

Working Paper

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International Sanctions: Improving Implementation through Better Interface Management

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I. Introduction: Interface challenges – Identifying and addressing pitfalls for implementation

Sascha Lohmann / Judith Vorrath

The use of sanctions beyond borders plays an increasingly significant role in contemporary foreign policy and global governance. National policy-makers, most prominently in the United States (U.S.), and from regional organizations such as the European Union (EU), as well as the United Nations (UN) have wielded this instrument with increasing frequency since the mid-1990s. In doing so, they have been targeting a growing number of state and non-state actors with varying types of restrictions on both diplomatic and economic exchange. Diplomatic sanctions comprise travel bans and non-recognition, including the exclusion from (in-)formal international bodies, or from cultural and sport events. Economic sanctions encompass the withdrawal of finance, trade, transport and communications, either comprehensively directed against entire countries or tailored to apply only with respect to sub-national units such as geographical regions and economic sectors, or persons (individuals and entities).

As a matter of fact, the use of international sanctions has been highly controversial due to its contested effectiveness, legitimacy and legality. Supporters praise it as a critical policy tool more forceful than words while less invasive and costly than war. The equally vocal group of opponents allege its ineffectiveness to elicit desired change, and point to the detrimental impact on civilian populations. Even multilateral sanctions bound to the UN Security Council's decision-making power on coercive measures according to Chapter VII of the UN Charter have faced serious criticism (see the contribution by Michael Brzoska). Their legitimacy has been suffering not only from deficiencies of due process and unintended consequences, but political maneuvering in the Council, especially among the permanent members. But their multilateral character, and practically global reach, still clearly sets them apart from unilateral, or autonomous sanctions, frequently imposed by the EU or the United States. In particular, the use of unilateral U.S. sanctions has sparked a lot of controversy in recent years, mostly due to its extraterritorial reach. The EU's newly introduced horizontal human rights sanctions regime may also lead to more controversy as the counter-measures by China against 10 European individuals and 4 entities in March 2021 has shown.

This controversial "sanctions debate" has persisted in the face of a more targeted use of international sanctions against specific sectors or individuals and entities, coupled with humanitarian exemptions and exceptions, which has emerged as the dominant mode of application by governments and international organizations since the mid-1990s.¹ Not

¹ Thomas G. Weiss, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions*, Lanham: Rowman & Littlefield, 1997; Graf H.-C. Sponeck, »Sanctions and Humanitarian Exemptions: A Practitioner's

least, it remains highly disputed – both by scholars as well as practitioners – in how far international sanctions help or impede to attain pursued policy objectives.²

There are many reasons why little agreement exists about how effective international sanctions actually are, though there is an ever increasing number of empirical studies scrutinizing this issue.³ First and foremost, defining what might count as intended result, and eventually as overall success, is inherently subject to diverging interpretations of what particular purposes international sanctions were intended to serve. Generally, different senders commonly employ international sanctions in different contexts, pursuing various objectives, some of which may be openly proclaimed while others may remain rather vague.⁴ Most prominently, the use of international sanctions has been geared toward eliciting desired behavioral change by targets. In particular, desired behavioral change may pertain to coercing targets into compliance, deterring further or future objectionable behavior, including by relevant third parties, or, at least, constraining targets in an ongoing behavior.⁵ Yet, even in the absence of behavioral change, there can be various other purposes that senders may pursue, including strategic communication vis-à-vis targets and relevant third parties, retributive punishment, or upholding self-identifications (such as being a defender of human rights) in situations where non-intervention could be construed as complicity.

A further complication for the analytical and political assessment of whether or not international sanctions might “work” relates to their use alongside other policy instruments that are frequently applied simultaneously. This makes the disentangling of effects produced by other interventions methodically challenging. Finally, there will always be a selection bias concerning the universe of publicly known cases, given that effective international sanctions may have sometimes only been threatened without ever being officially imposed.⁶ Yet, such a threat may actually produce an intended outcome, e.g. moving an actor to join peace negotiations. In sum, the controversial debate about the success and failure of international sanctions is most likely here to stay.

Commentary», in: *European Journal of International Law*, 13 (2002) 1, pp. 81–87; Ella Shagabudinova, Jeffrey Berejikian, »Deploying Sanctions while Protecting Human Rights: Are Humanitarian “Smart” Sanctions Effective?«, in: *Journal of Human Rights*, 6 (2007) 1, pp. 59–74; Joy Gordon, *Invisible War: The United States and the Iraq Sanctions*, Cambridge: Harvard University Press, 2010; Erica S. Moret, »Humanitarian Impacts of Economic Sanctions on Iran and Syria«, in: *European Security*, 24 (2015) 1, pp. 120–140; Grégoire Mallard et al., »The Humanitarian Gap in the Global Sanctions Regime. Assessing Causes, Effects, and Solutions«, in: *Global Governance: A Review of Multilateralism and International Organizations*, 26 (2020) 1, pp. 121–153 (122–123).

² Arne Tostensen/Beate Bull, »Are Smart Sanctions Feasible?«, in: *World Politics*, 54 (2002) 3, pp. 373–403; Daniel W. Drezner, »How Smart are Smart Sanctions?«, in: *International Studies Review*, 5 (2003) 1, pp. 107–110; Joy Gordon, »Smart Sanctions Revisited«, in: *Ethics and International Affairs*, 25 (2011) 3, pp. 315–335.

³ Gary C. Hufbauer u.a., *Economic Sanctions Reconsidered*, 3. Aufl., Washington, DC: Peterson Institute for International Economics, 2007; T. C. Morgan et al., »Threat and Imposition of Economic Sanctions 1945–2005: Updating the TIES Dataset«, in: *Conflict Management and Peace Science*, 31 (2014) 5, pp. 541–558; Gabriel Felbermayr et al., »The Global Sanctions Data Base«, in: *European Economic Review*, 129 (2020), p. 103561. Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Cambridge: Cambridge University Press, 2016.

⁴ Margaret P. Doxey, »Sanctions through the Looking Glass: The Spectrum of Goals and Achievements«, in: *International Journal*, 55 (2000) 2, pp. 207–223 (220).

⁵ For example, UN arms embargoes may not have led to policy changes by the target, but frequently have reduced arms imports by targeted states and groups. Michael Brzoska, George A. Lopez, *Putting Teeth in the Tiger: Policy Conclusions for Effective Arms Embargoes*, in: Michael Brzoska, George A. Lopez (eds.), *Putting Teeth in the Tiger: Improving the Effectiveness of Arms Embargoes*, Contributions to Conflict Management, Peace Economics and Development Volume 10, Emerald Group: Bingley/UK, 2009, pp. 243–254 (243).

⁶ Robert Pape, »Why Economic Sanctions Do Not Work«, in: *International Security*, 22 (1997) 2, pp. 90–136; Irfan Nooruddin, »Modeling Selection Bias in Studies of Sanctions Efficacy«, in: *International Interactions*, 28 (2002) 1, pp. 59–75.

Moving the debate forward by taking a step back

In this working paper, we attempt to move the debate about the effectiveness and legitimacy of international sanctions forward by taking a step back and focus on implementation. Notwithstanding the different possible objectives being pursued in individual cases, the sound implementation of international sanctions is key for achieving concrete desired effects, for example economic harm or a decrease of access to arms in a particular area and/or for a particular actor. This may or may not lead to the intended policy change, but it usually raises the chances for enhancing effectiveness. Indeed, whether or not the use of international sanctions can actually contribute to achieving desired results fundamentally depends on sound implementation including adjustments in response to non-compliance and violations. While imposing sanctions may in and by itself suffice to signal disapproval of a certain behavior, the effect may quickly wane and strategic communication vis-à-vis targets and relevant third parties could be undermined, if targeted actors realize that no serious consequences may follow. Therefore, the overall aim of the contributions is to identify the main challenges arising among as well as within the three different senders of international sanctions, and to identify avenues for improvement.

Narrowing and widening the scope

We situate ourselves within the broader sanctions reform movement, which has so far consisted of different processes that collectively addressed a simple fact: as long as the use of international sanctions remains a go-to instrument of foreign policy and global governance, there will always be things to improve with regard to their design and implementation. However, the scope of our working paper is both wider as well as narrower in comparison to previous and ongoing reform attempts, particularly regarding those seeking to increase the legitimacy and effectiveness of international sanctions.

On the one hand, our focus is wider as we address multilateral UN as well as unilateral U.S. and EU sanctions applied either in parallel to, or autonomously from, each other. So far, the existing literature has almost exclusively dealt with either unilateral or multilateral sanctions, while mostly providing recommendations to improve implementation by individual actors, including national governments, international and supra-national organizations, and the private sector.⁷ In contrast, we set out to address challenges of implementation for both multilateral, as well as regional and national sanctions. Given that the pursued objectives vary, we mostly focus on international sanctions that are aimed to contribute to nuclear non-proliferation, countering acts of international terrorism, and reducing armed conflict/supporting peace processes or protecting human rights.

On the other hand, we focus more narrowly on the implementation of international sanctions, which comprises practical steps taken to execute the withdrawal or restriction of diplomatic and/or economic exchange as decided by either nation states like the United States or international organizations like the UN and EU. The first step consists of the publishing of legal acts by respective (member) states containing prohibitions, including possible exceptions or exemptions for entire categories of transactions, or on a case-by-case

⁷ Sue Eckert, Enrico Carisch, Loraine Rickard-Martin, *Compendium: High Level Review of United Nations Sanctions*, New York: Compliance and Capacity Skills International/Watson Institute for International and Public Affairs, November, 2015; Niklas Helwig, Juha Jokela, Clara Portela (eds.), *Sharpening EU Sanctions Policy: Challenges and Responses in a Geopolitical Era*, FIIA Report 63, Helsinki: Finnish Institute of International Affairs, May 2020, Elizabeth Rosenberg, Jordan Tama, *Strengthening the Economic Arsenal: Bolstering the Deterrent and Signaling Effects of Sanctions*, Washington, DC: Center for a New American Security, December 16, 2019.

basis (i.e. through general or specific licenses, respectively). Further steps include the subsequent monitoring, consisting of due-diligence and other precautionary measures mainly undertaken by the private sector, as well as enforcement in the face of violations mostly by means of civil/administrative or criminal penalties (and in some cases also secondary sanctions).

Within the policy cycle – an ideal-typical depiction of the policy process – implementation (output) follows the design (input) and precedes both the effects (outcome) as well as effectiveness (impact) of international sanctions. Needless to say, these four stages of the policy cycle are closely linked. Consequently, design and implementation cannot be assessed in isolation. For example, a lack of (desired) effects of a particular restriction may lead to an adjustment of the specific type(s) of sanctions, which again has to be implemented. The interaction between the two stages can also go in different directions, when, for example, the UN Security Council adopts a resolution stipulating the use of sanctions, which subsequently needs to be implemented by individual member states. They, in turn, have to report back on their implementation efforts to the UN system. Although we take the evolution of specific sanctions regimes and interactions into consideration, the main focus is on the processes of implementation, encompassing mechanisms and interaction along particular chains of implementation or between them.

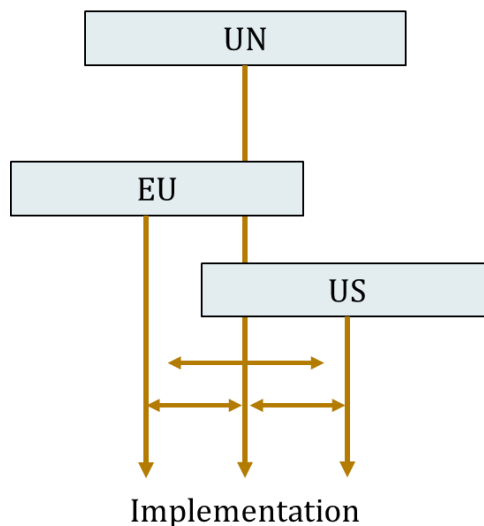


Figure 1: Interfaces within and between chains of implementation

Along and between these chains of implementation there can be feed-back loops and spill-over effects, linking the respective implementers. For example, the EU and United States are obliged to implement multilateral sanctions imposed by the UN Security Council. Whereas UN Security Council resolutions leave the enforcement up to individual member states, various mechanisms of monitoring have developed at other levels, including by the sanctions committees as subsidiary organs of the UN Security Council supported by UN expert groups. Beyond, states or regional organizations may opt to apply additional sanctions to enforce multilateral UN sanctions, or wholly autonomously in the absence of a UN Security Council resolution. Some bodies may not be an integral part of the immediate chain of implementation, but influence it in important ways, for example governance networks like the Financial Action Task Force (FATF).

Simply referring to the ultimate responsibility of nation-states for implementation – or a lack thereof – falls short of understanding the specific challenges that arise at different stages of the sanctions policy-cycle, and between different actors, involved in this process.

Up until now, the few studies on the implementation of international sanctions have not systematically scrutinized the respective regulatory practices, as well as processes of implementing UN, EU and U.S. sanctions, especially when it comes to their various interactions.⁸

Analytical focus: Interface challenges

The contributions of this working paper focus on specific challenges of implementation, which can arise at various interfaces along the chain of implementation. We define interfaces as sites of contact between actors tasked with the implementation of international sanctions. This contact can occur among and within senders, and vary both in intensity and quality, ranging from selective to regular as well as smooth to conflicting interaction. For example, sanctions committees of the UN Security Council are interfaces between the UN organization and its member states, and thus, need to cooperate and coordinate in both directions. Various implementation challenges may occur solely due to different senders of sanctions, and their respective regulations and processes. The underlying issues can be political, procedural or administrative, for example a lack of information or capacities. Yet they usually materialize in concrete challenges at connecting dots of actors and their competences. For example, European efforts to monitor and enforce multilateral UN Security Council sanctions, namely the arms embargo against Libya, have been in the spotlight. Sound implementation of the multilateral sanctions targeting actors in Libya would ideally require a host of responsible actors to work together, including the UN Security Council, its Sanctions Committee, the Panel of Experts, the EU, individual UN member states and their competent agencies, as well as the private sector. Yet, as not only this case of a UN sanctions regime has shown serious challenges for such cooperation in implementing sanctions persist and they go beyond a lack of political will by individual member states (see the contribution by Moncef Kartas). This working paper generally addresses challenges of implementing international sanctions at such interfaces while aiming to develop ideas for how to improve interface management.⁹

The study of interface challenges concerning various senders of international sanctions is still in its infancy. Few studies exist that offer some general policy-relevant proposals on how to enhance interinstitutional coordination and cooperation in global governance under the heading of what has been termed interplay management.¹⁰ More recent work has focused on conflicts that may arise at certain interfaces as a micro-level phenomenon that is fueled by diverging positions toward norms and rules, emerging when different spheres

⁸ Vera Gowlland-Debbas, »Implementing Sanctions Resolutions into National Law«, in: Vera Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 33–78; Clara Portela, »National Implementation of United Nations Sanctions«, in: *International Journal*, 65 (2010) 1, pp. 13–30; Bryan R. Early, »Confronting the Implementation and Enforcement Challenges Involved in Imposing Economic Sanctions«, in: Natalino Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Leiden/Boston: Brill Nijhoff, 2016, pp. 43–69; Elena Carpanelli, »Italian Practice in the Implementation of International Targeted Sanctions. Enhanced Protection or Additional Complexities?«, in: *The Italian Yearbook of International Law Online*, 27 (2018) 1, pp. 93–114; Francesco Giumelli, Michal Onderco, »States, Firms, and Security: How Private Actors Implement Sanctions, Lessons Learned from the Netherlands«, in: *European Journal of International Security*, 6 (2021) 2, pp. 190–209.

⁹ We exclude interfaces that exist between geographic and thematic sanctions regimes, as well as public and private international law. For the latter see Tamás Szabados, *Economic Sanctions in EU Private International Law (Studies in Private International Law)*, Oxford: Hart Publishing, 2019.

¹⁰ Olav Schram Stokke, Sebastian Oberthür, »Introduction. Institutional Interaction in Global Environmental Change«, in: Olav Schram Stokke, Sebastian Oberthür. (eds.), *Managing Institutional Complexity. Regime Interplay and Global Environmental Change*, Cambridge: The MIT Press, 2011, pp. 1–23 (6).

of authority asserted by nation states as well as international institutions overlap. For example, this has been the case regarding the due process protections in the UN Security Council's sanctions targeting al-Qaida.¹¹ Other work has sought to illuminate the interaction between senders of international sanctions by looking at network effects.¹² In building upon these more generalized insights about interfaces, this working paper explores coordination and cooperation between and among different actors engaged in the implementation of international sanctions in more detail. Empirically, we focus on three sources stipulating the implementation of international sanctions:

- (1) Mandatory multilateral sanctions based on UN Security Council resolutions obliging all member states to implement them. There are 14 ongoing UN sanctions regimes with different objectives such as ending armed conflict and supporting peace agreements/peacebuilding, protecting human rights, nuclear non-proliferation, and countering terrorism. Each regime is administered by a sanctions committee usually chaired by a non-permanent member of the UN Security Council. There are 10 monitoring groups or panels that support the work of 11 of the 14 sanctions committees. Both have become key bodies in the evolution from comprehensive to targeted sanctions since the early 1990s.¹³
- (2) Authorizations for further (but non-mandatory) unilateral sanctions contained in UN Security Council resolutions ("gold plating", "hooks"). The respective provision may stipulate an additional use of unilateral sanctions by (supra-)national jurisdictions, which may also include inspections of cargo in vessels sailing in the territorial waters, or on the high seas off the coast of states under UN embargoes and commodity bans (as in the cases of Somalia and Libya).
- (3) Wholly unilateral, or autonomous sanctions imposed by regional organizations like the EU, or individual states acting alone or together on an ad-hoc or formal basis.

In sum, interfaces can exist between different actors implementing sanctions based on a multilateral (UN), regional (EU) or national (United States) basis. Particularly in cases where international sanctions are applied in the same context, or against the same primary targets by more than one sender at a time, various interfaces may become relevant and potentially challenging. These can include all types of actors involved in implementing UN Security Council resolutions such as sanctions committees, regional organizations, member states, their administrative agencies, international governmental organizations, the private sector, and non-governmental organizations. Such interfaces can also occur where unilateral sanctions are adopted in order to strengthen multilateral sanctions, as in the cases of North Korea and Iran. Moreover, interfaces may emerge whenever international sanctions are applied independently from a UN Security Council resolution by more than one sender, like those targeting state and non-state actors from Russia, Venezuela or

¹¹ Christian Kreuder-Sonnen, Michael Zürn, »After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management«, in: *Global Constitutionalism*, 9 (2020) 2, pp. 241–267 (252).

¹² Sumit Joshi, Ahmed S. Mahmud, »Sanctions in Networks: "The Most Unkindest Cut of All"«, in: *Games and Economic Behavior*, 97 (2016), pp. 44–53; Sumit Joshi, Ahmed S. Mahmud, »Sanctions in Networks«, in: *European Economic Review*, 130 (2020), p. 103606.

¹³ UN SanctionsApp Version 6.0, <https://unsanctionsapp.com/>; Joanna Weschler, »The Evolution of Security Council Innovations in Sanctions«, in: *International Journal: Canada's Journal of Global Policy Analysis*, 65 (2010) 1, pp. 31–43.

Syria.¹⁴ Additionally, informal guidelines for specifying implementation standards, as developed by intergovernmental bodies in the realm of counter-terrorism finance and nuclear non-proliferation, may further complement formal sanctions.

Overview

This working paper is the brainchild of two consecutive workshops that were held at the German Institute for International and Security Affairs (SWP) in December 2019 in Berlin, and virtually in 2020. Invited participants, hailing from different personal and professional backgrounds, including former government officials as well as researchers, were united in their quest to improve the implementation of international sanctions. The open and candid discussions revealed many pitfalls related to the implementation of international sanctions, some previously known only to those who had encountered them in their daily work. Taking our findings as a starting point for further inquiry, some of the participants eventually embarked on broadening the existing knowledge about those implementation challenges that occur at interfaces between and among the three most active senders, namely the UN, EU, and the United States.

The working paper is the result of this collective endeavor. The main part is divided into three sections, each dedicated to a set of specific implementation challenges related to the use of international sanctions: (1) procedures and coordination of implementation, (2) monitoring and enforcement, and (3) unintended consequences and due process. Within each of the three sections, individual contributions focus on main challenges of implementation, which arise at different interfaces both within as well as among senders. As there were no pre-selected cases of the use of international sanctions, authors picked the most relevant interfaces from their perspective, and/or against their personal and professional backgrounds. Many of the contributors also offer some preliminary ideas on how to tackle the identified interface challenges in order to improve interface management.

Michael Brzoska reviews the reform efforts undertaken during the late 1990s and early 2000s regarding the interface management of UN sanctions, which sought to improve the design and output stage of the sanctions policy cycle. The interface between the UN Security Council and national governments naturally was of particular concern. But a host of interfaces with other actors within the UN system and outside also came into focus. He identifies and discusses two particular aspects of interface management that would remain a challenge to this day: time lags between UN Security Council mandates and member state implementation of UN sanctions and coordination of sanction implementation with those parts of the UN secretariat responsible for peacekeeping and mediation.

Thomas Dörfler analyses the interface between the UN Security Council as well as its sanctions committees and Forums of Export Control. Despite its high relevance, this particular interface has rarely been noted. He discusses the ban on proliferation sensitive goods and technology as a key measure of the North Korea and Iran sanctions regimes, exploring how lists of items generated by Forums of Export Control as transgovernmental networks (TGNs) served as the basis for UN Security Council decisions. The author argues that the Council relies on readily available lists of proliferation sensitive items by TGNs because they proved useful to coordinate different preferences among permanent members. While the use of such lists would increase consistency and coherence of implementation, serious challenges like updating the UN lists would remain.

Clara Portela examines the four thematic (or “horizontal”) EU sanctions regimes, which seek to counter international terrorism, the development and use of chemical weapons,

¹⁴ Michael Brzoska, »International Sanctions Before and Beyond UN Sanctions«, in: *International Affairs*, 91 (2015) 6, pp. 1339–1349.

the planning and perpetration of cyber-attacks, as well as grave human rights violations anywhere in the world. In doing so, she focusses on three interface challenges: Firstly, the discrepancy in due process standards arising between the UN and the EU; secondly, the problem of enforcing visa bans between the EU and its member states; and thirdly, situations where persons get listed under both country-based and thematic EU sanctions regimes. The author also refers to the additional challenges arising at the interface between the EU and international judicial bodies tasked with monitoring and enforcing international treaty obligations, as well as transitional justice mechanisms.

Richard M. Nephew assesses cooperation and coordination between the United States and the EU on the use of international sanctions by identifying six systemic and structural areas of strengths and weaknesses. While he concludes that the fundamentals of U.S.-EU cooperation are strong overall, he argues for a continuing need to address those interface challenges arising from differing legal and conceptual approaches. Moreover, he makes the case that asymmetrical capacities devoted to design and enforcement of international sanctions on both sides of the Atlantic would remain a core issue, requiring better channels of communication through strengthened consultative mechanisms.

Moncef Kartas discusses the set-up and interfaces of the UN sanctions regime on Libya and the question how “smart” these sanctions have really been in their design and implementation. Most prominently, he focuses on the interface between the UN Security Council as well as its sanctions committee with the Panel of Experts, which monitors implementation. His contribution also takes a closer look at other key actors like member states and the UN support mission in Libya. The author concludes that this particular case would show how dysfunctional interface management impedes the use of sanctions in a smart and integrated manner. Based on this finding, his contribution lays out steps towards a new approach to the design and implementation of UN sanctions regimes, particularly with regard to a more systematic review of the policy goals for regimes and of the concrete sanctions measures.

Hans-Jakob Schindler depicts challenging interfaces in monitoring and enforcing UN counter-terrorism sanctions starting out from the work of the ISIL, al-Qaida and Taliban Monitoring Team. The Team advising two sanctions committees works in a field that has enjoyed relatively broad political consensus among the members of the UN Security Council. The author particularly addresses regularly recurring challenges at four vertical and horizontal interfaces the Team is managing. These not only include the management of the relationship between member states and the Committee, but those relating to information flows to and from the Team to intermediaries, such as the FATF or private sector stakeholders. Overall, he argues that the process of sanctions design and development should be understood as a complex network of information flows and negotiations rather than a hierarchical process.

Anthonius de Vries addresses the at times lacking compliance with EU sanctions, which would undermine the effectiveness of this go-to instrument to promote the objectives of the Common Foreign and Security Policy (CFSP). In particular, he examines the interface challenge posed by fragmented competences between the EU and its member states. Based on an empirical analysis of how EU sanctions are implemented and enforced by the competent national authorities with little central oversight and active monitoring by the European Commission, he offers six practical steps toward better interface management, including enhanced reporting requirements, better guidance, further standardization, and initiating a debate on a more centralizing enforcement authority of the EU.

Erica Moret diagnoses a crisis point regarding the global use of international sanctions. She argues that the resulting collateral damage inflicted on civilians has, in large part, stemmed from the interface challenge created by an increasingly complex and overlapping regulatory framework of U.S. as well as EU sanctions. This would have prompted risk-

averse financial institutions to withdraw from entire jurisdictions. Based on a review of more than 40 multi-stakeholder initiatives and research projects set up over the past decade to create viable humanitarian channels for financial transactions, and complemented by semi-structured interviews with over 30 practitioners from various relevant backgrounds, she identifies seven practical recommendations to improve the interface management between governments and private actors such as financial institutions.

Mark Daniel Jaeger takes an even closer look into the wicked interface challenge posed by de-risking, scrutinizing how internal operational risk management practices by international financial institutions acting as intermediaries between banks have negatively affected the flow of cross-border humanitarian payments. He demonstrates how a lack of common standards on how payments are processed within a globalized financial system has increased the need for transparency regarding all actors along the chains linking the initiator and recipient of funds. In his conclusion, he calls for a multilateral approach to standard setting in order to effectively change the calculus of individual banks and encourage them to re-risk.

Justine Walker surveys the recent evolution of unilateral U.S. sanctions targeted against the People's Republic of China, which she discusses as an example of how the use of international sanctions has change significantly in terms of frequency, intensity, and sophistication. She lays out how opaque structures of ownership and control have made the determination to whom and to what kind of activities the respective regulations would actually apply not only onerous but almost impossible. This would leave businesses in the dark about what is permissible and what is prohibited. Her contribution characterized this interface challenge as a pressing issue for those companies operating in economic sectors that have only recently been subjected to U.S. sanctions such as the maritime shipping industry. She suggests three principle areas for a forward-leaning approach by governments to increase clarity for the private sector.

Though the use of international sanctions seems all but set to remain a highly versatile tool of foreign policy and global governance, the publication process of this working paper has shown that challenges of implementation go way beyond questions of decision-making and consensus-building in the responsible political bodies. Beyond the often discussed issues of whether and how sanctions should be used, and what their impact actually would be, the focus on interfaces has indeed revealed that various obstacles to effective implementation exist. In fact, this working paper illustrates that there are much more relevant interfaces in implementing international sanctions than often assumed. These include bodies that are not formally part of chains of implementation, but can influence these in important ways. Focusing on interfaces, in general, can contribute to bridging the oftentimes controversial views on the use of international sanctions by providing a constructive starting point for improving policies and practices of implementation as a precondition for effectiveness. Ultimately, sanctions implementation depends on the necessary political will and available capacities; yet both materialize at interfaces to varying degrees and in different ways.

Given the dynamic evolution currently unfolding at the regional level (e.g. with the EU creating new horizontal regimes such as those directed against alleged cyber-attacks and human rights abuses), as well as at the national level (particularly with the United Kingdom setting up its own sanctions regime after leaving the EU), interface management is most likely to remain relevant. Therefore, there is a continuing need for further research and systematic analysis of the thorny interfaces challenges for sound implementation. In this sense, the working paper can only be a starting point of a debate that will hopefully continue.

We are most grateful to all authors who have joined in this journey and who have subscribed to our explorative approach, which has required a good dose of thinking out of the

box as well as the willingness to openly engage in a diverse setting. We are also aware of the fact that this has been a challenging process at times, not least under the condition of a pandemic. Nevertheless, we very much hope all participants found it to be an enriching experience as much as we have, and thank all of them for their commitment and contributions. Last but not least, we sincerely thank those who have provided invaluable insights and comments along the way, as well as editorial and logistical assistance. We are thankful to all speakers at the two workshops, in particular Brian Early, Christian Plate, and Andrew Smith, who kindly agreed to provide comments on the drafts presented during our second workshop. Moreover, we extend a big thank you to all colleagues at SWP who have contributed to this working paper in various ways, especially Nele Bilo, Alexandra Bögner, and Katharine Machnik, who put in many hours to diligently proof read and skillfully format the entire manuscript. Finally, we gratefully acknowledge the financial support of the German Federal Foreign Office for both workshops.

II. Cohesion and consistency: Interfaces in procedures and coordination of implementation

Reviewing the UN sanctions decade: Reforms' effect on interfaces and remaining challenges

Michael Brzoska

Introduction

In the early 1990s, mandatory United Nations (UN) sanctions, which had only been imposed twice in the preceding four decades, became a frequently used policy instrument. With Cold War blockade gone, the United Nations Security Council (UNSC) extensively used its power under Chapter VII of the Charter to mandate the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. With respect to threats to the peace, breaches of the peace, and acts of aggression” (Article 41). However, the “sanctions decade” of the 1990s soon ran into trouble, leading to a crisis within and beyond the UNSC. This decade might well have given way to decades of “sanctions fatigue” if the crisis of UN sanctions in the second half of the 1990s had persisted¹. But a concerted effort by a coalition of officials and diplomats from the UN and Western mid-level powers, including Switzerland, Germany, Sweden, later joined by Greece and others, and supported by academics, representatives from international organisations and the business world, prevented that fate².

Issues related to the first steps in the sanction implementation cycle – design and output – were core to the sanction reform efforts of the late 1990s and early 2000s. Interfaces with other actors and processes in other policy areas were important elements considered during the reform process. In the case of UN sanctions, design and output are intimately related. The UN has few means to directly support the implementation of sanctions. While the UNSC decides on sanction mandates, member governments³ need to transform them into national legal language. While the interface with national governments was therefore of particular concern in the reform process, further improvements of a host of interfaces with other actors, both within the UN system and outside, were also suggested.

In the following text, I will first outline the major objectives and recommendations of the reform processes, focusing on particular interfaces at the design and output stage of the sanctions policy cycle. I will then discuss two selected suggestions for improvements for better managing interfaces between the UNSC as deciding upon the mandate and actors tasked with their implementation, as well as their fate over the last two decades. Firstly,

¹ On the debates leading to the sanction reform efforts see David Cortright, George A. Lopez, *Smart Sanctions: Targeting Economic Statecraft*, Lanham, 2002; Enrico Carisch, Loraine Rickard-Martin, Shawna Meister, *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights*, Cham, 2017.

² I use this concept here for three multi-stakeholder processes, consisting of a series of meetings and producing summaries with recommendations, the Interlaken, Bonn-Berlin and Stockholm processes. Thomas Biersteker et al., *Targeted Financial Sanctions, A Manual for Design and Implementation, Contribution from the Interlaken Process*, Providence, 2001; Michael Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions*, Bonn, 2001; Peter Wallensteen, Carina Staibano, Mikael Eriksson, *Making Targeted Sanctions Effective, Guidelines for the Implementation of UN Policy Options*, Uppsala, 2003. These were the basis for later reform efforts, e.g. within the *Security Council Informal Working Group on General Issues of Sanctions* which for instance produced a document discussed at an international symposium sponsored by the Greek government in 2007, https://www.un.org/ga/search/view_doc.asp?symbol=S/2007/734&referer=http://www.comcapint.com/links.html&Lang=E) and the High Level Review of United Nations sanctions in 2014/2015, <http://www.hlr-unsanctions.org/main/index>. I will not deal with the contentious debate about the humanitarian legal aspects of person sanctions, which also resulted in numerous reform proposals and activities.

³ For some types of UN sanctions the European Union (EU) is the legal authority to impose restrictive measures. From here on, any mention of member states is meant to also include the EU.

time lags between UNSC mandates and member state implementation of UN sanctions. Secondly, coordination with those parts of the UN secretariat responsible for peacekeeping and mediation. This choice is illustrative of the broader set of relevant interfaces, some of which are dealt with in other chapters of this volume.

I argue that reform efforts have had some effects in improving the first steps of implementation but were necessarily constrained by the interest of many governments, with the permanent members of the UNSC in the lead, to maintain sanctions as a highly flexible policy instrument. Overall, reforms have therefore been limited and remain on the agenda of those seeking to improve the output of UN sanctions.

UN Sanction implementation deficits and reform objectives

Foundations of the reform initiative

Comprehensive trade sanctions were primarily responsible for the UN sanctions crisis of the second half of the 1990s. The comprehensive economic sanctions against Iraq, Yugoslavia and Haiti had, albeit debatable, success in achieving their stated objectives, but also major humanitarian impacts. Particularly with respect to the Iraq sanctions, a strong movement to end comprehensive sanctions emerged, encompassing Western Non-Governmental Organisations as well as numerous governments. The United States (US) and the United Kingdom (UK), however, used the threat of their veto to block efforts to substantially lessen the pressure on Iraq. This in turn led many other governments, including those of the veto powers Russia and France, to fundamentally question UN sanctions policy.

While the Iraq sanctions were strictly enforced, other UNSC mandated sanctions seemed to have no effect at all on the ground. Several arms embargoes mandated in order to contain wars in Africa, including Angola, Sierra Leone and Liberia, were defied – by private arms dealers but also by governments who openly or secretly allowed them to operate. This contributed to the impression that most UN sanctions were useless.

Primary goal of the sanction reform efforts of the late 1990s and early 2000s was to re-establish UN sanctions as an accepted policy instrument by reducing humanitarian side effects of sanctions and improve implementation of agreed measures at the same time. As “targeted sanctions” (the term of choice superseding “smart sanctions”) they should be designed to effectively influence the behaviour of those responsible for the actions that the UNSC wanted to bring to an end, but put as little cost to others as possible.

Early on it was evident for those involved in the reform efforts, that it would not be possible to eliminate all negative side-effects of UN sanctions. However, it was argued that careful selection of the appropriate types and targets of sanction would help to limit such consequences. One of the main challenges of those promoting targeting sanctions has been to identify the right balance between not hurting innocent bystanders and inflicting sufficient “pain” on those with the power to change sanctioned policies.

Deficits in the design and output of UN sanctions

Even though Article 24 of the UN Charter regulates that sanction resolutions of the UNSC under Chapter VII of the Charter are binding for member states, implementation of UN sanctions is dependent on the willingness and capabilities of governments to implement the adopted measures effectively. There are political obstacles to such willingness. Governments may not see sanction decisions by the UN as legitimate, appropriate or conducive to their (economic or other) interests, or have the perception that the UNSC is biased

in its selection of targets. States that have defied UN sanctions, mostly through slack compliance, range from the United States (in the case of the sanctions against the former Yugoslavia) to certain African states.

Beyond politics, willingness and capability may also be impaired by more technical issues. It was such issues that the sanction reformers focused on – at the design and output stage of the sanctions policy cycle. They hoped that technical reforms would also increase the legitimacy of UN sanctions and, in turn, the willingness of states to invest resources into their effective implementation. Four such issues shall be mentioned here and are picked up in the next sections:

Clearly defined language in sanction resolutions. One issue related to design picked up by reformers was the language used to establish obligations. Representatives of member states often complained about the difficulty to translate provisions in UNSC sanctions resolutions into national legal frameworks. Furthermore, interpretation of key concepts in sanctions, such as “arms” or “assets”, were interpreted differently by states, as there were no agreed legal definitions.

Delays in national implementation. However, sanction implementation was not only limited further on in the sanction implementation cycle but also by deficits in the capacity to quickly and effectively translate UNSC decisions into national obligations. Government often had deficits in getting private actors involved, as well as in appropriate measures for the detection, deterrence and punishment of sanction busting.

Implementation support. Reformers noted that the capabilities of states to implement UN sanctions varied widely. Numerous states had difficulties to control their borders; many government bureaucracies lacked the capacity to inspect and investigate false documents; and corruption was a fact of life.

Cooperation within the UN system. Deliberations over UNSC sanction resolutions generally occur in closed circles of UNSC members who compromise to get to a resolution. At the same time, the UN is often present with several of its entities, for instance for mediation purposes, peacekeeping or humanitarian assistance, in locations where sanctions were planned or active. Sanction reformers criticised there was little interaction between those in the UNSC and other parts of the UN who might provide useful input into sanction design and implementation.

Interface management reform success and continuing challenges

Reformers were aware of the power and privilege of the UNSC in mandating UN sanctions. Particularly its five permanent members have a clear interest in limiting the influence over UN sanctions practice, including the design of sanctions. Reformers suggested however, that effectiveness of UN sanctions would benefit from stronger interaction between the UNSC and other actors, particularly member states beyond those in the UNSC and the larger UN system. Achievements and continuing deficits with respect to the selected issues are discussed below.

UNSC and member states

Reformers had some success with respect to improving the interface between the UNSC and member states. However, as recent assessments of various types, including by the

High Level Review on UN Sanctions, show, some challenges to sound implementation continue to be on the agenda⁴:

- a. **Wording of UNSC sanctions resolution.** The UNSC's power to freely decide on "what measures not involving the use of armed force are to be employed to give effect to its decision" (Article 41) implies the danger of the adoption of obligations which states find obscure, or technically difficult to comply with. Thus, when the UNSC started to mandate "asset freezes" in the late 1990s, governments interpreted their obligations quite differently. This is typical for a variety of sanctions, as core concepts often are not universally codified.

Codification of preferred definitions of terms repeatedly occurring in UNSC sanctions decisions was a major element of the work within the sanction reform processes. Another major element was the suggestion of standard language the UNSC should use if it mandated certain types of sanctions. The Watson Institute at Brown University in the US⁵ developed support tools for UN diplomats suggesting standard language and the Geneva based Graduate Institute commissioned a "sanctions app" with the explicit purpose to support diplomats negotiating resolutions on UN sanctions through knowledge of precedents and general practices⁶.

Glancing over sanctions resolutions during the last two decades, one finds a growing trend toward standard language, for instance in resolutions mandating arms embargoes, or on humanitarian exceptions. Even though the UNSC or sanction committees have largely refrained from providing succinct definitions of major terms, state practice of obligation has converged. Furthermore, some frequently used concepts, such as arms and military goods as well as financial assets are also central to other international agreements and arrangements, where definitions are available, such as the United Nations Register of Conventional Arms and the Financial Action Taskforce (FATF). However, the UNSC continues to be innovative. In SCR 1718 of 2006 it banned the transfer of "luxury goods" to North Korea, a hitherto unknown category in countries' export regulations.⁷ While more guidance has been provided on the preferred interpretation of sanctions resolutions by several committees, particularly

⁴ Except where stated differently, the assessment of achievements and continuing challenges is based on anecdotal evidence, earlier assessments e.g. in Michael Brzoska, "From Dumb to Smart? Recent Reforms of UN Sanctions", *Global Governance* 9, no. 4 (2003) 4, pp. 519-535; Thomas Biersteker, Sue Eckert, Aaron Haelgua, Peter Romaniuk, "Consensus from the bottom-up? Assessing the influence of the sanctions reform process", in *International Sanctions: Between Words and Wars in the Global System*, eds. Peter Wallensteen and Carina Staibano (London, 2005), 15-30; Clara Portela, "National Implementation of United Nations Sanctions: Towards Fragmentation", *International Journal* 65, no. 1 (2009); Thomas Biersteker, Sue Eckert and Marcos Tourinho, eds. *Targeted Sanctions: The Impact and Effectiveness of UN Action* (Cambridge, 2015); Carish et al, *The evolution of UN sanctions* [see footnote 1] and interpretation of the discussions and reports in the framework of the High Level Review on UN Sanctions, including Sue Eckert, Loraine Rickard-Martin, Enrico Carisch with support from Alix Boucher, *Compendium High Level Review of United Nations Sanctions* (New York 2015) and Jonathan Brewer and Richard Nephew, *Improving Implementation of UN Security Council Sanctions Resolutions* (New York, 2017).

⁵ Watson Institute for International Studies, *UN Sanctions Reform* (Providence, R.I., 2014), <https://www.yumpu.com/en/document/view/23549510/un-sanctions-reform-the-watson-institute-for-international-studies>.

⁶ <https://unsanctionsapp.com/>.

⁷ In 2011 the relevant UN sanctions committee agreed on relatively vague guidelines on what it considers luxury goods. More guidance has since been agreed by the committee, but government practice continues to be uneven with respect to goods to be covered, see <https://www.un.org/securitycouncil/sanctions/1718/implementation-notice>. See also <https://nkhumanitarian.wordpress.com/un-sanctions-definition-of-luxury-goods/> for some background and Maiko Takeuchi, *Smart Language: How to Address an Inherent Weakness Un-*

with respect to exemptions and exceptions, there continue to be complaints by UN member states about unclear obligations.

- b. **Improving timely response of member states.** Member states are expected to make UN sanctions legally effective in their jurisdictions as quickly as possible. This generally entails several steps which governments may have to take, from adopting relevant legislation, to issuing decrees, providing information to appropriate enforcement agencies, as well as sending notices to relevant private actors and strengthening practical measures to make sanctions busting unattractive. For the implementation of many types of sanctions, such as asset freezes or arms embargoes, interaction between governments and private actors is crucial. Obviously, all this goes faster and is likely to be more effective, if well organised in advance and not put in motion only when the UNSC decides to mandate a sanction.

Box 1 discusses the fate of one of the major suggestions for improving interface management coming out of the UN sanction reform processes, namely for member states to adopt “covering laws” allowing for implementation of UN sanctions without preceding national legislative action. Success has been mixed (see Box). The same seems to be the case for further steps for effective national implementation, such as the creation of dedicated sanctions units or well-established channels to provide relevant groups of private actors with pertinent information.

dermining the Implementation of U.N. Sanction on North Korea (Stockholm, 2020), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2917&context=ils> for a recent assessment of remaining deficits.

Box: Covering laws

Sanction reformers saw significant room for improvement by eliminating the need to ask national parliaments for specific legal acts whenever the UNSC mandated a sanction. Member states were encouraged to adopt “covering laws” which would automatically make UNSC sanctions decision national law and allow governments to immediately proceed to the next steps. A short “model law” was proposed, based on existing laws in various countries.

Table 1 indicates the fate of this recommendation for a select number of countries which are members of the Council of Europe. Prior to 1999, when the recommendation was first made in the Interlaken Process, 7 of the 35 countries for which pertinent information is available had covering laws. An additional six countries, including Germany, had constitutional provisions with the same legal effect. In the other countries, parliamentary debate and action was necessary to make sanctions legal under national law. In the first decade of sanction reforms, an additional 6 of the 35 countries adopted covering laws, bringing the total to 13. Since then (until 2018) only one additional country changed into that category, so that in 2019 there were still 15 among the 35 countries without such a law (the number of countries with pertinent constitutional provisions did not change over time).

Table 1: The status on “covering laws” in a select group of countries

<i>Covering law</i>	Prior to 1999	2000–2009	Since 2010	Total in 2019
<i>Yes</i>	7	plus 6	plus 1	14
<i>No</i>	22	minus 6	minus 1	15
<i>No (but relevant constitutional provision)</i>				
	6	no change	no change	6

Source: Council of Europe 2018. THE IMPLEMENTATION OF UNITED NATIONS SANCTIONS. <http://www.cahdi-databases.coe.int/Search/Index/3>

Overall, the responsiveness of member states to UNSC sanctions has grown but leaves room for further improvement⁸. An example is provided in Table 2. It indicates the time it takes the EU to legally adopt UN sanctions for the most recent cases of UN sanctions. On average (excluding the case of South Sudan, where EU sanctions preceded UN sanctions) it took 42 days for UNSC decision to become law for EU entities and citizens. While one can argue that this is fairly quick reaction considering the need to translate a UNSC resolution into an EU document, it still creates a significant time gap. As the European Union has a better organized bureaucracy than most governments it is likely that others have longer time delays.

⁸ See Radka Druláková and Štěpánka Zemanová, “Why the implementation of multilateral sanctions does (not) work: lessons learned from the Czech Republic”, *European Security* 29, no. 4 (May 2020): 522-542.

Table 2: Time delays in recent UN sanctions implementation by the European Union

<i>Sanc-tions concern-ing</i>	Restrictive measures	UNSC Resolu-tion	Date of UNSC decision	Date of EU Council Regu-lation and/or Decision	Time differ-ence in days
<i>Mali</i>	Travel re-strictions and an asset freeze	2374 (2017)	5 Sept 2017	28 Sep 2017 (2017/1770)	23
<i>South Sudan</i>	Travel re-strictions and an asset freeze	2206 (2015).	3 Mar 2015	10 Jul 2014 (748/2014)	-236
<i>Yemen</i>	Arms em-bargo	2216 (2015)	On 14 April 2015	8 Jun 2015 (2015/882)	55
<i>Yemen</i>	Travel re-strictions and asset freezes	2140 (2014)	26 Feb 2013	23 Dec 2013 (1352/2014)	25
<i>CAR</i>	Travel re-strictions and asset freezes	2134 (2014)	28 Jan 2014	10 Mar 2014 (224/2014)	41
<i>CAR</i>	Arms em-bargo	2127 (2013)	5 Dec 2013	23 Dec 2013 (2013/798)	18
<i>Guinea-Bissau</i>	Travel re-strictions and asset freezes	2048 (2012)	3 Mar 2012	31 May 2012 (2012/285)	89

Source: European Union 2020. Sanctions Map, <https://sanctionsmap.eu/#/main/details/15/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>

- c. **Support for improvements in national output of UN sanctions.** While reformers focused much effort on suggestions for translating UN sanctions obligations into national law, they were keenly aware that effective implementation of national obligations needs to follow but often is a major challenge. This is particularly critical with respect to “the weakest link” problem. Their level of effectiveness is determined by the least effective national implementation system of relevant states. From this it follows, that there is a common interest to improve national implementation systems of states whose weaknesses could be exploited by sanctions busters. One of the suggestions made during the reform processes was for the UN and national governments to assist member states with limited resources. While dedicated support for the implementation of sanctions has been rare, relevant support has been provided in the framework of other assistance

programs, ranging from support to improve arms export licencing procedures to support to strengthen physical border control as well as counterterrorism (including in context of UNSC Resolutions 1373 and 1624).

UN system

Sanctions are no end in themselves but serve policy goals. These policy goals are rarely addressed by sanctions alone but rather by a host of policy instruments. Furthermore, as indicated above, sanctions generally have effects beyond addressing their policy goals, for instance through their humanitarian side-effects. All this brings various other parts of the UN system into focus of sanction design and output. Two were of particular interest for sanction reformers namely those responsible for conflict analysis and mediation efforts, and those responsible for peacekeeping. A number of suggestions were made for improvements in relation to these interfaces, in order to increase the information base on which UNSC decisions are made, to improve enforcement through the assistance of UN organs and organisations, and to raise the credibility of UN sanctions for UN members not represented in the UNSC.

- a. **Conflict analysis and mediation in the UN system.** To reformers, tapping the UN system, particularly the secretariat but also humanitarian and development organisations, for relevant information seemed a natural way to improve the information base both for targeting sanctions and their effectiveness, particularly for member states with limited resources of their own. Another set of suggestions addressed the activities of the Secretary General and his representatives aiming to bring about political solutions to conflicts. Sanctions can potentially help but also hinder such efforts, by putting material pressures on conflict parties at the wrong or right time. Last but not least, there were suggestions to strengthen the support functions of the UN Secretariat for the UNSC and its committees for the operation of sanctions.

The first set of suggestions tailored well with general efforts to improve the information base for decision-making in the UNSC. Even though sanctions only received minor mention in the various relevant broader UNSC reform processes and despite the political difficulties they ran into, relevant capabilities of the Secretariat as well as interaction with other relevant UN entities have improved over time. Thus the sanctions unit in the Secretariat has grown from a very small to a sizeable outfit and other UN institutions, such as those on the humanitarian and peacekeeping sides, more frequently consulted by the UNSC and sanction committees.⁹

The same trend of limited improvement can be found for the interface between UN sanctions and mediation efforts by Special Envoys of the UN Secretary-General. A recent study by Thomas Biersteker, Rebecca Brubaker and David Lanz on this link identified both opportunities, successes, and shortcomings in coordination. Among the success cases mentioned are sanctions on Sierra Leone and South Sudan but the authors also found a number of cases where sanctions and mediation efforts were counteracting each other.¹⁰

- b. **Peacekeeping operations.** In crisis situations, the UN, and in particular UN peacekeeping missions, are often in a position to observe sanctions output. This led to the proposal in the UN sanction reform process to task UN peacekeeping troops with aspects of sanctions implementation, primarily through the gathering and

⁹ See Eckert et al, *Compendium* [see footnote 4]; Carisch et al, *The evolution of UN sanctions* [see footnote 1].

¹⁰ See Thomas Biersteker, Rebecca Brubaker and David Lanz. *UN Sanctions and Mediation: Establishing Evidence to Inform Practice* (New York, 2019).

provision of information but also through cooperation with UN sanction monitors groups and, if possible, through actual enforcement. Examples include MONUSCO's mandate to monitor the implementation of the DR Congo arms embargo (UNSCR 2277/2016) and AMISOM's support for enforcing the charcoal ban in Somalia (UNSCR 2317/2016).

There is a considerable geographical overlap between UN sanctions and UN peacekeeping. For several of the more recent peacekeeping missions, sanctions implementation support is part of their mandate, mostly in the form of information gathering.

Recent reviews of actual practice, however, are more sobering, finding resources and efforts of peacekeeping missions dedicated to these tasks rather limited. Prime reason is continuing reluctance both within the UN Secretariat as well as by peacekeepers on the ground to get involved with UN sanction implementation. Peacekeeping missions in general suffer from an overload of tasks, and sanctions implementation is generally seen as less important than others, such as supervision of ceasefires or protection of civilians. In some cases, sanction implementation support is seen as threatening mandated neutrality.

Conclusions

Improvements in interface management were a priority in UN sanctions reform processes of the late 1990s and early 2000s. First among the actors with whom interaction should be improved were national governments, followed by cooperation between the UNSC and other parts of the UN system. A large number of recommendations were made, also with respect to other interfaces, for instance with other international organisations and processes.

Judging by the available information, some success has been made but major deficits remain. Furthermore, some of the improvements in sanctions interface management, for instance between the UNSC and member states on the substance of obligations in sanctions resolutions, have come about because of other political processes, such as on counterterrorism and non-proliferation as well as the working of the UN in general, rather than because of the sanction reform process by itself.

Ironically, the popularity of sanctions in counterterrorism has raised another set of contentious issues which led to another round of sanction reform efforts a decade after the ones discussed here¹¹. Both sanction reform efforts could only come so far, primarily because of the eminently political character of this UNSC policy instrument.

¹¹ See e.g. Thomas Biersteker and Sue Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (Providence, 2005).

Interface challenges of UN sanctions with Forums of Export Control: Towards cohesion and consistency in non-proliferation sanctions?

Thomas Dörfler

Introduction

“One of the advantages of having a Nuclear Suppliers Group list is that that list is generated independently of the case under sanctions. (...) Now comes along sanctions on Iran you can appeal to that list because that list was not generated in order to screw Iran. It has got some kind of external validation that is really important for some states on the [sanctions] committee.”¹

The sanctions regime imposed on the Democratic People’s Republic of North Korea (DPRK) is certainly the most far-reaching of the United Nations (UN) Security Council’s current 14 sanctions regimes. Together with the sanctions regime against Iran, the DPRK sanctions regime has been a key pillar in the UN Security Council’s approach to preventing the proliferation of weapons of mass destruction (WMD) alongside its legislative role in WMD proliferation to non-state actors. In numerous sanctions resolutions on DPRK and Iran, the UN Security Council has considered developing nuclear weapons as a threat to international peace and security and gradually upgraded the measures in reaction to nuclear weapons and ballistic missile testing or enrichment activities. Together with a whole range of sanctions measures including an arms embargo as well as targeted individual sanctions, a ban on proliferation sensitive goods and technology is a key measure imposed in both sanctions regimes, which however has received little attention so far.²

Focusing on the output dimension within the sanctions policy cycle, the members of the UN Security Council face a challenging decision problem regarding the ban on proliferation sensitive goods and technology: Which objects do, and which objects do not, fall under the category of “items, materials, equipment, goods and technology (...), which could contribute to DPRK’s nuclear-related (...) programme”³ or “Iran’s enrichment-related, re-processing or heavy water-related activities, or to the development of nuclear weapon delivery systems.”⁴ Like many other targeted sanctions regimes, which rest on subjecting individuals and entities to travel bans and assets freezes, the UN Security Council (or its sanctions committees) must take numerous follow-up decisions. While an assets freeze cannot be implemented without a list of targeted individuals, a ban on goods and technologies cannot be implemented without a list of items. For proliferation-sensitive goods and technologies, this process is quite challenging as it demands strict export controls on an abundant range of items. Exporters face additional hurdles as many goods are dual-use, i.e. items, which can be used for both civil and military purposes. Exporters also need to control “below threshold” items, which could be upgraded towards use in WMD programs. Moreover, export control must be constantly revised to cover technological progress. Whereas failing to list a proliferation-sensitive item would undermine the effectiveness of a non-proliferation sanctions regime, adding too many items could hamper legitimate

¹ Interview with former Panel of Experts member (Washington D.C., 2013).

² For a list of sanctions measures, see: <https://www.un.org/securitycouncil/sanctions/1718> (accessed 23 April 2021).

³ United Nations Security Council, *Resolution 1718 (2006)* (New York, 14 October 2006), para. 8a ii, [https://www.undocs.org/S/RES/1718%20\(2006\)](https://www.undocs.org/S/RES/1718%20(2006)) (accessed 17 May 2021).

⁴ United Nations Security Council, *Resolution 1737 (2006)* (New York, 27 December 2006), para. 3, [https://www.undocs.org/S/RES/1737%20\(2006\)](https://www.undocs.org/S/RES/1737%20(2006)) (accessed 17 May 2021).

trade relations. Since sanctions committees are subsidiary bodies of the UN Security Council and not staffed with experts, the non-profit organization Security Council Report noted already back in 2006 that “complexities of defining what ‘proliferation sensitive’ items are, (...) could lead to very significant challenges for the [sanctions] Committee.”⁵

For the UN Security Council, the ban on proliferation-sensitive goods creates a collective action problem. Even if exporting countries have an interest in preventing WMD proliferation, some exporters may have an interest in the lucrative trade in such goods. A well-known case is the Iraqi chemical weapons program, which received supplies of precursors and technology from German companies during the 1980s. Another example is the Russian state company *Rosatom*, which was heavily involved in completing the Bushehr nuclear power plant in Iran. Although not necessarily in violation of an existing international embargo or domestic regulation, these special interests undermine the collective goal of preventing WMD proliferation and create the need to agree on a comprehensive list of proliferation goods and technology. Hence, the challenge lies in the standardization and harmonization of legal texts. Above all, however, UN Security Council members must agree on a thorough list of items despite “political sensitivities”⁶ in the case, differences over the scope of sanctions measures, and potential domestic interests being involved. In other words, agreement on a comprehensive item list is far from straightforward. In the following, I explore how the UN Security Council has dealt with the ban on proliferation sensitive materials in general, and why interfacing with forums of export control provided an avenue to bridge the political rift among UN Security Council members over the extent of item lists.

Forums of Export Control as new global governance actors

Forums of Export control are a type of transgovernmental networks (TGNs), which enable domestic officials to directly interact with like-minded counterparts of other participating countries. TGNs feature rather “loosely structured, peer-to-peer ties developed through frequent interaction.”⁷ They occupy a middle ground between international organizations and ad hoc diplomacy⁸, and belong to a larger class of “low-cost institutions.”⁹ TGNs are informal, not based on binding treaties, have no standing secretariat, decide by consensus, and are comprised of mid-level bureaucrats who coordinate policies across borders.¹⁰ Domestic authorities implement the adopted measures solely under domestic law. TGNs are beneficial governance instruments as participants have great flexibility, autonomy and usually harmonious interests in an issue. In the field of export control, they function as genuine interfaces for the coordination of export guidelines and lists of items. With regard to the non-proliferation of WMD, three TGNs are crucial (see Table 1). The *Nuclear Suppliers Group* (NSG) was established in 1975 as a network of domestic regulators of 48 states, including all five permanent members of the Security Council with the

⁵ Security Council Report (SCR), *Update Report No.4, ‘Iran’* (New York, 15 December 2006), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2015%20Dec%202006_Iran.pdf (accessed 17 May 2021).

⁶ Sue E. Eckert, Enrico Carisch and Loraine Rickard-Martin, “Compendium High Level Review of United Nations Sanctions”, (New York, November 2015), 62–63.

⁷ Kal Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, *Virginia Journal of International Law*, no. 431 (2002): 1–92.

⁸ Anne-Marie Slaughter and Thomas N. Hale, “Transgovernmental Networks”, in *The SAGE Handbook of Governance*, ed. Mark Bevir (London, 2011), 342–351.

⁹ Kenneth W. Abbott and Benjamin Faude, “Choosing Low-cost Institutions in Global Governance”, *International Theory* (online), 11 June 2020, 1–30.

¹⁰ Mette Eilstrup-Sangiovanni, “Varieties of Cooperation. Government Networks in International Security”, *Networked Politics: Agency, Power, and Governance*, ed. Miles Kahler (Ithaca, N.Y., 2009), 197–201.

goal of nuclear-related export regulation.¹¹ The *Missile Technology Control Regime* (MTCR) was founded in 1987 as a network of states interested in preventing the proliferation of WMD delivery systems. It comprises 35 participants, including four permanent members. While China is not a member, it has applied for MTCR membership and has pledged to adhere to its guidelines.¹² The *Australia Group* (AG) has been established in 1985 in reaction to the use of chemical weapons in the Iran-Iraq war obtained through legal trade and has 43 members. China and Russia, however, are non-members.¹³

Table 1: Export Control Networks in WMD Non-proliferation

	Nuclear Suppliers Group	Missile Technology Control Regime	Australia Group
Scope	Nuclear and related dual-use goods	Delivery systems and related technology	Chemical and biological weapons
Year	1975	1987	1985
Participants	48, incl. China, France, Russia, UK, US	35, incl. France, Russia, UK, US	43, incl. France, UK, US
Export Trigger List	<ul style="list-style-type: none"> ▪ NSG list Part I (items for nuclear use) ▪ NSG Part II (dual-use) 	MTCR Equipment, Software and Technology Annex: <ul style="list-style-type: none"> ▪ Category I (complete systems) ▪ Category II (dual-use) 	<ul style="list-style-type: none"> ▪ Chemical Weapons Precursors ▪ Dual-use chemical manufacturing facilities, equipment and technology ▪ Dual-use biological equipment, related technology ▪ Human, Animal Pathogens & Toxins ▪ Plant pathogens

Note: The *Australia Group* (AG),¹⁴ the *Nuclear Suppliers Group* (NSG),¹⁵ *Missile Technology Control Regime* (MTCR)¹⁶

NSG, MTCR and AG participants pledge to adhere to export policy guidelines applied to a list of items of proliferation concern ('export trigger lists'). All three TGNs operate list-

¹¹ Nuclear Suppliers Group (NSG), "The Nuclear Suppliers Group: Its Guidelines, Origins, Structure and Role", 2019, <https://www.nuclearsuppliersgroup.org/en/nsg-documents> (accessed 28 May 2021).

¹² Eilstrup-Sangiovanni, "Varieties of Cooperation", 220-1.

¹³ The Australia Group (AG), <http://www.australiagroup.net> (accessed 27 April 2021).

¹⁴ AG, <https://www.dfat.gov.au/publications/minisite/theaustraliagroupnet/site/en/index.html> (accessed 27 April 2021).

¹⁵ NSG, <https://www.nuclearsuppliersgroup.org/en/> (accessed 27 April 2021).

¹⁶ Missile Technology Control Regime (MTCR), <https://mtrc.info/> (accessed 27 April 2021).

based: The NSG maintains Part 1 and Part 2 as annexes to its guidelines. The former contains “items that are especially designed or prepared for nuclear use” including nuclear fuel, nuclear reactors, equipment for reprocessing and isotope separation, among others. The latter governs the export of “dual-use items and technologies,” items that also have non-nuclear use. The MTCR Equipment, Software and Technology Annex enumerates “a broad range of equipment and technology, both military and dual-use, that are relevant to missile development, production, and operation.” It contains two sections: Category I items consist of complete rocket or other delivery systems or major parts, whereas Category II items consist of dual-use equipment or parts. The AG export trigger lists cover five item categories including chemical and biological weapons precursors and their means of production.

The interface of UN sanctions with Forums of Export Control: The DPRK and Iran sanctions regimes

Despite frequently clashing interests in the UN Security Council, the permanent members’ interest in preventing WMD proliferation in principle has converged since the turn of the millennium.¹⁷ The Western permanent members have been staunch supporters of tough sanctions in response to WMD proliferation in the DPRK and Iran cases. China and Russia also have repeatedly expressed “firm opposition” to North Korean and Iranian nuclear ambitions.¹⁸ However, the permanent members had different political agendas on DPRK and Iran.¹⁹ The United States and its allies pushed for strong sanctions against the DPRK and Iran, though Europeans were more cautious on Iran. Russia and China, however, favored a less intrusive approach grounded in their political and economic ties with the DPRK and Iran and an aversion to resort to Chapter VII measures.²⁰ Russia cautioned that “the reaction (...) must be firm, but at the same time carefully calibrated.”²¹ In US-Chinese consultations, the Chinese government noted that “Beijing shares the same objectives (...) but has different ideas on the best way to proceed.”²² This political conflict also pertains to goods conducive to WMD programs. While Western members and their allies have repeatedly advocated for an extensive item list to be barred from the sale to North Korea and Iran, the governments of Russia and China objected to a broad list of “specific WMD-materials.”²³

In the DPRK case, UN Security Council members did not haggle over single nuclear and ballistic missile related items banned from sale to the DPRK, but instead, coordinated by reference to NSG and MTCR export trigger lists. In UN Security Council negotiations, sanctions proponents introduced NSG and MTCR export trigger lists as “standard lists”²⁴ for

¹⁷ Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte (eds.), “The UN Security Council in the Twenty-First Century”, (Boulder, CO, 2016), 862–4.

¹⁸ United Nations Security Council, *S/PV.5551* (New York, 14 October 2006), 4, <https://undocs.org/en/S/PV.5551> (accessed 17 May 2021).

¹⁹ SCR, *Update Report No. 3: North Korea* (New York, 7 July 2006), https://www.securitycouncilreport.org/atf/cf/%7B65BF96F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%207%20July%202006_North%20Korea.pdf (accessed 17 May 2021); SCR, *November 2006 Monthly Forecast* (New York, 30 October 2006), https://www.securitycouncilreport.org/atf/cf/%7B65BF96F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2006_11_forecast.pdf (accessed 17 May 2021).

²⁰ Einsiedel et al., “The UN Security Council in the Twenty-First Century”, 863.

²¹ SCR, *S/PV.5490* (New York, 15 July 2006), 6, <https://undocs.org/en/S/PV.5490> (accessed 17 May 2021).

²² U.S. Embassy Beijing, *PRC Working on DPRK in Private*, 06BEIJING14173_a, 6 July 2006.

²³ John R. Bolton, *Surrender is not an Option: Defending America at the United Nations and abroad* (New York, 2007), 304–8.

²⁴ Bolton, *Surrender is not an Option*, 305.

this purpose to increase the difficulty for Russia and China to object. Hence, in a draft resolution, the UN Security Council specified that the embargo applied to items “as set out in the lists in document S/2006/”, which would refer to an export trigger list contained in a member state letter, as modified “by the Security Council or the Committee.”²⁵ Even though the Russian and Chinese representatives “raised concerns (...) about (...) how we will define nuclear, biological and chemical and weapon related materials and ballistic missile components,”²⁶ the UN Security Council imposed an export ban to items of both NSG Part 1 and Part 2 lists.²⁷ Likewise, it imposed an embargo on items listed in the MTCR export trigger list.²⁸ While much of the haggling about UN Security Council Resolution 1718 (2006) concerned the arms embargo and cargo interdiction²⁹, the UN Security Council implemented the embargoed types of goods by employing NSG and MTCR lists. Negotiations over the extent of chemical and biological weapons precursors show that export trigger lists helped coordinate even in a contentious case. Because UN Security Council members could not agree on a list of chemical and biological weapons precursors, the Council referred the issue to the DPRK sanctions committee, which mirrors UN Security Council membership and decides by consensus.³⁰ The U.S. government immediately criticized that “Russia objected to putting in the same status” for the AG control list as the NSG and MTCR and announced “to push for the Australia Group Control List to be used for biological and chemical weapons issues” in the committee.³¹ The Russian government delayed any consideration by procedural objections.³² Within the sanctions committee, the U.S. government and its allies re-tabled the AG list.³³ However, Moscow “did not easily agree on the original list of biological and chemical banned items”, at least partially because of the “origins in the Australia Group, to which Russia does not belong.”³⁴ As the former U.S. Permanent Representative Bolton recalls, Russia argued that “any chem-bio list agreed by the Committee could not be based on the AG export control lists. At one point, the Russian delegate told the Committee: ‘We don’t even know what this Australia Group is’.”³⁵ Instead, Russia “insisted on a new list with Russian input.”³⁶

²⁵ Japan Economic Newswire, “Text of Provisional Version of draft UNSC Resolution on N. Korea”, *Japan Economic Newswire*, 13 October 2006.

²⁶ Colum Lynch and Glenn Kessler, “At U.N., U.S. Pushes for Vote on N. Korea; Russia and China Raise Concerns”, *Washington Post*, 14 October 2006, A14.

²⁷ United Nations Security Council, *Resolution 1718 (2006)*; Security Council Report (SCR), *S/2006/814* (13 October 2006), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/NKOREA%20S2006%20814.PDF> (accessed 17 May 2021).

²⁸ United Nations Security Council, *S/2006/815* (13 October 2006), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/NKOREA%20S2006%20815.PDF> (accessed 17 May 2021).

²⁹ Edith M. Lederer, “Security Council Approves Resolution Imposing Punishing Sanctions on North Korea”. *The Associated Press*, 14 October 2006.

³⁰ United Nations Security Council, *Resolution 1718 (2006)*, para. 8a.ii.

³¹ John R. Bolton, *Adoption of United Nations Security Council Resolution 1718 (DPRK): Remarks at the Security Council Stakeout* (New York: U.S. Permanent Mission to the UN, 14 October 2006).

³² Japan Economic Newswire, “UNSC N. Korea Sanctions Committee Holds 1st Meeting”, *Japan Economic Newswire*, 20 October 2006.

³³ SCR, *S/2006/816* (New York, 13 October 2006), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/NKorea%20S2006%20816.pdf> (accessed 17 May 2021).

³⁴ SCR, *Monthly Forecast January 2007* (New York, 22 December 2006), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2007_01_forecast.pdf (accessed 28 May 2021).

³⁵ John R. Bolton, *UNSC/DPRK: Sanctions Committee Agrees on Chem/Bio List*, U.S. Permanent Mission to the UN, 06USUNNEWYORK2117_a, 3 November 2006; Japan Economic Newswire, ‘U.N. Panel Fails to Get Final OK for List of Banning Items to N. Korea’. *Japan Economic Newswire*, 31 October 2006.

³⁶ SCR, *Monthly Forecast January 2007*.

However, despite Russian objections, the committee adopted a “relatively comprehensive” list of chemical and biological weapons precursors by consensus.³⁷ The list is almost identical to the Australia Group list.³⁸ The deletions included parts that AG members considered voluntary (“warning list”) and few other items, but the substance of the list remained intact, even though the Russian representatives opposed the list in the Council and the committee, respectively.³⁹ The committee chair noted in a press statement that “[h]undreds of items were selected based on restrictions under the Nuclear Suppliers Group, the Missile Technology Control regime and the Australia Group.”⁴⁰

The UN Security Council repeated this approach in the Iran case. Instead of deciding about details, the body simply accepted NSG and MTCR lists of goods and embargoed listed items.⁴¹ Because UN Security Council members intended to avoid technical negotiations, they focused on broader political questions and merely determined applicable list sections.⁴² As such, UN Security Council members did not haggle over details and disputed only the timing of imposing broad trigger list sections. For instance, Russia insisted on exempting light-water reactors and their fuel supply to be able to complete the Bushehr power plant. Dynamics in the UN Security Council led to imposing four sanctions rounds escalating the number of broad item categories. In Resolution 1737 (2006), the UN Security Council agreed on items on the NSG Part 1 list as embargoed items except for light-water reactors and low-enriched nuclear fuel, while NSG Part 2 remained voluntary. Concerning ballistic missile items, the UN Security Council adopted an embargo on MTCR items, except for drones above a 300 km range. In resolution 1803 (2008), the UN Security Council made NSG Part 2 list authoritative and removed the exemption to the MTCR list. Why does the UN Security Council rely on item lists produced by export control forums? One explanation is that export control lists are readily available, are based on long-standing behavioral expectations shared by network members, and domestic authorities are used to implementing the guidelines. The networked form of export control governance is beneficial as it enables networks to draw from the extensive expertise of domestic regulators and officials. Moreover, networks form among states with similar interests and exclude spoilers which can be compelled to accede later.⁴³ As a result, an implicit division of labour has emerged, in which export regulation experts deliberate about the content of the item lists within NSG, MTCR, and AG, and diplomats in the UN Security Council decide about which sections of the item lists are subject to the legally binding export ban. At the same time, the TGNs and the Security Council do not seem to communicate directly about the lists and are connected only through their member state representatives who participate in TGN meetings. While technically the TGNs are not part of the implementation process, this seems to aid the TGNs which operate at a considerable distance from the politicized environment of the Security Council.

As a result of this distance, available lists of proliferation sensitive items prove useful to coordinate different preferences among permanent members of the Security Council. In

³⁷ John R. Bolton. *UNSC/DPRK: Sanctions Committee Agrees on Chem/Bio List*.

³⁸ Japan Economic Newswire, ‘U.N. Panel OKs List of Banned Items Impacting Trade with N. Korea’. *Japan Economic Newswire*, 1 November 2006.

³⁹ Niobium and niobium alloys had only been added to the list recently. Deletions include: Four plant pathogens (out of 13), nine biological agents (out of 72) and two out of 17 animal pathogens, compare SCR, S/2006/816 with SCR, S/2006/853.

⁴⁰ BBC, “Steel, personal computers among goods banned from export to North Korea”, *BBC News*, 3 November 2006.

⁴¹ United Nations Security Council, *Resolution 1737 (2006)*.

⁴² Interview with UN Member State official (New York, 2013).

⁴³ Abbott and Faude, “Choosing Low-cost Institutions in Global Governance”; Eilstrup-Sangiovanni, “Varieties of Cooperation”.

essence, in a situation where all members prefer agreement over stalemate, but the governments of China and Russia want fewer items on the list, and governments of the United States the United Kingdom and France wish to extend the list, it is better to agree on the available list of items instead of stalemating the process. NSG, MTCR, and AG lists then serve as 'focal points' for coordination.⁴⁴ In addition, the lists are useful as they have been "generated independently of the case under sanctions" and hence beyond the political context of a case.⁴⁵ Even non-members of forums of export control are inclined to accept an export trigger list, as drafting competing lists is cumbersome and seems hardly feasible. Interestingly, a non-political sanctions approach was already discussed in the sanctions reform processes 20 years ago (see the contribution by Michael Brzoska). It failed due to member states' unwillingness to bind themselves to technical solutions, eventually turning against their interests. Nevertheless, relying on forums of export control is beneficial precisely because permanent members are not excluded from decision-making. Instead of entering protracted negotiations, the task to agree on a comprehensive item list under diverging interests provides incentives to agree on a readily-available technical solution.

What is the result of this coordination process? First, the coordination of UN Security Council members by recourse to NSG, MTCR, and AG lists yields consistent decisions and promotes the harmonization of legal texts. Unlike many other UN Security Council decisions, which may seem selective and inconsistent⁴⁶, the reliance on export trigger lists introduces consistency. Besides, resorting to NSG and MTCR lists in the DPRK case served as a precedent for the Iran case negotiated a few months later and may become relevant for future cases. The choice for export control lists also introduces reason and deliberation. While UN Security Council negotiations may still be opaque, the resulting technical solution is based on deliberation among expert networks of supplier countries, which operate distant from the politics of the sanctions regimes. As a UN Security Council member noted, the reliance on forums of export control "does indeed add more reason to the process" and results in "a more comprehensive list."⁴⁷ As a consequence, the usage of a technical list gleaned from forums of export control increases the credibility of non-proliferation sanctions and addresses capacity issues. The range of exporting countries is limited, and most exporting countries are already members of the respective TGNs and thus already adhere to the guidelines. Still, it matters for UN member states' implementation of Council decisions whether they are members of the TGNs. While TGN members can comply with Council imposed sanctions measures without adopting radically new measures, this is not necessarily the case for exporting countries that are non-members.

Interface challenges: Towards cohesion and consistency in non-proliferation sanctions?

Despite the implicit division of labor between export control networks and Council, interface challenges remain as concerns the standardization of item lists. One obstacle to cohesion and consistency lies in technological advancement over time, which necessitates continually updating the lists.⁴⁸ Moreover, because the lists are referred to by a fixed code, UN Security Council members must agree to upgrade the lists through adopting a resolution or address the issue in the sanctions committee through a consensual committee decision,

⁴⁴ Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA, 1960), 57.

⁴⁵ Interview with former Panel of Experts member (Washington D.C., 2013).

⁴⁶ Adam Roberts and Dominik Zaum, *Selective Security. War and the United Nations Security Council since 1945*, (London, 2009).

⁴⁷ Interview with UN Member State official (New York, 2013).

⁴⁸ Eckert et al., "Compendium High Level Review of United Nations Sanctions", 62–3.

which regularly opens up the process to contention. While the U.S. government and its allies perceive the measures as the floor with the ambition to upgrade the measures to forestall sanctions evasion, the governments of China and Russia perceive the adopted measures as the ceiling that should not be easily raised and consider new items as new sanctions.⁴⁹

The DPRK committee and the UN Security Council haggled several times over updating the lists, mainly because the sanctions skeptics felt that new or different items could mean additional sanctions.⁵⁰ As one Council diplomat noted: “The Chinese [representatives] are always very afraid of a new list because they think its additional pressure, which it is not”.⁵¹ In most cases, the Council or the committee has used updated versions as a focal point.⁵² To increase pressure, the drafters of additional sanctions resolutions have frequently “directed the Committee to review and update the items” within a specified timeframe.⁵³ For instance, in response to the DPRK missile tests in spring 2009, the UN Security Council adopted a Presidential Statement tied to a compromise that the committee would update the items list. In committee, the U.S. mission to the UN circulated an updated MTCR list, but Russia and China stalled. Russia particularly noted that some items had legitimate civilian use and that the committee could not proceed unless the MTCR list was translated into all UN languages.⁵⁴ Eventually, Russia and China gave in, on the condition that “the chair refer to this update solely by its UN reference number (S/2009/205) instead of identifying it as an MTCR document.”⁵⁵ On Iran, the Council updated NSG and MTCR lists in resolution 1929 (2010). In March 2013, the Iran sanctions committee again updated the NSG and MTCR items lists. A U.S. initiative to adopt a procedure for the automatic updating, however, failed, as China and Russia objected.⁵⁶ Ultimately, it remains “difficult to update the lists in the Council and Committee.”⁵⁷

The so-called “below threshold” items remain another challenge for the UN Security Council.⁵⁸ Target states may procure goods just below the export control threshold and later upgrade these to the level required for a WMD and missile program.⁵⁹ While the governments of the US, UK and France as well as their allies in the Council prefer extensive listings of such items, the governments of Russia and China remain skeptical.⁶⁰ Agreement on additional items has been difficult and occurred incrementally, while the UN Security Council has added many more items in reaction to the DPRK nuclear tests conducted in 2016 and 2017.⁶¹

⁴⁹ Interview with former Panels of Experts member (Washington D.C., 2013).

⁵⁰ Interview with UN Member State official (New York, 2013).

⁵¹ Interview with UN Member State official (New York, 2013).

⁵² See lists of prohibited items, available at: <https://www.un.org/securitycouncil/sanctions/1718/prohibited-items> (accessed 28 May 2021).

⁵³ For instance, *Resolution 1874 (2009)*, para. 24, [https://www.undocs.org/S/RES/1874%20\(2009\)](https://www.undocs.org/S/RES/1874%20(2009)) (accessed 28 May 2021).

⁵⁴ U.S. Permanent Mission to the UN, *DPRK: 1718 Committee Reviews Designation Proposals*, 09USUNNEWYORK401_a, 16 April 2009.

⁵⁵ U.S. Permanent Mission to the UN, *DPRK Sanctions Committee Makes Minimal Progress*, 09USUNNEWYORK416_a, 23 April 2009.

⁵⁶ See *S/PRST/2012/13*, adopted in response to DPRK missile tests, <https://undocs.org/S/PRST/2012/13> (accessed 17 May 2021).

⁵⁷ Interview with UN Member State official (2013, New York).

⁵⁸ Eckert et al., “Compendium High Level Review of United Nations Sanctions”, 62–3.

⁵⁹ Emil Dall, Tom Keatinge and Andrea Berger, *Countering Proliferation Finance: An Introductory Guide for Financial Institutions* (RUSI, 2017), 5.

⁶⁰ Susan Rice, *DPRK: 1718 Committee Makes New Sanctions Designations*, 09USUNNEWYORK701a, 18 July 2009.

⁶¹ See lists of prohibited items, available at: <https://www.un.org/securitycouncil/sanctions/1718/prohibited-items>.

Cohesion and consistency are less pronounced in absence of forums of export control determining embargoed items as the luxury goods ban in the DPRK sanctions regime illustrates. The luxury goods embargo immediately raised the question of what constituted 'luxury goods'. While China pushed back on attempts to define the term in committee, calling it a "mission impossible," the U.S. government initially abandoned any attempt to develop a definition because it "would be unlikely to lead to success at this point, and would distract the Committee from higher priorities - including designations"⁶². Gradually, as observed for other sanctions regimes⁶³, cohesion and consistency seem to have increased on luxury goods resulting from committee efforts, aided by detailed Panel of Experts investigations, and the desire to reduce the income stream for the DPRK nuclear program. Accordingly, the UN Security Council added additional items to the list of luxury goods in 2013 and again twice in 2016.⁶⁴ However, as the Panel of Experts noted in a recent report, in absence of "a more detailed list of prohibited luxury goods" defined by the Council and applicable for all member states, the implementation remains in the discretion of domestic authorities and thus highly uneven across UN member states.⁶⁵

The interface between the UN Security Council and forums of export control is a meaningful step towards cohesion and consistency in the UN sanctions regime imposed on the DPRK. Export trigger lists are easily available and provide a compromise for determining lists of embargoed items even if permanent members' interests diverge. Other UN sanction regimes may profit from similar fora setting standards, for instance, the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies with regard to arms embargoes, as recommended by the High-Level Review on UN Sanctions in 2015.⁶⁶ Some interface challenges such as updating and below threshold items remain, however, and likely continue to shape Council practice on non-proliferation in times of great power rivalry.

⁶² John R. Bolton. *UNSC/DPRK: Sanctions Committee Agrees on Chem/Bio List*.

⁶³ Thomas Dörfler, *Security Council Sanctions Governance: The Power and Limits of Rules* (New York, 2019).

⁶⁴ See lists of prohibited items, available at: <https://www.un.org/securitycouncil/sanctions/1718/prohibited-items>.

⁶⁵ DPRK Panel of Experts, *S/2020/151*, paras 153-166, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2020_151.pdf (accessed 17 May 2021).

⁶⁶ Eckert et al., "Compendium High Level Review of United Nations Sanctions", 60-1.

EU horizontal sanctions and the courts: Questions of interface

Clara Portela

Introduction

One of the most recent trends in the foreign policy sanctions of the European Union (EU) is the increasing adoption of ‘horizontal’, or ‘themed’, sanctions regimes.¹ Country-label sanctions regimes focus on a specific country, representing the traditional form of sanctions. Horizontal sanctions regimes, by contrast, address a specific norm violation without circumscribing its scope to geographical limitations, allowing for the listing of individuals and entities irrespective of their location or national affiliation. From 2018 to 2020, the EU consecutively adopted three thematic sanctions regimes, in a departure from the longstanding country-label preference that characterized its sanctions record.² These regimes concerned three distinct challenges: cyberattacks, the use of chemical weapons, and human rights abuses.

For decades, horizontal sanctions regimes remained typical for U.S. practice, where they co-existed with country-label regimes. The first transfer occurred from the United States to the United Nations (UN). In the aftermath of the September 11 attacks, the UN Security Council (UNSC) set up its first themed regime in the framework of its 1276 sanctions regime of 1999, which was later split into two, one sanctions regime focused on Afghanistan and a terrorism blacklist.³ The terrorism blacklist remains the only thematic sanctions regime within UN practice to our days. By contrast, the horizontal organizational logic has found some adepts among Washington’s allies, who recently started adopting themed sanctions regimes, on a national level or collectively in the framework of the EU.⁴ This chapter analyses the trend towards the ‘horizontalization’ of sanctions and identifies the challenges it presents in terms of interface management. A first section briefly presents horizontal sanctions regimes, differentiating them from geographic sanctions and illuminating the drivers of their introduction to the EU. A second section focuses on the EU’s experience with horizontal sanctions, focusing on its most recent addition, the human rights sanctions regime partly modelled on the U.S. Global Magnitsky Act of 2016.⁵ Some key implementation and interface challenges that lie ahead for this tool, as well as their political implications, are discussed in a final section, followed by a conclusion.

From targeted to horizontal sanctions

The introduction of targeted sanctions considerably enlarged the options available to policy-makers.⁶ Firstly, they admit various types of targets, including rebel groups, economic

¹ Clara Portela, “The Spread of Horizontal Sanctions”, *CEPS Commentary* (Brussels, 2019).

² Bastien Nivet, “Les sanctions internationales de l’Union Européenne: soft power, hard power ou puissance symbolique?”, *Revue Internationale et Stratégique* 97 (2015): 129-38; Niklas Helwig, Juha Jokela and Clara Portela, “EU Sanktionspolitik in geopolitischen Zeiten”, *Integration* 4 (2020): 278-294.

³ Charlotte Beaucillon, “Opening up the horizon: The ECJ’s new take on country sanctions”, *Common Market Law Review* 55, no. 1 (2018): 387-416.

⁴ Clara Portela, “Horizontal sanctions regimes: Targeted sanctions reconfigured?”, in *Research Handbook on Unilateral and Extraterritorial Sanctions*, ed. Charlotte Beaucillon (Cheltenham, 2021).

⁵ U.S. Congress, Global Magnitsky Human Rights Accountability Act, Public Law 114-328, 130 Stat, 2533.

⁶ Margaret Doxey, “Reflections on the sanctions decade and beyond”, *International Journal* 64, no. 2 (2009): 539-549.

sectors, banks, state and private companies, harbors, vessels and private individuals. Importantly, targeted sanctions can affect both private and public actors, depending on whether the sender aims at a government or not. In addition, sanctions can be targeted at specific territories within a state, such as a province under the control of a rebel faction. While targeted sanctions are not entirely unproblematic in terms of humanitarian effect,⁷ negative consequences on the populations are mitigated by focusing on certain segments of the economy only. In addition, targeted sanctions are valued by practitioners and scholars alike for their ‘scalability’, as they allow senders to adjust to changing circumstances and modifications in target behavior.

By contrast, horizontal sanctions are not a new type of measures, but rather an organizational principle for the establishment of blacklisting. Blacklists are routinely employed by those issuing targeted sanctions. The themed organizing logic displays certain advantages compared to country regimes. Horizontal blacklists can be employed to target individuals and entities beyond the reach of country sanctions regimes. While most country sanctions address specific crises – such as electoral violence, armed conflict, the assembling of a nuclear bomb or the spoiling of a peace process – global, horizontal blacklists enjoy the flexibility of accommodating different situations which may not be linked to a specific crisis. This may include practices by local, foreign or multinational enterprises in conflict zones or areas of limited statehood, such as the exploitation of natural resources contributing to grand corruption or gross human rights violations. A global horizontal list may be used to address transnational organized criminality or illicit networks trafficking in arms or military technology.⁸ Global Magnitsky designations include the Gupta brothers who, according to the U.S. Treasury, ‘leveraged [their] political connections to engage in widespread corruption and bribery, capture government contracts, and misappropriate state assets’ in South Africa.⁹ Thus, a global horizontal list is suitable to tackle transnational challenges.

The EU horizontal sanctions regimes

While the EU’s embrace of targeted sanctions has a long tradition,¹⁰ themed blacklists are unusual in Brussels’ practice.¹¹ Until 2017, the EU only operated one thematic sanctions regime: the terrorism list. All remaining sanctions regimes were country-focused. This started to change in 2018, when the EU adopted a sanctions instrument to address the use of chemical weapons, allowing it to target those “involved in the development and use of chemical weapons anywhere”.¹² A second horizontal blacklist against cyber-attacks saw the light of the day in 2019.¹³ Invariably, their adoption responded to foreign policy crises.

⁷ Erica S. Moret, “Humanitarian impacts of economic sanctions on Iran and Syria”, *European Security* 24, no. 1 (2015): 1-21.

⁸ Peter Wallensteen and Helena Grusell, “Targeting the right targets? The UN use of individual sanctions”, *Global Governance* 18, no. 2 (2012): 207-230.

⁹ U.S. Department of the Treasury, “Treasury sanctions members of a significant corruption network in South Africa”, Press Release (Washington, D.C., 10 October 2019), <https://home.treasury.gov/news/press-releases/sm789> (accessed 3 May 2021).

¹⁰ Anthonius de Vries and Hadewych Hazelzet, “The EU as a new actor on the sanctions scene”, in *International Sanctions: Between words and wars in the global system*, eds. Peter Wallensteen and Carina Staibano (Frank Cass, 2005): 95-106.

¹¹ The official ‘Principles for the use of restrictive measures’ do not mention the notion of horizontal regimes. Council of the European Union, “Basic Principles on the use of restrictive measures (Sanctions)”, Brussels, 7 June 2004.

¹² Council Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons OJ L259 (Brussels, 15 October 2018).

¹³ Council Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States OJ L129/13 (Brussels, 17 May 2019).

The emergence of the anti-terrorism list at the beginning of the century implemented a UN mandate following the September 11 attacks.¹⁴ Brussels then added its own entries, thereby giving rise to the EU's terrorism blacklist. By contrast, the impulse for the most recent thematic regimes came directly from the European Council.¹⁵ They followed, respectively, toxic attacks in Syria and Southern England, and a series of cyberattacks launched from outside the EU. Out of the 40 EU sanctions regimes currently in force, only the four abovementioned examples lack a country connection, while the remaining 36 focus on countries, either autonomously, supplementing or implementing UN measures.¹⁶ The sanctions regime against the use and proliferation of chemical weapons constituted the second horizontal sanctions regime of the EU.¹⁷ It represents its first coercive instrument against chemical weapons.¹⁸ Previous EU non-proliferation sanctions on Pyongyang and Tehran had been agreed against the background of a pre-existing UNSC mandate.¹⁹ By contrast, the EU sanctions regime against chemical weapons is not based on a UNSC mandate. This regime originated from toxic attacks against civilians detected in the Syrian civil war since 2012, most of them by the armed forces. Efforts to attribute responsibility failed due to polarization at the UNSC, which encouraged a coalition of countries to rally behind the 'Partnership against Impunity', a French initiative launched to promote accountability.²⁰ Shortly after, the Salisbury incident galvanized British activism favoring a strong reaction, which combined with the French initiative to bring about a list dedicated to tackle chemical weapons attacks. Consequently, the listings featured officials from a Syrian laboratory, alongside Russians suspected of plotting the Salisbury attack. The third horizontal sanctions regime, adopted in May 2019, addresses cyberattacks.²¹ The enactment of this sanctions regime followed a mandate by the European Council from October 2018, which called for a sanctions regime to respond to and deter cyber-attacks. The resulting sanctions regime only considers cyber-attacks with a 'significant effect'. It addresses cyber-attacks against the Union and its members, third states or international organizations. The cyber-attack sanctions regime explicitly dissociates the attribution of responsibility from blacklisting: "Targeted restrictive measures should be differentiated from the attribution of responsibility for cyber-attacks to a third state. The application of targeted restrictive measures does not amount to such attribution, which is a sovereign political decision".²² The fourth EU sanctions regime is the human rights sanctions regime. The inspiration came from the US. Horizontal sanctions regimes are typical for the U.S. sanctions system. The U.S. Global Magnitsky Act has a direct predecessor in the 'Sergei Magnitsky Rule of Law Accountability', enacted in 2012 in reaction to the torture and murder of the Moscow accountant Sergej Magnitsky, who allegedly uncovered a large-scale corruption scheme. The legislation only listed individuals implicated in the incident. In 2016, following intense lobbying by Magnitsky's employer, British-American Bill Browder, Congress

¹⁴ Beaucillon, 2018 (see footnote 3).

¹⁵ Viktor Szép, "New intergovernmentalism meets EU sanctions policy", *Journal of European Integration* 42, no. 6 (2020): 855-871.

¹⁶ This count includes EU autonomous measures and EU sanctions supplementing UN regimes. See EU sanctions map, <https://www.sanctionsmap.eu/#/main> (accessed 28 April 2021).

¹⁷ See footnote 12.

¹⁸ Clara Portela and Erica S. Moret, *The EU sanctions regime against chemical weapons: Upholding a taboo under attack*, EUISS Brief 17, (Paris: EUISS, 2020).

¹⁹ Brendan Taylor, *Sanctions as grand strategy* (London: IISS, 2010).

²⁰ Ministry of Foreign Affairs of France, "International Partnership against Impunity for the Use of Chemical Weapons: Declaration of Principles" (Paris, 23 January 2018).

²¹ Council Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States OJ L1 129/13 (Brussels, 17 May 2019).

²² Ibid.

adopted new legislation titled 'Global Magnitsky Human Rights Accountability Act' to address grave human rights violations and corruption worldwide.²³ The key innovations with respect to the 2012 act are its universal reach and the inclusion of the fight against corruption, which was absent from its precursor.²⁴ The first round of listings, published the following year, featured a mix of thirteen designees spanning Africa, America, Asia and Europe. Following the Global Magnitsky model, Canada passed the 'Justice for Victims of Corrupt Foreign Officials Act' in 2017, blacklisting individuals from Myanmar, Russia, Saudi Arabia, South Sudan and Venezuela in several sanctions waves.²⁵ The Baltic republics replicated Magnitsky legislation, emulating the original Magnitsky model rather than the global iteration.

The transfer of a global human rights blacklist from Washington to Brussels did not only follow Mr. Browder's lobbying, but was also promoted by the U.S. State Department, who conducted an active campaign in Europe and enjoyed the endorsement of the European Parliament.²⁶ The Netherlands officially proposed the establishment of an EU human rights sanctions regime in November 2018,²⁷ earning the applause of European civil society organizations.²⁸ In December 2020, the EU approved its horizontal sanctions regime to address serious human rights violations.²⁹ While the U.S. and Canadian Acts explicitly cover corruption, this feature remains absent from the EU regime.

Interface challenges

When implementing horizontal sanctions listings, various challenges can be anticipated in the interface with different judicial or semi-judicial bodies at different levels: national courts, European courts, and international courts.

The interface between due process guarantees at the UN and the EU

The most visible instance of interface between EU autonomous sanctions and UN sanctions can be found in the area of due process guarantees. Its connection resulted from European Court of Justice jurisprudence, unsuspectedly unleashed by litigation initiated by a designated individual. The claimant, Mr. Kadi, was designated under a UN resolution implemented by the EU in its anti-terrorism blacklist. After the Court of Justice of the EU ruled in favor of the claimant in what became the landmark 'Kadi' judgement of 2008, numerous individuals challenged their designations, which led to frequent annulments.³⁰ By 2017, cases regarding restrictive measures ranked second amongst those most often

²³ The White House, Executive Order 13818, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption" (Washington, D.C., 21 December 2017). Built upon the U.S. Congress 'Global Magnitsky Human Rights Accountability Act' of 2016.

²⁴ Francisco Javier Zamora and Maria Chiara Marullo, "La *Global Magnitsky Act* de los Estados Unidos: Sanciones internacionales contra corrupción y violaciones graves de los derechos humanos", *Ordine Internazionale e Diritti Umani* (2019): 535-549.

²⁵ 'Justice for Victims of Corrupt Foreign Officials Act' (Statutes of Canada, 18 October 2017).

²⁶ European Parliament resolution on a European human rights violations sanctions regime 2019/2580(RSP), (Strasbourg, 14 March 2019).

²⁷ Stef Blok, "Closing remarks at a meeting on the EU global human rights sanction regime" (The Hague, 20 November 2018).

²⁸ Open letter from non-governmental organisations in support of a targeted, global EU human rights sanctions regime, 5 December 2018.

²⁹ 3738th Council meeting Foreign Affairs, *Doc. 14949/19* (Brussels, 9 December 2019): 6.

³⁰ Clara Portela, "National implementation of United Nations Security Council sanctions: Towards fragmentation", *International Journal* (Canada) 65, no. 1 (2009): 13-30.

heard by the Court.³¹ This particular interface challenge led to a highly unusual situation: the EU, traditionally a fierce supporter of multilateralism and of UN authority, was failing to give effect to UN listings because of the lack of due process guarantees at the UN, causing a great deal of uneasiness among members of the UNSC. The “due process crisis” induced a crisis of confidence at the UN whose magnitude has been compared to that unleashed by the 1990 Iraqi embargo.³²

The crisis could be resolved with the establishment of a focal point that eventually evolved, in 2009, into the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee. Her role is to independently review requests from individuals, groups and entities seeking to be removed from the list. Although the role is not judicial in nature, all of the appointees so far have been former judges. While the figure of the Ombudsperson has been criticized as insufficiently guaranteeing due process rights due to her non-judicial nature, her recommendations on de-listings have been invariably accepted by the UNSC. Regardless of debates about the adequacy of the role of the Ombudsperson and her office, the arrangement put in place as a result of the interface challenge described remains peculiar: a fully-fledged judicial review at the European level co-exists with a non-judicial or quasi-judicial review at the UN level. Despite the discrepancy in the status of both reviews, their co-existence has managed to de-conflict a potentially difficult interface challenge. Other than the terrorism blacklist, there are no horizontal lists at the UN. Further interface challenges may arise with other senders, in particular the US. Despite close coordination with Washington in sanctions policies, full alignment is inviable on account of the due process *problematique* outlined above. This difference in approach became most evident in the EU's response to calls for the imposition of sanctions on senior Russian business and political figures by Russian opposition members following the jailing of opposition leader Alexei Navalny in January 2021. A diplomat from an EU member state confirmed this approach: “If we go after oligarchs, we need to make sure that we have a sound legal basis, so that they are not overturned by a court challenge later down the line”.³³ Illustratively, after the EU announced the listing of four Russian officials in response to the detention of Navalny and the repression of peaceful protests that ensued as the inaugural blacklist of its human rights sanctions regime, the United States followed with the listing of seven individuals and more than ten companies.³⁴

The enforceability of visa bans

EU sanctions legislation stipulates the conditions under which exemptions may be dispensed. The procedure for granting exemptions to private actors differs depending on whether the regime originates from the UNSC or it is an autonomous EU regime: When the EU implements UN-mandated sanctions, the authority to grant exemptions remains with the relevant UN Sanctions Committee. By contrast, exemptions from autonomous sanctions regimes are granted by national authorities. However, visa bans are implemented directly by member states. Exemptions from visa bans are contemplated under stipulated

³¹ Court of Justice of the European Union, *Annual Report* (Luxembourg, 2017).

³² Compendium of the High Level Review of United Nations Sanctions, A/69/941-S/2015/432 (New York, November 2015).

³³ Quoted in Andrew Rettman, “Pro-Kremlin oligarchs to avoid EU sanctions, for now”, *EU Observer*, 19 February 2021, <https://euobserver.com/foreign/150988> (accessed 3 May 2021).

³⁴ BBC, “Alexei Navalny: US imposes sanctions on Russians”, 2 March 2021, <https://www.bbc.com/news/world-us-canada-56255694> (accessed 3 May 2021).

conditions, such as humanitarian need or to allow for the attendance of designees of official meetings and dialogue process, in which case a no-objection procedure applies.³⁵ The exemption is granted unless a member state raises an objection within two working days. In case of objection, the Council decides whether to grant the exemption by qualified majority. By way of illustration, the EU human rights sanctions regime stipulates the following exemption procedure.

*“A Member State wishing to grant exemptions [...] shall notify the Council in writing. The exemption shall be deemed to be granted unless one or more of the Council members raises an objection in writing within two working days of receiving notification of the proposed exemption. Should one or more of the Council members raise an objection, the Council, acting by a qualified majority, may decide to grant the proposed exemption.”*³⁶

Enforcement of EU sanctions generally rests with member states authorities, while the Commission monitors the alignment of national law and penalties with the provisions of EU sanctions legislation. In the event of misalignment, the Commission invites member states to take corrective action, and, as a last resort, retains the power to launch an infringement procedure against member states failing to implement EU legislation.³⁷ Contrary to the implementation of financial and economic measures like asset freezes or selective trade embargoes, the Commission lacks oversight or enforcement powers with regard to visa bans. This interface challenge was confirmed by High Representative Josep Borrell commenting on a brief stopover of blacklisted Venezuelan Vice-President Delcy Rodríguez at Madrid airport in January 2020,

*“[T]he Commission cannot initiate any infringement procedure regarding a possible travel ban violation. Travel bans are in practice only contained in Council Decisions. Consequently, the Commission does not play a role in monitoring the implementation and cannot initiate an infringement procedure.”*³⁸

The Supreme Court of Spain, dealing with a complaint filed by a Spanish political party against a cabinet member who met Ms. Rodríguez at the airport, ruled that commitments derived from CFSP acts are political rather than legally binding, and thus, their enforcement is not subject to judicial review. Instead, the court implied that the enforcement of CFSP decisions remains in the hands of the Council of the EU.³⁹

This brings to the fore the contrast between, and thus the interface challenge relating to, the enforceability of the two measures combined in horizontal sanctions regimes: asset freezes fall within the realm of Community competence, are subject to the oversight of the Commission and are fully enforceable. By contrast, visa bans falls outside the oversight and enforcement powers of the Commission, and according to the Spanish domestic

³⁵ Clara Portela, “Member States resistance to EU foreign policy sanctions”, *European Foreign Affairs Review* 3, (2015): 39–61.

³⁶ Art. 2(8).

³⁷ Council of the European Union, “Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy”, doc. 5664/18, (Brussels, 4 May 2018).

³⁸ European External Action Service, “Venezuela: Speech by HR/VP Josep Borrell at the European Parliament on sanctions’ implementation”, Strasbourg, 11 February 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/74515/venezuela-speech-hrvp-josep-borrell-european-parliament-sanctions%E2%80%99-implementation_en (accessed 28 April 2021).

³⁹ Administración de Justicia, “Causa Especial No 20084/2020” (Madrid, 26 November 2020), at 3.3.2.

courts, are not legally binding. This creates a state of affairs prone to implementation conflicts. The question is how to ensure compliance with visa bans, as well as the respect for the exemption procedures, given that the issuing of visas remains an exclusive competence of member states. When tabling the draft text of the human rights sanctions regime, the Commission raised this issue by requesting the “oversight on the implementation of the travel bans”,⁴⁰ which, however, failed to make its way into the final text as it was rejected by the Council. Member states authorities may defy the visa bans without fearing consequences other than generating political discomfort, undermining the credibility of the tool, and most centrally, of EU unity. In addition, there is a risk that, faced with legal challenges over visa ban implementation, domestic courts in other EU countries may interpret CFSP obligations as being legally binding, generating controversy over their enforceability.

The relationship between horizontal listings and judicial or semi-judicial bodies

A perennial interface challenge of horizontal sanctions regimes exists with regard to the relationship between listings and international criminal justice, as well as with processes taking place at the national level, such as criminal justice or transitional justice mechanisms.

As explained above, no mechanism disciplines the allocation of designations to country-based regimes or thematic lists. As a result, individuals and entities may be listed, indistinctively, in a country-label sanctions regime or horizontal sanctions regime for the same wrongdoing. Furthermore, there is no impediment to simultaneous listings in both of them. Illustratively, some EU designations for toxic attacks feature simultaneously on the Syria sanctions regime and the sanctions regime on chemical weapons, both of which include involvement in toxic attacks as a designation criterion. As a result, certain – but not all – actors implicated in chemical weapons use in Syria feature on both lists. Multiple listings abound in the practice of the US, which listed Iran’s Islamic Revolutionary Guards under seven sanctions authorities.⁴¹ The comparative ease of removing entries from country-labelled lists as opposed from horizontal lists is exemplified in the separation of the Afghanistan list from the general terrorism sanctions regime in 2001. This disaggregation was meant to facilitate the delisting of Taliban members at Afghan government’s request, which was granted privileged access to the Sanctions Committee, with a view to promoting Afghan reconciliation.⁴²

Multiple listings bear the potential of generating controversy in terms of their relationship to international criminal justice, in particular when no explicit connection has been defined. While country-label listings – or at least a majority thereof – can be expected to be lifted once the political crisis they address has been resolved, horizontal sanctions regimes do not raise such expectation since they are detached from specific crises. Since no corrective or compensatory steps leading to the de-listing of targets are suggested in the applicable legislation, the question arises of whether de-listing is possible at all. One can speculate whether listings in horizontal sanctions regimes must result in national or international prosecution before they are removed. This reading is particularly plausible since the listing criteria in many horizontal blacklists feature actions typified as criminal. The designation criteria of the chemical weapons sanctions regime refer to natural persons

⁴⁰ European Commission, “Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide”, Press Release (Brussels, 19 October 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (accessed 28 April 2021).

⁴¹ James Gibney, “Trump’s sanctions are losing their bite”, *Bloomberg*, 2 April 2020.

⁴² Peter Romaniuk, “Responding to terrorism”, in *The UN Security Council in the 21st Century*, eds. Sebastian von Einsiedel, David M. Malone and Bruno Stano Ugarte (Boulder, Lynne Rienner, 2016): 277-298, 290.

“involved in manufacturing, acquiring, possessing, developing, transporting, stockpiling or transferring chemical weapons, or using chemical weapons”,⁴³ actions banned under the Chemical Weapons Convention. Similarly, the EU human rights sanctions regime mentions torture and slavery, criminalized under international law. Furthermore, it alludes to a number of international treaties, such as the Convention on the Rights of the Child, the Genocide Convention or the European Convention for on Human Rights, and, not least, the Statute of the International Criminal Court.⁴⁴

The U.S. Global Magnitsky Act considers prosecution of a designee for the activity for which sanctions were imposed as a reason for delisting.⁴⁵ This corroborates the quality of designations as an ersatz for prosecution – if appropriate prosecution happens, designations become redundant. However, prosecution is not the only possible outcome from a listing, at least in theory. The Global Magnitsky legislation also foresees the termination of a listing when the designee has “credibly demonstrated” a “significant change in behavior” and “credibly committed” not to engage in similar actions in the future.⁴⁶ So far, the record does not offer a clear pattern: of the thirteen persons listed in the first round of designations in the Global Magnitsky Act, three individuals had faced charges at home.⁴⁷

The EU has not declared any specific policy in this regard. In the past, it listed war criminals Radovan Karadžić or Ratko Mladić in a dedicated country-label sanctions regime after they had been indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), in a bid to support the work of this ad-hoc UN body.⁴⁸ By contrast, the EU human rights regime remains silent as to whether individuals will be designated in the expectation that they will be brought to justice, and whether designees will be removed from the list following indictment. Similar considerations apply to quasi-judicial processes such as processes of transitional justice.

In the absence of guiding principles for de-listing, additional interface challenges may arise between judicial bodies or quasi-judicial processes. In one scenario, national or international courts may request the listing of indictees, following the ICTY example, to incentivize their extradition and support the international visibility of the judicial process. Another possible scenario is that quasi-judicial bodies or transitional justice bodies may request the de-listing of individuals who have been granted an amnesty. Such actions may not always be aligned with EU foreign policy considerations.

When domestic or international prosecution of designees is pursued, sanctions may be taking a step toward the judicialization of these measures.⁴⁹ Dutch Foreign Minister Stef Blok advocated an EU human rights sanctions regime as an instrument ‘to supplement the criminal law’.⁵⁰ Scholars have been highly critical of this phenomenon,⁵¹ likening blacklists

⁴³ Art. 2 of Council Decision (CFSP) 2018/1544.

⁴⁴ Art. 1 and 2 of Council Decision (CFSP) 2020/1999.

⁴⁵ Section 1263, at (g)(2).

⁴⁶ Global Magnitsky Human Rights Accountability Act 2015.

⁴⁷ Anton Moiseienko, *Corruption and Targeted Sanctions* (Queen Mary Studies in International Law 35, Brill, 2019).

⁴⁸ Council Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY) OJ L315/52 (Brussels, 11 October 2004).

⁴⁹ Vera Gowlland-Debbas, “Security Council change: The pressure of emerging international public policy”, *International Journal*, 65, no. 1 (2009): 119-39.

⁵⁰ Blok 2019 (see footnote 27).

⁵¹ Marieke De Goede, “Blacklisting and the ban: Contesting targeted sanctions in Europe”, *Security Dialogue* 42, no. 6 (2011): 499-515.

to ‘criminal procedures’,⁵² or as a ‘mélange of politics and criminal justice’.⁵³ This depiction is particularly true of horizontal sanctions regimes: Because they are not linked to the resolution of any specific crisis, these tools can easily adopt an open-ended character that turns temporary freezes into de-facto confiscations and quasi-permanent bans.

Conclusion

In principle, the interface challenges concerning the implementation of horizontal EU sanctions regimes are common to all blacklists, irrespective of whether they are country-labelled or horizontal. However, these interface challenges are exacerbated in the case of horizontal sanctions regimes on account of their open-ended nature and their detachment from specific political crises. Three main interface challenges are identified: Between the UN and the EU, the key challenge is the discrepancy in due process standards, which can be successfully managed thanks to adaptation on the UN side. Between the EU and the domestic level, a potential problem relates to the ‘non-enforceability’ of visa bans, an anomaly that sets it apart from asset freezes. Finally, the still undefined interface between international tribunals and the domestic court systems of targets’ countries of nationality or operation can be expected to become a future source of confusion – if not tensions.

⁵² Wallenstein and Grusell 2012, 217 (see footnote 8).

⁵³ Moiseienko 2019, 5 (see footnote 46).

US engagement with the EU

Richard M. Nephew¹

Over the last twenty years, the United States and the European Union have generally striven to create a cooperative relationship, one marked by transparency, information-sharing, and harmonization to a significant degree. In many respects, this reflects the overall U.S. relationship with the EU's member states, most of which are also longstanding U.S. allies in NATO. But, it also represents the culmination of a significant amount of effort on the part of the United States, EU member states, and the EU itself.

That said, there are points of friction and disagreement within the relationship, no matter who has been in charge in Brussels, the EU's member state capitals, or Washington. Some of this is natural, stemming from the routine interplay of national interests and disagreements over policies great and small. But, there have also been more systemic differences of opinion, particularly as relates to how to manage global problems such as climate change, WMD proliferation, or international financial crime.

Sanctions policy can serve as a microcosm for examination of these various issues because, at one point or another, it has served as a source of stability in the relationship and as a source of disconnect. Rather than focus on the individual political issues that have driven disagreement, this piece will focus on systemic and structural areas of strength and weakness in the relationship. This is because individual cases can sometimes serve as sources of agreement or disagreement due to the idiosyncratic circumstances that pertain to that case alone. Systemic and structural issues, by contrast, tend to persist no matter the topic and are also potentially more susceptible to problem solving.

Strengths in the relationship

There are four key strengths in the US-EU sanctions policy relationship that merit consideration:

1. Information-sharing is relatively easy
2. Broad-based trust in the integrity of information
3. Routinized channels of communication
4. Established procedures that are translatable

On the first, though there are differences among the various member states of the European Union, it is relatively easy for the United States and EU member states to share information, particularly sensitive information that may even derive from intelligence sources. U.S. intelligence agencies may flinch in sharing intelligence with Russia or China, even when doing so could potentially prevent illicit conduct; concerns over sources and methods persist, and for good reason. However, with EU member states, they are relatively more cooperative and prepared to facilitate sharing.

In a sanctions context, that's important because it can enable action to be taken far more swiftly than when countries have to rely on less quality and detailed information to substantiate their sanctions requests.

This takes me to the second point: the importance of broad-based trust in the integrity of information passed. Though certainly there have been instances in which the EU has taken U.S. intelligence information skeptically – and the reverse has also been true – the day-to-

¹ The manuscript was finalized in November 2020.

day relationship is sufficiently robust that routine information has continued to be treated as accurate and credible nonetheless. Vetting and other procedures naturally are part of the process of deciding whether to utilize information that may have been passed (especially in order to address the legal requirements for designation in Europe and in the United States), but it is easier to do so on the basis of an assumed level of credibility, seriousness and integrity.

Routinized communications channels also make cooperation on sanctions enforcement matters easier and more effective. As mundane as it may appear, merely having regular embassy contact with officials is a major boon for sanctions cooperation. The U.S. Mission to the European Union in Brussels – and companion embassies in EU capital cities – was always able to schedule meetings with EU officials to pass along information that was received. There were agreed procedures for doing so, ways of passing back questions and commentary, and opportunities for regular US-EU contact via travel. The lines of communication were frequently open and, particularly after 2010, there was a greater level of interpersonal communication among officials that also enabled transparency, information sharing and trust.

Lastly, the existence of established procedures that also make sense in other contexts is a crucial, if unstated, part of the success in the relationship. The United States and the EU do not have similar procedures on a gross political scale, with the EU needing to manage 27 member states and the United States more concerned with its interagency process and Congress. But, for both sides, there is a clear understanding of how the other's process works. There are ways for the actors in both sets of institutions to be briefed on the status of developments, to comprehend how developments will mature within those processes and – where appropriate – how they might respectively offer their own opinions and information to shape the outcome. Other settings do not have nearly the same interaction and transparency, and the resulting opacity can make it harder to work collaboratively.

Weaknesses in the relationship

No relationship, however strong, is without its irritants and frustrations, especially when matters of international security, political sovereignty, and economic interest are intrinsic elements of what's at stake.

In the US-EU sanctions relationship, there are two weaknesses that merit consideration:

1. Differing legal and conceptual approaches; and,
2. Limitations in system capacity.

On the first, it is fair to say that while the United States and the European Union have a common vision about many international problems, they do not always see eye-to-eye. But, when it comes to sanctions policies, the differences are far more fundamental and pronounced.

As a threshold matter, the EU generally speaking does not prefer to harness its broad economic power in executing economic coercion against an individual target. The EU is prepared to impose sanctions upon targets, denying them access to EU markets and territory. But, it is unwilling to leverage that position to coerce non-EU businesses, banks, and individuals to abandon business opportunities with sanctions targets. While the United States freely utilizes the SDN list as a messaging device to international actors, the EU is reluctant to do the same. Secondary sanctions – where the U.S. SDN list is weaponized as a means of denying access to the U.S. economy for any entity or individual that does business with US-sanctioned targets – is completely off the table. Doing so would require threatening Russia, China, India, or other major economic partners with denial of access to European

markets. Conceptually, this is something that – to date – the EU has been extremely reluctant to consider, even when involving egregious violators of human rights or terrorists. By contrast, the United States often looks for ways to lend greater weight to national action. Even absent secondary sanctions, the United States will use its designation of entities and individuals as a rhetorical device, suggesting that others follow its good example. But, even when European market share is stolen by those prepared to do business with those the EU abandons in deference to sanctions, there is no willingness to impose costs upon them.

This is not because the EU is unaware of the potential benefits of doing so; rather, there is a conceptual disagreement about whether such a practice ought to be entertained. They have argued many times in the past, including in private, that to do so is to engage in extraterritorial practices, a violation of international law in their rendering. For the United States, by contrast, there is nothing extraterritorial about creating a set of consequences for activities that are inconsistent with U.S. interests. Indeed, the United States is not forbidding others to engage in business with designated Iranians, Russians, or Hezbollah; it is simply establishing the consequences of doing so with respect to U.S. business opportunities.

A related problem stems from the political attractiveness of sanctions in the United States, certainly as compared to that in Europe. As noted above, the EU has a clear understanding of how sanctions can come to pass in the United States, including how members of Congress and congressional committee staff can develop and pass sanctions legislation. But, this clear understanding does not mean that there is agreement with it and, moreover, the degree to which the U.S. infatuation with sanctions use has contributed to disagreements with Europe in the past. From the mid-1990s Helms-Burton legislation on Cuba and Iran-Libya Sanctions Act (ILSA) through the 2017 Countering America's Adversaries Through Sanctions Act (CAATSA), there have often been legislative acts that the EU and its antecedents have opposed notwithstanding consultation.

This raises a question about whether the disagreements matter or not. After all, any international political relationship will have differences of view, especially on matters of security and economic policy. It is probably most fair to say that the differences matter much more when the relationship is more fragile or under strain than when it is not. The 2010 Comprehensive Iran Sanctions Accountability and Divestment Act (CISADA) was not necessarily a popular piece of legislation in Europe and certainly was less so in 2015-2016 after the Joint Comprehensive Plan of Action (JCPOA) was reached. However, its passage was part of a broader, agreed strategy for confronting Iran and, consequently, disagreements about it were easier to manage. By contrast, ILSA did not comport with the EU's general approach toward Iran and – consequently – it was more problematic in US-EU relations, leading to threats and counter-threats until a political solution was reached in 1998.²

Conceptual arguments aside, there are also more persistent interface challenges. The limitation in relative system capacity is a particularly pernicious one, especially in the context of the hyper-sanctions era that has typified the last twenty years. While the United States has literally hundreds of professionals in the U.S. government that are at any one time working on sanctions cases, the EU itself had – at one point – a single person. He was responsible for not only the diplomatic problems of finessing the views of then-28 member states, but also the requirements of assembling and developing sanctions cases. Of course, he was aided by the member states of the EU and their various different agencies, but

²U.S. State Department, "Secretary of State Madeleine K. Albright: Statement on 'Iran and Libya Sanctions Act (ILSA): Decision in the South Pars Case'", London, 18 May 1998, <https://1997-2001.state.gov/statements/1998/980518.html> (accessed 5 August 2021).

overall the European Union itself often lagged behind the United States in institutional capacity to develop and execute sanctions cases.

The result was that the United States was able to develop and execute more sanctions cases than the EU often was, especially once the EU began losing cases in court over grounds of violating the due process rights of those subject to the sanctions. The EU had previously been able to short-cut some of the capacity issues that it had by minimizing its sanctions case development, but this was harder to do in the new legal era absent a reliance on very broad sanctions justifications (such as being employed by a sanctioned country's government). This became harder in the new legal environment.

Though the United States and the EU were able to work through some of these challenges, the reality still was that while there may be a U.S. team working with its EU colleagues on one challenge – that of Iran, for instance – another entire U.S. team may be simultaneously engaging with the EU on another. As an anecdotal matter, while I was negotiating the JCPOA with my EU colleague responsible for sanctions, he was simultaneously negotiating Russia sanctions with my boss. Moreover, the EU system requires the participation of local Brussels diplomatic missions. Some missions have sanctions-dedicated personnel, while others have mission officers who hold many different jobs within the missions in question. As another demonstration of capacity challenges, this too can lead to congestion.

Of course, within the United States, the process is not entirely smooth either: there are many different levels of the U.S. government that are involved in sanctions decisions, as well as the other parts of the government – particularly Congress – that are relevant to sanctions actions. If anything, though, this suggests that the United States may have too much capacity for sanctions policymaking, particularly on especially contentious issues, and that can present its own complications in identifying and articulating a common, consistent message.

This highlights a related weakness: the nature of the bureaucracy that afflicts both the United States and the European Union as they seek to employ sanctions. Both sides have systems that they understand and make sense, even as they are different; as noted above, this is a strength. But, these systems still require significant commitment of resources and effort in order to be effective. This is a positive element, from one vantage point, as it limits the possibility of capriciousness in sanctions, especially when multiple legal checks are required (as in the U.S. system, in part pursuant to the Administrative Procedure Act) and political checks (in the EU system). But, the presence of bureaucracy with its own quirks and issues also complicates the nature of the relationship. Take the manner of designating individuals and entities for sanctions. In the United States, there are dozens of people who are involved in the development of sanctions cases, from the intelligence officer to the policy officer to the lawyer. In order for a designation to go through, each of these people – and their bosses – have to sign off on the decision. The interagency process in the United States applies the same approach across another 2-3 agencies, depending on the nature of the designation. A lot of hands touch a case before it is permitted to be designated (at least in most scenarios). The EU has the same sort of bureaucratic requirement, but across 27 governments. Any one of the people tasked to review and approve a case could decline or ask for more time.

If this improves the outcome, then so much the better; that, after all, is the real task of bureaucracy, to vet decisions appropriately so that bad ones are avoided and good ones improved. But, in any system, there is the possibility of bureaucratic bad faith: decisions blocked in order to advance the unrelated interests of the blocker, either on a personal level or on behalf of an organization. The EU's recent consideration of sanctions against Belarus over the questionable results its August 2020 presidential elections was blocked

for a time by Cyprus, seeking to obtain support for sanctions against Turkey over its military operations in the Eastern Mediterranean Sea.³ This was hardly the first time that the consensus-based sanctions decision-making in Brussels led to problematic arguments and, in part as a response to such chicanery in the past, the EU's High Representative for Common Foreign and Security Policy has even suggested ending consensus requirements for sanctions decision-making and to instead handle them under Qualified Majority Voting.⁴ But, it does highlight the continuing difficulty of managing the bureaucratic hurdles that exist for sanctions policy, particularly when coordination between allies is sought.

Conclusion

Overall, the fundamentals of the US-European sanctions relationship are strong. There are organized processes for coordinating action and sharing information, and there is a broad political agreement that sanctions have an important part to play in managing national security and foreign policy issues. Turbulence in the relationship is not uncommon of course, and the Trump Administration's time in office has also been one in which coordination between the EU and the United States suffered (notably in relation to sanctions against Iran⁵ and Russia⁶). But, there is a significant base of substantive agreement and cooperation that has endured. Even over the last four years, the United States and the European Union have coordinated on sanctions concerning Belarus, Ukraine, and human rights violators the world over. Process improvements can be made, but the basis for cooperation is strong and sustainable so long as the political environment remains conducive to it. The biggest challenge facing the relationship today is the differing stances on various political problems around the world and the conceptual underpinnings of their respective sanctions approaches. These ought to be the focus of future work between officials across the Atlantic. Importantly, as the EU continues to adapt to the disruptions created by the Trump Administration and particularly its readiness to impose sanctions on European entities for violations of U.S. sanctions on Iran, Russia, Venezuela, and other targets, it will be important to avoid EU efforts to maintain an independent foreign policy approach becoming the source of new tensions. For example, the EU may insist that the United States fore-swear future sanctions policies that would punish European companies for engaging in trade or other business activities with U.S. sanctions targets. The United States will almost certainly rebuff such attempts, regardless of who is the president, and the resulting tensions could result in a more general clash over whether and how to employ sanctions. To be more productive, the U.S. and the EU may instead consider new consultative mechanisms that strengthen their partnership – based on the already in place good practices and procedures – while identifying ways of avoiding surprise and tension. These mechanisms could be more regularized and routinized, for example, and allow for greater debate over practical and political concerns. The United States could accept this theoretical diminution

³ Lorne Cook, "EU leaders overcome Cyprus veto, agree to Belarus sanctions", *AP News* (online), 2 October 2020, <https://apnews.com/article/turkey-europe-alexander-lukashenko-belarus-cyprus-4e5a75706a2ff211e3439cee2f3fa37c> (accessed 5 August 2021).

⁴ Ana Garcia Valdivia, "Josep Borrell: Green Light To EU's New Foreign Policy Chief", *Forbes* (online), 9 October 2019, <https://www.forbes.com/sites/anagarciavaldivia/2019/10/09/josep-borrell-green-light-to-eus-new-foreign-policy-chief/?sh=182baf5c1117> (accessed 5 August 2020).

⁵ Carol Morello, "European powers refuse to back U.S. call for escalating sanctions against Iran", *Washington Post* (online), 19 June 2020, https://www.washingtonpost.com/national-security/european-powers-refuse-to-back-us-call-for-escalating-sanctions-against-iran/2020/06/19/5f4d26ae-b253-11ea-a567-6172530208bd_story.html (accessed 5 August 2021).

⁶ America Hernandez, "EU countries protest US sanctions in warning to Washington", *Politico* (online), 13 August 2020, <https://www.politico.eu/article/eu-countries-protest-us-sanctions-say-german-officials/> (accessed 5 August 2021).

of its freedom of action if, for example, the EU were to agree to cooperate in managing future challenges, such as that presented by Russian or Chinese investment in Europe. Put another way, the United States and the EU could channel their reasonable differences of perspective and view as to the place and logic of their respective sanctions approaches into more effective ends. The conceptual differences may persist but, as with so many other challenges, they do not need to undermine the broader sense of collaboration that otherwise typifies the US-EU relationship; instead, they can be channeled constructively.

III. Transparency and compliance: Interfaces in monitoring and enforcement

The UN sanctions regime on Libya and sustaining peace: Not so ‘smart’ after all?

Moncef Kartas

Introduction

On 17 November 2017, the UN Special Representative of the Secretary-General (SRSG), in stressing the challenges of impunity for grave crimes and an economy of predation, for the first time reflected warnings that the UN Panel of Experts on Libya (the panel) had been raising since 2014.¹ The panel had shed light on the armed groups’ predatory practices and concluded that there was no incentive for the conflict parties to find a political solution to the Libya crisis as long as they could benefit from their privileged access to state resources.

The UN presents targeted sanctions as a tool to promote peace and stability, most notably in the case of so-called “country-specific sanctions regimes”. These targeted sanctions (also called smart sanctions) are very different in nature to those of non-proliferation or counter-terrorism regimes and, therefore, require a different approach in terms of design, implementation and monitoring. As a policy (not a punitive) tool, they should support an overall political process aimed at certain political objectives that ultimately advance the maintenance or restoration of international peace and security.² To develop and maintain this political strategy towards peace, the Security Council needs to constantly adapt and correct the sanctions regime in line with changes in the country context.

Through an analysis of the situation regarding Libya, this contribution argues that critical weaknesses within the UN sanctions system itself are undermining the ability of targeted sanctions to be ‘smart’ and effective in advancing these broader goals.

Firstly, at the policy level, inadequate attention has been paid to linking sanctions regimes to political processes within a comprehensive policy and strategy “encompassing peace-keeping, peacebuilding and peacemaking.”³

Secondly, at the operational level, the Security Council and its sanctions committees fail to strategically use the panels/groups of experts (expert groups) to develop a comprehensive assessment and evaluation of the impact of sanctions regimes, or to strengthen their implementation and adaptation to further their broader goals. Expert groups apply a narrow and technical case-based approach to their investigations, focusing on specific cases of sanctions violations. This approach leaves little room for analysing and reporting on broader dynamics. It also reduces the metrics of ‘success’ of the sanctions regime to the number of designated entities rather than the ability of sanctions to contribute to peace and stability.

Finally, the interface between the Security Council and its sanctions committees on the one side, and the expert groups, the Member States, UN agencies and other transnational organisations on the other side is dysfunctional, resulting in significant missed opportunities for a more strategic and effective use of sanctions as tools for peace.

The paper concludes with recommendations for strengthening the Security Council’s sanctions system in order to better realise the potential power of UN sanctions for promoting peace and stability.

¹ Remarks of the *Special Representative of the Secretary-General (SRSG)* to the United Nations Security Council - 16 November 2017, <https://unsmil.unmissions.org/sites/default/files/srsg-ghassan-salame-briefing-to-uns-16nov2017.pdf> (accessed 9 June 2021).

² United Nations Security Council, *SUBSIDIARY ORGANS OF THE UNITED NATIONS SECURITY COUNCIL* (New York, 8 January 2021), <https://www.un.org/securitycouncil/sanctions/information> (accessed 9 June 2021).

³ See footnote 2.

Policy, implementation and measuring sanctions' effectiveness

Country-specific sanctions regimes emerged in response to heavy criticism of the use of comprehensive sanctions, such as those imposed on Iraq, that had a devastating impact on the civilian population and failed to coerce the political leadership to change its behaviour. In response to the criticism, the Security Council created these new regimes to support peace and stabilisation efforts.⁴ In 1999, the Security Council adopted Resolution 1265 (1999) on the protection of civilians in armed conflict and conceived of targeted sanctions as one of the instruments to achieve that end. Between 1999 and 2010, more than eight country-specific sanctions regimes were established in parallel to peace support missions. As smart sanctions are more complex than comprehensive sanctions, their design, implementation and monitoring require more capacities. Expert groups were created to support sanctions committees in fulfilling their obligations to oversee the implementation of sanctions regimes. A key function of expert groups is to assist the sanctions committees, and by extension the Security Council, to adapt the design of sanctions regimes to the reality on the ground. This requires detailed knowledge about the political dynamics of a country and the inner workings of highly localised conflict economies.⁵ They should also be strategically combined with other policy instruments and be “part of a broader partnership between the State in crisis and the various UN actors seeking to restore international peace and security.”⁶ In practice, the use and form of targeted sanctions is more often determined by Security Council politics rather than by an evaluation of whether they are the most appropriate tool for supporting peace.⁷

Further, the current scholarly debate around sanctions effectiveness tends towards a results-based, rather than impact-focused, measurement.⁸ In other words, inadequate attention has been paid to how to measure the impact of sanctions on the achievement of the regimes' overarching policy goals – namely their impact on reducing armed conflict and violence. An analysis of the implementation of UN targeted sanctions thus requires analysing them within the context of the overall policy and strategy for peace (or lack thereof). Section IV below discusses how, in the case of the sanctions regime on Libya, a failure to link political processes and the sanctions regime at the policy level has undermined the effective implementation of the sanctions measures.

The sanctions committee-expert group interface

Over the past two decades, expert groups have emerged and consolidated as the main tool used by sanctions committees to monitor the implementation of regimes. The development of expert groups was driven by the need of sanctions committees to obtain data, information and analysis to better understand the effectiveness of sanctions measures. When expert groups were still in their infancy, the committees provided them with the flexibility to assess their respective sanctions regimes in a holistic manner. Today, expert

⁴ “Sanctions have clearly been related to the initiation or support of peace negotiations.” As noted by M. Eriksson and P. Wallensteen, “Targeting sanctions and ending armed conflicts: first steps towards a new research agenda”, *International Affairs* 91: 6 (2015) 1387–1398, 1394.

⁵ See F. Giumelli, “The purposes of targeted sanctions”, in *Targeted sanctions: the impacts and effectiveness of United Nations action*, ed. T. Biersteker et al. (Cambridge, 2016), 50.

⁶ Security Council Report (SCR), *Compendium of the High-level Review of United Nations Sanctions* (New York, 12 June 2015), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_432.pdf (accessed 9 June 2021), 49.

⁷ See Eriksson and Wallensteen, (see footnote 4), 1392.

⁸ See as an example Biersteker, et al., (see footnote 5).

groups are 'encouraged' to focus narrowly on investigating cases of non-compliance, rather than providing more comprehensive political and economic analysis or assessing obstacles to the implementation.⁹ The latter would include highlighting what cannot be adequately investigated by an expert group. This narrow approach has inhibited a dynamic for better implementation at the interface between the Security Council, the committee, member states and the expert groups.

The sanctions committee is the Security Council's operational formation in charge of overseeing the implementation of sanctions measures. The ultimate responsibility of implementing the measures rests with the UN member states. Based on Chapter VII of the UN Charter, the Security Council authorises member states to take measures that otherwise could be in conflict with international law and the norms of friendly relations and cooperation. In contrast to comprehensive sanctions, targeted measures are very arduous to put in place. Member states must establish administrative capacities and pass rules and regulations that also affect the private sector. The adoption of sanctions measures requires dedicated resources to investigate non-compliance and to (potentially) submit to the sanctions committee the names and details of entities for designation. It is, however, the role and responsibility of the Security Council and sanctions committees to ensure that the measures are adapted to the policy objectives, are fit for purpose, and that all UN agencies align their programming to the sanctions regime. This duty-sharing between the Security Council, its sanctions committees, and member states has proven dysfunctional.

The first expert group was created as a specific response to the sanctions committee's incapacity to adequately manage the sanctions regime for Angola. In 1999, Robert Fowler, the Canadian chair of the committee, grew frustrated with the inertia of the regime and the obvious violations of the arms embargo. Member states were hardly fulfilling their reporting obligations leaving the committee "blind."¹⁰ He proposed to establish an expert group to investigate why the sanctions were not working.¹¹ The Angola group of experts' first report (known as the 'Fowler Report') was blunt, comprehensive, and attracted much attention.¹² In 2000, the Security Council adopted Resolution 1295 (2000) establishing a monitoring mechanism that laid the foundation for future expert groups.

The interaction between a sanctions committee and an expert group depends largely on the committee chair's willingness and capacity to support and guide the group to be the committee's "eyes and ears".¹³ Chairs can have a huge influence on the dynamic of a sanctions regime. This relationship proved crucial for the development of innovative approaches to sanctions monitoring in the early years. Initially, each chair and their respective expert group had their own mode of interaction and style. Some chairs were very supportive and eager to "hear" what their experts had to say. Expert groups developed novel approaches and perspectives on looking at conflicts and the impact of sanctions. One example is the first Democratic Republic of the Congo (DRC) panel that focused on the

⁹ The monitoring team established pursuant to resolutions 1267 (1999) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, is not country specific and does not conduct investigations.

¹⁰ See e.g. A. Vines, "Can UN Arms Embargoes in Africa Be Effective?" *International Affairs*, 83:6 (2007), 1107-1121.

¹¹ See A. Vines, "Monitoring UN sanctions in Africa: the role of panels of experts", *Verification Yearbook*, ed. T. Findlay (London, 2003), 247. Also A. Boucher and V. Holt, "Targeting Spoilers: The Role of United Nations Panels of Experts", (Washington, DC, 2009), 26.

¹² See United Nations Security Council, *Report S/2000/203 (New York, 10 March 2000)*, <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sanc%20S2000%20203.pdf> (accessed 9 June 2021); The Panel was established pursuant to resolution 1237 (1999).

¹³ See for example Compliance and Capacity Skills International (CCSI), *Best Practice Guide for Chairs and Members of Sanctions Committee* (New York, 2020), 19.

political economy of conflict.¹⁴ Many interesting investigative tools gained prominence, such as the tracing of small arms and light weapons.

However, some of the reports of that era stirred up a lot of controversies and expert groups faced a backlash. Some member states who were exposed in the reports sowed doubt on the methodology and evidentiary standards of expert groups. Russia and China, who have long held a critical stance towards sanctions, strongly criticised some reports and in some cases threatened to block them. As a result, the effervescence of the early days did not last.

Efforts quickly turned towards standardising the modus operandi of expert groups. With the effort to make groups more “technical”, the notion of using them creatively was lost. Most importantly, the dynamic relationship between committee chairs and expert groups became the exception rather than the rule. In 2006, the Informal Working Group of the Security Council on General Issues of Sanctions developed best practices and guidelines on the working methods of expert groups and committees, on methodological standards for reporting, and on the technical format of reports.¹⁵ In 2015, the High-level Review recommended more performance assessment and standardisation, based on the notion that ‘disciplining’ the groups would strengthen their integrity and protect them from their detractors.¹⁶ But it was also the expression of a willingness to shift the expert groups’ attention from broader political dynamics of sanctions to a more “quasi-legal” focus on cases and potential designation for listing. This has led to a serious misconception of the work of experts (who are not legal investigators operating within a legally-established law enforcement system) and could risk creating a false parallel between sanctions measures and criminal law.

The standardisation of expert groups has largely turned into an end in itself that obfuscates the inertia of current sanction regimes resulting from poor implementation by member states. The key factors with the sanctions regime on Angola, Sierra Leone, Liberia and DRC, for example, was that the expert groups’ reports were able to be used to mobilise member states and private actors to take more responsibilities in the implementation of sanctions measures. The chair of the committee and /or other interested parties have to use the monitoring mechanism to promote implementation. The Libyan case, detailed in section IV, illustrates the effect of a lack of strategic coherence of the sanctions regime and the political peace process, and the resulting lack of leadership from the sanctions committee in mobilising member states and UNSMIL in implementing sanctions measures.

The UN sanctions regime on Libya: Dysfunctional interface management

The UN sanctions regime on Libya offers an interesting case study of the ramifications when the Security Council fails to adapt their sanctions policy and strategy to the situation on the ground. The failure was both the result and the cause of a dysfunctional interface between the sanctions committee, the panel, UNSMIL, the Libyan authorities, and the member states. The panel provided useful analysis on the diversion of weapons and illicit activities of armed groups, but its case-based approach meant it could not report on broader implementation issues. The lack of strategic orientation exacerbated the committee’s passive management of the sanctions regime.

¹⁴ See Boucher and Holt, (see footnote 11), 31.

¹⁵ United Nations Security Council, *S/2006/997* (New York, 22 December 2006), <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WG%20Sanctions%20S2006997.pdf> (accessed 9 June 2021).

¹⁶ See footnote 6, 41.

What strategy after the fall of Qaddafi?

In February 2011, the Security Council condemned, in Resolution 1970 (2011), the Qaddafi regime's use of force against civilians and the repression of peaceful demonstrators. It imposed a series of measures, including an arms embargo on transfers from and to Libya, an assets freeze and a travel ban, aimed at preventing further violence and serious human rights abuses. One month later, the Security Council Resolution 1973 (2011) authorised further measures to protect civilians, including the establishment of a no-fly zone. These measures were clearly intended to prevent the regime from accessing external support and to limit foreign support to the insurgent groups. The resolution prohibited the use of mercenaries and listed key figures of the Qaddafi regime as well as strategic Libyan financial and economic institutions. It also requested that the UN Secretary-General (UNSG) establish a panel of experts.

Resolutions 1970 and 1973 (2011) formulated a clear policy objective for sanctions, namely the protection of the civilian population. However, tensions soon arose between Russia and China, and several Western and Arab countries over the simultaneous enforcement of the no-fly zone by NATO members and allies and their provision of arms to the insurgents in violation of the arms embargo. This created the first serious tensions within the sanctions regime, resulting in a loss of support and focus for a common strategic policy approach towards establishing peace in Libya.

In September 2011, the Libyan National Transitional Council (NTC), the internationally recognised governing authority, was experiencing serious infighting. Nonetheless, the Security Council adopted Resolution 2009 (2011) welcoming the "improved situation" in Libya. It introduced exemptions to the arms embargo allowing the transfer of arms and related material – including training and other support – for security or disarmament assistance to the Libyan authorities with advance notification to the sanctions committee. In March 2012, the Security Council further weakened the embargo provisions and slimmed down the panel from eight persons to five, even though the panel's report to the committee hardly painted a picture positive enough to warrant less restrictive measures. In contrast, the report hinted at many disconcerting factors, most notably, the Libyan authorities' total absence of arms control and weapons and ammunition management capacities. One year later, as armed groups were interfering with the transitional process and the decisions of the General National Council (GNC), Libya's transitional legislative authority, the Security Council further amended and relaxed provisions on the enforcement of the arms embargo in Resolution 2095 (2013).¹⁷ This was despite the panel providing a picture illustrating the high risks of diversion in an extreme volatile context where government structures were controlled by competing political and military figures linked to several dominant armed groups.¹⁸

Unfortunately, the panel's report was weak in its political analysis and lacked recommendations. There were several reasons for this: Most member states neighbouring Libya showed very little capacity or willingness to support the panel in their investigations and

¹⁷ Paragraphs 9 and 10 of 2095 (2013) not only abolished notifications, but also introduced the term "non-lethal" material. It created a category that is not defined and not relevant in conventional arms trade. In the UN Register of Conventional Arms, Category Two includes: Self-propelled vehicles, with armoured protection and cross-country capability designed and equipped to transport a squad of four or more infantrymen. It includes armoured personnel carriers, on which the committee had failed to provide proper guidelines to member states. See UN Register of Conventional Arms, <https://www.unroca.org/categories> (accessed 9 June 2021).

¹⁸ See United Nations Security Council, *Report S/2012/163* (New York, 20 March 2012), <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%202012%20163.pdf>, (accessed 9 June 2021).

analysis; the panel had only five members, including two arms experts; and the Permanent Five (P5) had diverging views regarding the sanctions committee. Most significantly, however, was the fact that, despite the dynamic situation on the ground, a large share of the panel's resources remained focused on investigating cases of embargo violations in 2011. The cases were well-researched and showed how key countries, such as the UAE, had violated the embargo to support the insurgency in East Libya. But these cases had little relevance to the situation on the ground in 2013 and they were unhelpful in providing information that would assist the sanctions committee and the Security Council in their task of reviewing and adjusting the policy objectives and measures of the sanctions regime. In fact, these investigations continued until the panel's final report of 2017. The absence of guidance from the chair in the use of the panel's limited resources was an example of the weakness of the interface management between the sanctions committee and the expert group. A more decisive attitude by the chair in directing the panel could have brought an end to these inefficient investigations much sooner.

Sanctions and arms control – an integrated approach to peace support missions

The Libyan case is one of the best examples of a missed opportunity to use sanctions in a smart and integrated manner. Fundamentally, the Security Council and the UNSG fell short to integrate sanctions efforts into an overall strategy on Libya. This stands in stark contrast to the recommendation of the 2015 High-Level Review to mainstream sanctions in the UN system, “as part of a broader partnership between the State in crisis and the various UN actors seeking to restore international peace and security.”¹⁹

Monitoring sanctions implementation requires a strong interface between the sanctions committee, expert group, member states, UN agencies, and other relevant organisations. However, the Security Council's Resolution 2009 (2011), failed to link the mandates and work of the panel and UNSMIL in a complementary way. According to the resolution, UNSMIL supports the Libyan government but is not mandated to contribute directly to the implementation of the sanctions measures. At the same time, the panel is not mandated to work with the Libyan government to strengthen its capacity to enforce measures, for example, through the adaptation of its military procurement process to the arms embargo. The resolution language even explicitly directs the panel away from assessing the arms control capacities of Libyan authorities, thus denying a key opportunity for integrating the monitoring mechanism into the assistance provided to the Libyan authorities.

From an arms control perspective, Resolutions 2009 (2011) and 2095 (2013) also unnecessarily complicated the exemption mechanism established in 1970 (2011), instead of enabling the development of a mechanism specifically adapted to the new situation, which would have been more useful. As in all subsequent resolutions, the exceptions²⁰ were “intended solely for security or disarmament assistance to the Libyan government”.²¹ Yet, none of the paperwork required for making exemption requests included any substantial verification of the intended purpose of the equipment.

From 2014 to 2018, the panel made various recommendations aimed at making it as simple as possible to determine in its investigations whether transfers of equipment would be in non-compliance with the arms embargo - a determination that became very contested

¹⁹ See footnote 6, p. 49.

²⁰ Exemptions require either advance approval by committee (no Member says no) or an advance notification to the committee and the absence of negative decision (the majority of the Members says no). Exceptions do not require the committee's decision, but may be subject to notification, i.e. a member states must inform the committee about the transfer of equipment or provision of training.

²¹ United Nations Security Council, *Resolution 2009 (2011)*, (New York, 16 September 2011), paragraph 10, [https://www.undocs.org/S/RES/2009%20\(2011\)](https://www.undocs.org/S/RES/2009%20(2011)), (accessed 9 June 2021).

around the emergence of two competing governments. The panel suggested, for example, to introduce a “single port of entry” model, which would have made it easier to determine whether a transfer was authorised by the proper authorities or not. The panel’s reports highlighted that the arms embargo was having little impact. It noted, armed groups’ leaders were directly connected with key figures in the Libyan ministries and controlled part of the government and therefore could produce legal end-user certificates. Until mid-2014, the sanctions committee provided exemptions and was notified about most military equipment and related material that made its way to Libya that ultimately ended up in the hands of armed groups.

Overall, the panel’s logic was to tie the exemptions and notifications closer to a Libyan arms control process. In reality, the sanctions committee failed to establish relationships with the Libyan authorities. A close interaction between the Libyan authorities and the committee would have shown whether the Libyan authorities had any capacity to control the purchase, transfer and safe stocking of military and security equipment. It would have also allowed for a direct communication between the committee and the Libyan authorities, and would have stressed that sanctions measures were not punitive but supportive of the transition in Libya. What is more, the sanctions committee, with UNSMIL, could have tied in key neighbouring member states to raise their awareness and pressure them on their responsibility regarding the sanctions regime. A clear strategy and policy would have given the sanctions committee an operational focus and encouraged it to take a more assertive and pro-active stance in managing the sanctions regime. Without clear strategy the committee’s work was easily paralysed by the increasing tensions among the P5 and the obstructionist attitude of the ten elected members of the Security Council (E10) that had specific interests in the Libyan conflict.

Finally, the sanction committee’s lack of strategic initiative is further laid bare by the fact that none of the UNSG reports on the situation in Libya between 2012 and 2014 mention any specific UNSMIL contribution to the monitoring or implementation of the sanctions regime. In practice, UNSMIL restricted itself to providing some logistical support to the panel but did not systematically collect or share information regarding the sanctions regime. One reason for this is that UN agencies tend to be reluctant to be linked to sanctions for fear that that it could affect their mandate, politicise their technical assistance, alarm their potential partners, or be an obstacle to building confidence and working relationships with national institutions. These concerns are legitimate, but the sanctions committee could have addressed them, at least in part, by maintaining an active relationship with the Libyan authorities.

The blind side of a case-based approach

The narrow focus of the panel on cases of potential non-compliance with the sanctions regime, discussed above, drew its attention away from providing a broader assessment of the sanctions regime interfaces. This approach only compounded the failure of the sanctions committee to even attempt to integrate sanctions measures into the assistance provided to the Libyan authorities.

Further, a case-focus requires the panel to obtain ‘leads’ and to follow those that are most promising. However, promising leads are not necessarily the most relevant cases for assessing and monitoring the effectiveness of sanctions measures. For example, after 2011, outsized importance was placed on the illicit flows of weapons out of Libya. As the panel had limited access to Libya, their investigations focused on the information and leads provided by other cooperative countries. The panel was certainly aware that armed groups diverted approved arms transfers into Libya, and that some member states transferred, or at least enabled the covert transfer of, military equipment to armed groups. But the lack of

leads that would meet the evidentiary standards made it impossible for the panel to report on these sanctions violations. This became especially evident during 2014 when the armed conflict between the Karama and Dawn coalitions, and Haftar's siege of Benghazi ended any hope of a peaceful transition.

In August 2014, the Security Council reacted to the escalation in violence by tightening the arms embargo and considerably broadening the sanctions regime. It introduced a list of new designation criteria seeking to target spoilers. However, the situation in Libya was far more complex than simply a matter of spoilers obstructing the political transition. The panel reports detailed two important phenomena within this complexity: 1) the transfer of material to Libya with the support of foreign countries; and 2) the existence of black markets and the trafficking of small arms and light weapons (SALW) out of Libya. However, the sanctions committee and the Security Council adopted a narrow view of the Libyan conflict, focusing on the diffusion of SALW to extremist groups in Libya and the region as the main priority and area of agreement among the P5 and E10. They did not address the role of external players, such as member states, in perpetuating the violence. For example, the UAE, Egypt (a member of the committee for 2 years) and Jordan, were actively undermining the sanctions regime or at least providing the means to cover up individuals and entities acting in non-compliance. Again, the panel's case-based approach made it difficult to put more emphasis on states' constant disregard of the sanctions measures and their lack of cooperation with the panel's investigations.

After Haftar's launch of the Karam offensive in 2014, the design and policy of the sanctions measures were no longer adequate. Although resolution 2174 (2014) strengthened the arms embargo, the monitoring mechanism itself was no longer fit for purpose. There would have been a need for a comprehensive monitoring mission integrating neighbouring countries and regional forces. De facto since 2014, Haftar's forces managed to build up their arsenal to such an extent as to sustain an offensive on Benghazi for over three years, launch multiple offensives in the East and the South, and finally attack Tripoli in April 2019. All this happened while an arms embargo was in place.

Conclusion

Expert groups are useful tools for sanctions committees to gather information and gain a better understanding of the challenges in implementing sanctions measures. The committees' responsibility is to use the work of the expert groups to guide and pressure member states, UN agencies and others to undertake concrete steps to contribute to the implementation of the sanction measures. The success of the early expert groups did not lie in the cases they investigated, but in the way the chair and the sanctions committee utilised expert group reports to launch initiatives such as the Kimberley Process Certification Scheme for controlling rough diamond production and trade, to pressure and follow up with member states, and to review the design of the sanctions regime.

As the Libyan case demonstrates, the lack of a clear high-level strategy and policy guiding the use of sanctions to promote peace can lead to many missed opportunities to establish or strengthen a sanctions regime and its multi-layered interfaces. Without clear and shared political objectives amongst a sanctions committee's member states, the issues that the expert group analyses may not be addressed. Further, the chair and the penholders are less likely to create the space within which expert groups can undertake comprehensive analysis of the implementation challenges beyond a narrow focus on investigating individual cases of non-compliance.

A new approach is needed to the design and implementation of 'smart' sanctions regimes. First, the creation of an ad hoc commission or group composed of Security Council members and experts could develop a clear strategy and policy goals for any new regime, and, with the support of expert groups, conduct regular reviews of the sanctions measures. Second, sanctions regimes involve multi-layered interfaces that can each face multiple challenges. It would be crucial to develop broader reviews of the ways member states implement sanctions measures, i.e. looking at what concrete steps they take. This would feed into the committees' and expert groups' work. It would also offer opportunities to identify gaps, best practices and lessons learnt, and respond to member states' capacity building needs. Finally, better integration or mainstreaming of sanctions measures in peace support efforts could be enabled through the development of specific sanctions trainings for UN personnel within peace missions and other entities.

Challenging interfaces in monitoring and enforcing UN counter-terrorism sanctions

Hans-Jakob Schindler

This contribution will focus on the mandate and work of the ISIL, al-Qaida and Taliban Monitoring Team,¹ which advises both the 1988² as well as the 1267/2253 Sanctions Committees³ of the United Nations (UN) Security Council.⁴ It will argue that the Team has been specifically set up and mandated to manage a range of vertical and horizontal interfaces that are crucial to the maintenance of the 1267/2253 sanctions regime.⁵ While not being mandated to be a direct actor in the sanctions policy cycle, the regular and special reports as well as the recommendations of the Team are an important mechanism at the stage of implementation and for the development of the sanctions regime as a whole. In the first part of this article, the particular setup, mandate and work streams of the Team are described in order to clarify its specific role. The second part will focus on four vertical and horizontal interfaces the Team is managing. This will illustrate that the challenges encountered during the monitoring of the implementation and effectiveness of the sanctions measures and the maintenance of their effectiveness can only be met through a complex process involving stakeholders sitting at vertical and horizontal interfaces. Therefore, the process of sanctions design and development should be understood as a complex network of information flows and negotiations rather than a hierarchical process. The final part of this contribution will summarize the main lessons learned from the interface management challenges the Team faces in reporting on and facilitating the implementation of sanctions measures.

Unique setup – multiple interface functions of the Monitoring Team

The mandate and work of the Monitoring Team differs in several structural aspects from expert panels/monitoring groups that advise other sanctions committees of the Council. The Team has been set up and mandated by the Council, not primarily as an investigative

¹ The official name of the Team is “Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning ISIL (Da’esh), Al-Qaida and the Taliban and associated individuals and entities”, see United Nations Security Council, “ISIL (Da’esh) & Al-Qaida Sanctions Committee – Monitoring Team – Work and Mandate”, <https://www.un.org/securitycouncil/sanctions/1267/monitoring-team/work-and-mandate> (accessed 30 May 2021). For ease of reference, it will be referred to as the Monitoring Team or the Team.

² The 1988 Sanctions regime is not a counter terrorism sanctions regime and has unique structural and political complexities. Therefore, the contribution will only focus on the 1267/2253 Sanctions Regime. For an overview of the work of the 1988 Sanctions Committee and work of the Team for this regime, see United Nations Security Council, “1988 Sanctions Committee”, <https://www.un.org/securitycouncil/sanctions/1988> (accessed 30 May 2021).

³ The official name of the sanctions regime and the sanctions committee is “Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities”, see <https://www.un.org/securitycouncil/sanctions/1267>. For ease of reference, these will be referred to as the Committee and the sanctions regime.

⁴ For ease of reference, it will be referred to as the Council.

⁵ *Vertical interfaces*: Flow of information between Member States and the Committee, in particular listing and delisting requests and feedback on potential adjustments of the sanctions measures. *Horizontal interfaces*: Flow of information between international organizations, such as the Financial Action Task Force (FATF) or private sector stakeholders and the Committee.

body but to serve multiple interface functions. This is due to the particular structures of the two sanctions regimes the Team services.

Both the 1988 as well as the 1267/2253 sanctions regime have enjoyed a broad political consensus among the members of the Council since their inceptions. This is demonstrated by the regular passing of resolutions updating the regimes, which have normally been passed with the full consensus of the Council,⁶ even when the Council is deadlocked politically on other, related issues such as for example the situation in Syria.⁷ Furthermore, the 1267/2253 sanctions regime is a horizontal sanctions regime, covering international terrorism as it pertains to al-Qaida, the Islamic State in Iraq and the Levant (ISIL) and their various affiliates. Therefore, the mandate of the Team is not geographically defined but focused on the actors and actions of these two global terrorism networks.⁸

Consequently, the Team acts within three distinct workstreams. The first involves a continuous analysis of the developing threat posed by al-Qaida, ISIL and their affiliates.⁹ In order to fulfill this task, the Team is the only UN body with an explicit mandate “to consult, in confidence, with Member States’ intelligence and security services, including through regional forums”.¹⁰ Due to this specific mandate, the ten members of the Team are all former government officials from UN Member States, five of which hailing from permanent members of the Council. This enabled the Team to establish a global network of contacts within intelligence services and counter-terrorism authorities.¹¹

The second workstream focuses on developing recommendations on how the existing sanctions regime and its measures could be further refined to respond to the developing terrorism threat.¹² The Committee decides on these recommendations by consensus.¹³ Due to this consensus decision by the Committee, which is comprised of the 15 members of the Council, many of the recommendations of the Monitoring Team are subsequently

⁶ The latest resolution updating the mandate of the 1267/2253 Sanctions Committee and the Monitoring Team is UN Security Council Resolution 2368 (2017) (adopted 20 July 2017) available at [https://www.un-docs.org/S/RES/2368%20\(2017\)](https://www.un-docs.org/S/RES/2368%20(2017)) (accessed 17 May 2021). In addition, the Council regularly updates the mandate and work of the Team and Sanctions Committee via other related resolutions dealing with counter-terrorism issue. For an overview of all relevant resolutions, see <https://www.un.org/securitycouncil/sanctions/1267/resolutions>.

⁷ See, for example, “‘Lifeline’ Syria Aid Measure Lapses Over U.N. Security Council Deadlock”, *New York Times* (online), 10 July 2020, <https://www.nytimes.com/2020/07/10/world/middleeast/syria-aid-united-nations.html> (accessed 10 May 2021).

⁸ For a summary of the Team’s mandate, see United Nations Security Council, “Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning ISIL (Da’esh), Al-Qaida and the Taliban and associated individuals and entities – Work and mandate”, <https://www.un.org/securitycouncil/sanctions/1267/monitoring-team/work-and-mandate> (accessed 17 May 2021). The current details of the Team’s mandate are established in paras. 94 – 101 and Annex I of Resolution 2368 (2017), see footnote 6. The Team’s mandate is reviewed and renewed via a resolution every two years, see para. 94 of Resolution 2368 (2017).

⁹ This threat assessment also forms the basis of the Secretary General’s regular reports on the global threat posed by ISIL, see para. 101 of Res. 2368 (2017).

¹⁰ See footnote 8.

¹¹ The penultimate paragraph of each regular report by the Team outlines its international engagements as well as the regional meetings of intelligence services that the Team had convened during the reporting period. See for example para. 106 of S/2020/53, available at <https://undocs.org/en/S/2020/53> (accessed 17 May 2021). Due to the outbreak of the coronavirus, no meetings were organized in 2020.

¹² See footnote 8.

¹³ The decisions of the Committee on the recommendations can be found at United Nations Security Council, “ISIL (Da’esh) & Al-Qaida Sanctions Committee: Reports on the Committee’s position on expert group recommendations”, <https://www.un.org/securitycouncil/sanctions/1267/docs/reports-position> (accessed 27 May 2021).

included in Council resolutions focusing on the threat posed by ISIL and al-Qaida.¹⁴ The Team also has a mandate to bring to the attention of the Committee reports of non-compliance with existing sanctions measures.¹⁵ In order to enable the Team to fulfill this task, it is mandated to cooperate not only with Member States but also with important intermediaries, such as other UN missions, agencies, and bodies, the Financial Action Task Force (FATF), the International Civil Aviation Organization (ICAO) and others as well as relevant private sector stakeholders.¹⁶

The third workstream of the Team concerns support for the management and maintenance of the ISIL (Da'esh) & Al-Qaida Sanctions List.¹⁷ In this respect, the Team is on the one hand supporting Member States and the Committee in the preparation of listing and delisting request for individuals and entities¹⁸ as well as supporting the Committee in its decision making concerning the management and maintenance of the List,¹⁹ and supporting the work of the Ombudsperson.²⁰

These three workstreams outline the various interfaces, the management of which is one of the Team's core functions. These interfaces run vertically in the sanctions' adjustment process, such as the interface with Member States, the Committee and the members of the Council. They also run horizontally at various levels such as the interfaces with the Ombudsperson, intermediaries like international organizations and private sector stakeholders. However, it is important to note that the Team is mandated in a purely advisory function in this web of interfaces and is not a direct actor within the sanctions process as such.²¹ Therefore, the Team is continuously engaged in stakeholder management along

¹⁴ The consensus among members of the Committee facilitates the Council's decision to include the recommended changes into a new resolution since all Council members had already agreed in principle at the level of their delegates in the Committee. For a brief description of this functionality, see for example Hans-Jakob Schindler and Frederique Gautier, "Looting and Smuggling of Artifacts as a Strategy to Finance Terrorism Global Sanctions as a Disruptive and Preventive Tool", *International Journal of Cultural Property* 26, no. 3 (2019): 331-342.

¹⁵ Res. 2368 (2017), Annex I (h) (see footnote 6).

¹⁶ See footnote 8.

¹⁷ United Nations Security Council, "Sanctions List Materials: ISIL (Da'esh) & Al-Qaida Sanctions List", https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list (accessed 27 May 2021). For ease of reference referred to as "the List".

¹⁸ Res. 2368 (2017), Annex I (k), (l), (p), (q), (r) (see footnote 6).

¹⁹ Which includes listing, delisting, and review processes, see Res. 2368 (2017), Annex I (c), (j), (k) (see footnote 6). Several review processes that are conducted concurrently: Annual review of reportedly deceased individuals/defunct entities on the list, annual review of list entries that are missing essential data elements, annual review of those list entries that have not been reviewed for 3 or more years (in total around 30% of the List every year). See Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) Concerning Isil (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, *Guidelines of the Committee for the Conduct of its Work* (as amended on 5 September 2018), https://www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/guidelines_of_the_committee_for_the_conduct_of_its_work_0.pdf, page 12ff (accessed 17 May 2021).

²⁰ Res. 2368 (2017), Annex I (b) (see footnote 6). The office of the Ombudsperson receives delisting requests directly from listed individuals and entities, without a Member State acting as an intermediary. After analysis of all available information and direct, multiple communication and interviews with the individual or representatives of the entity that requested to be delisted, the Ombudsperson comes independently to a conclusion whether the respective individual or entity continues to fall under the listing criteria of the sanctions regime or whether a sustained change in behavior has occurred and makes a recommendation to retain or delist the individual or entity to the Committee. See <https://www.un.org/securitycouncil/ombudsperson>.

²¹ Crucially, the Team is not mandated to make direct suggestion on which individuals or entities should be included in the Sanctions List and only "(k) To consult with the Committee or any relevant Member States, as appropriate, when identifying that certain individuals or entities should be added to, or removed from, the ISIL (Da'esh) & Al-Qaida Sanctions List; (l) To bring to the Committee's attention new or noteworthy circumstances that may warrant a delisting, such as publicly reported information on a deceased individual;"; Res. 2368(2017), Annex I (see footnote 6).

those vertical and horizontal interfaces during its work concerning the implementation, monitoring, maintenance and development of the sanctions regime.

Interface management challenges in monitoring implementation and effectiveness – case studies

Four regularly recurring challenges interacting with respective interfaces illustrate that the monitoring, operational implementation as well as management of the effectiveness of the sanctions regime and its provisions requires continuous vertical as well as horizontal interface management.

Interface with intermediaries for global implementation

The first interface challenge stems from the horizontal nature of the sanctions regime and its global coverage. All three sanctions measures – travel ban, asset freeze and arms embargo – relate only to individuals and entities that are included on the sanctions list²² and their implementation is binding for all Member States.²³ The List also includes individuals and entities in nearly all regions. As a consequence, only a global and, as much as possible, harmonized implementation of these measures can ensure their effectiveness by avoiding gaps created by uneven implementation. However, the capacity of the Team with ten members is not sufficient for continuous global monitoring. Consequently, intermediaries at horizontal interfaces take on a significant role. These intermediaries not only operationalize the broadly formulated sanctions provisions but also use their own monitoring systems to promote and document their implementation. One of the most significant intermediaries in this respect is the FATF.

The FATF²⁴ has included the implementation of the sanctions regime in its Recommendation 6.²⁵ In order to promote and encourage the implementation of its recommendations, the FATF has developed a mutual evaluation process with financial regulators in Member States. The results of this process are documented in publicly available mutual evaluation reports.²⁶ Although gaps remain, significant progress has been achieved in the overall defensive mechanisms of the global financial system against the misuse of its services for the financing of terrorism.²⁷ Due to the complementary nature of the work of the FATF, the

²² For a summary see United Nations Security Council, “ISIL (Da’esh) & Al-Qaida Sanctions Committee: Sanction Measures”, https://www.un.org/securitycouncil/sanctions/1267#sanction_measures (accessed 27 May 2021). These are updated, regularly including provisions based on previous recommendations of the Team, on average every 18 months via resolutions by the Council. The latest resolution is 2368 (2017) (see footnote 6).

²³ Since the respective sanctions resolution have been passed under Chapter VII of the Charter of the UN, see last sentence of preamble to Res. 2368 (2017).

²⁴ The FATF sets “standards and promote[s] effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing”, see <https://www.fatf-gafi.org/about/what-wedo/>.

²⁵ FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations* (Paris, October 2020), 13, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> (accessed 17 May 2021).

²⁶ These reports are based on detailed analyses of the various steps a country has taken to implement the recommendations. The FATF methodology is described here: FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems* (Paris, November 2020), <https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed 10 May 2021).

²⁷ A comprehensive overview of the current, 4th round of evaluations can be found here: <https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> (accessed May 17 2021).

Team and the Committee closely cooperate with the organization.²⁸ Through its work, the FATF not only ensures a more harmonized implementation of the asset freeze provisions of the sanctions regime but also enables the Team as well as the Committee to be continuously updated on the status and effectiveness of its implementation. The Team regularly participates in FATF meetings and deliberations and interacts with several FATF-style Regional Bodies (FSRBs).²⁹

Balancing the Committee – Member State interface

The monitoring of the effectiveness of the sanctions measures presents another significant challenge. This includes data on, for example, the amount of funds linked to sanctioned individuals or entities that Member States' authorities have frozen. While intermediaries play a crucial role in the monitoring of the legal implementation, this more operational data can only be provided by the Member States themselves. The provision of such data requires intra-governmental coordination within governments which have to comply with a number of reporting requirements from other sanctions regimes of the Council as well. This bears the risk of "reporting fatigue", meaning delayed or incomplete reporting.³⁰ Therefore, careful management of the vertical interface between the Committee and Member States is necessary in order to ensure that the relevant data is provided on a timely basis. In order to meet this challenge, the Team has been mandated to report regularly on the effectiveness of a range of specific priority subjects to limit the reporting burden on Member States.³¹ In rare cases, the Team is tasked to analyse in detail the overall global impact of a particular sanctions measure, such as the asset freeze. This requires obtaining a significant amount of detailed data from all Member States, a considerable burden for the various government authorities involved. The most recent example is the joint report

²⁸ See for example the promotion of FATF standards by the Sanctions Committee: *Asset Freeze: Explanation of Terms* (24 February 2015), paras. 28, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf (accessed May 17 2021).

²⁹ The Team has official observer status with the FATF, see FATF, "Members and Observers", <http://www.fatf-gafi.org/about/membersandobservers/>, as well as with the Eurasian Group (EAG), see EAG, "Observer states and organizations", <https://eurasiangroup.org/en/observers> (accessed 17 May 2021). Since the UN has observer status in all FSRBs, the Team is able to participate in their deliberations as well, as necessary. The FATF and FSRBs are following the same methodologies pursue joint projects and having mutual access to all available documents. See FATF, *High-Level Principles for the relationship between the FATF and the FATF-style regional bodies* (Paris, 2012 [updated February 2019]), <https://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf> (accessed 17 May 2021).

³⁰ This issue has been highlighted as a challenge for the work of all Security Council sanctions regimes for a number of years already, see for example the discussion concerning the reform of the work of the Council in 2006: UN Security Council, "Security Council Reviews Work of Committees on Nuclear Non-Proliferation, Counter-Terrorism, Al-Qaida And Taliban" (New York, 30 May 2006), <https://www.un.org/press/en/2006/sc8730.doc.htm> (accessed 17 May 2021).

³¹ These priority areas have been identified in a range of Council resolutions. Currently, these the financing of terrorism (Res. 2199 (2015), 2462 (2019)), financing of terrorism through looting and sale of cultural heritage (Res. 2347 (2017)), and impact on foreign terrorist fighters (FTFs), returnees and relocators (Res. 2396 (2017)). These priority areas are addressed specifically in the regular reports of the Monitoring Team. For the current report see: UN Security Council, S/2020/717, paras. 76-83, <https://undocs.org/S/2020/717> (accessed 17 May 2021).

of the Team and the Counter Terrorism Executive Directorate (CTED) to assess the implementation and impact of counter terrorism financing measures by Member States.³² Although such larger scale impact assessments are very instructive, the Council and the Committee use this instrument only very sparingly to avoid reporting fatigue.³³

Facilitating operational implementation: Vertical interfaces

The third interface challenge arises from the operational difficulties of targeted implementation of global sanctions by government authorities and private sector stakeholders. In order to ensure effectiveness and to limit unintended consequences, it is crucial to correctly identify those individuals and entities that are included on the List and avoid misidentifications. To meet these challenges, the regime must ensure that all data is continuously updated³⁴ and provides a sufficient basis for an effective use of all available technical identification tools.³⁵ This requires continuous vertical as well as horizontal interface and stakeholder management with the Committee, Member States, specialized agencies within Member States and international organizations, such as for example INTERPOL. The provision of biometric identification data for listed individuals is one mechanism that illustrates this vertical web of interfaces. In 2014, following a recommendation by the Team, the Committee wrote to a range of Member States requesting that their judicial authorities provide biometrical data including fingerprints and pictures of listed individuals. This was based on the assessment that a significant number of individuals on the List had prior criminal records within the countries of their birth or residence and that consequently, pictures and fingerprints were available with judicial authorities.³⁶ This biometric data is now provided by Member States directly to INTERPOL for the inclusion in the publicly available INTERPOL-United Nations Security Council Special Notices that INTERPOL issues for all listed individuals and entities.³⁷ The List provides hyperlinks³⁸ to these Special Notices which are regularly updated, including with new biometric information³⁹ whenever data on the List changes. This biometric data can now be used by government authorities and private sector stakeholders to identify individuals. For example, the use of

³² Mandated in para. 37 of Res. 2462 (2019), the report (S/2020/493) can be found here: <https://undocs.org/en/S/2020/493> (accessed 17 May 2021).

³³ The previous occasion was the special report of the Team on the threat posed by FTFs in 2015, S/2015/358, mandated by para. 23 of Res. 2178 (2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/084/57/PDF/N1508457.pdf?OpenElement>.

³⁴ As mentioned above, the regime ensures this also through regular reviews of the data on the sanctions list. The details of the procedures for these reviews were influenced by recommendations made by the Team, see UN Security Council, S/2010/653, paras. 3-23, <https://www.undocs.org/S/2010/653> (accessed 17 May 2021).

³⁵ This relates primarily to the avoidance of so called “false positives” or “false negatives” when matching the identity of individuals included in the sanctions list with the identity of customers/citizens, during know your customer (KYC) procedures or during border control.

³⁶ See UN Security Council, S/2014/620, para. 3-4, <https://www.undocs.org/S/2014/620> (accessed 17 May 2021).

³⁷ See Interpol, “United Nations Security Council Special Notices”, <https://www.interpol.int/en/How-we-work/Notices/INTERPOL-United-Nations-Security-Council-Special-Notices>. The decision to establish these Special Notices was itself a reaction to a recommendation by the Team, see: S/2006/653, para 12, <https://undocs.org/S/2006/653> (accessed 17 May 2021).

³⁸ See <https://scsanctions.un.org/r/?keywords=al-qaida>. Currently, the technical systems of the UN Secretariat, which technically hosts the sanctions list, are not able to hold biometric data.

³⁹ Following a recommendation by the Team, see: S/2015/859, paras. 13-14, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/360/76/PDF/N1536076.pdf?OpenElement>

biometric information for customer identification in the banking sector has gained traction in recent years.⁴⁰

Maintenance of effectiveness: Managing interfaces with the private sector

A fourth significant challenge relates to the adjustment of the sanctions regime to the continuously changing terrorism threat environment. Both the regular threat assessments as well as the recommendations included in the regular and special reports of the Team serve this purpose. To meet this challenge requires both vertical and horizontal interface management. Any adjustment to the sanctions measures have global effects and therefore can produce significant unintended consequences. Adjustments must therefore be both effective as well as adequately targeted. In order to achieve this, the Team has developed a range of consultation channels with private sector stakeholders, including global industry associations.⁴¹ These consultations help the Team to understand the particular systems that members of the ISIL and al-Qaida networks seek to exploit and to device recommendations for the appropriate and effective adjustments of sanctions provisions. These consultation channels gained in particular importance after the emergence of the physical califate of ISIL in Iraq and Syria after 2014. Control over physical territory encouraged the travel of foreign terrorist fighters (FTF) to and from the conflict zone, and the expansion as well as diversification of income streams for the terror group, including proceeds from the exploitation of crude oil and the looting of cultural artifacts.⁴² This required a range of adjustments to hinder these new income streams. The Monitoring Team provided a range of special reports that included a significant number of detailed assessments and recommendations, based on consultations with a wide range of Member States and private sector stakeholders.⁴³ Many of these were subsequently included in resolutions by the Council.⁴⁴ One example is the introduction of new guidelines for the private sector on the use of Advanced Passenger Information (API) and Passenger Name Record (PNR) by the World Customs Organization⁴⁵ as well as the inclusion of this provision in Annex 9 of the Convention on Civil Aviation by the International Civil Aviation Organization (ICAO).⁴⁶ These changes enable private sector stakeholders, such as airlines, to transmit such data to Member States in order to facilitate the identification of FTFs.

⁴⁰ See, for example, Edward Grant, "The rise of biometric technology in banking", *Finance Digest* (online), <https://www.financedigest.com/the-rise-of-biometric-technology-in-banking.html> (accessed 10 May 2021).

⁴¹ The private sector is operationally implementing the sanctions provisions and therefore is both the first line of defense as well as the target for the members of the ISIL and al-Qaida networks who seek to misuse their services.

⁴² For an overview of these income streams, see S/2014/815, paras. 52-82, <https://www.undocs.org/S/2014/815> (accessed 17 May 2021).

⁴³ See S/2015/739, available at <https://www.undocs.org/S/2015/739>; S/2015/891, available at <https://www.undocs.org/S/2015/891>; S/2016/210, available at <https://www.undocs.org/S/2016/210>; S/2016/213, available at <https://www.undocs.org/S/2016/213> (accessed 17 May 2021).

⁴⁴ See for example para. 17 of Res. 2347 (2017) (see footnote 12).

⁴⁵ See World Customs Organization (WCO), "Passenger Controls", <http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/security-programme/passenger-controls.aspx> (accessed 17 May 2021).

⁴⁶ See International Civil Aviation Organization (ICAO), *Annex 9 to the Convention on International Civil Aviation – Facilitation*, 15th edition (Montreal, 2017), <https://mcaa.gov.mn/wp-content/uploads/2020/01/an09-cons.pdf>, Chapter 9 B Advanced Passenger Information (API), Section 9.5.

Summary: Horizontal and vertical interface management crucial

The Monitoring Team's particular setup and mandate is distinct from other expert panels/monitoring groups supporting the sanction committees of the Council. The three primary workstreams of the Team are organized around a purely advisory role to the prime decision maker, the Committee. In order to fulfill this role, the mandate of the Team positions it within a complex web of horizontal and vertical interfaces and requires constant management of the relationships of the Team with these stakeholders. Through its regular and special reports as well as its recommendations, the Team provides crucial input to the Committee and through its members to the Council.

The short analysis of four recurring challenges illustrated that meeting these challenges requires both vertical interface management, which refers to the management of the relationship between Member States and the Committee as well as horizontal interface management, i.e. information flows to and from the Team to intermediaries, such as international organizations like the FATF or INTERPOL, private sector stakeholders, as well as specialized authorities within Member States.

As a consequence, the basic sanctioning process which includes the listing, delisting, granting of exemptions for individuals and entities, is a straightforward vertical process between Member States and the members of the Committee, with the Team as an auxiliary facilitator.⁴⁷ However, any follow-up decisions concerning the maintenance and development of the sanctions regime and the necessary adjustments to maintain effectiveness and appropriate targeting of the measures to minimize unintended consequences requires the management by the Team of a complex web of horizontal and crucial interfaces to create information flows and feedback loops to update the legal provisions of the regime appropriately to the changing circumstances of the threat environment and implementation. Two interfaces have gained importance in recent years: engagement with private sector stakeholders and regional organizations. Currently, private sector consultations are conducted by the Team in an ad hoc, needs-based manner. While the Team has developed a standard format for its consultations with intelligence services through its regular regional intelligence services meetings,⁴⁸ similar structured engagements do not yet exist with the private sector. A more structured engagement may lead to a more effective feedback loop.

Secondly, regional organizations, such as for example the European Union (EU), the African Union (AU) or the Association of Southeast Asian Nations (ASEAN) have developed into significant intermediaries. A regular and structured high-level dialogue on counterterrorism already exists between the UN, including the Team, and the EU.⁴⁹ Similarly structured dialogue forums could be developed also with other relevant regional organizations. This may provide further opportunities to strengthen the implementation and effectiveness of the sanctions regime through an additional layer of regional feedback channels.

⁴⁷ For the details of the listing process, see https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/procedures-for-listing; for delisting, see https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/procedures-for-delisting; for exemptions, see <https://www.un.org/securitycouncil/sanctions/1267/travel-ban>, <https://www.un.org/securitycouncil/sanctions/1267/exemptions/assetsfreeze>; for Ombudsperson, see <https://www.un.org/securitycouncil/ombudsperson>.

⁴⁸ See footnote 9.

⁴⁹ See, for example, UN Office of Counter-Terrorism, "Counter-terrorism: Third EU-UN High level Dialogue" (3 December 2020), https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/201203_press_release_3rd_eu-un_hl_dialogue.pdf (accessed 17 May 2021).

Enhancing compliance with EU's foreign policy sanctions through better and/or new interfaces

Antonius de Vries

About 30 years ago, the Member States (MS) of the European Union (EU) started to recognize that the “domestic” legal basis for EU sanctions against third countries should be binding EU legal acts.¹ These EU sanctions have seen a sharp increase after the entry into force of the Lisbon Treaties.² But compared with the EU's international actions in areas such as trade, environment, development cooperation, and association agreements, the use of sanctions has shown a rather limited success in attaining the objectives of the EU's External Action like global peace and security, worldwide protection and promotion of human rights, global sustainable development.³ Lack of compliance with EU sanctions within the EU has been alleged as one of the reasons for their lack of effectiveness.⁴ Failing or inadequately functioning interfaces between the relevant actors may be an important reason for this lack of compliance. Still, not much attention has been given to the question of compliance. Not only has abundant scholarly research on EU sanctions largely neglected the question, the Council of the EU itself has repeatedly complained about being in the dark on this issue as did several MS separately. The latter is surprising given that the MS keep insisting that they themselves and not EU institutions or EU agencies have to remain responsible for ensuring such compliance. In her letter to vice-President Dombrovskis dated September 10, 2019 the President of the EU Commission asked him to ensure that “sanctions imposed by the EU are properly enforced.”⁵ Does this mean that the Commission wants to play a stronger role in ensuring compliance? Or would compliance with EU sanctions be better ensured when entrusted to a European Sanctions Enforcement Authority (ESEA), which could rise to the level of action taken by the USA's Office of Foreign Assets Control (OFAC)?

The following sections analyse the roles presently played by the competent authorities of the MS and the EU in ensuring compliance with EU sanctions.⁶ A tentative assessment is given of their effectiveness in doing so. Finally, some recommendations are made for enhancing the compliance with EU sanctions, including the desirability of considering the establishment of a European Sanctions Enforcement Authority (ESEA).⁷

¹ In this article the term EU sanctions will only refer to the sanctions that the EU imposes within the framework of its Common Foreign and Security Policy (CFSP), a subset of the EU's External Action, and the former European Political Cooperation (EPC), or on the basis of sanctions adopted by the UN Security Council under Chapter VII of the UN Charter.

² Respectively the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).

³ Cf. article 21 of the Treaty on the European Union (TEU) for the full listing of the objectives of the EU's External Action.

⁴ A good overview of impact and effectivity of EU sanctions can be found in the European Parliament Briefing, of May 2018 (author: Martin Russel, Members' Research Service), doc. PE 621.870.

⁵ Clara Portela, “Implementation and Enforcement”, in *Sharpening EU Sanctions Policy for a geopolitical era*, eds. Niklas Helwig, Juha Jokela and Clara Portela (Helsinki, 2020), p. 96 (notably footnotes 264 and 266).

⁶ For remedying the problem of overcompliance with EU sanctions, see the article on this issue in this Working Paper.

⁷ As a result of time and space available for writing this article, it will not deal with enforcement resulting from public opinion or competition pressure, or “uninvited help” from overseas.

Present division of enforcement tasks between the EU and the member states

EU sanctions come in two forms. There are those for which the EU has the competence to adopt legal acts, which impose directly applicable obligations on the addressees of these acts, and those for which this competence rests with the MS.⁸ With regard to ensuring compliance with the first type of sanctions, the Treaties do not provide for a specific and rigid division of tasks between MS and EU. The principles of subsidiarity, proportionality and sincere cooperation, the last one newly formulated in article 4.3 TEU, have so far in most cases led to what one may call the “classical” approach: the EU legislates, the MS implement. This approach is largely the case for EU sanctions.⁹ In addition to the relevant provisions of the Treaties, secondary EU law on EU sanctions provides for certain rules in respect of ensuring compliance with these sanctions. This is hardly the case for Council decisions taken on the basis of Article 29 TEU. Under regulatory acts based on article 215 TFEU, MS are always obliged to lay down the rules on penalties applicable to infringements of the provisions of those acts. These penalties must be effective, proportionate and dissuasive. MS have also to take all necessary measures to ensure that these rules are implemented, and have to inform the Commission of said rules without delay after the entry into force of the act imposing these obligations. MS are also obliged to designate national authorities entrusted with the task of issuing licenses or granting authorisations, where appropriate, or to establish such an authority. Furthermore, MS and the Commission are required to inform each other of the measures taken under these acts and to share any other relevant information at their disposal in connection with these acts, such as violations and enforcement problems, judgements handed down by national courts, and authorisations granted/licenses issued by MS. Information which may affect the effective implementation of the acts has to be shared immediately. MS must notify the Commission of all their competent authorities in respect of EU sanctions, including their contact details, and to do so without delay after the entry into force of the relevant regulation.¹⁰ Natural and legal persons, entities and bodies have to supply immediately to the competent authority of the MS where they are resident or located and to the Commission (directly or via this MS) any information that would facilitate compliance with the legal acts, although this obligation shall not prejudice applicable rules concerning reporting, confidentiality and professional secrecy. These persons, entities and bodies need also to cooperate with the competent authorities in any verification of such information. There are no specifications of time frames or formats for other information sharing. A user-friendly, publicly accessible, complete and duly up-to-date list of all national enforcement authorities (NEAs) of the MS and of their respective powers, seems not to exist. One may assume, though, that MS normally entrust existing (non-sanction specific) NEAs with

⁸ Addressees should not be confused with the targets of the sanctions.

⁹ Articles 29 TEU and 215 TFEU do not speak of sanctions, but of restrictive measures, but the term sanctions is generally used. The legislative process for EU sanctions is as follows: for each CFSP sanctions regime, the Council of the EU adopts first a Council Decision on the basis of 29 TEU thereby triggering MS and/or the EU to adopt the legal acts required for giving effect to that regime. As far as the EU is concerned, it adopts legal acts that are directly applicable to the addressees within the jurisdiction of the EU on the basis of article 215 TFEU. This article enables the Council to adopt rapidly these legal acts, which is particularly useful when the EU has to ensure immediately the implementation of sanctions imposed by the UNSC. It also functions as a bridge between legal acts adopted on the basis of article 29 TEU and article 215 (TFEU). It does not provide for a role of the European Parliament (EP) in the regulatory process.

¹⁰ Since 2003 MS are no longer obliged to ensure that the Council can publish those authorities and their contact details in an annex to the first and principal Council regulation of each sanction regime, so that addressees can know immediately at the entry into force of that regulation the NEA's that are relevant to them. These annexes nowadays contain only a single web-site address of each MS, which should enable addressees to find the relevant NEAs of that MS.

the additional responsibility for ensuring EU sanctions compliance, such as: customs services, authorities entrusted with issuing/refusing export/import licenses for arms, dual-use or similar items; bodies/forces in charge of controlling the identity of persons entering the Schengen area, notably through the Schengen Information System (SIS); authorities in the financial sector, such as Central Banks, insurance sector and anti-money laundering supervisors and financial intelligence units; public prosecutor(s). However, given the great variety of economic sectors and economic operators outside the financial sector involved in the obligation to freeze economic resources, MS may find it more difficult to entrust existing NEAs with ensuring compliance with the obligation to freeze these resources, and/or to create an appropriate new one. For that reason one may expect to find non-compliance notably in respect of this obligation.¹¹

The Commission, as Guardian of the Treaties, is the main EU Institution to ensure that the MS ensure the correct application of the provisions of the Treaties and of measures and/or adopted by the EU institutions pursuant to those provisions. In its turn the European Court of Justice (ECJ) is the Commission's supervisor. But neither the Treaties, nor the relevant EU sanctions acts, prescribe specifically how and how actively the Commission has to execute its task as Guardian of the Treaties. The Commission has hardly any powers to directly enforce compliance with the EU sanctions acts by the addressees of the regulatory acts in the private sector.¹² When a MS does not or not fully fulfil its obligation to ensure compliance, the Commission can start an infringement procedure against that MS. Eventually such a procedure can result in the imposition by the ECJ of serious penalties on the MS concerned. The Commission can be empowered by the Council to adopt regulatory or implementing acts, whereby, when necessary, enhancement of compliance can be attained.¹³ It can establish formal and/or informal expert groups, in order to obtain valuable feed-back on how correct compliance with EU sanctions can be ensured. It can also publish non-binding Opinions on questions of interpretation of acts and/or adopt non-binding Recommendations on compliance, and has done so with increasing frequency.¹⁴ In 2004 the Council established a working group of representatives of MS that should enable

¹¹ The definition of "economic resources" was first used in the framework of the EU autonomous sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) and has since then always formed part of sanctions regimes that aim to freeze such items. The definition covers in fact any item that can be exchanged for funds. Exceptions are normally made for items serving essential needs of natural persons.

¹² On the difference between direct and indirect enforcement, cf. Miroslava Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'", *Journal of European Public Policy* 24, no. 9 (2017): 1348-1366.

¹³ It did so for the first time under Council (EC) Regulation 723/2000 (sanctions against the Federal Republic of Yugoslavia/Serbia and Montenegro). As a result, a management committee was created in which all MS were represented and that was presided by a Commission representative. The main task of it was (dis)approval by the MS of Commission proposals including ones concerning enforcement. The committee also functioned as a forum where MS and Commission could discuss interpretation and enforcement/compliance problems. In 2001 the Council rejected the proposal of the Commission that a management committee should be responsible for the listing of terrorists in the Annex to the Regulation on terrorism financing. Since then, the Council has kept to itself the implementing power to amend the annexes to Regulations and Decisions which list the targets of autonomous EU sanctions.

¹⁴ Those Opinions, however, aim primarily mostly to ensure the uniform interpretation and application of EU law and thereby to prevent or at least minimize any disturbance of the level playing field established by the EU's internal market by EU sanctions.

MS, inter alia, to exchange their experiences regarding implementing and ensuring compliance with EU sanctions.¹⁵ This group has been also involved in drafting non-binding Guidelines and Best Practices in respect of EU sanctions.¹⁶

When it is up to the MS to adopt acts providing the directly applicable legal basis for EU sanctions defined in a Council decision under art. 29 TEU, the acts of each MS do only apply to those natural and legal persons and entities under the jurisdiction of that MS.¹⁷ As already said, generally they do not contain provisions on how the MS have to ensure compliance with such sanctions. So far, only decisions in respect of travel bans contain obligations for MS to exchange information with each other and the Council on granting exemptions and/or to obtain approval of the Council to grant certain types of exemptions. For this type of EU sanctions one could consider the Council as the EU enforcement authority for the compliance with such sanctions. But compared with the Commission, it is one with even weaker powers. For instance, it cannot start infringement procedures against MS and the ECJ has no powers to impose penalties on a MS for not ensuring compliance with article 29 decision.

Enforcement performance: A tentative assessment

Finding out if all MS always lay down the rules for penalties and take the related necessary measures for each EU sanctions regime turns out to be a very time consuming task. This is due to the fact that there apparently exists no publicly accessible, complete, detailed and duly up-to-date list of the rules laid down and measures taken by the MS. Open source information for a small non-representative sample of MS regarding the type and severity of penalties that are in force in these MS for different kinds of non-compliance reveals implementation has been uneven. Moreover, it is not possible to establish if and/or how much additional resources these MS made available to detect, investigate, prosecute and impose penalties for non-compliance. While all MS have been obliged to provide all the relevant information without delay after the entry into force of each relevant Council regulation to the Commission, the EU Commission had not made this information public.¹⁸ It is also remarkable that neither the EP nor national parliaments, academic researchers, NGOs or journalists have insisted on obtaining this information.¹⁹

The Council approved the latest version of the Guidelines in May 2018. Paragraph 96 thereof reads: “Both the CFSP legal instruments and the EC Regulations should provide for regular reporting on the implementing measures and enforcement actions taken by Member States to give effect to the restrictive measures.” This paragraph is almost identical to

¹⁵ Cf. Council doc. 5603/04 dd. January 22, 2004. Participants in these groups are usually diplomats posted at the Permanent Representations of the MS to the EU. A Commission services representative usually also participates.

¹⁶ Cf. the latest version of these Guidelines: Council doc. 5664/18 dd. May 4, 2018; and of Best Practices: Council doc. 8519/18 dd. May 4, 2018. These documents do not provide significant guidance regarding the tasks of the MS and the Commission in enforcing/ensuring compliance in addition to what is laid down in the Treaties or the regulatory acts of the Council and/or Commission.

¹⁷ Differences between MS in the scope of addressees of their national legislation, may create opportunities for natural or legal persons to evade or circumvent MS sanctions.

¹⁸ One may only guess for the reasons why the Commission did/does not do so. Maybe it feared/fears that making the differences in enforcement performance between the MS public could stimulate economic operators to channel their economic links with the targets of the sanctions through the MS with the least effective compliance enforcement performance, thereby stimulating a possibly unacceptable disturbance of the EU's economic level playing field.

¹⁹ Cf. briefing EP Research Service, author Martin Russel, PE 621.870, May 2018. In all MS and at the EU level exist the right to access to a whole range of official documents. It seems unlikely that access to said reports can legally be refused.

paragraph 26 of the Guidelines adopted in 2005. One may wonder why the Council again approved this non-binding guideline in 2018, because it had already for more than 25 years followed the Commission proposals for Council sanctions regulations that make such reporting legally binding for MS and the private sector. But more peculiar is the fact that till today the Council has not put into practice its own guidelines in respect of Council sanctions decisions based on article 29 TEU providing for MS sanction legislation.²⁰ By not developing further the reporting requirements notably by not specifying that such reporting should be made publicly available, and in any case provided to the EP, and should be done at specific intervals, the Council may in fact have strengthened the impression that it condones the continuation of the insufficient or even absent information sharing and public accountability by the Council itself, the Commission, MS and the private sector in respect of compliance. Of course, these deficiencies in information-sharing and public accountability are not solid proof of insufficient or even non-compliance.

The following rudimentary analysis of the risk of non- or insufficient compliance by the private sector shows that the risk of insufficient compliance may vary strongly depend on the type of sanction regime. In many cases, this risk of non-compliance and/or that of not detecting non-compliance may be low, or at least not unacceptable. For instance, as the major trading bloc in the world, the EU has a highly qualified custom apparatus that has shown to be able to prevent violations of EU legislation in international trade in goods and to ensure investigations and prosecution of such violations. Through its role in the coordination of the customs services of the MS the EU Commission can be well informed of difficulties in ensuring the correct fulfilment of EU trade sanctions and it can assist MS in remedying any shortcomings. This particularly applies with regard to international trade in dual-use items, where the EU Commission chairs the Coordination-Group wherein MS and Commission address, inter alia, enforcement problems.²¹ However, customs control is less effective if not absent in respect of international transfer of valuable non-tangible services and knowledge. And circumvention of sanctions through activities outside the EU is a well-known phenomenon. Non-compliance with EU (trade) sanctions may also result from national customs services giving a low priority to ensuring compliance with these sanctions.

Another weak point may be the interface between customs services and the NEA's that issue (or refuse) specific import or export licenses or authorisations, especially when the latter use documents unfamiliar to the customs services. Regarding the freezing of funds, EU Directives on the prevention of money-laundering and terrorist financing (AML/FT), require so-called "obliged entities"²² in the EU to control the flow of money (in its many forms) passing through their hands, literally but mostly figuratively. The EU Commission's surveillance in respect of compliance with EU (financial) sanctions can therefore be concentrated on those MS and those obliged entities that have been identified as needing to enhance their compliance efforts regarding said directives. Furthermore, the services of the EU Commission responsible for ensuring compliance with AML/FT directives could provide assistance to ensuring compliance with EU sanctions.²³ As already indicated, the freezing of economic resources is probably the most difficult obligation to comply with by the MS and the private sector due to the broad scope of the term "economic resources".

²⁰ Guidelines, latest version of 2018, referred to in footnote 15, and Guidelines laid down in 2005 in Council document 15114/05.

²¹ Cf. article 23 EU Council Regulation 428/2009.

²² As defined and listed in the EU's directives on money laundering and terrorist financing.

²³ This assistance will be easier since the Commission services sanctions unit is under the present Commission part of the Directorate-General dealing with money-laundering and terrorism financing.

Nevertheless, many, if not all, MS have a whole range of registers of fixed property, associations of notaries, publicly and/or privately held registers of beneficial owners of companies and other bodies which can serve as a kind of obliged entity. Through these entities MS can ensure a high degree of compliance with this obligation, if necessary by designating them as “obliged entities”. As in the case of customs control, the risk that there will be insufficient control of freezing of funds and/or economic resources may lie in the low priority given to these controls by NEA’s and/or “obliged entities”, because it is not their core business. Low priority may also result from the generally perceived low effectiveness of sanctions.²⁴ A low priority will almost certainly lead to a lower “pakkans”²⁵ for (potential) violators of EU sanctions.

That the Commission never started an infringement procedure against any MS for non-compliance could point to a satisfactory level of compliance by the MS. But the fact that the Commission has continuously failed to dedicate the required human, financial and technical resources to fulfil its role as Guardian of the Treaties in respect of EU sanctions may as well have led to a minimal or only passive monitoring of the enforcement efforts of the MS, and therefore to obtain insufficient evidence to justify infringement procedures. Other evidence also points to a need for more active monitoring by the Commission. For instance, a very limited and not representative sample of data obtained by the author from open sources shows failings of NEAs, some of which with a long experience with ensuring compliance with EU sanctions.²⁶

Furthermore, if the efforts of MS and the private sector in the EU to ensure compliance with the EU Directives on Money Laundering and Terrorist Financing (AML/FT) can serve as a proxy for the state of art of ensuring compliance with EU sanctions, one may assume an unsatisfactory level of compliance with those sanctions.²⁷ With respect to the implementation of these Directives, the EU Commission started infringement proceedings against a significant number of MS that did not meet their obligations to transpose EU AML/FT directives into national law or to do so in time. A “post mortem” report the EU Commission made on request of the Council regarding a number of serious cases of money laundering identified shortcomings that could serve as an indications of insufficiencies in ensuring compliance with EU sanctions.²⁸ That neither the EU Commission nor the Council have ever produced a publicly available assessment of the compliance with EU sanctions might be due to a lack of interest and/or information, but could just as well indicate insufficiency or non-compliance.

²⁴ Sanctions academics have tried to picture a higher effectiveness by stressing the function of sanctions as signals of disapproval, without however demonstrating that these signals are effective. Nevertheless, this function is often used in foreign policy circles to justify the imposition of sanctions.

²⁵ A nice short Dutch term which can only be translated in most languages by longer terms like “the chance to be caught”.

²⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The European economic and financial system: fostering openness, strength and resilience*, section 5, (Brussels, 19 January 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0032&from=EN>.

²⁷ Cf. preamble of (5th) Directive (EU) 2048/43, in particular § 20.

²⁸ Document COM(2019) 373 final of 24 July 2019.

Conclusion²⁹

It is well-known that it doesn't suffice to place the appropriate road-signs to ensure compliance with speed limits. An active monitoring of compliance with these limits is necessary as well as an effective system of punishing violators not respecting these limits. Similarly, it is not good enough to lay down obligations in EU and MS legal acts regarding compliance with EU sanctions without actively monitoring the fulfilment thereof and effectively, proportionally and dissuasively punish non-compliance. Although the foregoing sections show that there may not (yet) exist sufficient solid data to reach firm conclusions on the need for taking drastic steps to change the way compliance with EU sanctions is ensured, it seems clear that certain steps can and should be taken in order to improve the management of the quite a number of interfaces. Inspiration can be taken from the EU legal acts that are already in force in the field of the protection of the environment, of consumer protection, of data protection, or in the field of road, rail and maritime transport and others.

1. The Council should ensure that MS report on the compliance with sanctions for which they have to lay down the directly applicable acts. The reporting obligations should be at par with those in Council regulations based on article 215 TFEU. In respect of the latter, the Commission should become more active in ensuring that the reporting obligations already in place are strictly fulfilled so that more solid evidence on the level of compliance becomes available.
2. Future Commission proposals for EU sanctions regulations should contain more detailed provisions regarding compliance mechanisms for each type of EU sanction, such as defining "obliged entities" in the private sector, types and frequencies of monitoring, inspecting and reporting of compliance with EU sanctions by EEAs, MS, NEAs and economic operators and obliged entities in the private sector.
3. Reporting should use standardised formats that allow comparison of efforts of MS and of their NEAs and of those of the identical private sectors in the MS.
4. MS should report quarterly to the Commission and the Commission should at least once a year submit an assessment report to the European Council, the Council as well as the EP and national parliaments on the level of compliance with EU sanctions.
5. The Commission should propose to the Council to add serious violations of EU sanctions acts to the crimes listed in article 83(1) TFEU. If the Council would do so, the Commission could then propose the adoption of a Directive by the Council which would spell out which minimum penalties MS have to lay down for such serious violations.³⁰
6. A formal discussion should be started between all stakeholders on the desirability of establishing a European Sanctions Enforcement Authority (ESEA).

These steps would certainly take some time to result in an enhanced compliance with EU sanctions. But this should not form an obstacle for starting a formal discussion between and/or consultation of most interested parties. To start with, the existing approach of "The EU legislates, the MS implement" has to be questioned in the light of the common

²⁹ These conclusions have been formulated by the end of 2020. Any similarities between them and the intentions of the Commission regarding the need for improvements of implementation and enforcement of EU (CFSP) sanctions, as laid down in its Communication of January 18, 2021 (Document Com (2021) 32 final) may be fully coincidental.

³⁰ The latter proposal would not require a previous unanimous Council CFSP decision, because it would mainly refer to acts falling under the TFEU.

economic/financial space the EU has created, where goods, services, capital and people increasingly cross the borders of the MS with each other and of those with third countries. The USA's OFAC could be a source of inspiration for a strong and effective way of ensuring compliance with sanctions within the EU. However, as a model it would most likely not fit easily within the EU's cooperative federalism. OFAC is a federal agency, that, apart from its federal legislative, investigative and adjudication competences has direct and strong administrative enforcement powers across the USA. The EU model of ensuring compliance resembles more the German *Bundesstaat* (federalist state), where ensuring compliance with legislation passed at the federal level is mainly entrusted to the *Bundesländer*.³¹ The latter have in their turn to execute these tasks in full respect of the laws created at the federal level. But in a number of other policy areas than EU sanctions the EU has shown that the principles of subsidiarity, proportionality, and sincere cooperation can lead to the conclusion that certain direct enforcement competences can better be exercised at the EU level. Examples are the European Banking Authority and the Data Protection Authority, which inter alia have the power to impose impressive fines. Finally, a discussion about the creation of an ESEA to better manage interfaces and improve implementation of EU sanctions should not be hampered by nationalist sensitivities. EEA's are not Commission services in disguise. They are agencies where all MS can have a seat in the governing board. Already by bundling expertise at the EU level on ensuring as well as facilitating the desired and appropriate compliance, an ESEA would in all likelihood increase the effectiveness of EU sanctions, and maintain at the same time the level economic/financial playing field of the EU's Internal Market. Its efficiency would also lead to significant cost savings for the MS and the EU.

³¹ See for this description Rui Tavares Lanceiro, "The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation", *Perspectives on Federalism* 10, no. 1 (May 2018): 71-102.

IV. Rule of Law, fairness and legitimacy: Interface challenges of due process and unintended consequences

Time to act: Harmonizing global initiatives and technology-based innovations addressing de-risking at the interfacing sanctions-counterterrorism-humanitarian nexus

Erica Moret

Introduction

Love them or hate them, sanctions look set to remain a favored tool of foreign and security policy for the European Union (EU) and others around the world for the foreseeable future. In spite of this, global developments in their use over the past two decades have – once again – put a spotlight on their humanitarian impacts,¹ as well as the ways they can hinder the ability of humanitarian organizations to carry out their work effectively.² In particular, the phenomenon of “over-compliance” among private and not-for-profit sectors – also known as “de-risking” and the “chilling effect” – has become so entrenched that many vulnerable and fragile countries and populations around the world can now be considered “unbanked” and consequently face serious impediments in accessing basic healthcare and essential goods. The situation is further exacerbated through U.S. extraterritorial (or secondary) sanctions, compounded through the dominance of the U.S. dollar in international finance, and the prevalence of U.S. companies in global trade.³ Policymakers are increasingly asking themselves what urgent steps can be taken to resolve (or, at least, alleviate) what has been described as a mounting global crisis by the likes of the G20, World Bank, International Monetary Fund (IMF), Financial Stability Board (FSB) and the Financial Action Task Force (FATF).⁴

After outlining some of the key humanitarian concerns stemming from the contemporary sanctions and wider regulatory landscape, this paper highlights recommendations for future action. These recommendations range from more strategic policy and regulatory changes that could be made at the source of the problem, namely the largely unaddressed interface challenge between government and the financial sector through improved guidance and training, to the more tactical “sticking plaster” end of the scale, including in relation to humanitarian banking channels, special purpose vehicles (SPVs), stand-alone humanitarian banks, and the role for new technologies and other innovations in allowing funds to reach high risk jurisdictions. It does so through a review of over 40 multi-stakeholder initiatives and research projects that have been underway over the past decade in seeking to address problems associated with de-risking, as well as through anonymized semi-structured interviews with over 30 sanctions, humanitarian, regulatory and banking specialists and practitioners conducted between early 2018 and early 2021.

¹ Erica Moret, “Humanitarian Impacts of Economic Sanctions on Iran and Syria”, *European Security* 24, no. 1 (2015): 120-140.

² Alice Debarre, *Safeguarding Humanitarian Action in Sanctions Regimes* (International Peace Institute, New York, 2019); Emanuela-Chiara Gillard, *Research Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action* (Chatham House, August 2017), https://www.chathamhouse.org/sites/default/files/publications/research/CHHJ5596_NSAG_iv_research_paper_1708_WEB.pdf (accessed 1 May 2021).

³ Mark Daniel Jaeger, “Circumventing Sovereignty: Extraterritorial Sanctions Leveraging the Technologies of the Financial System”, *Swiss Political Science Review* 27, no. 1 (2021): 180-192.

⁴ Grégoire Mallard, Farzan Sabet and Jin Sun, “The Humanitarian Gap in the Global Sanctions Regime Assessing Causes, Effects, and Solutions”, *Global Governance* 26 (2020): 121-153.

A rise in complexity in contemporary interfacing sanctions practices

Interfacing sanctions regimes: Used to tackle a broad range of security threats and breaches of international norms, the United Nations (UN) has used sanctions for a growing number of objectives in past decades, though recent uptake has stabilized. In parallel, a growing number of countries and regional organizations – spanning advanced economies, emerging powers and developing countries – are employing autonomous or unilateral sanctions (instead of, or as well as, measures agreed through the multilateral framework) in an increasing variety of contexts, for a growing number of objectives, and against a mounting range of targets.⁵

As such, many of the world's sanctions regimes now represent a complicated web of overlapping measures creating various interface challenges. While a number of high-profile autonomous sanctions regimes are planned and coordinated through ad-hoc coalitions between the US, the EU and allies that may include Canada, Australia, Japan or regional organizations like the African Union (AU) or Arab League, no formal mechanisms currently exist to monitor their collective impacts, nor their unintended consequences. In addition, with the exception of some UN sanctions regimes (which sometimes include humanitarian panel experts), sanctioning powers do not tend to assess the humanitarian impacts of sanctions regimes.

Interfacing types of sanctions measures: A return of broader sectoral measures on strategically important areas such as finance and energy by some sanctioning powers since the early 2010s also accentuates their likely negative humanitarian impacts. Although most contemporary sanctions regimes remain highly targeted (such as travel bans, asset freezes and arms embargos), some selective sectoral sanctions and trade bans are now so broad that they can be considered *de facto* comprehensive measures, widely associated in the past with marked negative humanitarian consequences, especially when they led to a sharp economic decline and a drop in available capital. In spite of the best interests of sanctioning powers, the provision of licensing exemptions and exceptions on humanitarian grounds, or the provision of supplementary aid, is not typically enough to ensure citizens' basic access to healthcare and other essential goods, nor allow healthcare providers or humanitarian workers to carry out their work effectively.

Interfacing sanctions and wider regulations: Sanctions are often in place alongside Combating the Financing of Terrorism (CFT), Anti-Money-Laundering (AML) measures and export controls, which pose another interface challenge, which in turn adds an additional layer of complexity and costs to those seeking to navigate the complicated compliance landscape. Other policies in place, such as the Saudi naval blockade of Yemen, or the Israeli and Egyptian land, air and naval blockade of Gaza, are examples of other policies that further complicate matters for private and not-for-profit sector organizations operating in sanctioned countries.

Humanitarian impacts and obstacles posed to humanitarian action

A widespread practice of private and public sector over-compliance has accelerated over the past decade as a response to the rising complexity of these interfacing sanctions regimes and other regulations. In the case of the financial and banking sectors, de-risking

⁵ Erica Moret, "Unilateral and Extraterritorial Sanctions in Crisis: Implications of their Rising use and Misuse in Contemporary World Politics", in *The Research Handbook on Unilateral and Extraterritorial Sanctions*, ed. Charlotte Beaucillon (Edward Elgar Publishing, 2021).

has intensified in light of increasingly stringent regulatory requirements, a rise in major fines for those found to be in breach of the measures, and an ever more confusing and costly compliance environment. De-risking has also resulted in the rapid decline in the remaining number of active correspondent banking relationships (CBRs) around the world. As a result, some countries are now almost entirely isolated from the global financial system.⁶ Other private sector companies widely engage in similar processes of self-regulation, including those in the food, medicine and vaccine sectors,⁷ as well as those engaged in shipping (and other forms of transport), insurance, re-insurance, money transfer operators (MTOs, such as Western Union, as well as wider services required for the sending of remittances),⁸ logistics, courier delivery services and technology producers.⁹ Documented cases include those of Iran, Syria, North Korea/DPRK, Venezuela, Cuba, Afghanistan, Sudan, Somalia, Lebanon, Gaza and Yemen, but extend to many other parts of the world. Over-compliance among humanitarian actors (also known as the “chilling effect”) has also led some organizations to deliberately curtail (or even cease) activities from high-risk jurisdictions. Studies have shown that over-compliance across sectors presents obstacles to financial inclusion and integration, poverty reduction and economic growth,¹⁰ with vulnerable populations affected the most (such as women, children, the elderly, refugees, those on fixed incomes and those with chronic health problems).¹¹ Countries under the world’s strictest sanctions and CFT/AML regulations also face unique challenges in tackling the spread of the COVID-19 pandemic, including obstacles to scientific collaboration, fragile or crippled healthcare systems, and political barriers preventing effective cooperation across borders.

Mapping progress: initiatives and research on over-compliance

Research into over-compliance and de-risking is not new, but the past decade has nevertheless seen a rapid proliferation of global multi-stakeholder initiatives and research projects seeking to find solutions to some of the most tangible consequences. While too numerous to detail in this article, some of the fora are listed below:¹²

- Global NPO Coalition on FATF (whose aims include ensuring civil society is effectively engaged on the debate on AML and CTF) including the recently-launched FATF project seeking to study and mitigate the unintended consequences resulting from the incorrect implementation of the FATF Standards, including in relation to de-risking and financial exclusion.
- “Solutions for Safeguarding Humanitarian Action in UN Security Council Sanctions Regimes” (2019, run by the International Peace Institute [IPI], jointly supported by Swiss, German and Mexican Missions to the UN in New York).

⁶ IMF, *The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action*, June 2016, <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf> (accessed 1 May 2021).

⁷ Grégoire Mallard, Jin Sun and Erica Moret, “Mitigating the Health Effects of Sanctions in the Age of Coronavirus: A Proposal for a More Effective Global Health Governance Architecture”, under review.

⁸ World Bank, *Report on the G-20 Survey on De-risking Activities in the Remittance Market* (Washington, D.C., October 2015), <http://documents.worldbank.org/curated/en/679881467993185572/pdf/101071-WP-PUBLIC-GPFI-DWG-Remittances-De-risking-Report-2015-Final-2.pdf> (accessed 5 May 2021).

⁹ According to extensive consultations with representatives of these sectors between 2018 and 2021.

¹⁰ Jim Woodsome and Vijaya Ramachandran, *Fixing AML: Can New Technology Help Address the De-Risking Dilemma?* (Center for Global Development, 2018), <https://www.cgdev.org/sites/default/files/fixing-aml-can-new-technology-help-address-de-risking-dilemma.pdf> (accessed 5 May 2021).

¹¹ Moret 2015 (see footnote 1).

¹² These refer to both ongoing and concluded projects, dialogues or fora run as transnational collaborations, national endeavours, academic projects or in-house IO/NGO initiatives.

- UN Inter-Agency Standing Committee Task Force on the Humanitarian Consequences of Sanctions (no longer operating), which, among other things, undertook assessment missions on the humanitarian impact of sanctions and inputted to the 2014 High Level Review of UN Sanctions.
- The “Compliance Dialogue on Syria-Related Humanitarian Payments” (2018-2020, coordinated by the author of this report through the Graduate Institute, Geneva, funded by the Swiss government and supported by the European Commission, World Bank and the then UK Department for International Development, DFID, among others).
- The “Stakeholder Dialogue Forum on Derisking Supporting Financial Access for Humanitarian Organizations and Charities” (since 2016, Dutch Ministry of Finance, Human Security Collective [HSC], World Bank & Association of Chartered Anti-Money Laundering Specialists [ACAMS]).
- The “Global Partnership for Financial Inclusion (GPFI)” (G20/Alliance for Financial Inclusion, with input from the European Commission and the Netherlands government).
- “Unintended Impacts of EU Restrictive Measures on the Delivery of Humanitarian Aid” (2019, led by the Romanian Presidency of the EU, in collaboration with the European Commission and the International Committee for the Red Cross [ICRC]; alongside other meetings that include those with the UN’s Security Council Affairs Division or SCAD).
- The “Counterterrorism and Humanitarian Engagement (CHE) Project” (ongoing, Harvard Law School Program on International Law and Armed Conflict, funded by the Swiss government and supported by the Norwegian Refugee Council [NRC]).
- “UN Sanctions and International Humanitarian Law” (United Nations University, Centre for Policy Research [UNU CPR], supported by the Swiss Government and in coordination with the ICRC, 2020-2021).
- “When Money Can’t Buy Food and Medicine: Banking Challenges in the International Trade of Vital Goods and their Humanitarian Impact in Sanctioned Jurisdictions” (coordinated by the author of this report via the Graduate Institute, Geneva, with funding from the Swiss Network for International Studies [SNIS] and in collaboration with the UN and a range of INGOs and sanctions/CT scholars from the social and legal sciences).
- “Humanitarian Engagement with Non-state Armed Groups”, a joint project between Chatham House’s International Security Department and International Law Programme (from 2016).
- Working group on the “Unintended consequences of anti-money laundering (AML) and countering the financing of terrorism (CFT)” (Center for Global Development, CGD, c. 2015).

A number of national dialogues also exist, including:

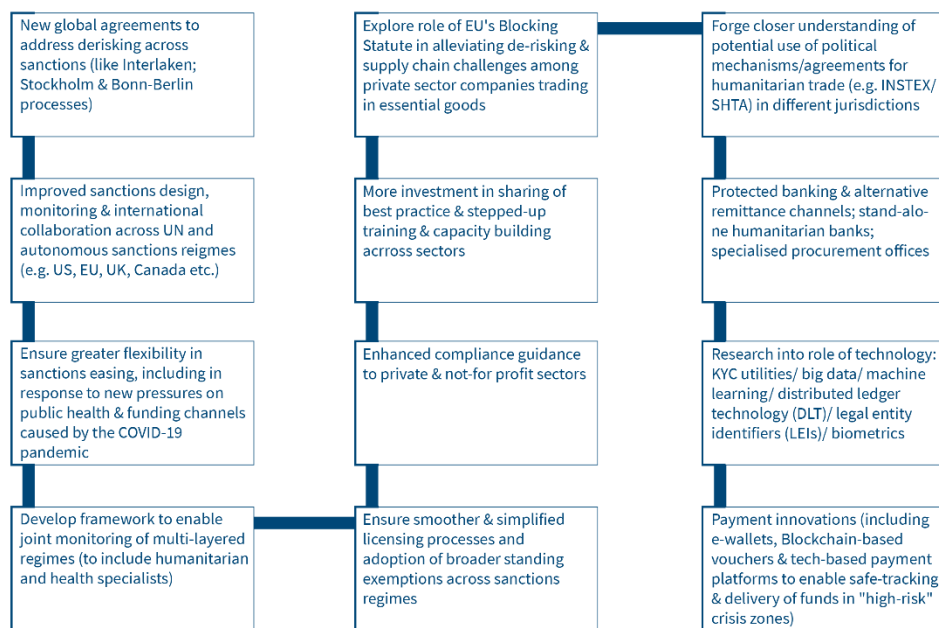
- The UK’s “Tripartite Humanitarian Working Group on International Non-Governmental Organisation Operations in High-Risk Jurisdictions” (currently run by the UK government).
- The “Dutch Roundtable” composed of banks, NGOs and donors from the Netherlands.
- A French de-risking initiative underway since 2017 composed of banks, NGOs and various government ministries.

- The German Finance Ministry is currently in the process of launching a new national dialogue following a round of surveys on de-risking circulated to NGOs and other stakeholders.

Solutions & multisectoral recommendations

A vast array of recommendations for improving the existing interface challenges of de-risking exist already (geared to governments, IOs, the private sector and NGOs), stemming from the aforementioned projects; not only for those imposing sanctions, but also for financial institutions, humanitarian organizations and the wider private and not-for-profit sectors. The following section summarizes some of the key suggestions, and offers some novel ideas for potential ways forward. Figure 1, below, provides a typology that illustrates where these solutions sit in the policy cycle.

Potential measures to alleviate de-risking pressures at different parts of the policy cycle.



Translation and adaptation: 2021 Stiftung Wissenschaft und Politik (SWP)

Figure 1: Potential measures to alleviate de-risking pressures at different parts of the policy cycle

Do not reinvent the wheel: Any future work designed to tackle de-risking across sectors should take heed of the existing (substantial, multi-disciplinary, trans-sectoral) body of work produced in recent years. For new (as well as existing) initiatives, stepped-up efforts should also be made to engage closely and regularly with ongoing projects in order to build on earlier developments, avoid duplication and collaborate on topics of common interest, where applicable. The exchange between these initiatives would be an entirely new interface by and for itself. This could (and *should*) be done at all stages of the de-risking process outlined in the figure above, beginning with broad policy changes (at the UN, US, EU and elsewhere) and ending with innovative solutions. Indeed, without changes at the source, such problems will continue to proliferate at a fast pace around the world, but without urgently needed action at the other end of the scale, vulnerable populations and fragile countries will increasingly be forced to forsake access to vital goods or humanitarian assistance, with grave consequences in the short- and medium-term and from the local

to global level. Policymakers should also seek ways to move some of these initiatives past the discussion stages, identify areas where improvements can still be made, and register progress that might be translatable to cases in differing geographical, political and humanitarian contexts. These efforts could benefit from a global dialogue akin to the earlier Interlaken, Stockholm & Bonn-Berlin processes, which radically changed the face of international sanctions policy in the 2000s and led to the shift from comprehensive to targeted use of international sanctions (see the contribution by Michael Brzoska).¹³

More considered sanctions design: At the UN, reporting on humanitarian impacts could be incorporated more broadly into the mandates of Panels of Experts and into the focus of Sanctions Committees, political considerations notwithstanding. Expansion of the Ombudsperson's role to also consider humanitarian matters could also be beneficial. The EU and allies, for their parts, could also consider appointing experts to fulfil similar roles. In cases of sectoral sanctions (particularly those on finance and energy sectors), assessments should be carried out more systematically on likely humanitarian effects, in consultation with humanitarian and public health specialists. The EU and other partners could work together to encourage the Biden Administration to move away from the far-reaching sanctions policies that were intensified under the Trump Presidency, including those associated with the much-critiqued "maximum pressure" campaign. Across the board, a concerted effort should also be made to return to more strictly targeted sanctions, rowing back on the "re-comprehensivization" of various international sanctions regimes.

More strategic sanctions design & implementation: Major sanctioning powers could employ a more strategic and flexible approach in the temporary easing of sanctions in response to changing situations on the ground, including in relation to the COVID-19 pandemic. Sanctions lifting need not be an all or nothing calculation; there is room for greater creativity and flexibility in how the tools are adapted in a responsive manner to wider geopolitical, socio-economic and public health considerations.¹⁴ Also beneficial would be better joint coordination and monitoring of multi-layered sanctions regimes, sovereignty concerns notwithstanding. Ad-hoc forms of collaboration in this sphere are already common and are expected to grow (including in light of the strengthening of the UK's capabilities due to its departure from the EU and Canada's bolstering of sanctions capabilities since 2017).¹⁵ An international body, for example at the G7 level or among the Group of Like-Minded States on Targeted Sanctions,¹⁶ could be created to carry out such a function. Another important area that warrants closer consideration is the role that the EU's Blocking Statute

¹³ Watson Institute for International Studies, *Targeted Financial Sanctions: A Manual for Design and Implementation: Contributions from the Interlaken Process* (Providence, RI, 2001); Michael Brzoska (ed), *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanction. Results of the Bonn-Berlin Process*, Bonn International Center for Conversion (BICC), (Bonn, 2001); Peter Wallensteen, Carin Staibano and Mikael Eriksson, *Making Targeted Sanctions Effective, Guidelines for the Implementation of UN Policy Options* (Uppsala, 2003), http://www.smartsanctions.se/stockholm_process/reports/Final%20report%20complete.pdf (accessed 5 May 2021).

¹⁴ For some examples, see Thomas Biersteker speaking as part of webinar panel convened by Erica Moret for the Graduate Institute's Global Health Centre and Global Governance Centre, "When Borderless COVID-19 Hits Sanctioned Countries, What Gives?", 2 June 2020, <https://graduateinstitute.ch/covid-webinar-sanctions> (accessed 1 May 2021).

¹⁵ Moret 2021 (see footnote 5).

¹⁶ Composed of Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Switzerland, and Sweden (Debarre 2019, see footnote 2) and since 2012 took action to improve the role of the Ombudsperson with regard to Human Rights considerations in UN sanctions regimes (see https://charityandsecurity.org/news/un_targeted_sanctions_improves_due_process_protections/).

(designed to provide protection to European companies against U.S. extraterritorial sanctions) could play in helping to avoid de-risking among commercial companies trading in essential goods (including medicine, vaccines, food, sanitary products and technology).

Improved licensing mechanisms & standing exemptions: Another set of detailed recommendations relates to the need to improve licensing exemption mechanisms and introduce broader standing exemptions to all sanctions regimes¹⁷; something that has been debated in various fora but has often been met with political opposition, including by the UNSC.¹⁸ The need for clearer regulatory language (and the development of a common language) is another commonly referenced recommendation across sanctions regimes. Continued efforts to streamline regulatory requirements for banks (and, in turn, what banks require from NGOs) would also be highly beneficial. A clearer view would also be useful across the board on the role of provisions such as Safe Harbor Protections,¹⁹ Comfort Letters and (the generally controversial) white lists of acceptable banks or NGOs.

Training & clarity: Another set of recommendations applicable to all relevant sectors relates to awareness-raising, pedagogy and communications. The UN, EU and other regional organizations should strive to provide clearer guidance to their member states. In turn, all sanctioning powers should strive to provide accessible advice, FAQs and easy-to-reach points of contact for companies and NGOs dealing with sanctioned jurisdictions. Training, capacity building and sharing of best practice across, and between, relevant sectors (governments, financial institutions, humanitarian actors, wider private sector) has also been highlighted as an urgent priority in light of widespread confusion over, and unawareness of, the problem. Wider sectors should also be included in these best practice discussions, such as MTOs (and other companies dealing with remittances), shipping firms and insurance companies, as well as other policy areas, such as development, education, public health, diplomacy and mediation.

Humanitarian banking channels, SPVs & alternative payment platforms: Other (ambitious) areas that warrant more urgent research, particularly at the policy level, are the identification and use of potential banking channels for large scale humanitarian efforts; “protected” or licensed payment routing involving named private banks; a stand-alone humanitarian bank (e.g. run by the UN or EU); SPVs and specialized UN procurement offices that can be granted full authority to access humanitarian goods and services in line with sanctions in place (as was created in Sudan to import medicines and as has been proposed in

¹⁷ For example, the ICRC, in a recent statement to the UNSC said “Further well-crafted humanitarian exemptions can be adopted by more States and promoted by the Security Council. These are best done through standing exemptions covering the exclusively humanitarian activities carried out by impartial humanitarian organizations operating in accordance with IHL rather than ad hoc remedies which can be inefficient and take unwarranted time and resources”. See ICRC, “Counter-terrorism measures must not restrict impartial humanitarian organizations from delivering aid”, Statement to United Nations Security Council debate: Threats to international peace and security caused by terrorist acts: International cooperation in combating terrorism 20 years after the adoption of resolution 1373 (2001), 12 January 2021, <https://www.icrc.org/en/document/counter-terrorism-measures-must-not-restrict-impartial-humanitarian-organizations> (accessed 29 June 2021).

¹⁸ According to interviews with sanctions and humanitarian specialists familiar with the UN system in May and July 2019. See also Rebecca Brubaker, *Paving Pathways to Peace Talks with Sanctions and Exemptions?*, Sanctions and Mediation Policy Memo Series, Policy Memo 1/3, (New York: United Nations University, 2020), <http://collections.unu.edu/view/UNU:7875> (accessed 29 June 2021).

¹⁹ Safe Harbor is a provision of a regulation that states that particular activities will not be considered in violation of particular rules.

the Syrian case).²⁰ While mechanisms or agreements such as INSTEX, the Swiss Humanitarian Trade Agreement (SHTA) and those in development in South Korea all focus on the Iranian context (and have suffered from a lack of political buy-in and continued fears over the far-reaching impacts of U.S. sanctions), more thinking could also be given to how these types of models could help to alleviate some of the strain experienced in other “unbanked” countries.²¹ Further thought should also be given to potential solutions offered by alternatives to the formal banking system, including in relation to traditional and alternative remittances channels,²² particularly in the current context where access to formal banking systems is increasingly unavailable to a range of fragile and vulnerable jurisdictions around the world.

Role of digital technologies: New technologies are another area that warrants more consideration for their potential to alleviate or resolve some of the main humanitarian problems linked to de-risking (privacy and data-storage considerations notwithstanding). One report for the Center for Global Development, for example, highlights the potential utility of know-your-customer (KYC) utilities,²³ big data, machine learning, distributed ledger technology (DLT; including Blockchain), legal entity identifiers (LEIs), and biometrics.²⁴ A recent Graduate Institute study went on to explore the viability of launching a Blockchain-based digital coin that could be administered by a multilateral licensing authority (including the U.S. Treasury’s Office of Foreign Assets Control or OFAC), capable of efficiently administering a global sanctions exemption program.²⁵ International Organizations (IOs) and international NGOs have also been researching and developing technology-based solutions to some of these problems (“tech-for-good”), while developments in the fintech and Govtech spheres have also developed products that may be adapted to serve a useful purpose in addressing de-risking.²⁶ Thus far, however, these types of solutions remain unexplored territory for most experts, practitioners and policymakers working on the global over-compliance crisis

Conclusion

The rising global emergency of de-risking has been shown to cause devastating barriers to humanitarian action and access to essential goods in heavily sanctioned or unbanked countries. The EU, second only to the U.S. as the world’s most prolific sanctioning actor,

²⁰ As suggested in the Syrian context in UN General Assembly, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on His Mission to the Syrian Arab Republic (A/HRC/39/54/Add.2)* (Geneva, 2018), <https://reliefweb.int/report/syrian-arab-republic/report-special-rapporteur-negative-impact-unilateral-coercive-measures> (accessed 1 May 2021).

²¹ Development of SPVs is unlikely to gain much traction, however, in light of the limited success of existing models as well as fears that it could lead to further fragmentation of the financial system and a decline in transparency.

²² This is the focus of a study currently being carried out by the author on the political economy of Syrian remittances for the National Agenda for the Future of Syria (NAFS) Programme II at United Nations-ESCWA as part of a wider project entitled “Syrian Remittances: Dynamics, Volume and Future”.

²³ For example, this could include the establishment of a KYC utility to better inform financial institutions/increase transparency on NGO operations and strengthen tools for due diligence by correspondent banks.

²⁴ Woodsome and Ramachandran 2018 (see footnote 10).

²⁵ Grégoire Mallard, Farzan Sabet and Jin Sun, “The Humanitarian Gap in the Global Sanctions Regime Assessing Causes, Effects, and Solutions”, *Global Governance* 26 (2020): 121–153.

²⁶ In Switzerland, for example, a joint initiative between the technical universities EFPL and ETH, and the ICRC, supports the development of technology-based innovations from engineering to data science, to support the fields of humanitarian assistance, sustainable development and peace promotion (<https://essentialtech.center>). This latter topic will be the focus of a new study run by the author and based at the Geneva Centre for Humanitarian Studies (a collaboration between the Graduate Institute and the University of Geneva).

has a central role to play in ensuring that the sanctions it employs impart as little harm as possible to vulnerable populations around the world. If the private sector over-complies with sanctions in place to the extent that no further trade of essential goods continues to decline, or that the humanitarian space continues to shrink, this runs the risk of not only causing further, catastrophic negative humanitarian consequences in fragile environments, but it could also inadvertently change the impact of the public policies in place and further reduce their chance of succeeding. As the negative humanitarian impacts of some interfacing sanctions regimes are put under a spotlight in relation to the pandemic, questions will be asked about the ability of governments and the international community to provide sufficient public health and vaccine provisions to *all* populations around the world, including those living in “unbanked” countries and those often inaccessible to humanitarian workers, such as non-state armed groups (NSAGs).²⁷ As the problem continues to worsen at a fast pace, this could not only have negative impacts for the EU – both reputationally (in light of its role as a normative power with keen humanitarian concerns) and in terms of its future ability to use sanctions effectively – but could also impact negatively on the UN’s use of the tool and its wider legitimacy. At a time when global governance is already at a crisis point, a further major knockback could have catastrophic impacts on the future of multilateral action and views on the legitimacy of global governance structures. Enacting more of the aforementioned solutions would also help address some of the key interface challenges and alleviate the suffering of innocent citizens.

²⁷ Tom Keatinge and Florence Keen, *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, Chatham House (London, 2017), <https://www.chathamhouse.org/sites/default/files/publications/research/2017-04-28-nsags-banking-restrictions-ngo-keatinge-keen.pdf> (accessed 1 May 2021).

Sanctions and the financial system: Steering away from de-risking?

Mark Daniel Jaeger¹

In the last decade, EU sanctions became a sophisticated policy tool that joins a complex international setting of Western sanctions targeting many crisis regions. At the same time, sanctions turned from a weak instrument with negligible economic impact into a powerful tool that can effectively cut off targets from access to funds and other assets. While considerable differences exist between senders in terms of sophistication of their respective output, with the U.S. far ahead in targeting, compliance monitoring, and enforcement capabilities, arguably the most important factor when it comes to translating output into outcome (see introduction by Sascha Lohmann and Judith Vorrath) – and the most significant intervening variable – lies outside the administrative setting of government authority. The financial system turned into the main implementation agent, emerging as the most consequential ‘interface’ between government and private sector implementers. Effectively, banks became the primary enforcers of sanctions.

In many respects, the turn to the financial system as key implementer of sanctions amplified their strength and extended their reach far beyond the territorial boundaries of sender jurisdictions.² However, some of the characteristics of contemporary sanctions regulations – complex rules with oftentimes extraterritorial reach, the risks associated with non-compliance, along with rather robust enforcement practices by some sanctioning authorities – turned a tool that is supposed to be targeted into a ‘blunt instrument’.³ For banks and other private actors, non-compliance with relevant sanctions regulations became not only a severe operational risk, but threatens to ruin business and reputation. In response to an environment perceived to be marked by high risk and regulatory uncertainty, the financial industry began to ‘de-risk’, by closing down client relationships, business activities and even cutting off entire countries from access to the global financial system, as Erica Moret highlights in the previous paper. ‘Over-compliance’ practices even included activities covered under International Humanitarian Law that are either exempt from sanctions, or for which carve-outs exist. In consequence, humanitarian actors face great difficulties in realizing transactions related to their activities in sanctions-affected crisis regions. Payments frequently get massively delayed and subjected to cumbersome and protracted clarification processes. Sometimes they are outright rejected, or funds are even blocked – somewhere on their way from remitter bank to beneficiary account. This paper focuses on the transaction issues involving high-risk jurisdictions and other sanctions-related contexts. I argue that, in order to understand the interface challenges existing between governments and the private sector in relation to humanitarian payments, it is crucial to consider the setup of international banking channels and take into account some basic operational risk management principles the financial system applies to them. Payment channels involve a chain of intermediaries, so-called ‘correspondent

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² Mark Daniel Jaeger, “Circumventing Sovereignty: Extraterritorial Sanctions Leveraging the Technologies of the Financial System.” *Swiss Political Science Review* 27 (2021): 180–192.

³ Susan Hannah Allen, David J Lektzian, “Economic Sanctions: A Blunt Instrument?”, *Journal of Peace Research* 50 (2013): 121–135.

banks': not every bank has a direct link with all others; rather, it is a network structure.⁴ How the financial system's risk management principles affect correspondent banking is a crucial bottleneck for humanitarian payments: a link (i.e. providing payment services) between banks comes with risks in relation to the payments instructed through it; banks seek to minimize these risks. Individual national efforts to address the challenges related to payment channels and de-risking are unlikely to fully resolve the issue. Overall, the paper illustrates that, in light of the globalized network structure of the financial system, common standards would increase transparency and reduce the burden due to excessive risk management. To this end, a multilateral response is needed that supports the development of clear expectations among banks in relation to legitimate humanitarian payments.

The paper is structured as follows: Its second section reviews existing responses to the interface challenge of ensuring the flow of humanitarian payments, which sought to address the issues through regulatory clarifications and stakeholder engagement in order to reduce uncertainty. Turning to correspondent banking, the third section explores the setup of international banking and traces the implications of the operational principles such as the 'risk-based approach' has for humanitarian payments and suggests way to extend reform efforts to cover bank-to-bank aspects.

Responses and reform efforts

It is easy to conclude that the growth and increased sophistication of sanctions regimes effectively resulted in a 'comprehensivization' of sanctions that simply kills off economic exchange, including trade in vital economic goods.⁵ In fact, 'horizontal' sanctions programs targeting terrorism and WMD proliferation may overlap with 'vertical' sanctions programs, targeting individual countries and regions; sanctions targeting specific individuals and entities now often co-exist with sectoral sanctions, prohibiting certain activities. However, the devil is in the detail. The sanctions-related difficulties that exist specifically in relation to realizing international humanitarian payments can be pinned down to several specific factors, as well as the interplay between them.

Generally, regulatory risks related to humanitarian transactions stem on the one hand from specific provisions related to sanctions regimes, horizontal or vertical (e.g. Debarre 2019). On the other hand, regulations targeting the non-profit organizations (NPOs) sector more broadly, related to countering the financing of terrorism (CFT), add an additional risk layer.⁶ Authorities in Europe and elsewhere sought to cover the sanctions-related challenges faced by humanitarian agents when moving project funds by allowing for the possibility of obtaining an exemption for humanitarian activities. EU sanctions programs routinely include derogations in sanctions regulations. Upon request, national competent authorities of EU member states can grant authorizations for humanitarian transactions. In light of the complexity of certain sanctions regimes, such as the EU's restrictive measures imposed against Syria, exemptions do not only cover the making available of funds and economic resources to listed parties, if humanitarian purposes require so. Exemptions also cover energy needs as well as certain dual-use goods that might be used for internal repression, and other circumstances where restrictions intended to impose limitations on targets interfere with the operational needs of humanitarian activities.

⁴ Henry Farrell, Abraham L. Newman. "Weaponized Interdependence: How Global Economic Networks Shape State Coercion." *International Security* 44 (2019): 42-79.

⁵ Grégoire Mallard, Farzan Sabet and Jin Sun. "The Humanitarian Gap in the Global Sanctions Regime: Assessing Causes, Effects, and Solutions", *Global Governance: A Review of Multilateralism and International Organizations* 26 (2020): 121-153.

⁶ Tom Keatinge, *Uncharitable Behaviour* (London: Demos 2014).

However, the complexity of contemporary sanctions regulations bears challenges in its own right. Their language can make interpreting individual provisions anything but a straightforward matter, spreading uncertainty as to their particular reach and limits.⁷ A case in point in the context of humanitarian activities is whether making available assets to *end beneficiaries* is permissible even if they were listed persons or whether doing so, especially with cash assistance, would require a specific authorization (Roepstorff, Faltas, and Hövelmann 2020).⁸ In order to alleviate such uncertainties and to clarify the extent of prohibitions, sanctioning authorities began to publish guidance on key terms in question. As part of this development, feedback from stakeholders, mainly from the humanitarian sector and the financial industry, by now is more systematically collected and taken into consideration (see the contribution Erica Moret).

At the level of implementation, sanctions regimes, as a broadly rules-based system involving strict liability, become part of a risk-based system. This system outlines a set of principles and expectations for managing risks related more broadly to CFT, to which some of the strictest sanctions belong to, as well as to other financial crimes, such as money laundering.⁹ The Financial Action Task Force (FATF), an intergovernmental organization, effectively provides the framework for this system through a number of ‘recommendations’. By virtue of their exposure to sensitive regions, humanitarian actors fall squarely within the scope of these governance efforts of the FATF: NPOs could be susceptible to misuse“(a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.”¹⁰

In response to an overly cautious reaction by the financial sector to the singling out of NPOs as ‘particularly vulnerable to terrorist abuse’, the FATF revised its recommendation 8 in 2016 by removing this statement as it had been received as a clearly negative assessment. In its interpretive note to recommendation 8, the FATF clarified that efforts should be directed towards *protecting* NPOs from abuse, prescribes a more nuanced approach for risk assessments and declares “such measures to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law”.¹¹ The FATF also published revised best practices on preventing the abuse of NPOs for terrorist financing in 2015, which included both guidance for countries as well as proposals on actions in line with a risk-based approach that NPOs could take to protect themselves.¹²

Complementing these efforts to provide better regulations and improved guidance, numerous European countries and donors have engaged in national stakeholder dialogues that include both humanitarian actors and financial institutions (see the contribution by

⁷ Justine Suzanne Walker, “The Foreign Policy Tool of Sanctions, Conflict and Ensuring Continued Access to Finance”, *Journal of Financial Crime* 24 (2017): 480–490.

⁸ Kristina Roepstorff, Charlotte Faltas, Sonja Hövelmann, *Counterterrorism Measures and Sanction Regimes: Shrinking Space for Humanitarian Aid Organisations*, Berlin: Centre for Humanitarian Action, February 2020, <https://www.chaberlin.org/en/publications/counterterrorism-measures-and-sanction-regimes-shrinking-space-for-humanitarian-aid-organisations/> (accessed November 30, 2020).

⁹ Anthony Amicelle, “Towards a ‘New’ Political Anatomy of Financial Surveillance.” *Security Dialogue* 42 (2011): 161–178.

¹⁰ FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Paris: FATF 2012-2020), 11, <http://www.fatf-gafi.org/recommendations.html> (accessed March 20, 2021).

¹¹ *Ibid.*, 52.

¹² FATF, *Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8)* (Paris: FATF, June 2015). <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/bpp-combating-abuse-npo.html> (accessed March 20, 2021).

Erica Moret). These conversations aim to address crucial obstacles to delivering humanitarian payments to sanctions-affected crisis regions. Often, NPOs did not have a clear understanding of their banks' requirements for facilitating these transactions. In turn, banks found that important information was lacking when payments were instructed and that they were involved only at a very late point in the process. In addition, general uncertainty was widespread as to what risk management efforts the parties involved engaged in and what the rationale with respect to the regulatory requirements was. Through these formats, states became more aware of the limits, ambiguities and tensions in existing regulations. Stakeholder conversations thus sought to foster common bases of understanding, exchange of information about risk management efforts taken across sectors, and promote enhanced knowledge about each other's requirements to realize humanitarian transactions.

Taken together, these efforts have addressed numerous important issues for effective humanitarian transactions in relation to sanctions-affected regions. Regulations have evolved to better recognize humanitarian assistance, while additional guidance has sought to address regulatory uncertainties next to national dialogue formats that aimed to foster understanding and trust between stakeholders. Remarkably, these efforts took place with respect to sanctions regulations themselves, as well as in relation to the broader rules on terrorism financing. The latter do not only guide national regulations and enforcement standards but influence the financial system's response to these threats.

Despite these efforts, however, the situation humanitarian actors encounter when seeking to realize transactions to sanctions-affected regions such as Syria and others did not significantly improve.¹³ Humanitarian transactions might still get rejected, either outright or substantially delayed. Often, the issue is not so much the bank of the NPO that is willing to support and initiate the transfer. Alas, this is no guarantee for the felicity of a transfer. Rather, payments get stuck on their way to the beneficiary.

Correspondent banking

The global financial system consists of a large collection of mostly private actors. International payments between a remitter and a beneficiary bank typically run through a chain of intermediary banks. This chain more specifically represents the provision of banking services by one bank, the "correspondent bank", to another bank, the "respondent bank" (see figure 1). The international correspondent banking system resembles the topography of a network.¹⁴ In this network, not every bank has a relationship with all of the others. Rather, bigger nodes in the network serve as payment service providers to smaller nodes. Large international banks typically act as correspondents for scores of other banks around the world.

For example, a payment in USD to a beneficiary located in Yemen initiated at a local remitter bank in Germany does not take the direct route to the beneficiary bank, which may happen to be one of the main financial institutions in Yemen. Generally, payments issued in USD pass through the U.S. financial system, i.e. involving a U.S. bank at some point in the correspondent banking chain. However, the remitter bank located in Germany may not have a U.S. correspondent bank. Instead, it has a relationship with a big payment service provider within its own jurisdiction. This payment service provider acts as respondent

¹³ Ironically, the consequent use of informal payment methods may recur to means that lack transparency, involve intermediaries of dubious reputation, miss the screening technologies otherwise employed to detect suspicious transactions, and generally lack a proper paper trail, thereby feeding into the risk of actual sanctions circumvention and terrorist financing (Anglin 2016:720)

¹⁴ See footnote 4.

bank in its relationship to a U.S. bank, the correspondent bank. The U.S. bank in turn has a relationship with a Lebanese bank, which then has a relationship the beneficiary bank in Yemen.

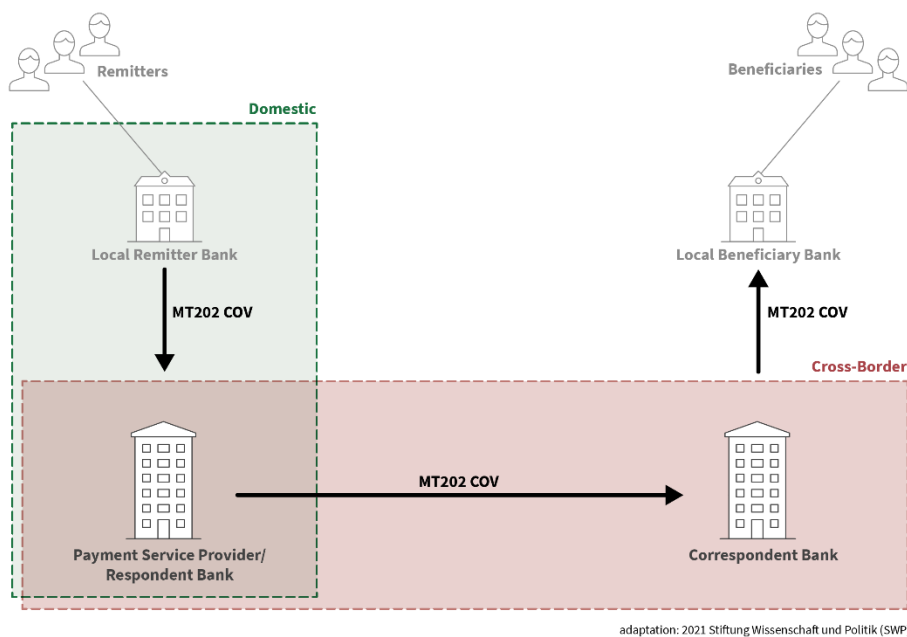


Figure 1: Correspondent banking¹⁵

Correspondent banks involved along the chain of the transaction will screen payments. Between correspondent banks using the SWIFT network for payment transfers, information about the transferred funds is sent through the so-called MT202 COV message, for traceability of funds from origin to destination. Originally introduced for AML/CFT purposes,¹⁶ it enables intermediary banks to screen transactions also for sanctions risks. If these banks detect something that runs against their policy, or even only comes with certain indications of doing so, payments will be stopped and inspected. Depending on the result, the remitter bank might be asked to provide clarification; the payment might get rejected and returned to the remitter bank; or it might be blocked because it appears to violate a regulation the intermediary bank deems applicable. Thus, every chain link that a payment comes across, a screening takes place, which in turn comes with a 'risk' of delay, rejection, or worse.¹⁷

To keep with our example, if a payment were intended to go to the account of a US-sanctioned person in Yemen, the wired funds would never arrive: Upon learning about this account holder, the U.S. bank would block the payment and report it to U.S. authorities. A customer of the remitter bank in Germany would not be able to transfer these funds successfully, even if this person was not subjected to any EU sanctions.

As a matter of fact, a similar pattern is at work with payments denominated in EUR. Large payment service providers serve as a hub for smaller banks. A payment in EUR from a remitter with an account at a local bank in Germany to a beneficiary in France may pass first

¹⁵ Jaeger, Müller, *Herausforderungen und Lösungsansätze zur Umsetzung von Wirtschaftssanktionen im Bereich der Korrespondenzbankenbeziehung* (Zurich: Swiss Bankers Association Presentation 2017).

¹⁶ Wolfsberg Group, *The Introduction of the MT 202 COV in the International Payment Systems* (2009), https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/comment-letters/24.%20Joint_Industry_Slides_on_MT_202_COV_%2820-05-09%29.pdf. (accessed June 15, 2019).

¹⁷ Cf. Marieke de Goede, "The Chain of Security.", *Review of International Studies* 44 (2018): 24–42.

through a larger German bank and a large bank in France, acting as intermediaries, before reaching its beneficiary account at a provincial bank. In between the larger German and French banks, it may even take a detour through a large intermediary payment service provider located in Spain. Which of the many 'channels' between larger banks as the main nodes in the network is being selected for a particular payment is usually determined by an automated process. The respective channel is not deliberately selected by bank employees for the thousands of daily payments.

Autonomy and control

Two aspects are crucial with the international network of correspondent banking: *autonomy* and *control*. The global financial system exhibits a high degree of autonomy in observing its regulatory environment, i.e. rules and laws set by states and other supervisory authorities, through the lenses of operational risk.¹⁸ It applies a risk-based approach as key regulatory principle prescribed not only to its 'external' relations, but also to its internal conduct.¹⁹ From the perspective of individual banks, correspondent banking links are client relationships as well.

When offering banking services to a respondent bank, the correspondent bank subjects it to a risk-based approach, just like any other client. Depending on its business, geographical area of operation, client base, types of payments processed, risk management capacities, etc., it will be assigned a risk score. Per contractual clauses, the respondent bank is obliged to respect the policies (and risk appetite) of the correspondent bank. Its payments are screened for transfers that may violate applicable regulations, or internal policies, and may ultimately lie outside of its "risk appetite". If the correspondent bank associates an increased risk with the respondent bank, it will be subjected to enhanced due diligence measures and will not be offered products that pose an increased risk to the correspondent bank. Depending on the business interest, the correspondent banking relationship may also be shut down if the associated risk is deemed too high. In consequence, risky transactions may signify a risky relationship.

It is important to follow this logic of mutual obligation and control fully to its end in order to comprehend how this system effectively exerts control across the global network of financial institutions. The troubles with the aforementioned USD payment to the US-listed person in Yemen will not start with the U.S. bank, but right at the local remitting bank in Germany – or at its payment service provider that has a U.S. correspondent bank. Attempting to perform this transfer through its U.S. correspondent bank risks causing the remitter bank to facilitate a payment that benefits a US-sanctioned party. Doing so would then violate U.S. law. If such payment attempts occur frequently, this would suggest to the U.S. correspondent bank that respondent bank either does not respect its policies or has inadequate risk management and controls in place. Such a conclusion will have repercussions for the relationship between these two institutions. The respondent bank that acts as a payment service provider to the local remitting bank in Germany thus has an incentive to screen payments in USD for indications of a U.S. sanctions risk and to reject payments that raise internal red flags. Furthermore, the payment service provider has no interest in receiving such payments in the first place, as they may raise concern at its U.S. correspondent bank if missed by its filters. In addition, the payment service provider that is the respondent of the U.S. correspondent bank may worry about its reputation with U.S. authorities, in case payments where it acted as an intermediary were frequently blocked

¹⁸ Michael Power, "The Invention of Operational Risk", *Review of International Political Economy* 12 (2005): 577–599.

¹⁹ See footnote 4.

and reported by U.S. banks for sanctions reasons. Therefore, the bank that provides payment services to the local German remitting bank may expect it not to instruct USD payments involving US-sanctioned parties, and to establish as well as maintain adequate controls to ensure compliance with U.S. law. That way, U.S. sanctions regulations (to stay with the example) effectively influence the behavior of all actors within the network.

How does all of this concern a humanitarian transaction issued in EUR to a sanctions-affected region, or one that involves an EU-sanctioned party? If the payment is to be successful, it is not just the remitter bank that has to be satisfied with its circumstances, involved risk control efforts as well as its documentation. Moreover, the entire chain of intermediary banks that form the payment channel, including the beneficiary bank will screen the payment, may require and scrutinize detailed payment information and will decide whether or not to execute the transaction. Whether any of these banks accepts such a payment, and on what conditions, depends both on the factors governing correspondent banking relationships, as well as banks' individual internal policies, and risk appetite. Humanitarian payments frequently get rejected not by the remitter bank, and not even by its payment service provider, but by another intermediary bank that acts as a correspondent bank. In order to tackle the issue of failed humanitarian payments, these complexities of correspondent banking need to be taken into account.

The need of multilateral solutions

Correspondent banks approach relationships with respondent banks as their clients in terms of risk. Whether a sensitive humanitarian payment will make it through depends, first, on an assessment of the relationship as much as it does, second, on full, transparent information that the transfer is legitimate.

Regarding the first point, related to the general parameters guiding the risk-based approach in correspondent banking relationships, to stop the trend of de-risking, supervisory agencies such as the FATF and the Bank for International Settlements already took steps by issuing clarification and additional guidance. In the past few years, banks became much more sensitive to the risks that they might be exposed to in correspondent banking.²⁰ Among the notorious issues was the question whether, and to what extent, a correspondent bank ought to check the clients of a respondent bank along a "know your customers' customer" (KYCC) rationale. While the guidance rejected such reasoning as misinterpretation of the risk-based approach, uncertainty remained as to whether this fully applies to sanctions risks.

On the second point, the situation revolving specifically around humanitarian payments, initiatives that fostered stakeholder dialogues at national levels were crucial steps for enhancing the situation for humanitarian transactions to sanctions-affected regions, as they strengthened mutual understanding and trust. However, to enhance the success rate of payments passing through the correspondent banking chain and reaching their beneficiary bank, efforts that seek to address the issues of rejected humanitarian payments need to advance to the international level.

To counter unilateral tendencies in financial institutions' risk appetite (or, rather: aversion) towards humanitarian cross-border payments, sustained dialogue is necessary, which not only replicates the mutual understanding and trust that has been achieved at

²⁰ Committee on Payments and Market Infrastructures, *Consultative Report on Correspondent Banking* (Basel: Bank for International Settlements, 6 October 2015), <https://www.bis.org/cpmi/publ/d136.htm> (accessed November 25, 2020); FATF, *Guidance on Correspondent Banking Services* (Paris: FATF, October 2016), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/correspondent-banking-services.html> (accessed November 25, 2020).

national levels, but pushes for common standards to increase acceptance of these kinds of payments.²¹ In other words, efforts at the financial system should focus on:

1. **Developing common standards of information and documentation requirements for risk assessing humanitarian payments**, for example sector-specific transaction due diligence questionnaires etc., to promote consistency and clear understanding of these requirements (i) for humanitarian actors; and (ii) between local banks / payment service providers.
2. **Harmonizing information standards for processing humanitarian payments at cross-border/international level**, including standard payment documentation, or specific text in payment messages indicating whether a payment takes place under an exception (EU) from sanctions regulations or a license (US), respectively, to enable timely and effective execution across the chain of intermediary banks.

To support and enable these steps, governments and regulators need to start taking de-risking seriously and accept that it is not merely the result of irrational behavior on part of financial institutions and other market participants. Hence, the crucial question from a regulatory viewpoint is: How can the financial system as a whole be moved to *re-risk*? Working against a more permissive risk appetite are an excessive need to interpret and face uncertainty due to a lack of clear and consistent regulations as much as the complexity of overlapping, incongruent sanctions regimes. Simply put, regulatory arrangements that needlessly heighten the chances of getting it wrong when applying them work against *re-risking*. Therefore, governments and regulators should focus on:

1. **Enhancing the provisions the legitimacy of humanitarian transactions rests upon**: Take as many question marks out of the analysis of whether a particular payment may be covered or not, by i) providing either precise grounds for derogations (EU)/specific licenses (US) or – whenever possible – broad, but clear-cut exemptions (EU)/general licenses (US); ii) ensuring all the basics are covered, including clear definitions (e.g. currently, EU sanctions provisions do not include a definition of humanitarian assistance).
2. **Increase consistency across regimes and, possibly, between sanctioning authorities**: In accordance with International Humanitarian Law, sanctions regulations should not prevent the provision of principled humanitarian assistance. As all exceptions (EU)/licenses (US) should reflect this basic legal principle, aligning exceptions by language and content towards a broadly recognized international standard would reduce complexity in assessing the legitimacy of individual transactions.

Nominally, individual financial institutions enjoy autonomy and decide on their own risk appetite when applying a risk-based approach to their business activities against their regulatory environment. To the extent that there are no common standards as to under what conditions humanitarian payments are considered legitimate and acceptable, and to what kind of information is required to make such an assessment, such payment processes will remain cumbersome and destined to encounter obstacles on their way from the remitter bank through the intermediary chain to the beneficiary account. However, the networked structure of the financial system is nevertheless a highly stratified arrangement. Standards and norms are effectively set by the main nodes and pushed towards smaller nodes at various interfaces among these private actors. The Wolfsberg

²¹ The elephant in the room is the United States, of course. Concern about risks of sanctions violations are disproportionately related to U.S. sanctions, primary and secondary, and potential enforcement actions. Even if there were common standards for assessing humanitarian payments with respect to EU sanctions this cannot be expected to completely resolve the payment channel issues existing today.

Group, a self-regulatory association of thirteen global banks, is a case in point. It has defined due diligence standards in correspondent banking,²² making clear that once common standards for humanitarian transactions were found, they could be effectively pushed through the financial system.

In light of how cross-border payment channels work in a thoroughly globalized financial system, efforts to improve the situation for humanitarian payments need to take that international dimension seriously. If over-compliance is a judgment cast at individual financial institutions, it is misguided in as far as it suggests that they would not act rationally towards their regulatory environment. Over-compliance may adequately describe the state at the systemic level – but in order to turn such description into an effective diagnosis, the operational intricacies of the system and the causes of over-compliance need to be recognized properly. Multilateralism needs to be put back in charge again.

Finally, a word from a security perspective: As a counterfactual, the lack of formal payment channels effectively forces transactions to rely on informal payment methods, which generally lack the control mechanisms of formal channels and increase the risks that these control mechanisms are set up against, including sanctions circumvention, money laundering and terrorist financing.²³ In other words, de-risking is a lose-lose situation: obstacles in delivering humanitarian assistance are conjoined with heightened security risks.

²² Wolfsberg Group. *Correspondent Banking Due Diligence Questionnaire and Guidance* (2018), <https://www.wolfsberg-principles.com/articles/cbddq-publication-%E2%80%93-22-february-2018>. (accessed January 5, 2021).

²³ See, for example: FATF, *The role of Hawala and other similar service providers in money laundering and terrorist financing*. (Paris: FATF, October 2013).

Private sector implementation and effectiveness deliberations: The rapidly evolving global sanctions landscape

Justine Walker

The past decade has been marked with a dramatic evolution in the international sanctions compliance and enforcement landscape. The scale and pace of change are evident not only in terms of the volume of individuals, entities and activities subject to sanctions, but also in how, and to whom, such sanctions are being applied. For instance, U.S. designations reached a high in 2017, and again in 2020. The evolving basis for why sanctions were applied is equally stark. As set out by the Center for New American Security (CNAS), notable trends have emerged. The near majority of sanctions imposed under the Bush administration were based on ties to terrorist groups or states on the State Sponsors of Terrorism list, over half of designations under the Obama administration were based on counter-proliferation programs, whereas the Trump administration concluded their term with a heavy focus on human rights violations.¹

Changing designation patterns have had a profound impact on business exposure and compliance frameworks. Nowhere is this more evident than in the U.S.-China sanctions context. As tensions have heightened between the U.S. and China, sanctions measures have increasingly become the policy tool of choice. Since mid-2020 there has been a dizzying sweep of U.S. actions on China, with one legal instrument being used after another. As industry attempted to contextualize these developments, it was necessary to look back to the end of 2019, namely, the passing of the Hong Kong Human Rights and Democracy Act and the Uighur Human Rights Policy Act of 2019.

The imposition of the controversial Hong Kong National Security Law (NSL) by the National People's Congress of the People's Republic of China was a new trigger point. In response, the U.S. Congress passed the Hong Kong Autonomy Act (HKAA), which paved the way for subsequent Presidential Executive Orders (E.O.). Such actions sat alongside a vast array of broader actions, including issuance of the Xinjiang Supply Chain Advisory, which sets out risks and considerations for business with supply-chain exposure to entities engaged in forced labor and other human-rights abuses in Xinjiang. In a wider move on data privacy, security and human rights, the State Department announced on the 5 August 2020 the expansion of its 'Clean Network' Initiative, which seeks to ensure that untrusted companies are not connected with U.S. telecommunication networks, U.S. mobile app stores and apps, cloud-based systems, and undersea cables. The following day, the White House published two E.O.'s under IEEPA provisions addressing Chinese social-media companies.²

The escalation of sanctions continued with the issuance in November 2020 of Executive Order 13959 (EO13959) that prohibited certain transactions in securities linked to "Communist Chinese Military Companies" (CCMCs). The U.S. Defense Department has so far listed over 60 companies as being under control of the Chinese military and operating in the United States (the so-called "Pentagon List"). The ban came into effect on 11 January

¹ Francis Shin, *Sanctions by the Numbers: Spotlight on China* (Washington, D.C.: Center for New American Security, 2 December 2020), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-2> (accessed 16 June 2021).

² Justine Walker, *Contextualizing the U.S.-China Relationship Amid Hong Kong and Wider Sanctions Developments*, ACAMS Industry Briefing Paper (21 August 2020), <https://www.acams.org/en/media/document/10681> (accessed 16 June 2021).

2021 and set out multiple wind-down periods, during which U.S. persons were expected to divest securities related to the CCMCs.

Over a period of 12 months, industry have set about digesting the long-term implications arising from the extraordinary shift in the global sanctions environment. Private sector actors are not only reevaluating business models in terms of compliance risk, but also supply-chain vulnerabilities and potential market-access implications. Legal risk has equally come to the forefront of private sector thinking. In response to the U.S. designations, the Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) released statements (8 August) urging companies to be 'fair' in their response to U.S. sanctions. The HKMA went a step further, indicating unilateral sanctions imposed by foreign governments had no legal status in Hong Kong.

In a more concerted pushback against sanctions, China has advanced a number of steps to build its own resilience against the extra-territorial application of foreign sanctions. In June 2021, China passed its Anti-Foreign Sanctions Law, which expanded the government's power to retaliate against sanctions imposed by the United States, the EU, the UK, Canada and others.

The new law builds upon the implementation of wider measures, including the creation of a new 'blocking' type of regulation which became effective January 2021. In drawing up a toolkit of counter sanctions, China reportedly drew on the legislative experience and system design of European Union and other countries and regions in terms of reporting, issuance of injunctions, and mechanism of judicial remedies.³

Compliance deliberations are at an early stage in terms of scope of the China blocking regulation, and indeed how vigorously the Chinese authorities will implement its application. In a similar vein to the EU blocking regulation, industry is assessing their legal exposure to a potential set of competing obligations. At the forefront of this is the extent to which the Chinese rules will be robustly applied, and whether they will pro-actively target companies for complying with U.S. sanctions.

Borrowing from the EU blocking regulation framework, China has also introduced a number of parallel aspects. Firstly, an exemption process, whereby a written application is submitted to the State Council for an exemption from compliance with the Chinese blocking regulation. Again, like the EU blocking regulation the China rules creates the opportunity of civil legal action for damages against those complying with extraterritorial measures. A framework for non-compliance penalties is also introduced. At this stage, open questions remain as to how forcefully the provisions will be applied, and how they will be balanced with commercial risk appetite decisions. Either way the law marks a material escalation of counter-sanctions and creates complex legal dilemmas in how exposed private sector entities, and individuals, balance directly conflicting obligations.

Over the past year the U.S.-China geopolitical context has entered uncharted territory, and for the foreseeable future there remains enormous uncertainty in how sanctions may evolve. It is indisputable that recent developments will have far-reaching consequences for global businesses operations and the global sanctions landscape alike. The private sector is now carefully considering how it navigates its exposure to the world's two largest economies. Of equal significance is that evolving China sanctions do not sit in a vacuum, and should not be viewed in isolation. More broadly, the wider sanctions landscape involving Russia, Syria, Cuba, Iran, Venezuela and North Korea correspondingly poses major implementation and effectiveness considerations, many of which are inter-connected and discussed in further detail below.

³ See remarks by Han Liyu, law professor, Renmin University of China, available at <http://www.mofcom.gov.cn/aarticle/ae/ai/202101/20210103029706.html> (accessed 16 June 2021).

Permissible vs. prohibited – Determining who and what is sanctioned

As sanctions have grown in sophistication, it has become progressively more challenging to distinguish relationships or activities which are unequivocally prohibited from those which are permitted. An illustrative example is that of industry deliberations on who was caught by the CCMCs related sanctions under E.O. 13959.

Over 60 companies were directly listed under the CCMC sanctions framework.⁴ Importantly, at the time the requirement also extended to entities with names that “closely match”, but do not exactly match, the name of those Communist Chinese military companies listed. The close match requirements were due to come into effect on 28 January 2021; but, following wide-spread implementation uncertainty, two last-minute extensions were given to original deadlines. As each deadline approached, speculation would swirl that the scale of the task, and corresponding uncertainty on how to apply the ‘close name match’ provisions would lead to further extensions.

Following a major U.S. policy review, on 3 June 2021, the Biden administration announced the revocation of E.O. 13959 and related CCMS list. Instead, a new E.O. and new list system were introduced. While maintaining the thrust of the Trump-era policy under E.O. 13959, the revised framework addressed a number of implementation challenges. Specifically, the complex issue of close name matches was removed. Also introduced is a more streamlined and expanded designation framework. The White House initiative, whilst offering some implementation clarity, sees the crux of complexity remaining. Precisely how to apply complex financial sanctions across the securities sector is still an open question and many industry deliberations are ongoing.

Moving away from China, the introduction of sectoral sanctions placed on certain Russian government-owned banks, energy companies and defence companies, following the annexation of Crimea and escalating Russian interventions in Eastern Ukraine, raised significant implementation challenges. At the time, sectoral sanctions were a relatively new and different type of sanctions response. The main difference is that they do not impose a blanket prohibition on a sanctioned target (e.g. a person, sector or country), instead restricting access to the loan and capital markets in the U.S., EU and other countries. They do this by restricting sanctioned companies, acting in sectors known for their need for medium- to long-term financing, to issue medium- and long-term equity or debt on EU and U.S. markets, and to restrict Russia’s access to EU and U.S. technology and expertise in the energy sector.

Whilst less restrictive than traditional blocking/asset freezing sanctions, their application has potentially been more complicated to implement. Definitional concepts of debt and equity, how to screen for prohibited transactions (versus a prohibited entity), together with the scope of application has created additional challenges at the interface between industry and governments. Despite being widely utilized since 2014, the application of sectoral sanctions remains a complex affair. The U.S. Russia Sectoral Sanctions Identifications (SSI) List is based on four Directives issued under the authority of E.O. 13662, with each Directive targeting specific sectors and places limits on the economic activity permitted in respect of each SSI target.

Not all sectoral sanctions are the same. Whilst common principle governs the EU and U.S. sectoral sanctions regimes against Russia, one key interface challenge remaining between the EU and U.S. relates to the differences of interpretation of rules. Such differences pose

⁴U.S. Department of Defense, “DOD Releases List of Additional Companies, In Accordance with Section 1237 of FY99 NDAA”, Press Release (Washington, D.C., 14 January 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2472464/dod-releases-list-of-additional-companies-in-accordance-with-section-1237-of-fy/> (accessed 16 June 2021).

considerable challenges to companies subject to both EU and U.S. jurisdiction. Moreover, entities identified as subject to sectoral sanctions are also highly integrated into the global economy. Consequently, traditional list-based sanctions screening can result in hundreds of thousands of hits without giving any indication as to whether a specific transaction is permissible under the varying rules. In short, navigating sectoral sanctions in order to determine permissible versus prohibited is now a discrete area of sanctions specialism. A central underpinning element for virtually all sanctions programmes is the need to ascertain 'indirect' sanctions risk exposure. Central to this are critical judgements in respect to ownership and control.

In terms of sanctions compliance, ownership or control is established in accordance with a set of criteria. In general, the threshold applied is commonly 50 percent, for instance if a sanctioned individual owns 50 percent or more of a non-listed entity than that entity also becomes sanctioned. However, determining whether the 50 percent-threshold is met can be highly complex. Equally, the significance of the "control" element varies between sanctions regime and can leave the door open to wide variations in interpretation.

The April 2018 U.S. sanctions under the U.S. Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) regime are illustrative of the interface challenges of implementing ownership and control obligations. In this specific scenario only a handful of Russian businesses and individuals were designated under U.S. sanctions, yet when ownership factors were included, hundreds – even thousands – of non-listed entities also became the subject of U.S. sanctions, including a number located in the EU.

A more recent illustration of the challenges associated with ownership and control, is that of the Xinjiang Production and Construction Corps ("XPCC"), which was subject to an OFAC designation in July 2020.

XPCC is a Chinese paramilitary and economic organization and was sanctioned due to its alleged human rights abuses against ethnic minorities in Xinjiang province. XPCC is a unique organisation in Xinjiang with administrative authority over several cities, settlements, farmland and has its own administrative structure which performs a range of governmental functions. Subsidiary companies manufacture a variety of products, and XPCC is reported to have stakes in more than 800,000 companies, as well as employing or indirectly supporting as many as 3.1 million people.⁵

Research shows that there are up to 34 layers of ownership of XPCC entities, with entities located globally in approximately 147 countries – including the U.S. – and feature more than a dozen companies publicly listed on the Hong Kong Stock Exchange.⁶ Given XPCC's unique structure, the sanctions on XPCC and its subsidiaries created major ramifications for global supply chains and more broadly across the private sector. For instance, the Xinjiang region accounts for approximately 85 percent of China's cotton production and is estimated to account for 13 percent of global cotton production. Consequently, the sanctioning of XPCC resulted in major international brands withdrawing from the region and large sways of commercial activity being displaced to other locations.

However, even following withdrawal from the Xinjiang region, global corporates have struggled with disentanglement from XPCC exposure. For instance, textile supplies in

⁵ For further information on XPCC scope and business operations, see Denisa Andreica, *Made in Xinjiang: US sanctions trigger scrutiny of supply chains in western China*, Aperio Intelligence Brief (6 October 2020), <https://www.aperio-intelligence.com/2020/10/06/made-in-xinjiang-us-sanctions-trigger-scrutiny-of-supply-chains-in-western-china/> (accessed 16 June 2021).

⁶ ACAMS October 2021, Ownership and Control Masterclass, XPCC case study, <https://www.acams.org/en/training/webinars/sanctions-masterclass-understanding-and-interpreting-ownership-and-control> (accessed 16 June 2021).

Bangladesh, Vietnam and other Asian countries often utilize Chinese raw cotton.⁷ Whilst asking suppliers to certify they are not using products obtained from XPCC is, on paper, a step in the right direction, it does not completely remove the risk and can be extremely difficult to verify. In fact, establishing any clear XPCC ownership and control overview has been an immensely challenging task for private industry, as effective auditing and due diligence processes are severely constrained in Xinjiang. Many relevant documents are only written in Chinese, and where information can be ascertained there is much variation between what appears to be owned 50 percent or more. Such constraints have been further compounded due to COVID-19 pandemic travel restrictions which, in many instances, have made in-person verification almost impossible.

Beyond the headline Russia and China examples, more straight forward every-day considerations absorb compliance efforts in determining what and who is sanctioned. Whilst ownership could be argued as a more straight-forward concept, determining control requires fact specific inquiries. In both cases, ownership and control structures of businesses across the globe can be complex and dynamic. By the same token, legal thresholds for when an entity is deemed sanctioned varies across key regimes, notably the U.S., EU, UK and Australia, with each applying different criteria. Even within EU member states, there exist considerable interface challenges (see the contribution by Anthonius de Vries) between individual competent authorities, which operate under the same governing regulations but regularly adopt different interpretations of how to apply the rules.

In sum, determining who and what is sanctioned now involves a complex set of judgments by private industry. Where sanctions are open to broad interpretation and/or lack sufficient implementation guidance, this often results in financial institutions adopting a highly cautious approach. This in turn may result in significant elements of what would otherwise be 'permissible activity' being discontinued due to some element of potential sanctions risk.

Future proofing global operations – Managing the risk of secondary sanctions and counter sanctions

This unprecedented growth in the use of sanctions, combined with innovations in how such measures are implemented, plus the evolving growth of retaliatory countermeasures has led to a highly complex geopolitical business environment. Consequently, private sector actors are increasingly seeking to 'future proof' global operations from the likelihood of conflicting legal challenges of operating over multiple jurisdiction. This is especially the case where complying with one set of sanctions obligations may create a direct conflict with laws of other jurisdiction of operation, which poses a particularly cumbersome interface challenge for private industry.

The application of U.S. secondary sanctions is at the heart of these deliberations. Unlike with U.S. primary sanctions, no U.S. nexus – such as a connection to the U.S. financial system, U.S. economy, or U.S. person – is required to trigger secondary sanctions restrictions. Whilst utilized by the U.S. administration, secondary sanctions have increasingly been introduced by the U.S. Congress in legislation. In applying, or threatening to apply, secondary sanctions, the United States penalizes actors for engaging with sanctioned targets even without the jurisdiction to make that engagement illegal.

⁷ Marie-José van der Heijden, Gözde Alkan Erener and Jürgen Balkaran, "The U.S. adds Chinese entity XPCC to its Sanctions List. The Implications for retail and fashion industry", Deloitte blog (30 September 2020), <https://www2.deloitte.com/nl/nl/pages/legal/articles/the-us-adds-chinese-entity-xpcc-to-its-sanctions-list.html> (accessed 16 June 2021).

The impact and implications for global business has been amplified by the continual expansion of entities subject to U.S. secondary sanction. The more forceful approach in the threatened use of secondary sanctions has been met by a rise in local regulations, blocking regulations or laws setting out prohibitions in respect to terminating or declining relationships on the grounds of U.S. sanctions.⁸

In response to escalating sanctions and conflict of law scenarios the private sector has turned to reviewing global risk appetite statements and contractual terms. Within this, secondary sanctions pose a particular set of deliberations for sanctions provisions in contracts. Contracts often include standard commitments, representations or warranties that a party must comply with; this includes compliance with “applicable” sanctions. However, in wording these contracts the question is whether U.S. secondary sanctions should automatically be deemed as directly “applicable” to non-U.S. persons who are out of the U.S. jurisdiction.

Interpreting standard contractual clauses intended to mitigate sanctions risk is now a matter of litigation with the EU and UK courts, which creates an additional interface challenge. Whilst the courts begin to offer their judgements, industry has nonetheless moved ahead with the inclusion of safeguards when drafting sanctions, payment and enforcement clauses into contracts. The unpredictable nature of sanctions regimes, combined with potential counter-sanctions, has further fueled a tightening of commercial risk appetite statements and even withdrawal from exposure to certain markets. Given the upward trajectory of sanctions it should be assumed that mitigating legal and regulatory cross-border conflicts will become the future normal. Consequently, multinationals – no matter where they are based – are increasingly driving ahead with a new model of risk assessment.

Raising the bar of compliance in new sectors

Whilst sanctions compliance expectations for all stakeholders has evolved considerably over recent years, expectations have also expanded into new sectors. This is especially true for the maritime shipping industry, whereby a concerted programme of UN and unilateral international activity, together with escalating U.S. enforcement actions, have amplified the importance of maritime sanctions compliance.

In May 2020, U.S. authorities published a ‘Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities’ (‘the Advisory’), which substantially expanded on previous communication to this sector.⁹ Although it is presented as an ‘advisory’ and the language within is that of recommendation rather than obligation, industry have tended to view such communications as creating a standard of expectation. In July 2020 the UK sanctions regulator issued its own ‘Maritime Guidance’.¹⁰

The new expectations are perhaps less of a significant development for those global financial institutions with more sophisticated sanctions compliance frameworks. However, in

⁸ Samantha Sultoon and Justine Walker, *Secondary sanctions’ implications and the transatlantic relationship* (Washington, D.C.: Atlantic Council, 2019), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/secondary-sanctions-implications-and-the-transatlantic-relationship/> (accessed 16 June 2021).

⁹ U.S. Treasury Department, “Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities. Guidance to Address Illicit Shipping and Sanctions Evasion Practices” (Advisory), (Washington, D.C., 14 May 2020), https://home.treasury.gov/system/files/126/05142020_global_advisory_v1.pdf (accessed 16 June 2021).

¹⁰ HM Treasury, Office of Financial Sanctions Implementation (OFSI), “Maritime Guidance. Financial sanctions guidance for entities and individuals operating within the maritime shipping sector” (London, December 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948299/OFSI_Guidance_-_Maritime_.pdf (accessed 16 June 2021).

the case of smaller and regional financial institutions, and those within the maritime sector itself, the bar has certainly been raised in terms of compliance, risk assessment and due diligence standards.¹¹ Consequently, there has been much debate about how to approach the current framework of evolving expectations. Specifically, the application of 'Know Your Customer' obligations, enhanced due diligence frameworks, Automatic Identification System (AIS) monitoring, contractual provisions and legal limitations concerning data-sharing have been at the forefront of industry deliberations to mitigate this interface challenge posed by heightened expectations coming from the United States and UK governments.¹²

As the private sector has sought to determine how best to implement expanded sanctions compliance obligations, a number of key elements have emerged as requiring further scrutiny. For instance, much uncertainty remains on competent authority expectations on risk assessment and due diligence, including how different stakeholders within the sector operate and what, in reality, is viable in terms of implementing due diligence across diverse global shipping-trade-commodity operations. Likewise, questions on how to effectively utilize AIS within the toolkit of wider sanctions compliance has been a hotly debated topic. Specific waters and geographic locations are key in shaping risk-based decisions concerning responses to the loss of AIS. In this regards industry has pushed for a more streamlined public-private understanding for how vessel data should be incorporated into risk models in order to limit disproportionately and ill-informed responses.

A further aspect arising from the U.S. Advisory are recommendations related to suspicious activity reporting. Specifically, the Advisory's list of deceptive shipping practices draws out the practice of 'false flags and flag hopping' and recommends 'that the private sector be aware of and report to competent authorities' any such occurrence.¹³ In Annex A, under specific guidance, the Advisory recommends that Flag Registries utilize 'relevant bodies to report possible illicit activity.' For ship owners, operators, and charterers, the Advisory additionally recommends emphasizing to clients that all ships will be monitored for AIS manipulation, and that instances of AIS disablement inconsistent with The International Convention for Safety of Life at Sea (SOLAS) will be both investigated and reported.¹⁴

Suspicion-based reporting obligations, where there is a case of suspected criminal activity, is a well utilized investigative and law enforcement tool. For financial institutions and other defined entities, specific domestic legal and regulatory frameworks set out precisely how such suspicious activity obligations should be implemented. Included within this are safeguards for those reporting, plus standards for how submitted information should be stored and shared.

In comparison to established reporting regimes, maritime actors have not traditionally been expected to fulfill this task. A novel interface challenge springs from the fact that there is no clearly defined regulatory authority for receiving such reports. Consequently, immediate questions have been raised over who is mandated to receive such reports, what should be reported, whether reporting frameworks should include certain protections to those who submit reports in good faith, and how expanded reporting frameworks

¹¹ See Justine Walker and Sam Cousins, *Maritime Sanctions Compliance: Enhancing Cross-Industry Cooperation and Implementation*, ACAMS (October 2020), <https://www.acams.org/en/media/document/12791> (accessed 16 June 2021), p. 4.

¹² ACAMS, the global AML/CFT/Sanctions membership body, convened a compliance task force specifically examining maritime related sanctions compliance matters; AIS is a navigational system governed by The International Convention for Safety of Life at Sea ('SOLAS') by which transponders transmit a ship's location and movements. In most cases this remains active to track a ship's progress.

¹³ Advisory (footnote 9), p. 3.

¹⁴ Advisory (footnote 9), p. 18.

should be balanced with the implementation of parallel legal obligations i.e. competition law and data protection.

A further interface challenge to note is that reporting requirements may raise questions of jurisdiction. For instance, the extent to which non-U.S. maritime actors are expected to report suspected breaches of U.S. sanctions, and if by doing so they risk breaching laws and regulations of other jurisdictions. In moving forwards with suspicion-based reporting obligations, industry has recommended that further dialogue is held on thresholds for reporting, information-sharing standards, anticipated investigations channels and how these should be applied to maritime activities.¹⁵ Drawing upon tried and tested reporting tools is an attractive model for sanctions authorities, but to ensure their effective implementation will require additional effort in building the correct infrastructure.

While a number of implementation questions arising from the highlighted interface challenges are specific to the maritime sector, aspects such as uncertainty regarding suspicion-based reporting requirements and due diligence expectations are applicable to a variety of sectors. As regulators increase their sanctions focus and expectations of new sectors, actors are finding they must ensure how best to navigate critical aspects of implementation.

The need for a forwards-leaning approach

As sanctions compliance expectations and the scope of implementation continue to evolve, a pressing need has emerged for government authorities to address resulting interface challenges by 'leaning forward'. Three principal areas stand out as requiring immediate attention.

The first relates to acknowledging the *scale and scope* of current sanctions. With the interdependence of international financial markets and international spread of large companies, the impact of today's sanctions now extends well beyond their intended target. This in turn can lead to a significant chilling effect. Dozens of major international banks have "de-risked" – exiting customers and even whole lines of business due, at least in part, to perceived direct or indirect sanctions risks and the potential commercial risks that may arise from a sanctions violation penalty being applied. Whilst some may use the term 'over compliance', in reality such statements normally overlook the operating complexity of managing global sanctions exposure and extra-territorial sanctions risk.

The second aspect relates to the prompt issuance of *interpretative guidance and licensing frameworks*.¹⁶ Those imposing sanctions rarely intend to prevent legitimate activity. However, building the necessary conditions for ensuring continued permitted exposure to highly sanctioned jurisdictions will undoubtedly require a more defined position on certain implementation matters. The COVID-19 pandemic and scale of humanitarian need in highly sanctioned environments has brought to the forefront the need for sanctions authorities to urgently step up their efforts. Recent guidance issued by both the United States and EU have been welcome steps, but it is clear much greater realignment is required. At a minimum, the U.S. government and EU authorities should undertake a combined strategic review of future priorities and licensing processes involving highly sanctioned jurisdictions. This should include mapping key humanitarian priorities for required international assistance involving jurisdictions such as Syria, Yemen, Iran and Venezuela,

¹⁵ See Walker and Cousins 2021 (footnote 11), p. 15.

¹⁶ See Justine Walker, *Navigating Humanitarian Exceptions: Challenges, opportunities and realities for the COVID-19 pandemic response*, ACAMS (2020), <https://www.acams.org/en/media/document/10686> (accessed 16 June 2021).

so as to ensure sanctions and related regulatory environments do not overly inhibit delivery of humanitarian and other permissible assistance.

Finally, the third area is the need for greater consideration of how to build private sector confidence in *sanctions easing mechanisms*. As demonstrated in the case of Iran, easing sanctions is legally and politically difficult and increasingly lacks longevity. Equally, disconnects between the EU and United States in how and when sanctions are eased are regularly noted. Moreover, the on/off nature of certain regimes has further resulted in the private sector viewing exposure through a much longer-term lens. For sanctioned actors, the economic benefits of sanctions easing will only be achievable by re-engagement of the private sector, and especially global financial institutions. As such, those imposing sanctions now, more than ever, need to address the interface challenge of regulatory uncertainty build in a mechanisms for ensuring legal certainty and protections in order to build confidence among private sector actors. Without such reassurances economic actors are unlikely to increase their exposure to previously sanctioned markets or actors. This in turn, will fundamentally undermine the usefulness of sanctions as a tool of diplomatic diplomacy.

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