ROUNDTABLE: ECONOMIC SANCTIONS AND THEIR CONSEQUENCES

The Not So Targeted Instrument of Asset Freezes

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While economic sanctions imposed during the Cold War, primarily by the United States, were never devastating to the targeted country, the United Nations Security Council's comprehensive sanctions imposed on Iraq in the 1990s were a different matter. After Iraq's infrastructure was destroyed during the Persian Gulf War of 1991, the sanctions prevented Iraq from rebuilding. Even with the advent of the UN's Oil-for-Food Programme, Iraq was never able to fully restore its electrical grid, agriculture, industry, or water treatment facilities; and the ensuing humanitarian crisis, including widespread malnutrition and epidemics of cholera and typhoid, continued for over a decade.

The so-called targeted sanctions that were formulated in the late 1990s seemed to hold great promise as a powerful tool that could be used with precision and effectiveness against government officials and elites while sparing civilian populations broad, indiscriminate harm, such as was experienced in Iraq. Asset freezes seemed like the quintessential form of targeted sanctions. Freezing the personal assets of autocrats would go far to strip them of the means to pursue abuses of power. The blacklisting of individuals and companies, and the focused sanctioning of corporate transactions, seemed to embody the precision that was envisioned in the emergence of targeted sanctions. A recent report published by the Center for a New American Security notes that "the expanding complexity of U.S. sanctions statecraft has allowed the U.S. government to more precisely target financial measures at criminal actors and security threats, and to narrowly target large global companies and enterprises where more sweeping sanctions could have yielded unacceptable collateral costs."[1]

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In practice, however, targeted sanctions have turned out very differently; and the same has been true of asset freezes. In many cases, targeted sanctions have compromised the systems upon which the target country's economy as a whole is dependent: international banking transactions, general imports and exports, foreign investment, shipping, technology, the energy sector, infrastructure, and industrial production.[2] While this has most frequently been the case in regard to sanctions imposed by national or regional governments—particularly the United States and the European Union—to a lesser extent it is true of UN sanctions as well. The Security Council sanctions on North Korea, for example, not only prohibit transactions concerning North Korea's nuclear program but also block an array of imports and exports affecting the country's economy, infrastructure, and industrial production: imports of steel, industrial machinery, and oil; and key exports, including coal, iron and other metals, textiles, and seafood.

In the case of U.S. and EU sanctions, it is even more evident that sanctions regimes are often directed at critical systems, or even whole sectors of a country's economy. This is certainly true of the U.S. sanctions imposed on Cuba since the 1990s, which have targeted its exports, foreign investment, shipping, access to technology, and access to banks and global financial institutions in a variety of ways. All of these types of sanctions have had a negative impact on Cuba's economy, infrastructure, and public services, including its electricity, transportation, and healthcare.[3]

Such negative impacts may also result from sanctions that purport to be narrowly targeted at "bad actors" or weapons programs. This was the case, for example, when from 2012 to 2016 the European Union, acting in concert with the United States, expelled Iran's major banks from SWIFT (Society for Worldwide Interbank Financial Telecommunication), the global financial-messaging hub that facilitates nearly all international banking transactions. This expulsion compromised Iran's ability to engage in a broad range of banking transactions that were legal and had no relation to the country's nuclear program.

The False Promise of Asset Freezes

The above issues with targeted sanctions notwithstanding, many policymakers view asset freezes in a different light. They argue that, unlike the sanctions on commodities or imports/exports, asset freezes and other forms of targeted financial sanctions are characterized by considerable precision. This is a misleading

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assessment. Further, asset freezes can also raise other more well-known concerns, as described below.

Due Process

Asset freezes have been criticized on due process grounds for many years. Under Security Council Resolution 1267, adopted in 1999 to put pressure on the Taliban and al-Qaeda, the Security Council required all member states to ensure that the assets of the targeted persons within their jurisdictions were frozen indefinitely. And yet these individuals were sometimes being targeted on the basis of scant factual information or on claims with little credibility. The list of individuals increased dramatically after September 11, 2001. At the same time, there was little recourse for those who maintained that the claims made about them were false.

The standard for imposing asset freezes raised an additional layer of concern. These freezes were not punishment for criminal acts, where there would be a hearing and a conviction. Rather, these were preventive measures, ostensibly intended to prevent individuals or companies from using their resources to commit acts of terrorism. But anticipating who may or may not commit a wrongful act is a questionable business; for unlike a criminal accusation, it is hard to see exactly how someone might disprove the claim that they may commit a wrongful act in the future. This process was harshly criticized by legal scholars, who called for greater protections for those sanctioned, including the right to see and respond to the evidence against them, and to appeal to an impartial external body.[4] The lack of due process was also challenged in the European courts, most significantly in the 2013 *Kadi* case,[5] which invalidated the European regulations implementing the Security Council resolutions on the grounds that they violated basic principles of human rights. In response to these concerns, the Security Council ultimately established an internal ombudsperson to review the claims of those who were listed, at least in regard to the 1267 sanctions, but the Council has not done so with regard to the other sanctions regimes that impose similar measures.

Larger Consequences: The High Cost of U.S. Imposed Asset Freezes

The due process issues are well known. What is less well known, and rarely acknowledged, are the broad and systemic ways that these listings of individuals may do damage to the target country as a whole. This is in part because listing individuals not only freezes their assets but also prohibits nearly any transactions or commercial dealings with those individuals. As a result, a blacklisted government official, or official of a state-owned entity, not only loses access to his

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own assets abroad but also loses the ability to transact business on behalf of his state.

Although it would seem that the effects of such sanctions are limited when the number of targeted officials is small, the United States and the European Union have increasingly used the targeting of officials as an explicit strategy to isolate governments. This is true with regard to Crimea, North Korea, Syria, and Venezuela. In the case of Venezuela, the government officials are specifically named and the sanctions are updated when government personnel change. Freezing the assets of individuals or specific companies may then function to disrupt or even paralyze or bankrupt the target state, undermine the country's industrial production, compromise its imports and exports, and undermine critical economic and governmental functions.

The United States imposes more sanctions, by far, than any other government or international body, and its sanctions are the most extreme and far-reaching. For example, the United States has blacklisted many of the senior officials in the Venezuelan government, including the president and the last two vice presidents, as well as the director of the Central Bank of Venezuela; the minister of foreign affairs; the president of CENCOEX (the government agency that sets the foreign exchange rate); the head of the agency that manages price controls; the minister for agriculture and the former head of the agency that purchases medicines from abroad; and the vice minister for Europe of Venezuela's Ministry of Foreign Affairs.[6] The United States claims that these are responses to the corruption of the current Maduro government. But it is also the case that blacklisting these individuals compromises Venezuela's efforts to buy inputs for agriculture, provide healthcare, manage the current economic crisis, and engage diplomatically with its European allies and trade partners.

Similarly, when state industries or state properties are blacklisted, particularly those related to shipping and the energy sector, such measures are neither limited nor precise. On the contrary, the economy and infrastructure can be affected on a structural level. That was the case when in January 2019 the United States blacklisted Venezuela's national oil company, Petróleos de Venezuela, S.A., which generates 95 percent of the country's export revenue,[7] and when in April 2019 it blacklisted thirty-four of Venezuela's oil tankers.[8] Likewise, the 2011 sanctions targeting the Central Bank of Libya and the national oil company had a considerable impact on the Libyan economy.[9] And in Iran, the National Iranian Oil Company and Islamic Republic of Iran Shipping Lines (Iran's national shipping line) have

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been blacklisted, as has the entire Islamic Revolutionary Guard Corps, which in addition to being a branch of Iran's armed forces is also a major player in the operation and maintenance of Iran's infrastructure, particularly its construction and telecommunication sectors. Similarly, U.S. sanctions have blacklisted Gaviota, a unit of the Cuban military that manages hotels and bus lines for tourists, effectively targeting the country's tourism industry, one of the most significant sectors of Cuba's economy.

The United States also imposes targeted financial sanctions on certain *types* of transactions, which would seem to be an even narrower measure than blacklisting a person or company. Under U.S. law, asset freezes of individuals and companies are designated by placement on what is called the Specially Designated Nationals (SDN) List: no business can be conducted with those on the list. The Sectoral Sanctions Identifications (SSI) List, on the other hand, does not impose a blanket prohibition on all dealings with those on the list but rather on particular types of transactions, such as extending credit to a targeted entity or prohibiting energy exports to it. On its face, it seems that the SSI List provides greater precision, and avoids the negative impact of blacklisting whole companies or state agencies. But that is not always the case. For example, in 2017 as Venezuela scrambled to restructure its debt, the United States prohibited its creditors from extending to the country new credit with a maturity date of more than thirty days. This blocked Venezuela from renegotiating its debt, since doing so would create new loans in place of the old ones. Unable to keep up with its debt payments, or to renegotiate the terms of the debt, Venezuela went into default on many of its obligations and creditors began seizing state assets, including oil shipments and an offshore oil refinery. Any oil exports are now at risk of being seized by creditors. As income from Venezuela's oil exports plummets, the economic crisis worsens. Whatever corruption or mismanagement can be laid at the feet of the Maduro government, the debt crisis exacerbates the economic problems—and the humanitarian situation—profoundly.

In the United States, the Global Magnitsky Human Rights Accountability Act of 2016 provides the U.S. Treasury Department a standing legal authorization to adopt such sanctions against foreign government officials accused of serious human rights abuses, even where there is not a broader sanctions regime imposed on the country. Citing the act, in July 2018 the Treasury Department sanctioned several of Nicaragua's top government officials, including the national police commissioner; the president of Petronic, the national oil company; and the president of the Supreme Electoral Council.

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Expanding the reach of "narrow" asset freezes even further, the Foreign Sanctions Evaders (FSE) List blacklists not only the ostensible wrongdoers but also those who assist Iran or Syria by facilitating these countries' trade and financial transactions in the face of U.S. measures taken against them. For example, the FSE list is not limited to those who help Iran or Syria buy weapons or hide illicit assets; in addition, it targets as a "foreign sanctions evader" any actor who arranges shipping or financial transactions for *any* of Iran's or Syria's imports or exports, however innocuous or necessary, in circumvention of U.S. sanctions.

Once a person or company is on the FSE list, "U.S. persons" are prohibited from conducting "all transactions or dealings, whether direct or indirect" with those entities (although the FSE list falls short of asset freezes, such as those imposed under the SDN list).[10] "U.S. persons" include not just U.S. nationals but also, in some cases, foreign subsidiaries of U.S. companies, foreign companies with branches in the United States, and foreign banks when they are interacting with the U.S. financial system. As a result, a European bank would be prohibited from processing a transaction in U.S. dollars through the U.S. financial system for the Swiss shipping company Bluemarine S.A. or the Dutch company Staroil,[11] in part because the United States maintains that they assisted Syria in circumventing U.S. sanctions. The overall effect is to greatly expand the scope of who gets punished: not only the Syrian or Iranian "bad actors" but also those who facilitate the trade or financial transactions of these actors, and then all who do business with the *facilitators*. Thus, not only is the U.S. enforcement extraterritorial, its reach is then expanded exponentially.

For those who are put on any of these lists—SDN, SSI, or FSE—the prohibitions are extreme and the damage can be severe. At the same time, because inclusion on a list is an administrative matter and not a criminal one, the standard for adding a listing is very low. It only requires that the Treasury Department has a "reason to believe"[12] that the individual meets the standard of the relevant authority (which, in the case of an executive order, is based on criteria set by the executive)—far from the standard for criminal conviction of beyond a reasonable doubt. To give an example, it seems that a group of Russian individuals were designated for possible future sanctions partly on the grounds that they were listed as billionaires by *Forbes* magazine.[13] According to the complaint of one such Russian in U.S. federal court, when Oleg Deripaska was blacklisted banks closed his accounts and businesses terminated negotiations with him. In addition, he could not find legal counsel to represent him in time to challenge the imposition of a worldwide

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freezing order. His law firm, which was a U.S. firm, was barred by the sanctions from representing him, and when his attorneys asked the Treasury Department for permission to provide Deripaska with legal services, they were denied. Once he found legal counsel outside the United States, foreign banks would not remit his legal fees to the firm for fear that they themselves would be sanctioned.[14] While Deripaska, a billionaire, may not be a sympathetic defendant, what is significant about his experience is that many of the consequences he suffered occurred outside the United States and outside the jurisdiction of the Office of Foreign Assets Control (OFAC). What we are seeing is that U.S. sanctions also create a "chilling effect" that extends beyond their explicit terms: foreign banks, law firms, and various other parties refused to do business with Deripaska or his companies even when they faced no clear legal risks from the OFAC.

The Chilling Effects of Asset Freezes

The chilling effect extends well beyond the direct and even the indirect impact of the blacklists. For banks, shipping companies, manufacturers, and others involved in international trade and finance, keeping up with lists of designated individuals and entities with whom they cannot transact business is costly and burdensome for many reasons. First, there may be multiple sanctions regimes—imposed by different national, regional, and international bodies—whose parameters are different and sometimes inconsistent with each other. In addition, these sanctions regimes each undergo frequent changes. As noted on the news site of one multinational law firm, "The state of United States, European Union, and other sanctions regimes is in flux like never before."[15] Compliance with U.S. sanctions presents particular difficulties. For a manufacturer, for example, to comply with the U.S. sanctions on Russia, it is not sufficient to simply check potential customers against the Treasury Department's lists of individuals and companies. This is because a manufacturer cannot export goods to any company that is more than half owned by an entity on a Treasury Department list. So the manufacturer is required to exercise due diligence to find out if its potential customer is owned by a person or company that is blacklisted. Further, if the potential customer has multiple owners, then the manufacturer has to determine who all of these owners are and how much of the company each one owns. It then must determine how much of the company these various owners own in total, because it is prohibited to export goods to a company where more than half is owned by

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blacklisted entities *in the aggregate*. Thus, the efforts and cost required for compliance for a single sale can be tremendously burdensome. In addition, there are no clear rules about what constitutes sufficient due diligence in researching all of the possible beneficial owners of each potential customer.[16]

Unsurprisingly, many companies and banks simply choose to terminate all business with the sanctioned country rather than take on the burden of compliance along with the risk of penalties that may total in the billions of dollars. This occurred, for example, when Wells Fargo and Bank of America withdrew from Nicaragua not because this was explicitly required under U.S. law, but because they thought the costs and uncertainties of compliance, along with the other difficulties in the country, warranted withdrawing altogether from the Nicaraguan market.[17] Similar decisions have been made in regard to Myanmar, Venezuela, Zimbabwe, and many other countries that have been subjected to embargoes or even targeted sanctions. The multinational law firm Baker McKenzie noted that it had seen considerable concern from companies that if they engaged in even legally permitted business with Iran, they might inadvertently breach U.S. sanctions law and potentially lose access to the U.S. market. The risks were so great that banks were reluctant to engage even in legitimate transactions involving Iran that were not subject to sanctions.[18]

As banks, shipping companies, insurers, oil companies, and others engage in this risk analysis, they often arrive at the same conclusion: Since compliance is costly and burdensome, and the vagueness of U.S. law means that they are often unsure of exactly what compliance requires, it is safer to simply withdraw altogether from doing business with a sanctioned country, even if their business does not directly engage any blacklisted entity. The result is that the country's access to banking, shipping, fuel, and goods is diminished far beyond the parameters of the sanctions.

Issues of Legality

As these blacklists continue to have an enormous impact on international business, their legality remains highly questionable from the standpoint of international law. In the case of Security Council–backed sanctions, there is at least a presumption of legality. But even that is not absolute, such as in cases where the Security Council uses its powers to impose hardship or to act arbitrarily in a way that results in human rights violations. This happened in the case of

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Iraq, when jurists and human rights organizations decried the Security Council sanctions as violations of international human rights law, and again when the European courts invalidated the regulations implementing Resolution 1267 as violations of *jus cogens*.

The legality of unilateral sanctions, including asset freezes, at least in some cases can be even more problematic. The U.S. sanctions that are extraterritorial—that is, interfering in the trade between the target country and its third-party trade partners—have been repeatedly challenged by the international community. In response to the Torricelli and Helms-Burton acts of the 1990s, which allowed claims against Cuba's foreign investors to be filed in U.S. courts, Canada, Mexico, and several European countries adopted retaliatory "clawback" legislation; and the European Union and United Kingdom brought an action against the United States before the World Trade Organization. Every year since 1992, Cuba has introduced a resolution before the UN General Assembly denouncing the U.S. embargo as a violation of international trade law. The votes in support of these resolutions typically include nearly every country in the United Nations, and in 2018 the vote was 189–2, with only the United States and Israel voting against the resolution.[19] When the United States reimposed extraterritorial sanctions on Iran in 2018, subjecting European companies to U.S. penalties if they do business with Iran, the European Union updated its blocking statute (first introduced following the adoption of the Helms-Burton Act in 1996) prohibiting European companies from complying with U.S. law in this regard.[20]

In a 2000 working paper for the UN Commission on Human Rights, legal scholar Marc Bossuyt suggested that the legitimacy of a sanctions regime should be judged in part by reference to the Martens Clause of the Hague Convention, invoking "principles of law of civilized nations, principles of humanity, and the dictates of the public conscience."[21] It might well be argued that near-unanimous votes of the UN General Assembly and blocking statutes by many nations would express the "dictates of public conscience" and the "principles of law of civilized nations."

To the extent that U.S. sanctions are intended to bring about regime change, this raises further questions about their legality. Sovereignty is broadly considered to entail respect for territorial boundaries and political independence; both violating foreign borders and seeking the overthrow of a foreign state constitute aggression and are prohibited under the UN Charter.[22] Despite this prohibition, in some cases U.S. blacklists are explicitly intended to force regime change. In April 2019, a

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bipartisan group in the U.S. Senate, frustrated that Nicolás Maduro continued to hold office, introduced legislation that would remove any Venezuelans from the SDN List who pledged support for opposition leader Juan Guaidó.[23] In regard to Nicaragua, the Trump administration has blacklisted many of the senior officials in government, including the vice president and the first lady, while President Trump has called for "free, fair, *and early* elections" to replace Daniel Ortega.[24]

When the blacklists include state officials, such as the minister of agriculture, the head of the national oil company, or the director of the central bank, or when blacklists include state enterprises that are critical to the economy, such as the national shipping lines or military units that manage the infrastructure, it is impossible to limit the impact on the country's population. Whatever corruption or mismanagement may exist, sanctions that have a structural impact will worsen the situation and undermine the markets and private actors as well as any efforts by the state to meet the needs of the population. At the same time, sanctions that target government officials and enterprises will likely not be seen by the general population as a well-intentioned act by a benevolent foreign power. On the contrary, the state will likely portray these measures as the aggressive act of a hostile power; and where the sanctioning government is seeking regime change, whatever the rationale, that perception will indeed be correct.

In recent months there have been many expressions of concern about whether the United States has overused "the sanctions tool." If the United States continues to use its singular powers over the international financial system so aggressively in pursuing its interests, there is a fear that alternative financial systems will emerge and that the United States will lose its hegemony over the global financial infrastructure. But there is an ethical concern as well: However frequently we use the word "targeted" or "precise" or "individual" to describe financial sanctions, including asset freezes, in significant ways they have come to look much like the "old" comprehensive sanctions of the 1990s. And, like the old sanctions, they are doing much to create, or worsen, chaos and fear and hardship in foreign lands.

NOTES

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[3] Amnesty International, *The US Embargo against Cuba: Its Impact on Economic and Social Rights* (London: Amnesty International Publications, 2009).
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[5] Judgment in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission, Council of the European Union, *United Kingdom v. Yassin Abdullah Kadi* (2013), curia.europa.eu/juris/document/document.jsf?docid=139745&doclang=EN.
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[10] Office of Foreign Assets Control, *List of Foreign Sanctions Evaders Sanctioned Pursuant to Executive Order 13608* (Washington, D.C.: U.S. Department of the Treasury, February 7, 2019).
[11] United States Treasury Department, Office of Foreign Assets Control, "List of Foreign Sanctions Evaders Sanctioned Pursuant to Executive Order 13608," February 7, 2019, www.treasury.gov/ofac/downloads/fse/fselist.pdf.
[12] Department of the Treasury, Office of Foreign Assets Control, "Appendix A to Part 501—Economic Sanctions Enforcement Guidelines," 31 CFR, *Federal Register* 74, no. 215 (November 9, 2009), www.federalregister.gov/documents/2019/05/21/2019-10616/addition-of-entities-to-the-entity-list. Under § 744.11(b) (Criteria for revising the Entity List) of the EAR, persons for whom there is reasonable cause to believe, based on specific and articulable facts, that he/she has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such persons may be added to the Entity List.
[13] Leonid Bershidsky, "The U.S. List of Russian Oligarchs is a Disgrace," Bloomberg, January 30, 2018, www.bloomberg.com/opinion/articles/2018-01-30/the-u-s-list-of-russian-oligarchs-is-a-disgrace.
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[22] Article 2, Charter of the United Nations, June 26, 1945, www.un.org/en/sections/un-charter/chapter-i/index.html.

[23] Camilo Montoya-Galvez, "Senators Introduce Bill to Send $400 Million in Aid to Venezuela, Strengthen Sanctions," CBS News, April 3, 2019, www.cbsnews.com/news/venezuela-bill-senators-introduce-legislation-to-send-400-million-in-aid-strengthen-sanctions/.

[24] Trump Administration, quoted in Akin Gump Strauss Hauer & Feld LLP, *New U.S. Sanctions Regime Targeting Nicaragua* (Washington, D.C.: Akin Gump Strauss Hauer & Feld LLP, 2018), p. 2 (emphasis added), www.akingump.com/en/news-insights/new-u-s-sanctions-regime-targeting-nicaragua.html.

Abstract: Asset freezes are sometimes viewed as the quintessential form of targeted sanctions—relatively effective in achieving their goals, while affecting only the individuals and companies that are "bad actors." However, as part of the roundtable "Economic Sanctions and Their Consequences," this essay argues that there are significant ethical problems raised by asset freezes and other forms of targeted financial sanctions. Sanctioners (specifically, the United Nations Security Council and the U.S. government) have long been criticized for targeting individuals and companies for arbitrary reasons or without adequate due process. However, there is a second concern that is less well known. Asset freezes and other targeted financial sanctions may be imposed on government officials, government agencies, or private companies that hold a critical role in the target country's economy. A country's central bank, national oil company, or national shipping line, for example, may be severely compromised as a result of its inclusion on a financial blacklist. In addition to the explicit prohibitions imposed by targeted financial sanctions, there is a chilling effect as well. This can be seen when international banks and corporations withdraw from the target country altogether because the burden of compliance with these measures is so great, and the potential penalties so high.

Keywords: asset freezes, targeted financial sanctions, due process, targeted sanctions, blacklisting, humanitarian impact

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