

## SYMPOSIUM ON UNILATERAL TARGETED SANCTIONS

## LIKE IT OR NOT, UNILATERAL SANCTIONS ARE HERE TO STAY

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Financial and economic sanctions are often adopted to serve multiple ends, including deterrence and prevention, but they are best understood as a tool to incentivize change in a target's behavior. In pursuit of this coercive objective, it is generally—but not always—the case that sanctions are more effective when they are imposed multilaterally, and the broader the coalition the better. This is because multilateral sanctions leverage the diverse sources of pressure that coalition partners can bring to bear on a target and carry with them the legitimacy of broad international support. Taken to its extreme, this argument may suggest that sanctions should always be multilateral, whether adopted through the United Nations, another forum, or an ad hoc coalition. But as we explain below, there are at least two significant reasons that militate in favor of unilateral sanctions. First, within the broad limits of international law, every country must retain the authority to impose sanctions to protect its sovereign security interests, even when it cannot muster a coalition of like-minded allies or a sufficient number of votes—and avoid a veto—on the UN Security Council. Second, imposing “smart” sanctions is actually a difficult business, requiring a complex administrative apparatus to design, build, implement, enforce, and defend them. International institutions, including the United Nations, are inherently less able to build the necessary structures to effectively enforce sanctions. For all of these reasons, two systems of sanctions—one national, one supranational—will likely coexist into the future.

There is one additional reason—unique to the United States—that ensures longevity for unilateral sanctions; namely, they leverage the United States' asymmetric economic power to achieve national security objectives without either resorting to force or foregoing those objectives altogether. While other states also use economic tools to project power, the U.S. dollar's status as the global reserve currency means that the United States will continue to turn to sanctions in a broad range of circumstances.

*A Flexible National Security Tool for All*

Sanctions are a tool of foreign policy risk management, used both to address acute crises and to mitigate risk from long-term threats like terrorism and cyberattacks. They are used principally to shape behavior by influencing the incentives to which an adversary must respond, typically by raising the cost of certain undesirable behavior, such as pursuing a nuclear weapons program, engaging in territorial aggression, or supporting destructive

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cyberattacks. In so doing, they help the sanctioning country achieve its national security objectives, even if they cannot achieve decisive outcomes on their own.

The fact that sanctions are a core foreign policy tool has two important implications for the relationship between multilateral and unilateral sanctions. First, different countries will perceive a need to impose sanctions in different situations because they perceive their national security interests differently. Second, even when several countries agree on the need to impose sanctions, they will often differ on the targets, types, and duration of sanctions that need to be imposed. If countries were forced to abandon this tool for use exclusively through a multinational mechanism, they would surrender the flexibility sanctions provide to address different kinds of risks, not to mention an important aspect of sovereignty.

Two examples illustrate the point that nations do not always agree on the circumstances in which sanctions should be imposed: the sanctions adopted in response to Russia's incursion into Ukraine, on the one hand, and the U.S. narcotics trafficking sanctions program, on the other.

In 2014, in response to Russia's unlawful invasion of Crimea and eastern Ukraine, the United States and the European Union worked collaboratively to impose sanctions on Russia. Both the U.S. and EU sanctions programs had three main components: a traditional "blocking" program that operated to freeze the assets of individuals and entities that were "designated" for participating in the Russian incursion (and for related reasons); an economic blockade of Crimea, which Russia's Parliament purported to annex in March 2014; and an innovative set of sanctions that restricted certain dealings in debt and equity issued by leading companies in Russia's most important economic sectors, such as financial services, defense, and energy.

This third component of the U.S. and EU sanctions program was designed to balance two competing objectives—to meaningfully depress Russia's long-term growth by limiting the ability of leading banks, energy, and defense companies to obtain access to financing, and to recognize that some of those targeted by the "Sectoral Sanctions Program" were deeply integrated into the global economy, especially in Europe. If the United States and the European Union had imposed blocking sanctions on these banks and companies, or restricted dealings in *all* debt they had issued, including short-term "commercial paper" and overnight lending, some of those actors likely would have collapsed entirely and, as a result, imposed massive costs on their own economies in addition to imposing consequences on Russia.

The United States and the European Union, working in very close coordination to respond to Russia's flagrant disregard for international law and norms, sought a flexible option that imposed costs on Russia, but also limited the risk of escalation and the damage done to their own economies. Military force was off the table for a number of reasons. Sanctions, therefore, seemed like the right approach to make Russia pay a meaningful price for its aggression without dramatically escalating the conflict or inflicting significant harm on the United States or Europe.

The story at the United Nations, of course, was entirely different. Russia, as a permanent member of the Security Council, wields a veto over Security Council resolutions. So while UN-based sanctions may have been the preferable response to the Ukraine crisis, Russia effectively prevented their imposition. As a result, despite efforts by the United States and others to hold Russia accountable at the United Nations, Russia vetoed, for example, a draft Security Council resolution declaring Crimea's March 2014 status referendum invalid and calling on states not to recognize any alteration of Crimea's status on the basis of the vote. If sanctions could only have been imposed through the United Nations or a similar international forum in which Russia had veto rights, there would have been no ability to use sanctions to address the Ukraine crisis, narrowing the range of impactful options available to countries that opposed Russia's flagrant violation of international law and norms.

The adoption of the U.S. counternarcotics sanctions program is another example of a circumstance in which a country perceived a threat that it could contest with sanctions, but where other countries did not share the imperative to act. And it highlights the importance of individual states using sanctions to manage risk even when they cannot muster sufficient support for a UN resolution.

In 1995, the U.S. government increasingly viewed extensive illegal drug use in the United States not only as a domestic law enforcement challenge but also as a national security issue. President Clinton adopted a sanctions program designed to target the interests of significant foreign narcotics traffickers, specifically focused on those in Colombia. In particular, the President cited “the unparalleled violence, corruption, and harm” these drug traffickers “cause in the United States and abroad” as the justification for the sanctions program.

This sanctions program was one of the first to shift the approach from broad jurisdictional embargoes (like that imposed on Iraq after the Gulf War) to those that “target” specific individuals and entities engaged in wrongdoing, and it is widely regarded as one of the most successful U.S. sanctions programs. Notably, however, no other nation at the time (or since) has adopted a similar program focused on narcotrafficking. If the United States were required to garner international assent for the program through the United Nations, it is almost certain that the United States would not have been able to implement this program.

There are a number of other instances in which jurisdictions have adopted unilateral sanctions programs to deal with foreign policy challenges unique to them or that they perceive as being more acute than others in the international community. Just recently, for example, the United States adopted a program targeted at foreign interference in domestic elections; the European Union has a program designed to help Egypt recover assets misappropriated after the 2011 uprisings; and Canada has a sanctions program designed to target corrupt officials in Tunisia.

Even when likeminded countries agree that sanctions ought to be imposed, they often disagree on the scope, nature, and extent of those sanctions, emphasizing further that countries should retain the authority to impose sanctions unilaterally to meet their needs and protect their interests. For example, while the United States and the European Union both have Russia sanctions programs, as described above, the lists of entities targeted under those programs are not identical. And the European Union’s legal requirements mean that its sanctions programs sometimes allow “preexisting contracts” to be performed even if they would otherwise be subject to sanctions, while U.S. sanctions programs generally have no such exception.<sup>1</sup> A requirement that sanctions be imposed either by the United Nations or not at all would more often than not be a recipe for inaction.

### *Only States Can Have Truly Effective Sanctions Programs*

In addition to their link to core national security interests, *effective* sanctions programs require a sophisticated and well-resourced governmental structure for implementation. Today, and perhaps forever, these structures exist only at the state level; it would be difficult, if not impossible, to replicate them at the United Nations or any other supranational institution.

The political decision to impose sanctions to confront a foreign policy challenge is only the first, and in some respects the easiest, part of a sanctions program. That is, in part, why sanctions increasingly have become the “go-to” tool for addressing national security challenges—the declaration that the problem will be attacked by a sanctions program provides the patina of action without necessarily any effective follow-up. That was certainly the case with the sanctions program adopted in September 2018 by the Trump administration to combat foreign election interference.<sup>2</sup>

<sup>1</sup> U.S. sanctions programs sometimes, but rarely, contain general licenses that allow companies and individuals to wind down existing commercial relationships. But these are almost always time-limited.

<sup>2</sup> Commentators noted that the administration adopted the sanctions program principally to forestall Congress from adopting legislation that, if enacted, would have prescribed onerous sanctions on Russia for interfering in U.S. elections. See, e.g., Ed Stein, *What’s in the Executive Order on Election Interference?*, LAWFARE (Sept. 19, 2018).

The imposition of an effective sanctions program involves an elaborate process that encompasses multiple government agencies acting within frameworks that—in the United States, at least—are the product of rich statutory, administrative, and judicial rules. The broad phases of the sanctions process include program design, target identification, designation decisions, assessment of efficacy, detection of evasion, sanctions enforcement, and adjudicating challenges to sanctions designations. What follows is a brief description of each of these phases in the United States. Few other countries have developed analogous structures. No international institutions, including the United Nations, have developed anything remotely close to this system—and it is nearly impossible to conceive that multilateral institutions could do so in light of how bound up some of these functions are with the core incidents of national sovereignty, such as law enforcement, intelligence gathering, and criminal prosecution.

In the United States, sanctions programs generally begin with the identification of a particular national security or foreign policy challenge. Although the Congress in recent years has enacted legislation that prescribes certain sanctions,<sup>3</sup> the International Emergency Economic Powers Act is the main statute that establishes the authority to impose sanctions, and it delegates to the president the authority to declare national emergencies and develop sanctions programs in response.<sup>4</sup>

Once the government takes a decision to establish a sanctions program, a series of administrative processes commence to determine the individuals and entities that should be subject to sanctions. The heart of this process lies in the Treasury Department's Office of Foreign Assets Control (OFAC), the agency charged with implementing sanctions and developing policy with respect to their ongoing administration. In determining specific sanctions targets, OFAC compiles an administrative record laying out the basis for its decision. Information underlying sanctions decisions comes from a wide range of sources, including law enforcement information, State Department reports, open source material, and also, critically, classified intelligence. After OFAC compiles an administrative record, proposed designations go through vetting outside of OFAC, including at the National Security Council in the White House, to consider diplomatic and intelligence equities, as well as litigation risk.

Once the United States has imposed sanctions, it continually (re)assesses their effectiveness. This includes both an evaluation of how well the sanctions are working to accomplish their national security objectives, as well as efforts to detect evasion. The results of these processes take the form of adaptations or amendments to the sanctions programs, as well as measures to stop evasion, which can take many forms, from arrest and prosecution to quiet interventions by allied governments to further sanctions designations. Moreover, the potential for civil and criminal enforcement encourages individuals and entities to comply.

Finally, a process for sanctioned parties to have their designation adjudicated, and to be able to have sanctions removed, is critical to their long-term effectiveness. This fact is linked to the fundamental goal of sanctions—if they are designed to influence behavior, what incentive would there be to change if there is no way to be relieved of sanctions pressure? OFAC has established an administrative process for sanctioned persons to petition for delisting, but the subjects of designation can litigate the issue in court as well, sometimes successfully.

While the United Nations can do some of these things, it cannot—and probably will not ever be able to—create a sufficiently capable administrative ecosystem for sanctions the way individual countries can. To begin with, the decision to adopt a sanctions program at the United Nations requires broad assent, and since sanctions will always be a product of the UN Security Council, they will never materialize in a manner that a permanent member

<sup>3</sup> Congress has adopted particular statutes to deal with specific sanctions challenges, such as the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 for Iran, and the Countering America's Adversaries Through Sanctions Act, adopted in 2017 and addressing Russia, Iran, and North Korea.

<sup>4</sup> Sanctions program themselves are typically created by an executive order issued by the president that specifies both the reason the program is being adopted and the criteria by which a person or entity can be designated for sanctions—for example, illicit conduct, such as drug trafficking, or having a particular status, such as being a senior Russian political figure.

perceives as a threat to its interests. There is no UN Security Council sanctions program that addresses Syria, for example, despite the scale of the humanitarian catastrophe there, because Russia has blocked Security Council action to protect the Assad regime.

Even when the United Nations does adopt a sanctions program, it does not have an independent law enforcement or intelligence function and so cannot develop its own evidence on which to base designation decisions. The United Nations, furthermore, has no effective way to enforce its sanctions, for which it also relies on member states.<sup>5</sup> And even when states or the United Nations identify evasion, the United Nations has no capacity to prosecute it or adapt the programs themselves to account for evasion absent another Security Council resolution.

Critically, the United Nations' administrative process to review designations is fundamentally limited because it ultimately depends on Security Council review and approval. (The United Nations, of course, lacks any truly independent judicial processes to review sanctions decisions.) It was not until 2006 that the United Nations developed an administrative review process in the form of a "focal point" for delisting requests by sanctions targets.<sup>6</sup> Sanctions ombudspersons have the authority to receive requests for removal from the applicable lists, to make an initial evaluation of the petitioner's request, and to coordinate a decision-making process with the relevant sanctions committee. But in the end the relevant sanctions committee, comprised of Security Council members, ultimately decides whether to grant the petitioner's request.

Thus, multilateral sanctions programs will always face structural limitations that national programs need not contend with.

#### *A Critical Unilateral Tool for the United States*

Finally, there is simply no getting around the fact that the United States will continue to adopt unilateral sanctions programs so long as it retains an outsized role in the global economy and financial system. The U.S. dollar is, today, the unparalleled global reserve currency, a reality borne out by the numbers. As of early 2019, the International Monetary Fund's statistics of total official allocated foreign exchange reserves show approximately US\$10.7 trillion, of which US\$6.6 trillion are held in U.S. dollars. The currency with the next highest level of reserves is the Euro, with US\$2.2 trillion; there are US\$192 *billion* worth of Chinese renminbi reserves, US\$480 *billion* worth of pounds sterling, and US\$16 *billion* worth of Swiss francs. While there are anecdotes about individuals or entities who try to avoid transactions in dollars in order to escape the reach of U.S. sanctions, there seems to be little risk of the dollar's role being supplanted anytime soon. Additionally, many significant international transactions in goods and services are denominated in dollars, even when those transactions do not involve U.S. companies or individuals. Because of these phenomena, the U.S. government can exercise jurisdiction over a sizable portion of international commerce.

That offers the United States a unique power—namely, the ability to affect behavior all around the world by leveraging the role of the U.S. dollar. The U.S. government's unique role is manifest in the increasing use of so-called "secondary sanctions," by which the United States extends its leverage over activity it opposes even when

<sup>5</sup> The committees established by certain relevant resolutions do important work monitoring compliance with the regimes and advising both the United Nations and member states on sanctions issues, but they do not constitute a sufficiently large or empowered administrative apparatus to replicate the work that member states do to develop, implement, and enforce sanctions.

<sup>6</sup> The absence of a meaningful opportunity to contest designation decisions was a significant flaw in the UN and EU sanctions programs in the early post-9/11 period, and it took Yassin al-Kadi a decade worth of litigation to generate structural reforms in the European Union. These changes shaped the ways in which the European Union undertakes and reviews designations. The litigation resulted in the broader inclusion of reasons for action in EU designation decisions.

transactions do not involve the U.S. dollar or otherwise involve the United States or any person subject to U.S. jurisdiction.<sup>7</sup>

This extensive use of sanctions by the United States has been the focus of some intense criticism from countries and companies caught in the expansive web of prohibitions and risk. Scholars and diplomats also have criticized this use as illegitimately extraterritorial and an alleged violation of international law, including the rules of the World Trade Organization.<sup>8</sup> Regardless of these arguments, extensive and sustained state practice reveals that unilateral sanctions, including ones in which the United States exploits its asymmetric economic and financial advantage, are here to stay.

This is, we submit, not only a statement of reality, but also to be welcomed even if one is not aligned with U.S. foreign policy across the board. It means that the United States has a powerful mechanism short of war to project power and pursue its national security goals. Sanctions occupy a special place in the spectrum of options, between traditional diplomacy and military action. And to a degree qualitatively different from any other country, having this option at hand offers U.S. policy-makers the ability to defend the country's interests in a way that can be effective, inexpensive, and targeted, while avoiding the extensive collateral damage and the other adverse consequences of kinetic options. That is not to say that sanctions do not impose real costs on their targets and, undoubtedly, unintended collateral impact. But when considering the options, sanctions can often be the preferable course.

<sup>7</sup> Secondary sanctions bar foreign companies (often foreign financial institutions) from doing business in the United States if they engage in proscribed activity with parties that are subject to U.S. sanctions. They apply in circumstances in which the potential secondary sanctions target is not directly subject to U.S. sanctions laws and regulations.

<sup>8</sup> Ultimately the United States and Europe reached a diplomatic agreement on the implementation of the Iran and Libya Sanctions Act of 1996 and other extraterritorial sanctions.