with the principles of international law or the Charter of the United Nations or that contravene the basic principles of the multilateral trading system and that affect, in particular, but not exclusively, developing countries”).

³⁷ See *Ukraine-/Russia-related Sanctions*, U.S. TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> [<https://perma.cc/7DBT-FN4V>]; see also CORY WELT, CONG. RSCH. SERV., IN11869, *RUSSIA’S WAR AGAINST UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER RESPONSES* (Dec. 20, 2022). Cf. *Fact Sheet: United States, European Union*,

Some argue that the sanctions are having a “profound effect on the Russian economy,” with adverse consequences not just on policymakers and government officials, but also on private citizens.³⁸

When—exactly—do sanctions cross the line between (i) permissible measures or counter-measures, and (ii) impermissible intervention or illegal coercion? That’s a much-debated issue, legally and politically.

Article 2(3) of the UN Charter obliges all Member States to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Under Article 2(4), all Member States must “refrain in their international relations from 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.” Article 2(7) prohibits the United Nations from “interven[ing] in matters which are essentially within the domestic jurisdiction of any state” (with the critical exception of “the application of enforcement measures under Chapter VII”).³⁹

In theory, at least, economic sanctions are employed as an alternative to (perhaps in response to) the threat or use of force and in support of a peaceful settlement of whatever the underlying crisis, dispute, or controversy might be. When the sanctions have been authorized by the UN Security Council under Chapter VII and have been implemented accordingly, there is little room to contest their international legality. The same is true of sanctions regimes adopted by other international institutions (such as the EU) in accordance with their respective rules and requirements. At the same time, they can—indeed, are intended to—have coercive effect and compel the “target state” to take (or refrain from taking) some particular action or course of conduct.

More broadly, however, there is no specific understanding about

and G7 to Announce Further Economic Costs on Russia, WHITE HOUSE (Mar. 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/> [<https://perma.cc/QG9W-S29H>].

³⁸ Vladimir Milov, *The Sanctions on Russia Are Working*, FOREIGN AFFS. (Jan. 18, 2023), <http://www.foreignaffairs.com/russian-federation/sanctions-russia-are-working> [<https://perma.cc/44W7-DMMP>].

³⁹ U.N. Charter art. 2, ¶¶ 3, 4, 7.

(i) how to distinguish the lawful sanctions from the unlawful, (ii) what the necessary factual (or jurisdictional) predicates might be, or (iii) whether and how to impose sanctions in the economic or digital contexts. One can view the effort to use so-called “smart sanctions” as an effort to address criticism that a particular sanctions regime is over-inclusive.⁴⁰

The overall effectiveness of sanctions—particularly from the economic and political perspectives—is frequently debated. Because they frequently, if not inevitably, impose costs on *private* parties (not just the government or government officials) and have significant effects *outside* (as well as inside) the targeted state—for instance in the business, commercial and banking communities in other countries—such sanctions can have broad (even global) economic consequences. In this sense, sanctions are never really “cost free”—they often create real challenges for the private sector, even in the sanctioning State.⁴¹ That’s clearly the case with the Russia sanctions.

The main purpose of sanctions is to compel the targeted government to take (or refrain from taking) certain actions or otherwise to change its policy—typically, to cause it to cease certain actions or otherwise alter its behavior by raising the cost of failing to do so. In consequence, the most effective sanctions are those that punish a country the most severely. Even where “targeted” at the political or economic “elite,” they tend to be the ones that also impose the heaviest burdens on the targeted country’s innocent population.

That seems especially to be the case when the sanctions are aimed at disrupting the target state’s economy as a whole, precisely in order to bring pressure on the government. For instance, curtailing the supply of food or medicine, restricting access to oil and gas, embargoing all forms of humanitarian relief, imposing particularly intrusive financial sanctions—all these can be effective but they can also raise serious questions of legality, *inter alia* as

⁴⁰ For an interesting perspective, see Joy Gordon, *Russia, Ukraine, and the Demise of Smart Sanctions*, CARNEGIE COUNCIL FOR ETHICS IN INT’L AFFS. (Mar. 21, 2022), <https://www.ethicsandinternationalaffairs.org/2022/russia-ukraine-and-the-demise-of-smart-sanctions/> [https://perma.cc/XN4X-RQNL].

⁴¹ For one such perspective, see AGATHE DEMARAIS, *BACKFIRE: HOW SANCTIONS RESHAPE THE WORLD AGAINST U.S. INTERESTS* (2022).

violations of international human rights.⁴²

On the one hand, no specific rule of international law prohibits states from resorting to such sanctions—whether unilaterally or by mutual coordination. Generally, political or economic sanctions are preferred to the direct use of military force. Whether in a given situation the imposition of severe sanctions (unilaterally or multilaterally) might—in and of itself—properly be considered either (i) to endanger international peace and security, or (ii) to constitute a “use of force” for purposes of article 2(4) of the UN Charter, is a contextual (and therefore debated) issue, on which different observers and participants will be of varied opinions.⁴³

Even when, depending on the circumstances, the sanctions in question might be so characterized, they might well be justified as permissible measures of unilateral or collective “self-defense” under Article 51 of the Charter or under some “self-help” concepts recognized by customary international law (under the somewhat difficult heading of “retorsions and countermeasures”).⁴⁴

Some contend that to be lawful, sanctions must also be objectively necessary, proportionate, and consistent with principles of international human rights law or international trade and investment law, and they must offer effective humanitarian exceptions or exemptions. Clearly, opinions might differ about the relevant criteria for determining “necessity,” “proportionality” or “consistency” with human rights law or under customary international law more generally.

In a given situation, one might usefully refer to the International Law Commission’s 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts.⁴⁵ Article 49(1) provides the basic rule: “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations” under

⁴² See, e.g., Idriss Jazairy, *Unilateral Economic Sanctions, Int'l Law, and Hum. Rts.*, 33 ETHICS & INT'L AFFS. 291 (2019); IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS: THE IMPACT OF THE PRINCIPLE OF COMMON CONCERN OF HUMANKIND (2022).

⁴³ U.N. Charter art. 2, ¶ 4.

⁴⁴ See, e.g., Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW (Larissa van den Herik, ed., 2017).

⁴⁵ G.A. Res. 56/83, annex (Jan. 28, 2002).

international law. The Draft Articles also provide *inter alia* that:

“Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.” Art. 49(2).

“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.” Art. 51.

“Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.” Art. 53.⁴⁶

While one might therefore postulate a customary international law requirement of proportionality (under which the severity of sanctions must be limited by the severity of the danger to which they are addressed), there is no evident agreement on how to measure “relative severity” by any objective standards.

Some also argue that a sanctions regime that violates the proportionality or relative severity standards (however measured) might give the target state a claim for compensation, for itself or perhaps (*parens patriae*) for the injuries and losses suffered by its innocent nationals.⁴⁷

All these issues are in play in the current situation in Ukraine. Internationally, the predominant view is clearly that the sanctions imposed on Russia cannot rationally be said to exceed the magnitude or severity of its violations of international law — through both its invasion of Ukraine and its actual conduct of the conflict — especially now that the United States has formally accused Russia of committing “crimes against humanity.”⁴⁸ A strong argument can thus be made that the Russia/Ukraine sanctions should clearly be considered proportional and within international law norms even if some of the onus falls on the civilian population.

To be sure, there’s a different view that it is *never* permissible,

⁴⁶ *Id.* Article 54 provides that “[t]his chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.” *Id.* art. 54.

⁴⁷ Lori F. Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT’L L. 249 (2019).

⁴⁸ See Karl Ritter & Geir Moulson, *U.S. determines Russia has committed crimes against humanity, Harris says*, PBS (Feb. 18, 2023), <https://www.pbs.org/newshour/world/u-s-determines-russia-has-committed-crimes-against-humanity-harris-says> [<https://perma.cc/R67W-Z63Y>].

no matter the circumstances, to impose sanctions that inflict broad suffering on the most vulnerable groups of innocent civilians or that undermine an economy as a whole. That view has given rise to the effort to craft “tailored” or “smart” sanctions aimed at governmental policy-makers and other elites and minimizing their “collateral” impact on innocent parties.⁴⁹ Whether the current sanctions against Russia meet those criteria, and whether they will ultimately be effective in compelling Putin’s government to change its policy and behavior (and in deterring other states from committing similar violations in the future) remains to be seen.

In other words, sanctions can be effective, but they can also be a blunt instrument and broadly destructive. As one observer recently commented, sanctions should be considered “a specialized instrument best deployed in controlled circumstances, not an all-purpose tool for everyday use;” they should therefore be handled “like a scalpel, not a Swiss Army knife.”⁵⁰

III. Economic Sanctions: The Unilateral Framework in the United States and the European Union

The United States and the EU have used economic sanctions extensively, for many decades, to target other states; they have also been the major players in designing and implementing the economic sanctions against Russia since 2014. Sanctions, by exerting pressure on a targeted state, and on key individuals and entities of that state, aim to persuade the state to comply (at least partially) with the demands of the sanctioning state. The prospect of removal of sanctions can also be an important “carrot” in a bargaining process among states leading to a negotiated settlement. Sanctions can also isolate or weaken the military power of the sanctioned regime, and deter and punish the sanctioned country.⁵¹ Specific objectives of sanctions programs have included the promotion of democracy, destabilization of a regime, prevention of war, ending war,

⁴⁹ Jonathan Masters, *What Are Economic Sanctions*, COUNCIL ON FOREIGN RELS. (Aug. 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions> [https://perma.cc/S2QR-9SUE]

⁵⁰ Daniel W. Drezner, *The United States of Sanctions*, FOREIGN AFFS. (Sept./Oct. 2021), <https://www.foreignaffairs.com/articles/united-states/2021-08-24/united-states-sanctions> [https://perma.cc/8VEA-2Q3G].

⁵¹ DAVID CORTRIGHT & GEORGE A. LOPEZ, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 1, 7 (David Cortright & George A. Lopez eds., 2002).

promotion of human rights, reducing terrorism, and preventing chemical and nuclear proliferation.⁵²

A. Sanctions in the United States

Sanctions have been used extensively by the U.S. over the past 60 years. There are currently thirty-eight sanctions programs administered by the U.S. Department of the Treasury's Office of Financial Asset Control (OFAC), ranging from the well-known sanctions against Iran, Cuba and North Korea, to less well-known programs such as the Rough Diamond Trade Controls and the Foreign Interference in United States Elections Sanctions.⁵³ The primary statutory authorities used by the U.S. are the International Emergency Economic Powers Act (IEEPA), and the National Emergencies Act (NEA), which allow the office of the President, through Executive Orders, to impose sanctions on states, individuals and entities.⁵⁴

In the U.S., the President often is the sole decision-maker in deciding whether to impose economic sanctions. Under the IEEPA, the President can determine that there exists an "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."⁵⁵ Once the President declares that a national emergency exists, in accordance with the NEA, the President submits a declaration to Congress and publishes the declaration in the Federal Register. Under IEEPA, the President has the ability, *inter alia*, to investigate, regulate or prohibit the use of U.S. banking instruments and transactions involving property or interests in property under U.S. jurisdiction. To implement the sanctions program, national regulations are developed and

⁵² Jonathan Masters, *What Are Economic Sanctions?* COUNCIL ON FOREIGN REL. (Aug. 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions> [https://perma.cc/9QWW-UL5T].

⁵³ *Sanctions Programs and Country Information*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information> [https://perma.cc/2QKU-M4R8] [hereinafter *Sanctions Programs*].

⁵⁴ International Emergency Economic Powers Act, Pub. Law No. 94-412, 90 Stat. 1255 (Sept. 14, 1976) [hereinafter *IEEPA*]; 50 U.S.C. Ch. 34. In addition, the Export Control Act is used to restrict the exports of goods and services from the U.S. to a sanctioned state; and the ITAR, 22 C.F.R. pts. 120-30, restricts the export of military equipment.

⁵⁵ IEEPA, *supra* note 54, § 202(a).

published, which are enforced by regulatory agencies and the Department of Justice. In addition to sanctions imposed under the IEEPA and NEA, Congress also enacts sanctions as part of specific legislation.⁵⁶

Sanctions design and implementation occurs through an inter-agency process which is often coordinated by the National Security Council, which advises the President and coordinates matters of national security among government agencies. The primary departments and agencies include: (1) the Department of State, which, through its Office of Economic Policy and Implementation, develops and implements foreign policy-based sanctions designed to counter threats to national security arising from specific activities and countries; (2) OFAC, which plays a primary role in administering and enforcing many U.S. sanctions programs; and (3) the Department of Commerce's Bureau of Industry and Security (BIS), which is responsible for developing export control policies and issuing export licenses for particular goods/end users/destinations as appropriate in consultation with the Departments of State, Defense, and Energy.⁵⁷

Country-based economic sanctions, which prohibit virtually all activity and transactions involving a particular country, were traditionally used by the U.S. government, and several active sanctions programs—Cuba, North Korea, Syria, Iran, and the Central African Republic—are designed this way.⁵⁸ List-based sanctions, often referred to as smart sanctions and full blocking sanctions, target identified individuals, entities and organizations, rather than an entire country. These parties are identified on the List of Specially Designated Nationals and

⁵⁶ See e.g., EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., R47344, U.S. SANCTIONS: LEGISLATION IN THE 117TH CONGRESS 4, 10 (2022); see e.g., Reinforcing Nicaragua's Adherence to Conditions for Electoral Reform (RENACER) Act of 2021, Pub. L. No. 117-54, 135 Stat. 413; Ending Importation of Russian Oil Act, Pub. L. No. 117-109, 136 Stat. 1154 (2022); Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022).

⁵⁷ *Economic Sanctions Policy and Implementation*, U.S. DEP'T OF STATE, <https://www.state.gov/economic-sanctions-policy-and-implementation/> (last visited May 16, 2023); OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/> [<https://perma.cc/9ZFE-3XBX>] (last visited May 16, 2023); *About BIS*, BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/about-bis> [<https://perma.cc/9PGJ-QXBT>] (last visited May 16, 2023).

⁵⁸ Sanctions Programs, *supra* note 53.

Blocked Persons (SDN List) maintained by OFAC.⁵⁹ U.S. persons are prohibited from entering into transactions with any individual or entity on the list, and their assets in the U.S. are frozen.⁶⁰

In the case of Russia, the United States has also developed sectoral sanctions, which target certain industry sectors such as energy, finance, and the military, and prohibit transactions with individuals or entities in those sectors, but not generally.⁶¹ In the past few years, the U.S. has also used a new kind of sanction, known as “secondary sanctions,” to target third country actors doing business with targeted regimes, persons, and organizations (they are not currently part of the Russia sanctions program).⁶²

Another important type of economic sanction involves restricting the import of targeted state goods and services, and the export or re-export of sensitive technology, goods, and services to individuals and entities located in the sanctioned country. Under the Export Controls Act of 2018, the President has the authority to control (1) the export, reexport, and transfer of items (commodities, software, or technology), whether by U.S. persons (including corporations) or by foreign persons, wherever located to protect national security; and (2) the activities of U.S. persons, wherever located, relating to specific nuclear explosive devices, missiles, chemical or biological weapons, whole plants for chemical weapons precursors, foreign maritime nuclear projects, and foreign intelligence services.⁶³

Both OFAC and BIS have established General Licenses aimed at minimizing the unintended consequences of these sanctions on third parties. Under a General License, certain activities are specifically permitted, and there is no need to approach the

⁵⁹ *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> [<https://perma.cc/35DY-RW92>] (last updated Mar. 15, 2023).

⁶⁰ See Pierre-Hugues Verdier, *Sanctions Overcompliance: What, Why, and Does It Matter?*, 48 N.C. J. INT'L L. 471, 474 & n.4 (2023).

⁶¹ *Sectoral Sanctions Identifications (SSI) List*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/consolidated-sanctions-list-non-sdn-lists/sectoral-sanctions-identifications-ssi-list> [] (last updated May. 12, 2023).

⁶² Ole Moehr, *Secondary Sanctions: A First Glance*, ATL. COUNCIL (Feb. 6, 2018), <https://www.atlanticcouncil.org/blogs/econographics/ole-moehr-3/> [<https://perma.cc/78NL-WA9B>].

⁶³ 50 U.S.C. § 4812.

regulatory agency for a Special License. A Special License can be issued by OFAC or BIS to a specific person or entity to authorize them to conduct activities that might otherwise be prohibited by the sanctions.⁶⁴

B. Sanctions in the European Union

In the EU, forty-seven sanctions programs are currently in place.⁶⁵ Nineteen sanctions programs implement UN sanctions, some of which impose additional restrictions beyond what is required by the UN sanctions.⁶⁶ Twenty-five sanctions programs involve autonomous sanctions regimes against countries not subject to UN sanctions; these are focused on specific themes, including terrorism, chemical weapons, human rights, and cyberattacks.⁶⁷ These sanctions programs are used to achieve certain foreign policy objectives incorporated in the framework of the EU's Common Foreign and Security Policy (CFSP).⁶⁸

Under EU law, the procedures for adopting EU sanctions are complex and require a CFSP Council Decision. A CFSP Council Decision in turn requires the unanimous agreement of all twenty-seven EU Member States. If the sanction involves asset freezes, trade restrictions or export bans, additional implementing legislation at the EU level will also be required, i.e. a Council Regulation.

The types of sanctions employed by the EU are similar to those used by the United States with one exception. The EU expressly provides that its sanctions involve no secondary sanctions and do

⁶⁴ See *Russian Harmful Foreign Activities Sanctions*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/sanctions-programs-and-country-information/russian-harmful-foreign-activities-sanctions> [<https://perma.cc/FBE7-FH86>] (last visited May 16, 2023).

⁶⁵ EU Sanctions Map, EUR. COMM'N, <https://www.sanctionsmap.eu/#/main> [<https://perma.cc/U8H5-AZ7C>].

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ Consolidated Version of the Treaty on the European Union art. 21(2), Oct. 26, 2012, 2012 O.J. (C 326) 28-29. These objectives include (1) safeguarding the EU's values, fundamental interests and security, (2) consolidating and supporting democracy, the rule of law, human rights and the principles of international law, and (3) preserving peace, preventing conflicts and strengthening international security.

not apply extraterritorially⁶⁹. In pre-invasion Ukraine disputes with the U.S., the EU strongly objected to unilateral extraterritorial sanctions and has enacted blocking legislation to prevent EU persons from complying with such sanctions.⁷⁰

C. Coordination of Unilateral Economic Sanctions

Following Russia's attack against Ukraine, the U.S., EU and other Allied governments put in place a set of economic sanctions targeting Russian individuals and entities, including state companies and high-level government representatives.⁷¹ In the design and implementation of these sanctions, the U.S. and the EU have cooperated closely, and many sanctions are identical or substantively similar.⁷² Imposing such a comprehensive package of sanctions required a substantial amount of coordinated efforts that was undertaken through discussions in multilateral forums, such as the G7,⁷³ United Nations and NATO summits.⁷⁴

Likewise, bilateral dialogues were undertaken, such as meetings held by the U.S. Under Secretary of State for Political Affairs and the European External Action Service Deputy Secretary General for Political Affairs,⁷⁵ and with various states including Germany, France, and the U.K. In addition, the U.S., the EU and other World Trade

⁶⁹ *Frequently asked questions: Restrictive measures (sanctions)*, EUR. COMM'N (Feb. 26, 2022), https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401 [<https://perma.cc/L74E-UHTW>].

⁷⁰ Julia Schmidt, *The Legality of Unilateral Extra-territorial Sanctions under International Law*, 27 J. CONFLICT & SEC. L. 53 (2022).

⁷¹ See *infra* Figure 1, which shows the numbers of individuals and entities that have been targeted by Allied governments.

⁷² KRISTIN ARCHIK, CONG. RSCH. SERV., IN11897, RUSSIA'S WAR AGAINST UKRAINE: EUROPEAN UNION RESPONSES AND U.S.-EU RELATIONS 3 (February 6, 2023).

⁷³ "The G7 (Group of Seven) is an organization of the world's seven largest so-called 'advanced' economies, which dominate global trade and the international financial system. They are Canada, France, Germany, Italy, Japan, the UK and the United States." *G7: What is the G7 and what is it doing about Ukraine?*, BBC NEWS (Jan. 18, 2023), <https://www.bbc.com/news/world-49434667> [<https://perma.cc/RR5L-4RF4>].

⁷⁴ See Viktor Szép, *Unmatched Levels of Sanctions Coordination*, VERASSUNGSBLOG (Mar. 3, 2022), <https://verfassungsblog.de/unmatched-levels-of-sanctions-coordination/> [<https://perma.cc/A46G-4SVS>].

⁷⁵ Press Release, Office of the Spokesperson of U.S. Dep't of State, U.S.-EU Joint Press Release by the EEAS and Department of State on the First U.S.-EU High-Level Dialogue on Russia (Mar. 30, 2022), <https://www.state.gov/u-s-eu-joint-press-release-by-the-eeas-and-department-of-state-on-the-first-u-s-eu-high-level-dialogue-on-russia/>, [<https://perma.cc/GLW3-6PCB>].

Organization (WTO) members have worked together to suspend Russia's preferential trade treatment under World Trade Organization rules,⁷⁶ and to work together in international organizations such as the International Monetary Fund, the World Bank and the European Bank for Reconstruction and Development to suspend programs and projects in Russia and close down offices based in Russia.⁷⁷

A high level of cooperation was also exhibited in the lengthy process of developing and imposing sanctions on seaborne crude oil sold in excess of a price cap of \$60/barrel. To address EU dependency on Russian gas, the U.S. committed to boosting its liquified natural gas exports to the EU.⁷⁸ This cooperation is also evidenced by the formation of the Russian Elites, Proxies and Oligarchs (REPO) Task Force by the U.S., other G7 countries, the EU, and Australia, designed to gather and exchange information about Russian oligarchs and to ensure more effective criminal prosecution, sanctions design and enforcement, and other restrictive measures.⁷⁹

Coordination of sanctions is important for three reasons. First, sanctions regimes are more effective and durable when they are multilateral, and especially when the sanctioning states represent a significant percentage of the target state's commercial and trading partners. Second, while U.S. sanctions power is sharp, it is not all-

⁷⁶ Shara Aranoff et al., *Revocation of Russia's MFN Trade Status: What Companies Need to Know*, GLOB. POL'Y WATCH (Mar. 21, 2022), <https://www.globalpolicywatch.com/2022/03/revocation-of-russias-most-favored-nation-trade-status-what-companies-need-to-know/> [https://perma.cc/3HL5-ZC3R].

⁷⁷ Francesco Seatzu, *Suspending Belarus and Russia From the World Bank and EBRD: An Undesirable Possibility?*, VÖLKERRECHTSBLOG: INT'L LAW & INT'L LEGAL THOUGHT (Jun. 13, 2022), <https://voelkerrechtsblog.org/suspending-belarus-and-russia-from-the-world-bank-and-ebrd/> [https://perma.cc/43RV-N9CB]; Richard Porter, *Board of Governors Vote for Firm Action Against Russia and Belarus*, EUR. BANK FOR RECONSTRUCTION AND DEV. (Apr. 4, 2022), <https://www.ebrd.com/news/2022/board-of-governors-vote-for-firm-action-against-russia-and-belarus.html> [https://perma.cc/J4GS-ZB57].

⁷⁸ Gavin Maguire, *Column: U.S. LNG exports both a lifeline and a drain for Europe in 2023*, REUTERS (Dec. 21, 2022, 1:00 AM), <https://www.reuters.com/business/energy/us-lng-exports-both-lifeline-drain-europe-2023-maguire-2022-12-20/> [https://perma.cc/JK8Y-7BM7].

⁷⁹ Press Release, U.S. Dep't of Just., U.S. Departments of Justices and Treasury Launch Multilateral Russian Oligarch Task Force (March 16, 2022), <https://www.justice.gov/opa/pr/us-departments-justice-and-treasury-launch-multilateral-russian-oligarch-task-force> [https://perma.cc/2MGF-VZZ6].

powerful, and can create tension and risks for businesses in the U.S. Finally, blatant disregard of allies' and partners' interests in the application of coercive economic tools can undermine U.S. relationships more broadly.⁸⁰

The coordination efforts, sometimes referred to as “sanctions diplomacy,” are based on the premise that sanctions will be most effective when they are levied by many countries in parallel. The coordinated sanctions send a stronger message of focus and resolve, and result in less opportunity for evasion by individuals, entities, and states. Because a UN Security Council resolution was not a viable option to impose multilateral sanctions on Russia, the United States and the EU were required both to coordinate their efforts and to organize a coalition.

In the U.S., overall sanctions diplomacy is spearheaded by the State Department, through its Office of Sanctions Coordination (OSC).⁸¹ Headed by a Presidential appointee with ambassadorial rank, the OSC is tasked with the diplomatic coordination of the U.S. and its allies and partners throughout the world (emphasizing the relationships with the U.K., the EU and member countries of the EU, Canada, Australia, New Zealand, Japan, and South Korea), “to ensure the maximum effectiveness of sanctions imposed by the United States and such allies and partners.”⁸² Its mandate is to build coalitions and make U.S. sanctions policy multilateral whenever possible.

Further, since a key purpose of sanctions is to help create conditions that allow for their removal as part of negotiated resolutions, the OSC is expected to play an advisory role to U.S. government delegations charged with negotiating agreements that involve the removal of sanctions. In addition to the OSC, OFAC and other U.S. government departments and agencies involved in designing and administering sanctions will also seek to work

⁸⁰ See Jarrett Blanc & Andrew S. Weiss, *U.S. Sanctions on Russia: Congress Should Go Back to Fundamentals*, CARNEGIE ENDOWMENT FOR INT'L PEACE (April 3, 2019), <https://carnegieendowment.org/2019/04/03/u.s.-sanctions-on-russia-congress-should-go-back-to-fundamentals-pub-78755> [<https://perma.cc/U7UV-XHNA>].

⁸¹ The Office of Sanctions Coordination, whose authority had lapsed, was reinstated on December 21, 2020, as part of the Consolidated Appropriations Act, 2021. Consolidated Appropriations Act, Pub. L. No. 116-260, § 361, 134 Stat. 1182, 3131-33 (2020).

⁸² *Id.*, 134 Stat. at 3132.

together with foreign counterparts.⁸³

In the EU, sanctions diplomacy is a more complicated process that involves both different entities and states within the EU structure, and non-EU states. As mentioned above, sanctions fall within the CFSP and require a unanimous CFSP Council Decision.⁸⁴ The High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission (HR/VP) provides political guidance to the European External Action Services (EEAAS) and is in charge of coordinating the EU's foreign policy tools, including the coordination on sanctions with other nations.⁸⁵

In December 2022, the Helsinki Commission, along with representatives from the EU and the U.K., jointly announced the creation of the US-Europe Coalition on Russia Sanctions, whose main purpose is to “synchronize the sanctions policy between the European Union, Ukraine, and the USA.”⁸⁶ The Coalition will be expected to unify the West's efforts and economic sanctions aiming for a positive outcome in the Ukraine-Russia conflict.

Even though there has been close cooperation among the Allied governments on sanctions design and implementation, and 141 states voted in the U.N. General Assembly to condemn the Russian invasion, many important states, including China, India, Mexico, Turkey, Brazil, Indonesia, Saudi Arabia, and South Africa, have not imposed sanctions on the Russian regime. The Economist Intelligence Unit estimates that 36% of the world's population lives in countries that have actively condemned Russia and imposed

⁸³ The US OFAC and the UK have engaged in technical meetings and the two heads have indicated that they intend to engage in wide ranging coordination in sanctions programs going forward. Andrea Gacki & Giles Thomson, *Enhancing the US-UK Sanctions Partnership*, U.S. DEP'T. OF THE TREASURY (Oct. 17, 2022) <https://home.treasury.gov/news/featured-stories/enhancing-the-us-uk-sanctions-partnership> [<https://perma.cc/DU93-4T86>].

⁸⁴ Consolidated Version of the Treaty on the European Union art. 21(2), *supra* note 68, 2012 O.J. (C 326) 28-29.

⁸⁵ *The Diplomatic Service of the European Union, About the European External Action Service*, EUR. UNION EXTERNAL ACTION SERV. (Aug. 18, 2021), https://www.eeas.europa.eu/eeas/about-european-external-action-service_en#8419 [<https://perma.cc/5VAU-JSZF>].

⁸⁶ Press Release, Commission on Security and Cooperation in Europe, Helsinki Commission Announces Briefing on US-Europe Coalition for Russia Sanctions, (Dec. 12, 2022), <https://www.csce.gov/international-impact/press-and-media/press-releases/helsinki-commission-announces-briefing-us-europe> [<https://perma.cc/G6VU-CT5E>].

sanctions on the Russian economy, while an estimated one-third of the world's population lives in countries that have remained neutral and not imposed sanctions.⁸⁷ Another third (32%) of the world's population lives in countries where the government has affirmatively supported Russia's actions or where official declarations have been consistent with Russia's narrative, including by avoiding calling the war an "invasion."⁸⁸ Led by China, in the long term these countries will try to benefit from closer ties to an anti-Western coalition, further reinforcing a split in the global economic and geopolitical landscape.⁸⁹

In terms of global economic power, however, the states sanctioning Russia represent about 70% of global GDP. By contrast, the neutral and Russia-friendly blocs constitute only around 30% of global GDP, with China and India accounting for nearly two-thirds of this group's economic footprint.⁹⁰

IV. U.S. Economic Sanctions Related to the Russian Invasion of Ukraine

In 2014, and most recently in 2022, the United States responded to Russian actions in Ukraine by imposing a broad range of economic sanctions against Russia and listed Russian individuals and entities.⁹¹ These sanctions fall into six broad categories: blocking sanctions, sectoral sanctions, ban on new investment, sanctions related to services, import sanctions, and export sanctions.⁹²

⁸⁷ *Russia can count on support from many developing countries*, ECONOMIST INTEL. UNIT (Mar. 30, 2022), <https://www.eiu.com/n/russia-can-count-on-support-from-many-developing-countries/> [<https://perma.cc/5X2B-WEKD>].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Table 1, *infra*, lists the laws and Executive Orders pursuant to which U.S. economic sanctions have been imposed on Russia.

⁹² The broad categories do not cover all of the sanctions that the U.S. has imposed, such as freezing the assets of the Central Bank and preventing certain Russian financial institutions from using SWIFT for international currency transactions. Press Release, U.S. Dep't of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth, (Feb. 28, 2022), <https://home.treasury.gov/news/press-releases/jy0612> [<https://perma.cc/YN2F-A3P5>]; *An Update to Our Message for the Swift Community*, SWIFT (Mar. 20, 2022), <https://www.swift.com/news-events/news/message-swift-community> [<https://perma.cc/5ZTZ-X63F>].

A. Blocking Sanctions Against Individuals and Entities Listed on the List of Specially Designated Nationals and Blocked Persons (SDN List)

The United States has imposed full blocking sanctions⁹³ on a variety of Russian institutions and persons, including banks and financial institutions, state-owned enterprises and management, and prominent business and political figures, as well as technology and defense companies, maritime companies, and entities and individuals that have assisted Russia in evading sanctions. The most severe level of targeted sanctions, full blocking sanctions, prohibits any U.S. person, located anywhere in the world, from engaging in transactions with or for the benefit of targeted individuals and entities.⁹⁴ U.S. persons with custody or control over property or property interests belonging to blocked entities must also freeze those assets.⁹⁵ These sanctions apply to both the OFAC “Specially Designated Nationals” list and entities at least 50% owned by a blocking target.⁹⁶

The full blocking sanctions imposed by the U.S. following the February 2022 invasion are better described as expansive rather than unprecedented and novel. Prior to February 22, 2022, 951 individuals and entities were listed on the SDN List under the Russian sanctions programs. Following the 2022 invasion, 1,948 additional names were added, and there are now a total of 2,899 individuals and entities on the SDN List (as of February 23, 2023).⁹⁷

⁹³ In the EU, this type of sanction is called an “individual restrictive measure.” *EU restrictive measures against Russia over Ukraine (since 2014)*, EUR. COUNCIL (last reviewed Mar. 15, 2023), <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/#individual/> [<https://perma.cc/8QCP-N7VJ>].

⁹⁴ Hdeel Abdelhady, *U.S. Blocking and Non-Blocking Sanctions on Russia to Be Felt Widely*, Thomson Reuters, (Mar. 1, 2022), <https://www.reuters.com/article/bc-finreg-sanctions-on-russia/commentary-u-s-blocking-and-non-blocking-sanctions-on-russia-to-be-felt-widely-idUSKBN2KY4SI>. [<https://perma.cc/GN5R-GBXR>].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ U.S. DEP'T OF THE TREASURY, *supra* note 59. *See infra* Figure 1 for sanctions imposed by the EU and certain other Allied governments since the 2022 invasion.

B. Sectoral Sanctions Against Entities Operating in the Finance and Energy Sectors of the Russian Economy Listed on the Sectoral Sanctions Identification List (SSI List)

Sectoral sanctions have been imposed on specified persons operating in the finance, energy, and defense and related materiel sectors of the Russian economy. Under these sanctions, U.S. persons are prohibited from engaging in certain specified transactions with entities listed on the SSI List. However, the property and interests in property of these persons on the SSI List are not blocked, nor are transactions with them prohibited beyond these restrictions.⁹⁸

These sectoral sanctions have been enacted through Directives: Directive 1 (finance sector) generally applies to certain debt and equity transactions with entities on the SSI List; Directive 2 (energy sector) covers debt financing transactions longer than 90 days with entities on the SSI List; Directive 3 (defense and related materiel sector) covers debt financing transactions longer than 30 days; Directive 4 (deepwater, Arctic offshore and shale energy sector) covers goods, services (except for financial services), or technology in support of exploration or production for deep-water, Arctic offshore, or shale projects that have the potential to produce oil; and Directive 5 (quantum computing).⁹⁹ These four Directives were in place prior to the 2022 Ukraine invasion, but the number of individuals and entities on the SSI list has increased significantly since the February 2022 invasion.¹⁰⁰

⁹⁸ *Ukraine-/Russia-related Sanctions*, U.S. DEPT. OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> [https://perma.cc/35VA-CUBV] (last visited May 15, 2023).

⁹⁹ *See id.*

¹⁰⁰ The quantum computing sector was added as a new sector following the 2022 invasion by a Determination of the Secretary of Treasury, but OFAC has not issued a new directive. This determination allows blocking sanctions to be imposed against any person identified by the Secretary of the Treasury, in consultation with the Secretary of State, as operating in the quantum computing sector of the Russian economy. OFF. OF FOREIGN

C. Ban on New Investment

New investment in Russia by any U.S. person, wherever located, is prohibited.¹⁰¹ OFAC has indicated that it considers investment to be the commitment of capital or other assets for the purpose of generating returns or appreciation.¹⁰² This prohibition on all new investment superseded earlier sanctions which had at first prohibited new investments in the Russian energy sector,¹⁰³ and had then expanded to prohibit new investment in the Russian *economy*.¹⁰⁴ This type of economic sanction has been used in other

ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, DETERMINATION PURSUANT TO SECTION 1(a)(ii) OF EXECUTIVE ORDER 14071 (Sept. 15, 2022), https://home.treasury.gov/system/files/126/determination_09152022_eo14071.pdf [<https://perma.cc/5GFD-5Y9G>].

¹⁰¹ Exec. Order No. 14071, 87 Fed. Reg. 68, 20999 (Apr. 6, 2022).

¹⁰² Frequently Asked Questions, Russian Harmful Foreign Activities Sanctions, No. 1049, U.S. DEP'T OF THE TREASURY (June 6, 2022), <https://ofac.treasury.gov/faqs/1049> [<https://perma.cc/Z7AW-H8EZ>].

Unless exempt or otherwise authorized by OFAC, transactions that OFAC considers to be 'new investment' for the purposes of the respective E.O. prohibitions include:

- The purchase or acquisition of real estate in the Russian Federation, other than for noncommercial, personal use;
- Entry into an agreement requiring the commitment of capital or other assets for the establishment or expansion of projects or operations in the Russian Federation, including the formation of joint ventures or other corporate entities in the Russian Federation;
- Entry into an agreement providing for the participation in royalties or ongoing profits in the Russian Federation;
- The lending of funds to persons located in the Russian Federation for commercial purposes, including when such funds are intended to be used to fund a new or expanded project or operation in the Russian Federation;
- The purchase of an equity interest in an entity located in the Russian Federation (see FAQs 1054 and 1055); and
- The purchase or acquisition of rights to natural resources or exploitation thereof in the Russian Federation.

Id. Frequently Asked Questions, Russian Harmful Foreign Activities Sanctions, No. 1055, U.S. DEP'T OF THE TREASURY, <https://ofac.treasury.gov/faqs/1055> [<https://perma.cc/SM7J-CCG6>] (last updated Jan. 17, 2023).

¹⁰³ Exec. Order No. 14066, 87 Fed. Reg. 47, 13625 (Mar. 8, 2022).

¹⁰⁴ Exec. Order No. 14068, 87 Fed. Reg. 50, 14381 (Mar. 11, 2022).

OFAC sanctions programs.¹⁰⁵

D. Sanctions Relating to the Provision of Certain Services by U.S. Persons to Any Person or Entity Located or Organized in Russia

1. Accounting, Trust and Corporate Formation, and Management Consulting Services.

U.S. persons, wherever located, are prohibited from providing accounting, trust and corporate formation, and management consulting services to any person located in Russia, with two exceptions: services provided to Russian affiliates that are owned or controlled by U.S. persons, and services relating to the winddown or divestiture of an entity located in Russia that is not owned or controlled by a Russian person. While this sanction targets specific forms of services, prohibiting the provision of services by U.S. persons has been used in other OFAC sanctions programs.¹⁰⁶

2. Certain Services by U.S. Persons in Oil Sales Transactions: the Oil Price Cap

The United States (in coordination with other members of the G7 (Germany, United Kingdom, France, Japan, Canada, Italy), the EU, and Australia) has imposed sanctions on seaborne crude oil sold in excess of a price cap of \$60/barrel.¹⁰⁷

This oil price cap sanction is indeed novel and unprecedented. It was designed to restrict Russia's main source of income for financing its military operations without materially affecting the

¹⁰⁵ See, e.g., 31 C.F.R. § 560.207 (Iran).

¹⁰⁶ See, e.g., 31 C.F.R. § 560.204 (Iran).

¹⁰⁷ OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, DETERMINATION MADE PURSUANT TO SECTION 1(A)(II) OF EXECUTIVE ORDER 14071 (Nov. 21, 2022). Significantly, the oil price cap does not apply to crude oil transported via the Druzhba pipeline from Russia to Poland, Germany, the Czech Republic, Slovakia and Hungary. This crude oil is also not subject to sanctions by the EU. *Question for written answer E-002408/2022 to the Commission*, EUR. PARLIAMENT (July 1, 2022), https://www.europarl.europa.eu/doceo/document/E-9-2022-002408_EN.html [<https://perma.cc/JX6Y-DEVP>]; Ben Cahill, *Press Report on EU Embargo and Russian Oil Price Cap*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 10, 2023) <https://www.csis.org/analysis/progress-report-eu-embargo-and-russian-oil-price-cap> [<https://perma.cc/8UYG-YTHN>].

global supply of oil.¹⁰⁸ Transactions involving Russian oil below the price cap are lawful, while transactions above the price cap are sanctioned. The oil price cap is designed to keep private sector businesses involved in providing services in oil transactions below the price cap, and to prohibit any service provider involved in the trading/commodities brokering, financing, shipping, insurance, flagging, and/or customs brokering (“Covered Services”) of Russian-origin oil from providing Covered Services if the oil has been purchased at a price above the price cap.¹⁰⁹

Generally, the oil price cap applies the moment Russian crude oil is sold by a Russian entity for maritime transport, until it goes through customs clearance in a jurisdiction other than Russia. Once the crude (or other oil product covered by the price cap) is refined or otherwise subject to substantial transformation in a different jurisdiction, the cap price will no longer apply as the product is no longer considered to be of Russian origin.

To encourage private sector participation in Covered Services below the oil price cap, OFAC has implemented a safe harbor applicable to U.S. providers of Covered Services. To fall within the safe harbor, U.S. service providers have to comply with certain due diligence and documentation-related obligations, the scope of which depends on the Covered Services offered.¹¹⁰ If a U.S. service

¹⁰⁸ Press Release, U.S. Dep’t Treasury, Fact Sheet: Limiting Kremlin Revenues and Stabilizing Global Energy Supply with a Price Cap on Russian Oil (Jan. 19, 2023), <https://home.treasury.gov/news/press-releases/jy1141> [<https://perma.cc/D953-NLX4>].

¹⁰⁹ The oil price cap was also extended to other petroleum products by a determination pursuant to EO 14071 dated February 3, 2023, to Discount to Crude petroleum products (at a price of \$45/barrel) and Premium to Crude petroleum products (at a price of \$100/barrel). Discount to Crude petroleum products include products such as residual fuel oil and waste oils, while the Premium to Crude petroleum products include products such as gasoline, kerosene, diesel and jet fuel. *See* OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, DETERMINATION PURSUANT TO SECTIONS 1(A)(II), 1(B), AND 5 OF EXECUTIVE ORDER 14071: PRICE CAP ON PETROLEUM PRODUCTS OF RUSSIAN FEDERATION ORIGIN (Feb. 3, 2023).

¹¹⁰ Services providers are divided into three categories for compliance purposes:

Tier 1 Actors: Actors who regularly have direct access to price information in the ordinary course of business. . . . Tier 1 Actors must retain documents showing that Russian oil was purchased at or below the relevant price cap. . . . **Tier 2 Actors:** Actors who are sometimes able to request and receive price information from their customers in the ordinary course of business. . . . Tier 2 Actors must, to the extent practicable, request and retain documents that show that Russian

provider fails to meet all the requirements of the applicable safe harbor, the provider may potentially be subject to civil and/or criminal liability.

E. Ban on Imports from Russia

The U.S. sanctions regime prohibits importation into the United States of the following Russian-origin goods: gold;¹¹¹ “crude oil; petroleum; petroleum fuels, oils, and products of their distillation; liquefied natural gas; coal; . . . coal products;”¹¹² “fish, seafood, and preparations thereof; alcoholic beverages; non-industrial diamonds; and any other products of Russian Federation origin as may be determined by the Secretary of the Treasury in consultation with the Secretary of State and the Secretary of Commerce.”¹¹³

F. Ban on Exports of Goods, Technology or Services to Russia

Following Russia’s 2014 invasion of Ukraine and annexation of Crimea, the BIS imposed licensing requirements applicable to exports (direct or indirect), reexports (from one third country to another) and transfers (in country; any transfer within any third country) of items subject to the Export Administration Regulations (EAR) destined for certain Russian entities, and special controls on items subject to the EAR intended for use in specified Russian

oil was purchased at or below the relevant price cap. [If such information is not obtained,] Tier 2 Actors must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil was purchased or will be purchased at or below the relevant price cap. . . . **Tier 3 Actors:** Actors who do not regularly have direct access to price information in the ordinary course of business. . . . Tier 3 Actors must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil was purchased or will be purchased at or below the relevant price cap.

OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, GUIDANCE ON IMPLEMENTATION OF THE PRICE CAP POLICY FOR CRUDE OIL AND PETROLEUM PRODUCTS OF RUSSIAN FEDERATION ORIGIN (Feb. 3, 2023), https://home.treasury.gov/system/files/126/price_cap_guidance_combined_20230203.pdf [<https://perma.cc/9MQW-R27J>].

¹¹¹ Press Release, U.S. Dep’t of the Treasury, *U.S. Treasury Sanctions Nearly 100 Targets in Putin’s War Machine, Prohibits Russian Gold Imports* (June 28, 2022), <https://home.treasury.gov/news/press-releases/jy0838> [<https://perma.cc/V99T-GU59>]

¹¹² Exec. Order No. 14066, 87 Fed. Reg. 13625 (Mar. 10, 2022).

¹¹³ Exec. Order No. 14068, 87 Fed. Reg. 14381 (Mar. 15, 2022).

industry sectors.¹¹⁴

The control of exports, reexports and transfers (in country) of goods, technology or services to Russia and to identified individuals and entities connected to Russia significantly expanded following the February 2022 invasion, targeting in particular the defense, aerospace and maritime sectors by imposing a policy of denial on sensitive items used in Russia's defense, aerospace, and maritime industries.¹¹⁵ These items, many of which were not previously subject to controls when destined for Russia, include semiconductors, computers, telecommunications, information security equipment, lasers, and sensors.

While BIS has announced a policy of denial,¹¹⁶ licenses are now required for: all items on the EAR's Commerce Control List (CCL);¹¹⁷ certain sector-specific items listed in Section 746.5 and Supplements 2, 4, and 6 to Part 746 of the EAR and any items going to a military end use or end user or a military intelligence end use or end user regardless of whether located in or outside Russia; and exports to a person on the BIS Entity List.¹¹⁸

BIS also adopted two new Foreign Direct Product rules in relation to Russia, which state that sanctions apply to foreign-produced items, located outside the U.S., which are the "direct

¹¹⁴ 15 C.F.R. §§ 744, 746.

¹¹⁵ Exec. Order No. 14071, 87 Fed. Reg. 20999 (Apr. 6, 2022).

¹¹⁶ Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR), 87 Fed. Reg. 12226 (Mar. 3, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04300.pdf> [<https://perma.cc/3ZX8-NZ7S>].

¹¹⁷ The CCL categories consist of: nuclear materials, facilities and equipment; materials, chemicals, microorganisms and toxins; materials processing; electronics; computers; telecommunications and information security; sensors and lasers; navigation and avionics; marine; and aerospace and propulsion. BUREAU OF INDUS. AND SEC., U.S. DEP'T OF COM., COMMERCE CONTROL LIST (CCL), <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> [<https://perma.cc/58X8-4GA7>] (last visited Mar. 15, 2023).

¹¹⁸ The BIS Entity List names businesses, research institutions, government and private organizations, and individuals that are subject to specific license requirements for the export, reexport and/or transfer of specified items. 15 CFR § 744, Supplement 4, <https://www.bis.doc.gov/index.php/cbc-faq/faq/281-1-what-is-the-entity-list> [<https://perma.cc/AK52-T2UG>]. BIS has now included over 410 entities on the Entity List for reasons related to Russia's invasion of Ukraine. *Current State of BIS Export Controls in Response to the Russian Federation's Invasion of Ukraine*, BAKERHOSTETLER: RESOURCES (Jan. 19, 2023), <https://www.bakerlaw.com/Current-State-of-BIS-Export-Controls-in-Response-to-the-Russian-Federations-Invasion-of-Ukraine> [<https://perma.cc/M7EY-ANX9>].

product” of specified “technology” or “software,” or are produced by a plant or major component of a plant that itself is a “direct product” of specified “technology” or “software.”¹¹⁹ If the specified “technology” or “software” is of U.S. origin, this sanction prohibits certain countries, entities, and persons from using or accessing direct products made from or that rely on U.S. technology and software.¹²⁰ The first new rule prohibits the entire country of Russia from accessing foreign direct products based on technology and software of U.S. origin, and the second rule prohibits Russian “military end users” from accessing these products.

The Department of Commerce also imposed restrictions on the export to Russia of “luxury goods” and on exports worldwide to certain Russian oligarchs and certain other actors supporting the Russian government. These new export controls seek to significantly limit financially elite individuals’ and entities’ access to luxury goods.¹²¹

In common with many other OFAC sanctions programs, the Ukraine-Russia-related sanctions program provides that “any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions” of any of the Executive Orders and the directives issued under E.O 14024, are prohibited.¹²² This regulation is an important enforcement tool for OFAC and the DOJ and increases risks to businesses seeking to structure transactions that comply with sanctions.

¹¹⁹ 15 C.F.R. § 734.9 (f)

¹²⁰ *Id.* § 734.9(g)

¹²¹ “Luxury goods” are listed in Supplement 5 to Part 746 and include jewelry, perfumes, leather, silk, fabrics and textiles; clocks and watches; footwear, vehicles, and antiques. *Imposition of Sanctions on ‘Luxury Goods’ Destined for Russia and Belarus and for Russian and Belarusian Oligarchs and Malign Actors Under the Export Administration Regulations (EAR)*, 87 Fed. Reg. 14788 (Mar. 16, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-03-16/pdf/2022-05604.pdf> [<https://perma.cc/EQN4-Y9BQ>].

¹²² Exec. Order No. 14024 § 4, 3 C.F.R. 542, 545 (2022); Exec. Order No. 14065, 87 Fed. Reg. 10293 (Feb. 21, 2022); Exec. Order No. 14066, 87 Fed. Reg. 13625 (Mar. 8, 2022); Exec. Order No. 14068, 87 Fed. Reg. 14381 (Mar. 11, 2022); Exec. Order No. 14071, 87 Fed. Reg. 20999 (Apr. 6, 2022).

V. Economic Sanctions Compliance by the Private Sector

A. Compliance and Enforcement

Sanctions often have a direct and significant impact on business operations and transactions engaged in by private sector businesses by prohibiting or restricting transactions with (1) customers, thereby disrupting sales of services, goods, and technology; and (2) vendors of goods and services, thereby impacting global supply chains. Sanctions can also impact the ability of parent companies to engage in transactions with their subsidiaries and other affiliates operating in sanctioned countries. In addition to operational impacts, businesses are forced to incur additional, often substantial, compliance costs for risk and compliance personnel, lawyers, and consultants, and for screening and other information services costs related to due diligence.

Businesses face exposure to fines and penalties in the event they fail to comply with sanctions. Violations of the OFAC regulations are subject to both criminal and civil penalties. When a person “willfully” violates the rules, the U.S. Department of Justice (DOJ) may pursue criminal penalties of up to \$1 million per violation and, in the case of individuals, up to twenty years’ imprisonment.¹²³ OFAC can impose civil monetary penalties for sanctions violations of up to \$250,000 or twice the amount of the prosecuted transaction, whichever is greater.¹²⁴ Violations of the export control regulations also expose individuals and companies to both criminal and civil penalties. Criminal penalties include up to twenty years’ imprisonment for individuals, and a fine not higher than \$1 million, whereas administrative civil penalties can reach the greater of \$300,000 per violation or twice the value of the transaction.¹²⁵ Significantly, these civil violations are “strict liability” offenses, meaning that companies and individuals can be liable and subject to significant penalties even if they were unaware that their activities ran afoul of the sanctions.¹²⁶

OFAC, the BIS, and the DOJ have each brought many enforcement actions against business entities over the last ten years.

¹²³ 50 U.S.C. § 1705(c).

¹²⁴ *Id.* § 1705(b).

¹²⁵ *Id.* § 4819 (b) & (c).

¹²⁶ *Id.* § 1705(b), § 4819(c) (imposing civil liability for unlawful acts without requiring they be done “willfully”).

Since 2015, OFAC has brought over 125 enforcement actions for violations of U.S. sanctions regulations,¹²⁷ and large civil penalties have been imposed against major financial institutions: BNP Paribas (\$964 million; 2014); Credit Agricole (\$329.6 million, 2015); UniCredit Bank (\$611 million, 2019) and Standard Chartered Bank (\$657 million, 2019). BIS, between 2017 and 2021, completed more than 200 administrative enforcement actions for export control matters and imposed civil penalties in excess of \$1 billion.¹²⁸

The possibility that the U.S. government will bring actions for sanctions violations is not a speculative risk. First, the U.S. government has a history of bringing criminal and civil actions, and entering into settlement agreements, non-prosecution agreements, and deferred prosecutions agreements with companies for violations of U.S. sanctions. Second, DOJ officials have indicated that there is a “new level of intensity and commitment to sanctions enforcement,” that sanctions are no longer just a concern for banks and financial institutions, that “any business with an international supply chain” should place sanctions at the forefront of its compliance efforts, and that the DOJ “expects a new level of sophistication and resource commitment to sanctions compliance at companies across the globe.”¹²⁹ Treasury officials have stated that OFAC will take enforcement actions against institutions or individuals that evade, avoid, cause a violation of, or conspire or attempt to violate OFAC or BIS regulations on the Russian sanction matters.¹³⁰ Given the risks of substantial financial penalties and reputational harm arising from adverse publicity, companies are devoting resources—both human and financial—to better

¹²⁷ *Civil Penalties and Enforcement Information*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information> [<https://perma.cc/F3WS-5QVF>] (last visited Mar. 16, 2023).

¹²⁸ See, e.g., U.S. DEP’T OF COM., BUREAU OF INDUS. AND SEC., ANNUAL REPORTS 2017-2021, <https://www.bis.doc.gov/index.php/about-bis/newsroom/publications> [<https://perma.cc/7553-YH4B>].

¹²⁹ *Deputy Attorney General Lisa O. Monaco Delivers Keynote Remarks at 2022 GIR Live: Women in Investigations*, U.S. DEP’T OF JUST. (June 16, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women> [<https://perma.cc/6E67-ENX4>].

¹³⁰ Brett Wolf, *US Treasury to Act Against Russia Sanctions Compliance Failures*, *Official Says*, THOMSON REUTERS (June 3, 2022), <https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/russia-sanctions-compliance-failures/> [<https://perma.cc/Z6ET-FLHX>].

understand, assess, and mitigate these risks.

One fundamental challenge with regulatory compliance is that there is no one-size-fits-all solution. OFAC and BIS, the primary government regulators, have recognized this challenge and have urged companies to employ a risk-based approach for compliance which takes many factors into account, including a company's size and sophistication, products and services, customers and counterparties, and geographic locations.¹³¹ The OFAC Risk Matrix, included in its Economic Sanctions Enforcement Guidelines, was developed to help financial institutions evaluate their compliance programs. The OFAC Risk Matrix classifies risk as low, medium, and high based on a number of factors, including size and stability of the customer base, number of high-risk customers, number of funds transfers and international transactions, history of OFAC actions, management commitment and competence, strength of the OFAC compliance function, levels of training, and quality control methods.¹³²

Both OFAC and BIS have made efforts to clearly communicate their expectations regarding appropriate sanctions compliance practices.¹³³ While neither agency mandates that a company have any specific compliance program, each has indicated that the existence of an effective compliance program is an important factor influencing its many enforcement decisions (e.g. take no action, issue a cautionary letter, find a violation, impose civil monetary penalties, make a criminal referral, and take other administrative actions such as license denial, suspension, modification, or revocation, cease and desist orders, and settlement agreements).

The "Framework for OFAC Compliance Commitments" (OFAC Compliance Framework)¹³⁴ has identified five essential

¹³¹ U.S. DEP'T OF THE TREASURY, A FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS (May 2, 2019), https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf [<https://perma.cc/K9AW-JXUL>].

¹³² Economic Sanctions Enforcement Guidelines, 31 C.F.R. pt. 501, app. A.

¹³³ *E.g.*, OFAC has also published FAQs in respect of sanctions compliance. *Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs> [<https://perma.cc/E9L8-VD8R>] (last visited Mar. 16, 2023). The EU has also issued guidance on compliance programs. *See* Commission Recommendation (EU) 2019/1318, 2019 O.J. (L 205/15) 1977-0677, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318> [<https://perma.cc/8C6C-VJ7Q>].

¹³⁴ U.S. DEP'T OF THE TREASURY, *supra* note 131.

components of compliance: (1) management commitment,¹³⁵ (2) risk assessment,¹³⁶ (3) internal controls,¹³⁷ (4) testing and auditing,¹³⁸ and (5) training.¹³⁹ BIS, for its part, has published its Export Compliance Guidelines, which delineate the elements of an effective export compliance program, largely mirroring the OFAC elements. These elements include strong and continuous management commitment, risk assessment, export authorization procedures, recordkeeping, training, audits, handling compliance issues, and having an export compliance program that is current and relevant.¹⁴⁰

As part of an effort to communicate its expectations to individuals and businesses, OFAC has publicly disclosed over a dozen settlement agreements since the Guidelines were published in 2019.¹⁴¹ These settlement agreements, which involve financial and non-financial institutions, routinely include “Compliance Commitments” whereby the respondent company agrees to maintain, for a period of at least five years, sanctions compliance measures designed to minimize the risk of reoccurrence of similar

¹³⁵ *Id.* at 2. Management, which consists of the board of directors and senior leadership, should review and approve a sanctions compliance program, delegate sufficient authority and autonomy to compliance units, allocate adequate resources to the compliance units, promote a culture of compliance, and implement necessary measures to reduce future compliance failings.

¹³⁶ *Id.* at 3-4. The risk assessment should analyze risks posed by clients, customers, products, services, supply chain, intermediaries, counterparties, transactions, and geographic locations, and should inform the extent of due diligence to be conducted at various points in a relationship or transaction.

¹³⁷ *Id.* at 5-6. Internal controls include policies and procedures for the sanctions compliance program, audits, recordkeeping, and clear communication of policies and procedures internally and externally.

¹³⁸ *Id.* A company should have an accountable, independent audit function that has sufficient authority, skills, and resources, with audit procedures appropriate to the level and sophistication of the sanctions compliance program.

¹³⁹ *Id.* Training should be provided to all appropriate employees at least annually, provide adequate and job-specific knowledge, include tailored-training for high-risk employees, and communicate compliance responsibilities.

¹⁴⁰ U.S. DEP’T OF COM., BUREAU OF INDUS. AND SEC., EXPORT COMPLIANCE GUIDELINES: THE ELEMENTS OF AN EFFECTIVE EXPORT COMPLIANCE PROGRAM 1 (Jan. 2017), <https://www.bis.doc.gov/index.php/documents/pdfs/1641-ecp/file> [<https://perma.cc/W55N-6NJP>].

¹⁴¹ *See generally Recent Actions*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/recent-actions/enforcement-actions> [<https://perma.cc/5889-TXH4>] (last updated May 1, 2023).

conduct.¹⁴² Significantly, the Compliance Commitments require the entity to provide OFAC with an annual certification, for a five-year period, confirming that the respondent company has implemented and continued to maintain the agreed-upon sanctions compliance measures.¹⁴³

In addition to civil enforcement actions brought by the agencies, the DOJ, through its National Security Division (NSD), prosecutes criminally willful violations of sanctions and export controls.¹⁴⁴ NSD has published an Export Control and Sanctions Enforcement Policy for Business Organizations (NSD Enforcement Policy) which describes how the DOJ will determine whether and how to proceed with charging decisions (i.e., guilty plea, non-prosecution agreement, and deferred prosecution agreement).¹⁴⁵ Under the NSD Enforcement Policy, when a company (1) voluntarily self-discloses export control or sanctions violations to NSD; (2) fully cooperates; and (3) timely and appropriately remediates, there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors.¹⁴⁶ Aggravating factors include exports of items that are particularly sensitive or to end users that are of heightened concern, repeated violations, involvement of senior management, and significant profit.¹⁴⁷

To receive full credit for timely and appropriate remediation under the NSD Enforcement Policy, a company is required (1) to have implemented an effective compliance program, which may

¹⁴² U.S. Dep't of the Treasury, *supra* note 131.

¹⁴³ U.S. DEP'T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, SETTLEMENT AGREEMENT BETWEEN OFAC AND ALFA LAVAL MIDDLE EAST LTD. (Apr. 28, 2021), https://home.treasury.gov/system/files/126/20210719_al_middle_east_settlement.pdf [<https://perma.cc/D2U6-7XM8>]

¹⁴⁴ *Export Control and Sanctions Enforcement Policy for Business Organizations*, U.S. DEP'T OF JUST., 1 n.2 (Dec. 13, 2019), https://www.justice.gov/nsd/ces_vsd_policy_2019/download [<https://perma.cc/YB7K-AU2K>] (“In export control and sanctions cases, NSD uses the definition of willfulness set forth in *Bryan v. United States*, 524 U.S. 184 (1998). Under *Bryan*, an act is willful if done with the knowledge that it is illegal. The government, however, is not required to show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.”).

¹⁴⁵ *Id.*

¹⁴⁶ Under the NSD policy, a company will not be permitted to retain any of the unlawfully obtained gain and will be required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct. *Id.* at 3.

¹⁴⁷ *Id.* at 6.

vary based on the size and resources of the organization;¹⁴⁸ (2) to appropriately discipline employees, including those identified by the company as responsible for the misconduct, and those with supervisory authority over the area in which the criminal conduct occurred; and (3) to have appropriate policies and procedures relating to retention of business records and prohibiting the improper destruction or deletion of business records.

OFAC, BIS and the DOJ have considerable discretion in determining the appropriate action to take in response to a violation of the U.S. sanctions regime, both when deciding to commence an action and when deciding on the penalty for a violation. A key factor for OFAC in making enforcement decisions is whether the company followed its guidance set forth in the OFAC Compliance Guidance. Likewise, in January 2023, the DOJ issued a revised version of its Criminal Division Corporate Enforcement Policy (“CEP”) which sets out the Criminal Division’s approach for resolving cases with corporations.¹⁴⁹ To receive full credit for timely and appropriate remediation, a corporation must have implemented an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization and the risks related to the businesses in which the organization is engaged.¹⁵⁰

B. Specific Compliance Concerns

OFAC’s considerable experience in administering and enforcing multiple sanctions programs over the years has enabled it to identify certain deficiencies and weaknesses in sanctions compliance. These deficiencies and weaknesses include any lack of

¹⁴⁸ The NSD Policy identifies important elements of an effective compliance plan: the company’s culture of compliance, the resources the company has dedicated to compliance; the quality and experience of the personnel involved in compliance, the authority and independence of the compliance function and the availability of compliance expertise to the board; the effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment; the compensation and promotion of the personnel involved in compliance, the auditing of the compliance program to assure its effectiveness; and the reporting structure of any compliance personnel employed or contracted by the company. *Id.* at 5.

¹⁴⁹ DEP’T OF JUST., CRIMINAL DIVISION CORPORATE AND VOLUNTARY SELF-DISCLOSURE POLICY (Jan. 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download> [<https://perma.cc/372S-C4HZ>].

¹⁵⁰ *See id.* Note, however, that the CEP is not directly applicable to criminal sanctions and export control cases brought by NSD instead of by the Criminal Division.

a formal sanctions compliance program; misinterpretation or failure to understand the applicability of OFAC regulations; facilitation of transactions by non-U.S. persons through overseas subsidiaries or affiliates; exporting or re-exporting of goods, technology or services to OFAC-sanctioned persons or countries; use of the U.S. financial system for transactions involving sanctioned persons or countries; limitations of sanctions screening software or filters; improper due diligence of customers and clients relating to ownership and business dealings; decentralized compliance functions and inconsistent application of a sanctions compliance program; and misconduct of senior-level employees.¹⁵¹

Any effective corporate compliance program must address these deficiencies and weaknesses identified by OFAC. In the context of the Russia sanctions, businesses have been exposed to increased compliance risk arising from the multiple and constantly changing sanctions regimes imposed by Allied governments, the vast multiplication of individuals and entities subject to sanctions, and the governments' interests in calibrating sanctions to allow and even encourage certain transactions to be undertaken while prohibiting others.

C. Conflicts Among Sanctions Regulations of the Allied Governments

The sanctions imposed by the United States, the EU and other Allied countries have presented compliance challenges for multinational companies that conduct many different types of commercial transactions with counterparties which are Russian or which transact business with Russia. While Russia sanctions have been coordinated among the U.S., the EU and other sanctioning states, they are not identical. In fact, there are key differences that have made the compliance task complex.¹⁵² Due diligence risks and costs have therefore increased for companies engaged in international activities when certain transactions are permitted under the U.S. sanctions regime but forbidden under both the EU's

¹⁵¹ Economic Sanctions Enforcement Guidelines, 31 C.F.R. pt. 501, app. A (listing various activities in a Risk Matrix that OFAC considers high-risk for financial institutions to reference in evaluating their compliance programs).

¹⁵² Brian J. Egan et al., *Disparate US, EU and UK Sanctions Rules Complicate Multinationals' Exits from Russia*, SKADDEN'S 2023 INSIGHTS (Dec. 13, 2022), <https://www.skadden.com/insights/publications/2022/12/2023-insights/new-regulatory-challenges/disparate-us-eu-and-uk-sanctions-rules> [<https://perma.cc/3A3K-U6Q7>].

and the U.K.'s regimes. This lack of regulatory alignment forces companies to conduct a jurisdiction-by-jurisdiction due diligence prior to engaging in cross-border transactions.¹⁵³

Another challenging area involves the lists of sanctioned individuals and entities. While there is substantial overlap, the U.S., EU and U.K. entity and party lists are not identical. As a result, some entities and individuals on the U.S.'s SDN, SSI and Entity Lists are not on the EU's or U.K.'s lists.¹⁵⁴ Such inconsistency has created compliance difficulties because the sanctions regimes do not impose a general prohibition on dealing with Russian counterparties, but instead have targeted very specific industries and individuals, while allowing transactions with others.¹⁵⁵

The U.S., the EU, and the U.K. also have different rules governing the automatic application of sanctions to non-listed entities. The U.S. has long applied the "50 Percent Rule" to determine whether non-listed entities owned by listed blocked entities will be sanctioned.¹⁵⁶ If a sanctioned party owns, directly or indirectly, 50% or more of the entity, that entity will be subject to sanctions. In this context, "indirectly" refers to one or more blocked persons' ownership of shares of an entity through another entity or entities that are 50 percent or more owned in the aggregate by the blocked person(s). Thus U.S. persons generally may not engage in any transaction with an entity that is blocked pursuant to the 50

¹⁵³ Jennifer A. Schwesig, *Russian Sanctions: Compliance Considerations for Global Companies Across Multijurisdictional Sanctions Regimes*, ARMSTRONG TEASDALE (July 2022), <https://www.armstrongteasdale.com/thought-leadership/russian-sanctions-compliance-considerations-for-global-companies-across-multijurisdictional-sanctions-regimes/> [<https://perma.cc/Y7GA-VCMS>]

¹⁵⁴ *Consolidated list of persons, groups and entities subject to EU financial sanctions*, EUR. COMM'N, <https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions> (last updated Dec. 23, 2020).

Guidance: The UK Sanctions List, FOREIGN, COMMONWEALTH & DEV. OFF., <https://www.gov.uk/government/publications/the-uk-sanctions-list> (last updated May 16, 2020).

¹⁵⁵ Rachel Wolcott et al., *The Fog of Sanctions: Global Banks and Business Face Unprecedented Challenges in Applying Measures Against Russia*, THOMSON REUTERS (July 2022), <https://thomsonreuters.wpeneginepowered.com/en-us/wp-content/uploads/sites/20/2022/07/Russia-Sanctions-White-Paper-2022.pdf> [<https://perma.cc/CA7D-2LPS>].

¹⁵⁶ *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*, U.S. DEP'T OF THE TREASURY (Aug. 13, 2014), https://home.treasury.gov/system/files/126/licensing_guidance.pdf [<https://perma.cc/2UCX-G2GF>].

Percent Rule. The 50 Percent Rule is not new; it was developed prior to the 2014 Russia/Ukraine sanctions. Neither the EU nor the U.K. has adopted the same 50 percent Rule; rather they consider an entity a blocked person if the entity is either more than 50 percent owned or controlled, directly or indirectly, by a blocked person, introducing “control,” and not just equity ownership, as a determining factor.¹⁵⁷

Business operations can also be adversely impacted by individual personal liability considerations arising from non-identical sanctions. Individuals who are nationals of one sanctioning state, and who are senior managers and directors of a company in another sanctioning state, also face restraints on their ability to act. An American working for an EU company in Europe remains a U.S. person subject to the U.S. sanctions prohibitions, even if the EU company is not subject to U.S. sanctions. In instances where this occurs, the American manager or director may not be allowed to participate in or with transactions or entities that are not sanctioned in the EU, but are sanctioned in the U.S., requiring recusal from activities on specific transactions.”¹⁵⁸

Complying with the bans on the provision of professional and business services has also proven complicated to administer. While the U.S. and the EU have developed certain exemptions to services provided to fully-owned or controlled subsidiaries incorporated in Russia, the U.K. has put in place a process that requires applying for and obtaining a license, thus affecting an important number of intercompany transactions. In addition, the U.K. recently broadened the scope of its professional and business services restrictions to include additional activities such as the provision of IT consultancy, architecture, engineering, advertising, and auditing services,

¹⁵⁷ COUNCIL OF THE EUROPEAN UNION, RESTRICTIVE MEASURES (SANCTIONS) – UPDATE OF THE EU BEST PRACTICES FOR THE EFFECTIVE IMPLEMENTATION OF RESTRICTIVE MEASURES (June 27, 2022), <https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf> [<https://perma.cc/EM7Q-79LE>]; HM TREASURY, OFFICE OF FINANCIAL SANCTIONS IMPLEMENTATION, UK FINANCIAL SANCTIONS: GENERAL GUIDANCE FOR FINANCIAL SANCTIONS UNDER THE SANCTIONS AND ANTI-MONEY LAUNDERING ACT 2018, (Aug., 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100991/General_Guidance_-_UK_Financial_Sanctions_Aug_2022_.pdf [<https://perma.cc/6234-2AZQ>].

¹⁵⁸ *Hot Topics in Sanctions Compliance for Financial Services Firms, and Broader Considerations*, NORTON ROSE FULBRIGHT (May 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/f6315bc5/hot-topics-in-sanctions-compliance-for-financial-services-firms-and-broader-considerations> [<https://perma.cc/V2P4-X8HZ>].

thereby adding yet more complexity to an already complex compliance task process.¹⁵⁹

D. Sanctions Screening

There has been a great deal of regulatory and compliance attention focused on the sanctions screening process given the vast expansion of, and increase in the frequency of changes to, the names of entities and individuals on the SDN, SSI and BIS Entity Lists. Screening involves comparing data about existing and potential business partners (customers, suppliers, distributors, and resellers) with the names of entities and individuals on lists issued by OFAC and BIS in the US, the EU, and other jurisdictions. This process requires that all relevant information from the entire business entity must be gathered from the outset, including siloed data maintained across different product and business lines. It also requires risk-based due diligence that assesses beneficial ownership, political exposure, and military end use, which in large companies is often a challenging task. Since the lists change frequently, mostly due to the addition of new entities and individuals by OFAC and BIS, the compliance process also requires frequent rescreening.

Specific failings by businesses related to screening include the failure to include complete and accurate information and the poor configuration of screening software data (e.g., outdated screening lists, incomplete data screening, and failure to account for alternative spellings of names). Language differences, phonetic transcriptions, and transliteration from one alphabet or writing system to another present difficulties for the screening process. To deal with this problem, “fuzzy matching,” which involves introducing flexibility to the matching of names and terms, has become part of the screening process.¹⁶⁰ While laudable, this flexibility may increase the non-compliance risk, as evidenced by several OFAC enforcement actions in recent years that involved

¹⁵⁹ *Updated Guidance on supplying professional and business services to a person connected with Russia*, EXPORT CONTROL JOINT UNIT (Feb. 7, 2023), <https://www.gov.uk/government/publications/professional-and-business-services-to-a-person-connected-with-russia/professional-and-business-services-to-a-person-connected-with-russia> [<https://perma.cc/C274-V3HC>].

¹⁶⁰ Charlie Steele et al., *Sanctions Screening: Challenges and Control Considerations*, in *THE GUIDE TO SANCTIONS* 317, 325 (Rachel Barnes et al. eds., 3d ed. 2022).

fuzzy matching inadequacies.¹⁶¹

E. Increased Due Diligence Burdens

In 2022, OFAC altered its guidance on the steps companies are to take to comply with the 50 Percent rule. While prior guidance required companies to examine the ownership structure of a company of interest to determine whether a single blocked person had a 50 percent or greater ownership interest, under the revised guidance, companies must now ensure that their screening and diligence procedures evaluate whether the aggregated ownership percentage of all blocked persons with ownership interests in a company meets or exceeds 50 percent.¹⁶² Each owner—no matter how small the interest—must now be examined to determine whether it qualifies as a blocked person or SSI-sanctioned person, which, in turn, requires examining the ownership of that entity, and the entities owning that entity. OFAC has not provided specific guidance on the level of diligence that is required to comply with this new rule. Given the lack of transparency in entity ownership, it is likely that this will remain an area of vulnerability for companies.

F. Overcompliance

The governments' pronouncements that they will intensify criminal and civil enforcement of Russia sanctions violations has prompted companies to pay great attention to compliance matters as they wind down operations, divert resources, enter into transactions, and engage in risk management and due diligence processes. In the process, companies often engage in a practice of self-regulation in order to reduce legal, regulatory, or business risks associated with

¹⁶¹ See, e.g., U.S. DEP'T OF THE TREASURY, OFAC ENTERS INTO \$34,328.78 SETTLEMENT WITH MONEYGRAM PAYMENT SYSTEMS, INC. FOR APPARENT VIOLATIONS OF MULTIPLE SANCTIONS PROGRAMS (Apr. 29, 2021), https://home.treasury.gov/system/files/126/20210429_moneygram.pdf [<https://perma.cc/9FDB-ZW4N>]; U.S. DEP'T OF THE TREASURY, OFAC ENTERS \$583,100 SETTLEMENT WITH DEUTSCHE BANK TRUST COMPANY AMERICAS FOR APPARENT VIOLATIONS OF UKRAINE-RELATED SANCTIONS REGULATIONS AND EXECUTIVE ORDER 13685 OF DECEMBER 19, 2014, "BLOCKING PROPERTY OF CERTAIN PERSONS AND PROHIBITING CERTAIN TRANSACTIONS WITH RESPECT TO THE CRIMEA REGION OF UKRAINE" (Sept. 9, 2020), https://home.treasury.gov/system/files/126/20200909_DBTCA.pdf [<https://perma.cc/39BR-GLJP>].

¹⁶² Addition of General Licenses for the Official Business of the United States Government and Certain International Organizations and Entities and Updates to the 50 Percent Rule Interpretive in OFAC Sanctions Regulations, 87 Fed. Reg. 78470 (Dec. 21, 2022).

inadvertent violations and to reduce compliance and monitoring costs.¹⁶³ This may involve blocking all financial or other transactions with a sanctioned country, entity or individual, including those that fall outside the scope of the sanctions.¹⁶⁴ This can arise due to several factors. Sanctions regimes are often complex, and even when sanctions are coordinated, they are never identical; there is also the risk of extraterritorial enforcement if the coordinated sanctions diverge in the future. In addition, burdensome administrative processes, including licensing requirements, make it cumbersome, costly and slow to engage in transactions. Other important factors include the significant financial costs involved in compliance and the prospect of new rounds of sanctions. Perhaps most importantly, there is the risk of substantial financial and business penalties if sanctions are breached.

Businesses may also self-regulate and choose to curtail or end Russian operations and transactions for reasons not directly related to compliance, such as safety of employees, logistics, public perception and even ethics. Numerous U.S. companies with operations in Russia issued press releases stating that their decisions to leave Russia were ethics-based.¹⁶⁵ It is noteworthy that, while in many cases these companies were not required to do so by sanctions regulations, as of February 2023, 372 companies have halted Russian engagements or completely exited Russia; 498 companies

¹⁶³ See *Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights, Report of the Special Rapporteur on Unilateral Coercive Measures*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights> [<https://perma.cc/BK2F-LZTU>] (last visited Mar. 21, 2023). Such self-regulation by businesses in their transactions involving sanctioned states, individuals, and entities is also termed “overcompliance” and “self-sanctioning.”

¹⁶⁴ *Id.*

¹⁶⁵ For example, KPMG explained that its decision “is a consequence of the actions of the Russian Government. We are a purpose-led and values driven organization that believes in doing the right thing.” *KPMG Statement on Russia and Belarus*, KPMG (Mar. 7, 2022), <https://kpmg.com/ua/en/home/media/press-releases/2022/03/kpmg.html> [<https://perma.cc/N7BY-V8SS>]. ExxonMobil issued an unequivocal condemnation of the invasion: “We deplore Russia’s military action that violates the territorial integrity of Ukraine and endangers its people.” *ExxonMobil to Discontinue Operations at Sakhalin-1, Make No New Investments in Russia*, EXXONMOBIL (Mar. 1, 2022), https://corporate.exxonmobil.com/news/newsroom/news-releases/2022/0301_exxonmobil-to-discontinue-operations-at-sakhalin-1_make-no-new-investments-in-russia [<https://perma.cc/5LMY-N376>].

have curtailed most or nearly all operations while keeping return options open; and 164 companies have scaled back some significant business operations but are continuing with others.¹⁶⁶

With respect to the Russia sanctions, business overcompliance and self-sanctioning can have important adverse consequences if it involves humanitarian areas such as food and medicine or if businesses become so risk-averse that they are unwilling to engage with individuals and entities in the sanctioned state, and thereby reduce the benefit of sanctions reduction as a bargaining chip in negotiations to resolve the conflict.¹⁶⁷ The oil price cap is an area where self-regulation/overcompliance may be particularly problematic. The sanction is designed to encourage companies to provide services when oil prices are below the cap, and to cease providing them when the prices are above the cap. If too many businesses simply stop providing services altogether, an important goal of the sanction will not be met.

VI. Conclusion

The economic sanctions imposed by the United States, the European Union and other Allied governments following the Russian invasion of Ukraine have been extensive. Wave after wave of sanctions have followed the February 2022 invasion, expanding on the significant sanctions that were already in place following the 2014 invasion and annexation of Crimea. The design and implementation of the economic sanctions has been carefully coordinated, and the sanctions are substantially aligned. Humanitarian international law concerns have been addressed by exempting food and medicine from the sanctions. The types and scope of the targeted economic sanctions dwarf those of other

¹⁶⁶ *Over 1,000 Companies Have Curtailed Operations in Russia – But Some Remain*, YALE SCH. OF MGMT., <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [<https://perma.cc/VQP7-YPTH>] (last updated Mar. 21, 2023). An additional 179 companies have postponed future planned investment, development and marketing while continuing substantive business, and 234 companies have not exited or reduced activities. *Id.*

¹⁶⁷ Overcompliance and its effects are further discussed by other contributors to the North Carolina Journal of International Law's 2023 annual symposium on sanctions. For an extensive overview of the problem and suggestions for its management, see Adam M. Smith & Cody M. Poplin, *Keeping Sanctions "Smart": Calibrating U.S. Sanctions Policy to Overcome Overcompliance*, 48 N.C. J. INT'L L. 499 (2023). For a relatively sanguine analysis of the effects of overcompliance, see Verdier, *supra* note 60.

targeted sanctions program. Close to two thousand individuals and entities have been subjected to blocking sanctions and restrictive measures, and ownership and control rules have resulted in thousands of other non-listed entities being covered by the sanctions. Specially tailored sanctions, such as the oil price cap and the restriction on providing certain types of services, have also been imposed, in each case to add additional points of pressure.

The economic sanctions have impacted financial and non-financial business operations, and businesses have scrambled to understand the sanctions regulations, engage in risk management, undertake due diligence, and implement systems and procedures as part of their compliance functions. Government enforcement officials in the U.S. and EU have communicated to the private sector that having an effective compliance program is a key factor that government agencies will consider in deciding whether to pursue civil and criminal enforcement actions, the types of dispositions that may be available to a business organization, and the range of penalties they may impose. Government statements about extensive enforcement have magnified the risk of non-compliance.

Significantly, states representing more than two-thirds of the world's population have not imposed economic sanctions on Russia, and goods, technology and services from those states continue to be provided to Russia. Whether, and to what extent, the coordinated unilateral economic sanctions of the Allied governments will be effective in degrading Russia's ability to wage war and in stopping its aggression in Ukraine remains an unanswered question.

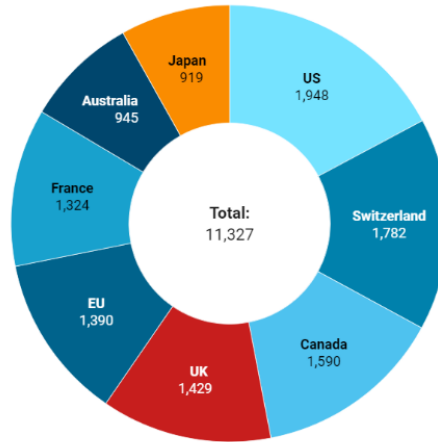
Appendix

Figure 1 (Current as of February 22, 2023)
Reprinted with permission from Castellum.ai, *supra* note 3.
Copyright 2023 Castellum.ai.

Who Sanctioned Russia

Since 22 February 2022

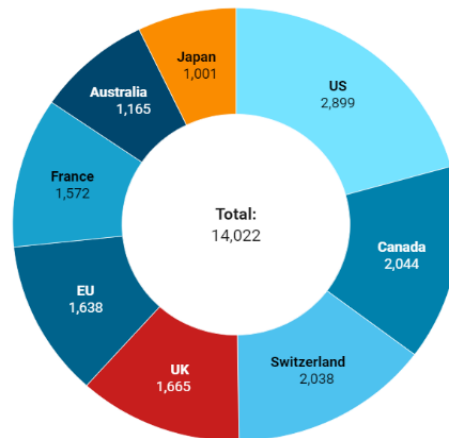
- US (1,948)
- Switzerland (1,782)
- Canada (1,590)
- UK (1,429)
- EU (1,390)
- France (1,324)
- Australia (945)
- Japan (919)



Total Russia Sanctions by Source

Since 2014

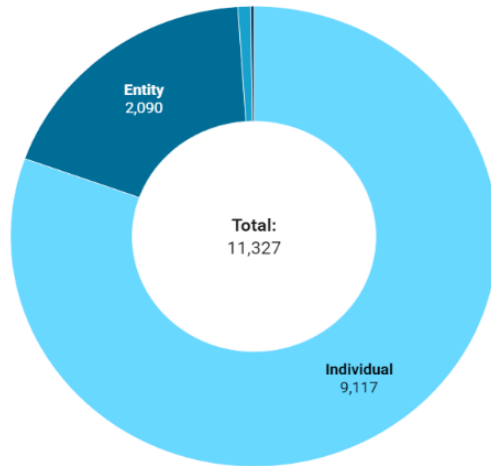
- US (2,899)
- Canada (2,044)
- Switzerland (2,038)
- UK (1,665)
- EU (1,638)
- France (1,572)
- Australia (1,165)
- Japan (1,001)



Sanctions Targeting Russia by Type

Since 22 February 2022

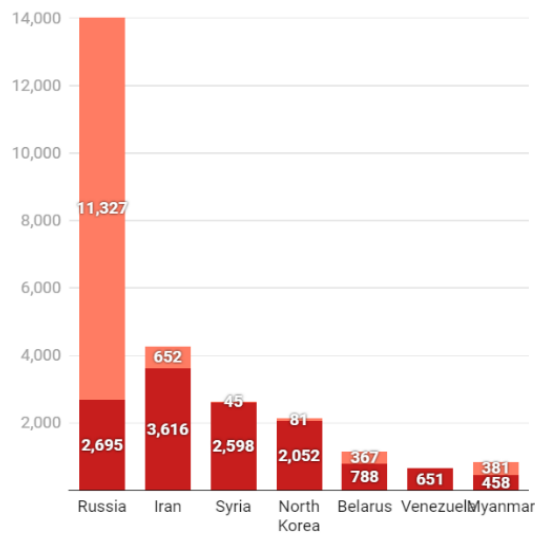
Individual (9,117) Entity (2,090) Vessel (96)
Aircraft (24)



Includes designations from: Australia, Canada, EU, France, Japan, Switzerland, UK, and US.

Russia Tops Sanctioned Countries

Before 22 February 2022 Since 22 February 2022



Source: [Castellum.AI](#) • [Get the data](#) • [Embed](#) • [Download image](#) • Created with [Datawrapper](#)

Table 1: U.S. Sanctions Related to Russia's Invasion of Ukraine

Authorities	Targets
EO 13660; Countering Russian Influence in Europe and Eurasia Act of 2017	Those responsible for undermining Ukraine's democracy; threatening its peace, security, stability, sovereignty, or territorial integrity; misappropriating assets; and/or illegally asserting government authority
EO 13661	Russian government officials; those operating in Russia's arms or related material sector; entities owned or controlled by a senior Russian government official; those acting on behalf of, or materially assisting or supporting, a senior Russian government official
EO 13662	Entities and individuals operating in specified sectors of the Russian economy. Four treasury directives specify financial services, energy (including deepwater, Arctic offshore, and shale oil development projects), and defense
EO 13685	Any person operating in the Crimea region of Ukraine; any leader of an entity operating in the Crimea region of Ukraine
Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014	Those responsible for violence and human rights abuses during antigovernment protests in Ukraine in 2013-2014; undermining Ukraine's peace, security, stability, sovereignty or territorial integrity; and serious human rights abuses in territory forcibly occupied or controlled by Russia Russian government officials, family members, and close associates

	<p>for acts of significant corruption</p> <p>Foreign individuals and entities for violating Ukraine or cyber-related sanctions or facilitating significant transactions for individuals, their family members, and entities subject to sanctions on Russia</p>
Ukraine Freedom Support Act of 2014	<p>State-run arms exporter Rosoboron export.</p> <p>Russian individuals and entities for conducting weapons transfers to Syria, Ukraine, Georgia, Moldova, and potentially other countries</p> <p>Foreign individuals and entities for investing in deepwater, Arctic offshore, or shale oil projects in Russia.</p> <p>Foreign financial institutions for facilitating significant transactions (1) related to Russia's weapons transfers to Syria, Ukraine, Georgia, Moldova, and potentially other countries; (2) related to deepwater, Arctic offshore, or shale oil projects in Russia; and (3) for individuals and entities subject to sanctions related to Russia's invasion of Ukraine.</p> <p>Withholding by Gazprom of significant natural gas supplies from NATO member states or countries such as Ukraine, Georgia, or Moldova</p>
EO 14065	<p>Those operating in the so-called Donetsk People's Republic (DNR) or Luhansk People's Republic (LNR); any leader, official, senior executive officer, or member of the board of directors of an entity operating in the above regions</p>
EO 14066	<p>Importation into the United States of the certain products of Russian Federation origin, including crude oil, petroleum fuels, oils and products of</p>

	<p>their distillation; liquefied natural gas; coal; and coal products</p> <p>New investment in the energy sector in the Russian Federation by a United States person, wherever located</p> <p>Any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by the foreign person would be prohibited by this section if performed by a United Persons or within the United States</p>
EO 14068	<p>Importation into the United States of certain products of Russian Federation origin, including fish, seafood, alcoholic beverages; and non-industrial diamonds</p> <p>The exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of luxury goods to any person located in the Russian Federation</p> <p>Any new investment in any sector of the Russian Federation economy by a United States person, wherever located</p> <p>The exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of U.S. dollar-denominated banknotes to the Government of the Russian Federation or any person located in the Russian Federation</p> <p>Any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person</p>

	would be prohibited if performed by a United States person or within the United States
EO 14071	<p>New investment in the Russian Federation by a United States person, wherever located</p> <p>The exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any category of services to any person located in the Russian Federation</p> <p>Any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a United States person or within the United States</p>

Addendum

On February 24, 2023, the one-year anniversary of Russia's invasion of Ukraine, the United States, in coordination with other Allied governments and the EU, announced a new slate of economic sanctions, including export controls and tariffs on Russian goods. These new sanctions targeted more than 200 individuals and entities, including both Russians and third-party actors across Europe, as well as Russian officials, proxy authorities illegitimately operating in Ukraine, and a dozen Russian financial institutions.¹⁶⁸ OFAC issued a new determination targeting the metals and mining sector of the Russian Federation economy under Executive Order 14024 and imposing sanctions on 22 individuals and 83 entities.¹⁶⁹

¹⁶⁸ Kelly Hooper, *White House Announces New Sanctions Against Russia on Invasion Anniversary*, POLITICO (Feb. 24, 2023), <https://www.politico.com/news/2023/02/24/white-house-announces-sanctions-against-russia-ukraine-anniversary-00084308> [https://perma.cc/U2C3-2CWP].

¹⁶⁹ Press Release, Off. of Foreign Assets Control, U.S. Dep't of the Treasury,

With this determination, OFAC can impose sanctions on any individual or entity determined to operate in that sector.¹⁷⁰ OFAC also designated over 30 third-country individuals and companies connected to Russia's sanctions evasion efforts, including several related to arms trafficking and illicit finance.¹⁷¹

Additional sanctions were imposed on approximately 100 individuals and entities (1) complicit in the administration of Russia's government-wide operations and policies of aggression toward Ukraine and in the illegitimate administration of occupied Ukrainian territories for the benefit of the Russian Federation, (2) involved in the design and construction of part of the Vostok oil project, and (3) operating in Russia's advanced technology sector, including enterprises that develop and operate Russia's nuclear weapons.¹⁷²

President Biden also signed proclamations raising tariffs on a variety of goods from Russia, primarily metal and metal products, to 70% from 35%,¹⁷³ and imposing a 200% tariff on Russian-made aluminum and aluminum products made with metal smelted or cast in Russia.¹⁷⁴ As part of the sanctions package announced on the first-year anniversary of the Ukraine invasion, the Department of Commerce also issued four rules imposing additional export restrictions on Russia and Belarus and refining existing controls, imposing export control measures on Iran to address Iranian drones and their use by Russia, and adding 86 entities to the Entities List.¹⁷⁵

Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions Against Russia (Feb. 24, 2023), <https://home.treasury.gov/news/press-releases/jy1296> [<https://perma.cc/T3FD-FRCN>].

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *The United States Imposes Additional Sweeping Costs on Russia*, U.S. DEP'T OF STATE (Feb. 24, 2023), <https://www.state.gov/the-united-states-imposes-additional-sweeping-costs-on-russia/> [<https://perma.cc/2CL5-6K6N>].

¹⁷³ *On One Year Anniversary of Russia's Invasion of Ukraine, Biden Administration Announces Actions to Support Ukraine and Hold Russia Accountable*, WHITE HOUSE (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/24/fact-sheet-on-one-year-anniversary-of-russias-invasion-of-ukraine-biden-administration-announces-actions-to-support-ukraine-and-hold-russia-accountable/> [<https://perma.cc/AZ6A-KRK5>]; see also Proclamation No. 10523, 88 Fed. Reg. 13277 (Mar. 2, 2023).

¹⁷⁴ Proclamation No. 10522, 88 Fed. Reg. 13267 (Mar. 2, 2023).

¹⁷⁵ *Commerce Imposes Additional Export Restrictions in Response to Russia's Brutal*

War on Ukraine, U.S. DEP'T OF COM., (Feb. 24, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3227-2023-02-24-bis-press-release-additional-russia-invasion-response-actions/file> [<https://perma.cc/K92V-GLE9>].

[This Page is Intentionally Left Blank]