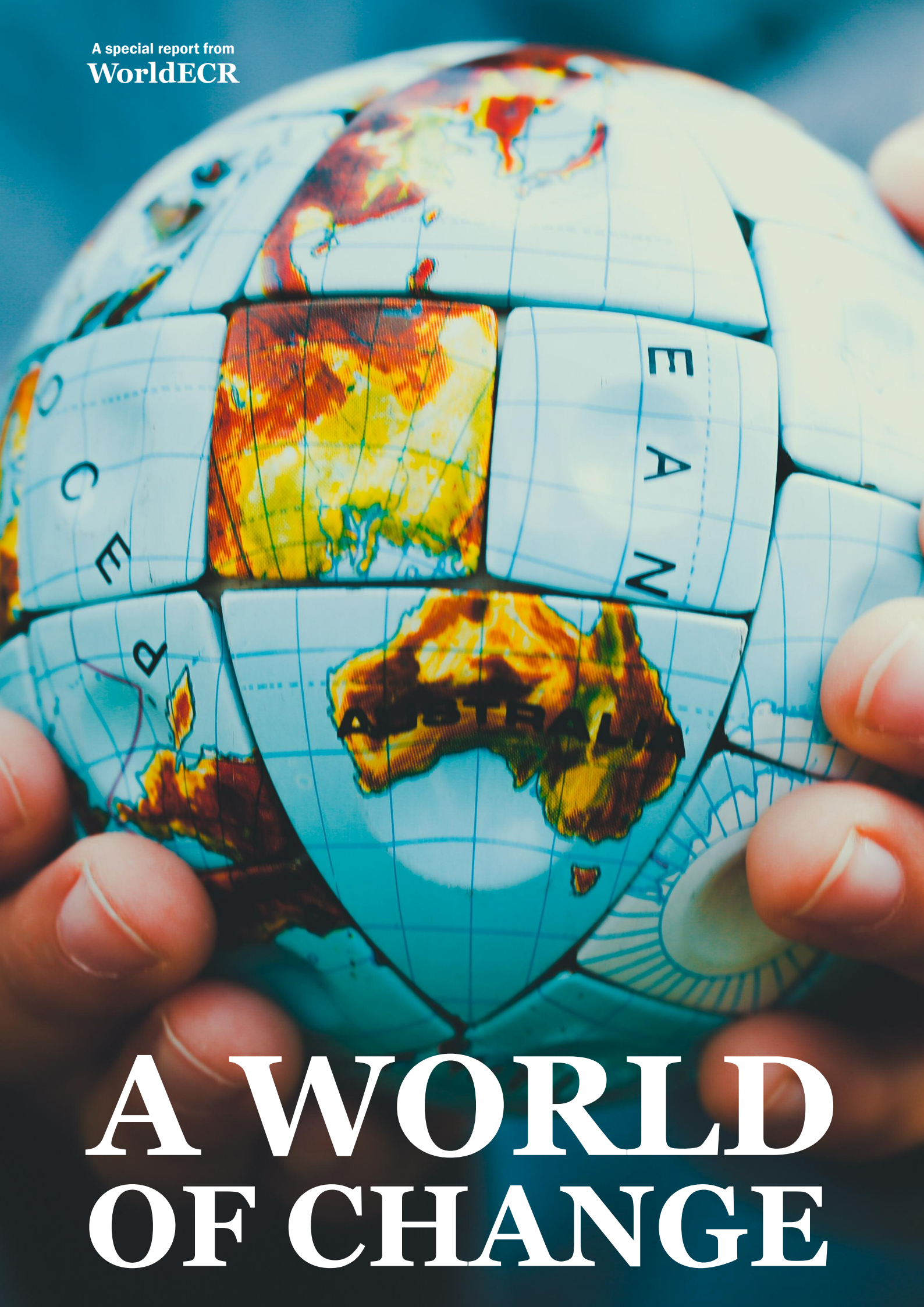
A special report from
WorldECR



A WORLD OF CHANGE

Welcome to this special report from *WorldECR*, the journal of export controls and sanctions.

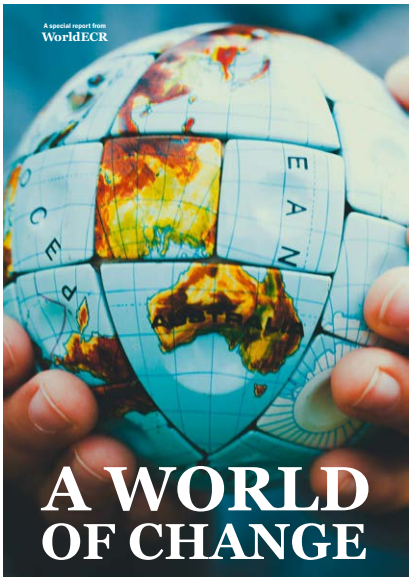
In 'A World of Change', we consider the current climate in international economic sanctions and export control – the policy matters, the regulatory developments, the impact for industry – in discussion with practitioners in the field and, with their assistance, cast an eye to the coming years and what we can expect them to bring.

The 'Insight' articles, provided by recognised leaders in the field, offer an expert – and interesting – 'take' on some of the key talking points and challenges facing companies and compliance professionals today.

Against a backdrop of developing technology and increasingly complex controls, and as we head into 2019, it's clear that sanctions and export control professionals have never been in such demand.

I hope you enjoy this special report.

Tom Blass, Editor, WorldECR
December 2018



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INSIGHT

SAFE HANDS NEEDED

More and increasingly complex sanctions. New technology and new controls to go with them. Geopolitical upheaval. It's all in a day's work for the export control compliance professional.

The perennial gift of uncertainty – regularly received from the world by trade compliance managers – possesses the oxymoronic qualities of both the unpredictable and the unexpected, and this year's variant is a real corker.

As at time of writing, Chinese-US (and Canadian) relations have been dragged to an all-time low by the arrest at Vancouver airport of Huawei CFO Meng Wanzhou for her role in alleged Iran sanctions violations. The United States is seeking her extradition – China has responded with the threat of 'consequences' for both of the other countries involved.

In the United States itself, the Special Counsel investigation into Russian interference into the 2016 presidential election appears to be reaching some kind of denouement. Whatever else may be its fallout, further sanctions are certainly a likelihood – and quite possibly other domestic trouble.

In the United Kingdom, prime minister Theresa May hangs on to her political life by a thread, a victim, as was her predecessor, of the exercise in democracy made manifest in a vote on Britain's continued membership of the European Union.

Turning to the Middle East, western lawmakers – if not those necessarily with executive power – are breaking with a long tradition of only muffled criticism of Saudi Arabian foreign and domestic policy.

Latin America, also, looks set for disruption: Nicaraguan politicians now join counterparts in Venezuela on sanctions lists, and observers say there could be more to come – especially since the ambit of sanctions legislation has now clearly been expanded and extended to grasp within its ambit the corrupt and the cruel.

'Merely screening doesn't cut it. You need to be able to identify ownership of all parties, even the ownership of the airport your forwarding agent is proposing to ship your product through!'

Julie Cooper, Spectris

'We have to deal with the world as it is, and how we imagine it will be. That's the best we can do,' is what one industry compliance old-timer told *WorldECR*. Many men and women have concluded as much over the millennia, and doubtless many more shall.

But in the very particular space of export controls, imagining how the world will be is set to become – or has become – part of the job description.

Put it on the agenda

Asked by *WorldECR* as to which issues are keeping his in-tray warm, Bjorn Uggla, vice president, head of export compliance for Saab AB mentions:

- the increasing complexity of existing sanctions regimes
- new Swedish military export control legislation – introducing a criterion under which the democratic status of the recipient country will be a key factor for granting a licence
- the implications of the General Data Protection Regulation on screening processes
- the possible consequences of BREXIT
- proposed changes in the EU dual-use regulation
- the challenge of complying with cloud controls…

In other words, that's a full plate – even before adding the acronyms of the year, FIRRMA, and ECA and having to navigate the wave of change they will bring across the Atlantic.

Clearly, each company, depending on what it manufactures or exports, where it exports to and how, has concerns that are pertinent to itself, and its sector: the new Swedish democracy criterion is less likely to keep awake a Kentucky-based, dual-use widget manufacturer than it is Bjorn Uggla.

But generally speaking, broad, sweeping regulatory change impacts most globally-interfacing companies, in some way or another. Thus, the head of compliance at an oilfield services company describes CAATSA, the US withdrawal from the JCPOA, and the ongoing trade dispute between the United States and China as 'the main challenges' confronting his sector. There has not, he says, been sufficient government guidance – particularly as regards the applicability of CAATSA and the reimposition of Iran sanctions – which leaves him wondering whether the goal of lawmakers 'is potentially to sustain uncertainty and lack of clarity to optimise their flexibility.'

Julie Cooper, export control compliance manager for a UK company manufacturing specialised measuring instruments (Spectris), also points the finger at the Russia and Iran sanctions as a major preoccupation for a company such as hers. In addition to identifying the potential Russian ownership of counterparties, and ensuring that the company's European businesses had exited the Iranian market within the required time frames, the conservative stance of banks, 'most of which have internal policies which go above and beyond the regulations themselves, meant that the banks were policing transactions, even where no export licence is required and where there is no US nexus.'

As to the ever-increasing need to have a grasp of all the players in the supply chain, she comments: 'Merely screening doesn't cut it. You need to be able to identify ownership of all parties, even the ownership of the airport your forwarding agent is proposing to ship your product through!' She notes, for example, the fact that several Russian airports, frequently used for freight, are owned by Russian oligarchs Oleg Deripaska and Viktor Vekselberg.

'Those players that are able to provide a "one stop shop" for all screening/ownership requirements, fully automated and able to link to any ERP system, meeting both export control and ethics needs, are the ones that are most likely to stay in the game,' she says.

Back to the future

Trade compliance works on several registers – and at different paces. There is the coalface, firefighting aspect – responding quickly to changes in political happenstance: blockades and blocking statutes, coups and crises, outright outrage, or unilateral U-turns. This aspect, is, arguably, the slice of the pie that industry finds most confounding.

As our oil and gas sector compliance leader says: 'We live in a world shaped by rapid and often unpredictable changes in geopolitics. It is not obvious that currently available due diligence tools are sufficiently sophisticated or reactive enough to provide suitable risk-mitigation support.'

And there are the quotidian tasks of training, record keeping, and other requirements of an internal compliance plan (which itself must be kept up to date), ensuring commitment to compliance from 'the top', performance reviews, and maintaining physical security.

There's no doubt that automation has changed / is changing / will continue to change the face of trade compliance – but it will remain a uniquely human discipline. As one

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Global Trade Compliance

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compliance head comments: 'Wherever the greatest threat is a human one – whether caused or driven by avarice, resentment, malice or misguided intent or good ol' fashioned sloppiness, there has to be a human dimension to the solution.'

Sanctions policy is for the most part reactive: it goes against the laws of good sense and justice to punish parties for what they have yet to do. By contrast, if it is to be effective, export control regulation is bound to attempt to anticipate the future.

This, of course, is what the United States Department of Commerce Advance Notice of Proposed Rulemaking, announced in November,[1] which seeks 'public comment on criteria for identifying emerging technologies that are essential to U.S. national security, for example because they have potential conventional weapons, intelligence collection, weapons of mass destruction, or terrorist applications or could provide the United States with a qualitative military or intelligence advantage,' is attempting to do.

'We are finding the technology categories to be vague and indecipherable, and any unilateral controls that the US might impose on these technologies could significantly impair US industry.'

Bryce Bittner, Textron

At first blush, many companies may think the targets of the consultation – which includes human/computer interfaces, quantum computing, artificial intelligence ('AI') and other not-yet-readily-purchasable-in-the high-street technology, are sufficiently alien to their own product inventories that they need not concern themselves with it.

One senior manager for international trade compliance at a global brand organisation cautions against arriving at that conclusion too soon: 'Take artificial intelligence, or AI,' he says. 'Is the control parameter the AI itself, or will the rule eventually go beyond that, to control products that incorporate AI? Would that push an everyday object that just happened to include AI as part of its functionality onto the control list? Or, what if the AI were controlled, and it were incorporated into a product which itself is already on the control list – would that mean that it's pushed into a different category?'

Companies, he says, should be thinking imaginatively about how these technologies, and potential controls placed upon them, may, in time impact their businesses. At his company, he says, 'There's always discussions from a classification standpoint with engineering teams, and an understanding that everything has to be classified. These guys are aware of the issues. And we've been talking to our engineers about some of the technology that doesn't yet fall under a classification – like additive manufacturing – for a long time.'

This senior manager argues that the exercise upon which the government has set out (and which other governments will likely embark upon in time, or have already), is helpful – an example of well-thought-out law making.

'The government doesn't know all these technologies. Looking at them like this, and thinking about their national security implications, is good law making. They didn't just try to figure it all out for themselves only to receive a lot of negative feedback.'

Not everybody watching this space is convinced – indeed, some are quite unambiguously opposed to it. Bryce Bittner, Director of Global Trade Compliance at Textron (a group of companies that includes Bell Helicopter, Beechcraft, Cessna, Kautex, Jacobsen, Textron Airborne Solutions, Textron AirLand, and others), told, *WorldECR* that the questions are too vague and the need superfluous.

'I believe,' says Bittner, 'that the ECCN 0Y521 series that already exists in the Commerce Control List, governed by 15 C.F.R. 742.6(a)(7), provides an adequate venue for the departments of Commerce, Defense, and State to place export controls on so-called "emerging technologies" when the US government determines that the export of such technologies pose a threat to US national security or foreign policy interests.

'In considering comments to BIS's 19 November 2018 Advance Notice of Proposed Rulemaking on Emerging Technologies, we are finding the technology categories to be vague and indecipherable, and any unilateral controls that the US might impose on these technologies could significantly impair US industry while allowing our international competitors to continue to advance their products/technologies and capture international markets.'

Do others feel likewise? The answer to that question will only emerge when the Commerce Department publishes the results of its consultation next year.

What will Santa bring?

From talking with industry compliance people, as *WorldECR* does, our take is that there's an awareness among the cohort that each crisis brings an opportunity – to make compliance invaluable, raise its profile within the company, and, more broadly, increase resources available to it, demanding greater specialisation and respect. 'Whose job isn't more challenging?' said one export compliance manager.

That notwithstanding, here are some of the things that we think industry compliance professionals are looking for as 2018 draws to a close:

- Greater clarity, from governments and the multilateral regimes, regarding compliance with increasingly complex controls on ITT (intangible technology transfer)
- More opportunities for benchmarking and sharing information and best practice
- Clearer guidance on the application of sanctions and – for example – the extent of due diligence required for country-specific transactions

Few are hugely hopeful that all their wishes will be granted. But that's the nature of the beast. ■

Links and notes

[1] Deadline for responding now extended to 10 January 2019. See: https://www.federalregister.gov/documents/2018/11/19/2018-25221/review-of-controls-for-certain-emerging-technologies

The US government is trying to figure it out. You should, too.

By David L. Hall

Advances in law lag behind advances in technology. This has always been true, but is particularly self-evident in the current age, defined as it is by technology shifts so frequent they don't seem like shifts at all. Mechanical systems have given way to digitisation and miniaturisation. The gyroscope – once a large metallic object – is now a tiny microchip in your phone. As a result, US export controls increasingly apply to intangibles like software and other technology. How is this likely to affect international trade in the future?

The US problem

The US government has come to realise the significant loss of US origin technology to its adversaries. One of the most startling examples is the loss to Chinese hackers of the radar software for the $1.4 trillion F-35 stealth joint strike fighter, a fifth-generation tactical fighter, employing the most advanced US stealth technology. This is no accident. The US Commission on the Theft of Intellectual Property ('IP Commission') put it starkly in 2013: 'National industrial policy goals in China encourage IP theft, and an extraordinary number of Chinese in business and government entities are engaged in this practice.'[1] The US government recognises the problem, but has not identified a systemic approach to solving it. As the IP Commission recognised: 'American policy in this area has been limited mostly to attempts to talk foreign leaders into building more effective intellectual property rights (IPR) regimes. In addition, the US Department of Justice has prosecuted individual employees of American companies who have been caught attempting to carry trade secrets with them to foreign companies and entities. This policy of jawboning and jailing a few individuals has produced no measurable effect on the problem.' What this means for international commerce is that the US government, lacking a strategy, will address the US technology loss problem in an ad hoc, piecemeal manner – thus increasing the degree of difficulty in complying with US international trade requirements.

Law enforcement

The US Department of Justice this year formed a Cyber Digital Task Force. Its first report serves to demonstrate, at least on a rhetorical level, the Department's intention to address cybercrime.[2] This is a change; the Department's past performance is not consistent with its current rhetoric. Last year, the US government mounted only 140 'computer fraud' prosecutions, compared to 11,954 drug prosecutions.[3] Only once has the US government arrested and successfully prosecuted a Chinese software pirate operating from China.[4] But now the Department will be under pressure to deliver on its rhetorical promises. This means that international businesses can expect to see US law enforcement devote increasing resources to the outflow of technology from the US – albeit in a sporadic manner.

ECRA and FIRRMA

A Congress infamous for dysfunction nevertheless recently passed two statutes directly addressing the problem of technology loss from the US: the Export Control Reform Act ('ECRA')[5] and the Foreign Investment Risk Review Modernization Act ('FIRRMA').[6]

Under ECRA, the US Department of Commerce is authorised to control exports of 'emerging' and 'foundational' technologies. Neither of these terms is defined, but ECRA directs Commerce to lead an interagency effort to define them. Likewise, FIRRMA expands CFIUS coverage to include factors such as access of non-US investors in US companies to 'nonpublic technical information' relating to 'critical infrastructure' and 'critical technology'. These key terms are not defined in the statute, but will be defined by regulation. The clear import of the legislation is to expand CFIUS authority to regulate access by non-US entities to US technology. CFIUS will thus become an increasingly important factor to consider in international transactions involving investment in US companies.

Sanctions

The US Department of Commerce has recently added Fujian Jinhua Integrated Circuit Company, Ltd. ('Jinhua') to the Entity List because of its theft of national defence-related technology from the US.[7] ZTE recently entered into a $1.4 billion settlement with the Commerce Department relating to exports to Iran and North Korea.[8] Sanctioning companies one by one is a cumbersome process, but Commerce can be expected to continue targeting companies it believes are involved in unlawful exports of technology from the US.

Conclusion

The US government doesn't have a strategy to deal with the problem of technology loss, relying instead on piecemeal solutions. But US agencies clearly intend to increase regulation and enforcement activity relating to the loss of US technology – which increases the degree of difficulty in complying with US law. They're thinking about it; so should you. ■

Links and notes

1 http://www.ipcommission.org/report/ip_commission_report_052213.pdf

2 https://www.justice.gov/ag/page/file/1076696/download

3 https://www.justice.gov/usao/page/file/1081801/download

4 Hall, David Locke, CRACK99: The Takedown of a $100 Million Chinese Software Pirate (W.W. Norton 2015).

5 https://www.congress.gov/bill/115th-congress/house-bill/5040/text#toc-H77128BCC95BB40CE9905EBF1CE9748CC

6 https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA_0.pdf

7 https://www.commerce.gov/news/press-releases/2018/10/addition-fujian-jinhua-integrated-circuit-company-ltd-jinhua-entity-list

8 https://www.bis.doc.gov/index.php/all-articles/17-regulations/1432-bis-reaches-superseding-agreement-with-zte

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Growing divergences between US and EU sanctions: the impact of a fast-moving sanctions landscape on compliance efforts

By Jason Hungerford, Tamer Soliman, Paulette Vander Schueren and Edouard Gergondet

Changes in the geopolitical landscape have created new divergences between US and EU sanctions and it is increasingly challenging for businesses operating globally to design their compliance programmes in a way that preserves business opportunities.

Russia and Iran have come under the spotlight as prime examples of growing divergences between US and EU sanctions. In respect of Russia, the US extended the scope of its restrictive measures, through the Countering American Adversaries Through Sanctions Act ('CAATSA') in August 2017 and the 'oligarch designations' in April 2018. By contrast, EU sanctions against Russia have not been substantially amended since the end of 2014, and certain Member States, such as Italy, are reportedly pushing for such sanctions to be scrapped altogether. As the UK has been the chief proponent of EU sanctions against Russia, the EU position could be open to change post-Brexit.

In respect of Iran, and following the US' decision to withdraw from the Joint Comprehensive Plan of Action ('JCPOA'), sanctions were progressively re-imposed on 6 August and 4 November 2018. Conversely, the EU reiterated its commitment to the JCPOA and, in an effort to tackle the extra-territorial effects of the reinstated US sanctions, the so-called 'Blocking Statute' was updated effective 7 August 2018.

Divergence in the scope of applicable sanctions and designations, or their interpretation, is not a novel issue. However, the growing rift between US and EU sanctions, and the potential for further divergences, create additional compliance hurdles.

Traditionally, economic operators have sought to limit sanctions risks to the furthest extent possible by designing comprehensive programmes which aim at compliance with the most restrictive sanctions regimes worldwide. Sanctions policies and contractual clauses are routinely drafted by reference to the sanctions imposed by both the US and the EU. For example, in the insurance sector, the Lloyds' LMA 3100 clause, one of the most common sanctions clauses, provides for compliance with Australian, EU, UK and US trade or economic sanctions laws.

In our globalised world, businesses can be subject to the sanctions laws of numerous jurisdictions. A compliance policy and programme based on the most stringent applicable requirements ('catch-all compliance programme'), should therefore – at least theoretically – allow multinational operators to limit their risks on each market.

Catch-all compliance programmes facilitate, to a certain extent, the burden of compliance for businesses. However, divergences in sanctions laws globally significantly complicate the setting-up, implementation and monitoring of such programmes. Businesses must navigate complex sanctions regimes, understand their similarities and divergences and ensure that the programme remains at all times accurate and up-to-date.

In that respect, Brexit will likely add a further layer of complexity, as economic operators will need to delve into the intricacies of another independent sanctions regime.

Arguably, a catch-all compliance programme cannot deliver best-in-class results. From a legal perspective, it may not address the somewhat novel issue of conflicting sanctions regimes. Economic operators may not always be able to act in compliance with both US and EU laws. In such situations, economic operators would be caught between a rock and a hard place and forced to proceed with a difficult balance of interests.

From a business perspective, the conservative nature of a catch-all compliance model, while legitimate, means that transactions that would in fact be permitted based on applicable laws are not always carried out.

A catch-all compliance programme creates risks of over-shooting. To preserve business interests while managing the ever-growing complexity of divergent sanctions laws, businesses, in their compliance efforts, should consider the sanctions laws that are actually applicable to a transaction, rather than base their assessment on the most restrictive ones. Much like sanctions evolved, global compliance programmes should evolve into targeted compliance programmes.

But, in a globalised world, is it really feasible to move toward targeted compliance programmes? Carrying legitimate transactions may be impeded by third-party considerations. By way of example, financiers and insurers may be subject to different sanctions laws and block a transaction that is legitimate for the other parties, while IT platforms may restrict access to their services in certain sanctioned locations. Businesses should also consider the possible reputational damage of carrying legitimate transactions, that are however prohibited under another jurisdiction's sanctions laws.

Compliance programmes need to consider the collateral impacts of 'someone else's sanctions laws' and the perception the general public may have of their activities. Divergences in sanctions laws multiply these collateral impacts and, thereby, make compliance a difficult balancing act. ■




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The Global Magnitsky Act: Sanctions in response to international crises

By Ryan Fayhee, Alan Kashdan, Olivier Dorgans, Tyler Grove and Clothilde Humbert

The Global Magnitsky Human Rights Accountability Act ('Global Magnitsky Act') is a federal statute that targets persons responsible for human rights abuses and corruption throughout the world. While US sanctions have long targeted persons based on other malign behaviours (e.g., drug trafficking, terrorism, proliferation of weapons of mass destruction), the Global Magnitsky Act has proven to be the go-to tool that allows the US to quickly respond to global political crises.

The Global Magnitksy Act is the second piece of legislation named after Russian lawyer Sergei Magnitsky, who discovered and revealed a scheme that allowed Russian Interior Ministry officials to pocket 5.4 billion rubles ($230 million USD) in fraudulent tax refunds. Magnitsky was arrested in 2008 and died in custody in 2009. In 2012, Congress passed the first piece of legislation, which authorised sanctions against Russian officials believed to be responsible for Magnitsky's death and other perpetrators of human rights abuses in Russia.

In 2016, Congress enacted the Global Magnitsky Act, which broadened the original 2012 legislation to apply worldwide and provided for corruption as an additional basis for the imposition of sanctions. On 21 December 2017, President Trump issued Executive Order 13818 to implement the Global Magnitsky Act. Specifically, the order authorises the Office of Foreign Assets Control ('OFAC') to apply asset-blocking sanctions and visa restrictions to persons involved in 'serious human rights abuse', corruption or the transfer of the proceeds of corruption, or who are leaders or officials of a sanctioned entity or entity engaged in human rights abuses or corruption.

Likely because of the legislation's broad applicability, the sanctions have been the primary vehicle to further the administration's policy of incremental sanctions pressure to achieve its foreign policy goals. To date, the Trump administration has made over 100 Global Magnitsky Act designations.

For example, in April 2018, Nicaraguan President Daniel Ortega and his political supporters began to violently repress opposition party protests following controversial social security reforms and, using the authority granted by the Global Magnitsky Act and Executive Order 13818, OFAC acted quickly to designate three of these individuals in July 2018.

Following continued violent political repression in the country, the administration recently authorised more comprehensive sanctions on 27 November 2018 through Executive Order 13851, including designating the sitting vice-president, who happens to be President Ortega's wife.

While most US sanctions programmes allow OFAC full discretion to decide whether to implement sanctions and against whom, the Global Magnitsky Act requires the president to respond within 120 days to a request from the heads of certain congressional committees for a determination as to whether specific parties engaged in human rights violations, and, if so, to impose sanctions. This mechanism was utilised in the recent sanctions imposed in response to the 2 October 2018, murder of journalist Jamal Khashoggi at the Saudi consulate in Istanbul. On 10 October 2018, 11 Republican and 11 Democratic senators, including the chairman and ranking member of the Foreign Relations Committee, co-authored a letter to President Trump requesting such a determination 'with respect to any foreign person responsible for such a [human rights] violation related to Mr. Khashoggi'. Subsequently, on 15 November 2018, OFAC sanctioned 17 individuals for their role in the murder.

Like other US sanctions programmes, the US can apply Global Magnitsky Act sanctions unilaterally without the consent of other countries. While swift application of the sanctions is part of their effectiveness, the US government would be best served to establish multilateral support for the sanctions actions when possible, especially from jurisdictions that have adopted similar measures, including the EU, UK, Canada, Lithuania and Estonia.

Other unilateral sanctions priorities – most notably, the US's efforts to isolate Iran after withdrawing from the Joint Comprehensive Plan of Action – require cooperation from foreign partners to eliminate financial channels that could be used to evade US restrictions. With the increasingly cautious nature of banks and freight companies, often going beyond what the law requires, there are growing concerns that the spillover effect from targeted sanctions in some countries could have unintended, detrimental effects on certain local economies and could also limit access to medicine, food, and other humanitarian goods and services in Iran, Syria, Sudan, and North Korea.

Moving forward, companies are advised to carefully manage their supply chains, third-party relationships, ownership structures, distribution networks and customer contacts to guard against this diverse array of risks and, in particular, account for the long-arm reach of US jurisdiction to far-flung operations.

Meaningful diligence when on-boarding customers and third parties and regular (and periodic look-back) screening with up-to-date protocols are essential. Existing diligence protocols intended to address corruption risk, can also be leveraged to account for and mitigate these additional risks. As customer contracts and loan facility agreements increasingly contain provisions to limit liability and avoid reputational damage, there is no better time to evolve beyond the now outdated compliance stovepipes of the past into holistic and programmatic compliance programmes that are fully implemented into internal policies, procedures, and approvals. ■





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‘A key market for our company has just had sanctions imposed on it. What do we do?’

Daniel Martin and Anthony Woolich suggest a simple but effective procedure for responding to the news that existing contracts may be impacted by sanctions.

It was the Global Compliance Officer's worst nightmare. Of course she knew what sanctions were, and she’d worked with her business colleagues in various departments carrying out proper due diligence to make sure that they never traded in breach of sanctions – but the sanctions had never had a huge impact on the business, as they hadn’t been targeted at any of the markets in which the company operated.

Now, suddenly, she’d found herself summoned to a hastily arranged board meeting where all eyes were on her.

Sanctions had just been imposed by the EU and the US against one of their most important markets, where they had orders to fulfil, suppliers to pay, and shareholders to satisfy. This was no longer about making sure that they were not impacted by sanctions, this was about managing a situation where sanctions directly impacted on them.

She needed to explain to the rest of the business what they needed to do, in a clear, straightforward way, so that they could focus on the key issues.

Fortunately, there was time for a quick phone call to their external lawyer before the meeting.

‘IRAN,’ the lawyer said.

‘No,’ the Global Compliance Officer interrupted, ‘it’s not Iran. We never did business in Iran.’

‘I know,’ replied the lawyer. ‘But it’s a helpful way to remember what you need to do, and it applies whichever sanctioned country you’re dealing with.

By “IRAN”, I mean

Identify,
Review,
Analyse,
Notify.

‘These,’ said the lawyer, ‘are the four elements you need to focus on.

‘You need to *identify* any contracts or other transactions which relate directly or indirectly to the sanctioned country, or which have any potentially sanctions-related element. That way, you know your exposure and you can start to manage the process. You need to impress on the business at the outset the need to tell you about all of the trades and other activities in or with the sanctioned country – they must not hold anything back, as that will make the process more difficult and challenging in the long run.

‘You need to *review* your current and future performance obligations under those contracts – delivery of cargoes, payments, etc – and whether the new sanctions impact on them. What is it that you actually have to do under your current contracts. And by when? This will allow you to plan and prioritise the must urgent cases.

This was no longer about making sure that they were not impacted by sanctions, this was about managing a situation where sanctions directly impacted on them.

‘You need to *analyse* the contract terms to see what your legal position is, in light of the new sanctions. You are looking to see whether there is any wording or other contractual mechanism that will allow you to manage the situation and avoid a dispute.

‘Start by looking for a specific sanctions clause. This may include warranties from your counterparty that the trade does not infringe sanctions and, more importantly, it may include some form of break clause . At the most extreme end of the spectrum, that would allow termination of the contract. But even if it doesn’t, it may allow suspension of your obligations, or give you a liberty to perform the contract in another way, and that may be enough to deal with the short-term issue. The more options you have, the better.

‘Remember to consider not only your obligations (for example, to deliver a cargo), but also the obligations of the companies which you rely on: Is there a sanctions clause in your contract with them which they can exercise and which will leave you exposed to your customer because you can no longer perform?

‘If there is no specific sanctions clause then you’ll need to rely on more general wording. For example, you should check whether the contract includes a general warranty that the trade is lawful or a clause which requires compliance with laws. If not, we can think about other options, like arguments about illegality, frustration, and *force majeure*. Those arguments will not be straightforward, and will depend on the facts, so you need to gather as much information as you can to understand exactly why you don’t want to perform: Is it illegal, or is this an internal policy decision? Are you actually prohibited from performing, or is this something which your bank or another third party is insisting on?

‘If there is no clause, what are the consequences of breaching the contract? How will you manage that exposure? You may want to raise the issue with your counterparty at the first opportunity and agree a joint approach.

‘Finally, you need to *notify* the business of the new corporate policy with respect to future transactions with the sanctioned country. Make sure people know that the situation has changed and that they must proceed with caution. Also think about what you might need to say to your bank and insurers, as they will have their own sanctions concerns.’

At the board meeting the CEO was reassured. ‘Great job. We have a plan and we know what we’re going to do. Let’s get on with it, everyone.’ ■

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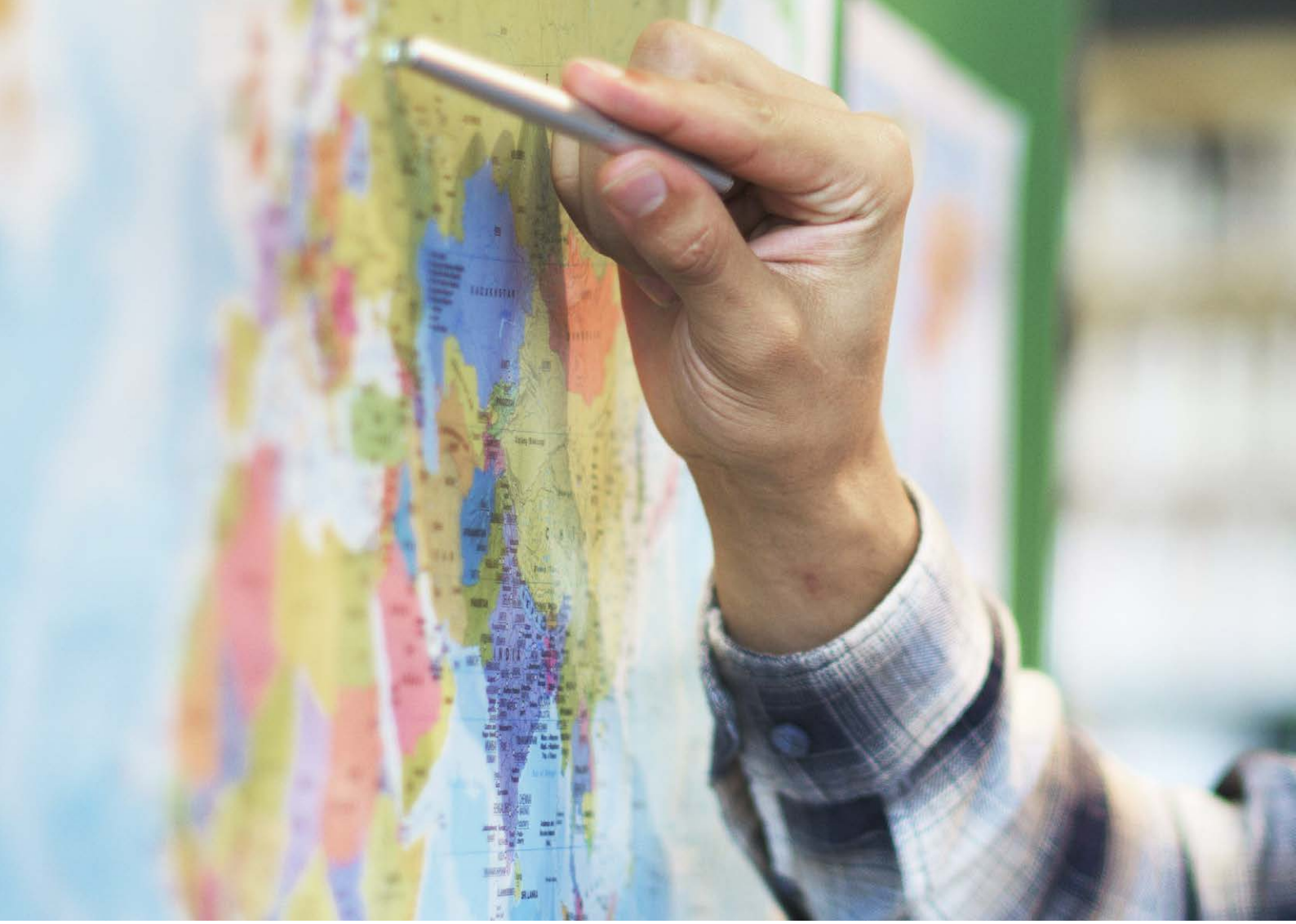

MAPPING THE CHANGES

While Iran and Russia continued to provide the lion's share of work for sanctions lawyers in 2018, it is the divergence of policy between the US and the rest of the world that is creating some of the more complex compliance challenges for international businesses.

Low on the wall of an office in the City of London hangs a political map of the world. At first glance, it appears that someone has set about randomly defacing it with coloured marker pens. Take a closer look, however, and you will find method in the apparent mayhem. The office and map belong to a leading sanctions lawyer. He says that he updates the map by colouring in each new country to which some form of sanction or embargo now applies. 'It only ever gets more colourful. Yesterday I added Nicaragua.'

If – possibly using a different coloured marker pen – you were then to highlight places where there's a presumption of denial for export licences, or a de facto embargo, such as those countries under the EU's Everything But Arms Policy, the map would become yet more busy, more vibrant, as the potential complexities of international trade become all the more apparent.

As at time of writing, world leaders have recently gathered at the G20 Summit in Buenos Aires. Topics of discussion there – and in diplomatic salons, dinner tables, newsdesks and boardrooms around the world – include Ukrainian/Russian tensions

around the Kerch Straits; the sanctioning of various Saudis for their role in the murder of Jamal Khashoggi (and recent attribution of responsibility for it, to Crown Prince Mohammad bin Salman by the US Senate); the fallout of the United Kingdom's looming departure from the European Union; and, most likely top of the agenda, the trade war between China and the United States.

'I don't see much political will in Europe to expand sanctions against Moscow.'

Jane Shvets, Debevoise & Plimpton

Each of these is in one way or another on the radar of the international diplomatic community. But as the world lurches toward the year 2020, clear vision is in short supply.

Back in the London office, the coloured-in map now includes not only Iran, Syria, North Korea, Russia, Venezuela, Burma/Myanmar, Cuba and others – but also pointillistic representations of entities and their interests designated under country-specific legislation or order, but located outside of them – or all at sea, in the case of maritime vessels. 'Two years ago, we thought the terrain was difficult,' smiles the lawyer. 'We were only in the foothills.'

'Sanctions are coming. November 5,' tweeted President Trump three days before the reimposition of US sanctions on Iran. Of course, the business world already knew that – companies in and out of the US had been working hard to meet the compliance requirements of the shifting sanctions landscape for many, many months.

For lawyers in private practice, two countries, Iran and Russia, are responsible for the greatest number of phone calls, billable hours and general problem-solving. This is much as it was under the Obama administration. The difference now, as Jane Shvets of Debevoise & Plimpton says, is that, 'On Iran, there was some divergence between the EU and US approaches and regulations. But now they're actually at odds. And as regards Russia, there are full-scale differences – I don't see much political will in Europe to expand sanctions against Moscow.'

Sue Millar of Stephenson Harwood echoes that point. 'Despite the Skripal case, there's no getting away from the fact that the UK, and Europe generally, benefits a great deal from Russian money. Potentially I can see further divergence with the United States, here, purely driven by economics. The US, despite its Russian energy interests just hasn't got as much at stake.'

To Iran and back

The re-imposition of sanctions related to Iran, of course, was not wholly unexpected. Though the agreement reached between the P5+1 and Iran, the Joint Comprehensive Plan of Action ('JCPOA') – by which Iran gave up nuclear enrichment in return for sanctions relief – was regarded as the jewel in the crown of Barack Obama's foreign policy, detractors regarded it a 'bad deal'. As a presidential candidate, Donald J. Trump made no bones about his intention to revisit it. In May this year, President Trump announced that he would be withdrawing the United States' participation. In June, General License H, which authorised the non-US subsidiaries of US parent companies to do business with Iran (providing that certain conditions were met) was revoked. In November, the last of the 'wind-down' periods given to companies to end their operations in Iran expired.

'It is unlikely in my view that a force majeure argument applies because the principle of a roll back of sanctions was specifically envisaged.'

Sue Millar, Stephenson Harwood

The international business community, along with Iran's leaders, was put on full alert. Secondary sanctions are now active and some 700 entities re- or newly designated. Stern warnings have been issued by the Office of Foreign Assets Control of the US Treasury Department ('OFAC') to foreign companies who might be considering continuing to trade with Iran, and the US State Department has made it clear that before sanctions are removed, Iran must address a broader sweep of concerns than its nuclear programme alone.

None of which is any great surprise to lawyers working in the field. One lawyer who says her firm has been 'at the coalface' (acting for Iranian, British and other banks and business) of Iran-related work since the EU sanctions coming into force earlier this decade, is Sue Millar. Should anyone have been surprised when US sanctions came back to bite?

'In my opinion, no,' she says. 'The snapback of sanctions was specifically envisaged in the JCPOA and although the rollback of US secondary sanctions does not fall within the terms of the JCPOA, President Trump made his intentions clear even on the campaign trail. It is unlikely in my view that a *force majeure* argument applies because, as I say, the principle of a roll back of sanctions was specifically envisaged. It is not therefore something which counterparties can argue was not foreseen when they entered post-JCPOA contracts.'

But many companies are now placed in the horns of a dilemma by the European Union's response to the US withdrawal, which has been to add the sanctions measures to its 'blocking regulation' by which 'no EU person shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the measures specified in the Annex or from actions based thereon or resulting therefrom.'

The European Union is also

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At the sharp end

The use of sanctions is not universally popular – not only amongst those impacted by them. Criticism is made not only of the fact that they frequently fail in their expressed outcomes (arguably, it could be said, the Iran sanctions leading to the signing of the now-broken JCPOA was an exception to that rule) but also to the ease with which lawmakers can affect the lives of innocents at the stroke of a pen. Many foreign policy watchers winced somewhat, at the visual messaging that announced in November that 'Sanctions Are Coming,' – which one lawyer described as 'loaded with hubris and distasteful.'

Ryan Fayhee, a partner at the DC office of the law firm Hughes Hubbard & Reed (and a former DOJ prosecutor) thinks that the process of 'de-risking' – especially in the financial sector – is of some concern to many in the US federal government:

'Humanitarian aid is not getting through, because even though government has provided a general licence or will license those exports, it is impossible to find non-US banks to finance the logistics – even if products are being given free. But I do see some indications that there will be adjustments made – perhaps the creation of some safe harbour to finance the delivery of those products. I hope that there's a way to do that – or the US will risk losing its credibility. Yes, government should be able to punish those that need to be punished. But sanctions were never intended to create a serious crisis, where, for example, people can't get medicine.'

A great deal of the sanctions-related work undertaken by lawyers lies in advising companies on their compliance plans and strategies, on investigations where they're required, and on bespoke issues arising out of new market entries or acquisitions. On occasion (or every day, in the case of some specialists) they find themselves at the sharp end of practice – working on behalf of clients to challenge a designation or listing, whether that be under US or EU law or other. For while to the compliance officer, each name added to a list represents a new layer in the rapidly-accreting navigational hazards to international business, there's undoubtedly a human story there, too.

'The system is overloaded at the moment. In November we had a judgment that came 10 months after the hearing. It's an extraordinarily long time. Especially when your life is on hold.'

Guy Martin, Carter-Ruck

Guy Martin, partner at law firm Carter-Ruck in London, undertakes sanctions work almost exclusively before the European courts as well as other tribunals. Martin says: 'I've done two cases arising out of the Arab Spring for clients from Syria in Luxembourg courts. In one, it was a case of mistaken identity: when the client's name was transliterated into English it was very similar to the intended targets of the designation, despite the fact that in Arabic, the two names were completely different. After two months the matter was cleared up, and a clarifying regulation was reissued. But my client was absolutely terrified of what might happen, and what it would mean for him and his family. Since then, the Council of the European Union has changed its practice, and now includes the Arabic spelling in the listing, and has – for the first time – employed Arabic-speaking staff in its offices to help them. But it took that case to make it happen.'

Much of Martin's work arises out of the Arab Spring, which saw popular revolts in Tunisia, Libya, Egypt and Syria. Prior to the Arab Spring his 'flagship' case lay in his representation of Saudi businessman Yassin Kadi who secured two landmark rulings from the ECJ. At heart was whether the European Union could rely, in making its own designations, on the listing by the United Nations Security Council. The outcome was that a UN designation does not of itself preclude a challenge in the European Union by a party subject to EU restrictive measures. It also lead to the creation of the role of Office of Ombudsperson in the Security Council, who is empowered to provide a degree of scrutiny of UN designations.

The *Kadi* cases, Martin says, 'laid down certain principles of natural justice. And I'm afraid they're being eroded and watered down, which is a great shame.'

The law, says Martin, will continue to change as the challenges keep coming. 'The system is overloaded at the moment. In November we had a judgment that came 10 months after the hearing. It's an extraordinarily long time. Especially when your life is on hold.'

considering the creation of a SPV (special purpose vehicle) as a means by which EU companies could continue to trade with Iran whilst side-stepping the US dollar payment system. To date, no EU government has agreed to host it for fear of being sanctioned by the US.

Olivier Dorgan of Hughes Hubbard & Reed believes that another reason that might be behind the delay in getting the SPV off the ground is that, in the event, not all Iranian banks have been relisted, meaning that some regional French, German and Italian banks have maintained limited links with Iran. 'The fear of all flows of funds drying up hasn't been realised, so the urgency has abated.'

Nonetheless, in France, where Dorgan is based, memories of the $9bn penalty paid in 2015 by way of settlement by BNP Paribas for violations of US sanctions are still fresh. 'Most large companies are pulling out of Iran, and SMEs also, for the reason that after 5 November it has become very difficult to obtain payment,' says Dorgan. 'Banks are writing to companies asking if they have sizeable exports to Iran and

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threatening to close their accounts. It can be very aggressive and toxic!'

Against this backdrop, observes Debevoise partner Satish Kini, many companies now find themselves in something of a lose-lose situation.

'Of course, the blocking regulation isn't new,' says Kini. 'It was introduced in 1996 in response to the Helms Burton Act. But there's been little enforcement under it and it's mostly been honoured in the breach. But now, with the Iran regulation added, a lot of people are worrying about it.'

Since the reemergence of the blocking statute, it's apparent that some companies have decided that the greater threat comes from non-compliance with US sanctions than from any penalty the EU is likely to impose on a Member State company. But lawyers say few are presented with a simple binary choice.

'By way of example,' says Brussels-based Mayer Brown partner Paulette Vander Schueren, 'the door is open for companies to put quite a lot of pressure on each other. In case of termination of commercial relations, the blocking regulation may have a perverse effect. Due to conflicting interpretations, pressure and threats of whistleblowing may be made even where the reasons for terminating a particular relationship are legitimate and in compliance with the blocking regulation.'

'It's not always the simplest thing, to make a decision that takes into account complex commercial and regulatory issues.'

Tamer Soliman, Mayer Brown

Vander Schueren's DC-based partner Tamer Soliman says that in conjunction with colleagues in Brussels and London, 'One of things we're doing jointly to help companies navigate these issues is to work through the rationale for the decisions that they make. But it's not always the simplest thing, to make a decision that takes into account complex commercial and regulatory issues.'

SWIFT alternatives

'The thing about sanctions,' says Giovanna Cinelli, leader of the international trade and national security practice at Morgan Lewis & Bockius, 'is that they represent geographically cross-cutting issues that affect people regardless of the kind of products and services they manufacture or provide.

'Companies should keep records that possess a level of detail that they may not be used to keeping. It can be very resource-intensive.'

Giovanna Cinelli, Morgan Lewis

'The question, "Do I have an issue?" is one that needs to be asked by companies whether they're in the biotech sector, in universities or banks or manufacturers. Within that construct, the next stage is to ask how to handle conflicts between jurisdictions – for example, what are the issues for a French company with US facilities? Or an Indian company with US suppliers? "Do I have to comply, and with whose laws? And is it all of the company? How can I do so whilst functioning efficiently?"'

All of this, says Cinelli, is paradoxically complicated by global communication technology which means operations are enmeshed and intertwined, making it harder for businesses to separate out the strands of their activities that might be differently affected by the respective jurisdictions to which their operations are subject.

Blocking statutes present challenges to global compliance, but the nuance is important: 'If you look at the EU's pronouncements in this area, they're quite clear. The message is that companies are free to make their own business decisions. But if the motivating force for refraining from business with Iran is fear of US sanctions, then that may not comport with EU requirements. If there are other reasons – such as supplier unreliability – then other reasons exist to limit or change a relationship even with entities in Iran. What it means, in part, is that companies should keep records that possess a level of detail that they may not be used to keeping. It can be very resource-intensive.'

Not who you know, but who your who-you-know knows

Erich Ferrari, founder and principal of

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DC firm Ferrari & Associates, whose practice is almost exclusively OFAC-focused, notes that on 16 October 2018, OFAC designated a bank that provided services to entities that were owned by an entity that provides services to, and is owned by, another bank that was providing services to a customer owned and controlled by entity providing services to the IRGC.

'There's an adage in the AML world that goes, "You don't need to know your customer's customer." But that seems to have been turned on its head... It'll be interesting to see how it'll play out.'

Erich Ferrari, Ferrari & Associates

The full suite of related designations were orchestrated 'against a vast network of businesses providing financial support to the Basij Resistance Force (Basij), a paramilitary force subordinate to Iran's Islamic Revolutionary Guard Corps (IRGC),' the Treasury said. Amongst these, points out Ferrari, were private banks that had frequently been used for the financing of legitimately exported humanitarian products.

'The rationale for the designation was very interesting,' says Ferrari. 'There's an adage in the AML world that goes, "You don't need to know your customer's customer." But that seems to have been turned on its head. Is that the new position? It'll be interesting to see how it'll play out.'

Notwithstanding the oft-encountered difficulty of finding banks willing to finance legal exports to Iran, there are a number of obstacles facing companies looking to make the kinds of exports that are traditionally permitted by general licences. As Barbara Linney, of DC firm Miller & Chevalier, notes, 'Part of the issue is that not all general licences are identical, so you have to be very mindful of the way in which you're using them – and not make assumptions based on the conditions of other licences.'

Another challenge, she says, comes from 'deceptive practices' commonly employed by sanctions evaders and proliferators. 'There's been a lot of focus on diversion recently, and the risk of front companies posing as humanitarian concerns is a very real one.'

Another vocational hazard for the sanctions practitioner, says Linney, is the vagueness of the regulatory wording and guidance: 'Certain of the secondary sanctions refer to prohibitions on the "facilitation of significant transactions" – and the agencies have shown a clear intention to use those tools. But what does "significant" actually mean? There is no clear guidance on that, nor a track record from which to glean bright lines. One has to wonder whether the lack of clarity is actually part of the strategy to discourage transactions in general, not just "significant" transactions!'

Speaking in tonnes

By dint of their client bases, some law firms are more likely to find themselves immersed in the intricacies of the Iran sanctions than others. Given the respective histories of the two 'allies' (now on either side of the JCPOA fence), UK firms are more likely to have an Iran practice than are US firms. As one lawyer said: 'In the UK, Iran seems to be generally disapproved of – but then so is much of the world. In the United States, it's seen as a pariah state.'

'Companies want to comply with sanctions but the conflicting US and EU positions on Iran have put insurers and their shipping clients firmly between a rock and a very hard place.'

Michelle Linderman, Crowell & Moring

Michelle Linderman is a London-based partner at Crowell & Moring. She has built a strong practice advising on sanctions issues impacting in the insurance and shipping industries, which, unlike many economic sectors, 'jumped back into Iran with both feet' after the lifting of economic sanctions in 2016 and the delisting of Iranian shipping companies such as the Islamic Republic of Iran Shipping Line ('IRISL'), which has one of the world's largest fleets. 'The insurers wanted that tonnage on their books,' she says. 'It represented a huge amount of potential revenue and work as IRISL and others needed insurance cover.'

Since then, she says, the combination of the blocking statute, lack of guidance from regulators, and reluctance on the part of financiers, has changed the mood, and many are looking to extricate themselves from the renewal of contracts for Iranian assureds or are placing limitations on the cover provided.

In late November, the International Group of P&I Clubs published an advisory warning its members that, 'Following the end of the wind down period there may still be some limited trade with Iran that is possible for non-US persons to undertake without a significant risk of violating US secondary sanctions (for example, the carriage of certain agricultural commodities, consumer goods and foodstuffs). Members should be aware, however, that even if the trade does not appear to violate US sanctions, practical difficulties mean that it is extremely unlikely that International Group Clubs will be in a position to make or receive payments, provide security or respond to any claims in the usual manner.'

It further cautioned that, in circumstances where a P&I club does cover a claim with an Iranian nexus, 'there is the potential for there to be significant reinsurance shortfalls.'

Linderman says that while in some sectors companies could withdraw with only a modicum of difficulty from Iran, it's more of a challenge for maritime insurers, and the uncertainties are huge.

'Imagine you have a ship owned by a German company carrying Iranian oil, and insured by an EU-based P&I club, and there's an incident in Iranian

waters. The owner makes a claim, and the P&I club refuses to pay due to the risk of breaching US secondary sanctions; the German shipowner could seek damages from the P&I club for its losses as a result of the P&I club breaching the EU blocking statute. In those circumstances the P&I club may seek to apply to the European Commission for permission to comply with the US secondary sanctions. The European Commission then has to decide who it sides with – the German shipowner or the EU-based P&I insurer. Clients are asking all the right questions about this but there are no firm answers. There are also policy considerations as if the EU, for example, gives permission for an insurer to comply with the US sanctions, how will that carry with the Iranians? And might they seek redress in the courts?'

'In light of the risks associated with dealing with companies with SDNs on their boards, dealing with non-sanctioned Russian parties can be very difficult to handle. Clients are very cautious.'

Charles Claypoole, Latham & Watkins

And if all International Group P&I clubs pull out of the Iran market because of the US secondary sanctions, what, she posits, would be the situation in the event of a big oil spill? 'Yes, the vessel might have alternative insurers outside the International Group, but that insurer wouldn't necessarily have the resources to pay for the clean-up!'

Not, says Linderman, that the industry isn't giving each of these issues due consideration. 'There are a lot of very smart people thinking through these concerns – and a lot going on behind the scenes. Companies want to comply with sanctions but the conflicting US and EU positions on Iran have put insurers and their shipping clients firmly between a rock and a very hard place.'

Russia still out in the cold

Relations between Russia and the rest of the world deteriorated further in 2018. The high-profile scandal of the poisoning of the Skripals in the United Kingdom, and concerns about the seizure of a Ukrainian vessel which the Russian authorities say strayed into their territorial waters, have heightened mutual suspicions.

The head of the UK's MI6 secret service has issued warnings about Russia's intentions and the kind of response they might elicit and there's general concern about the role the Kremlin is seeking to play on the world stage – and how. And of course, the Special Counsel investigation in the United States into Russian interference in the Presidential elections of 2016 not only rumbles on, but is taking scalps.

And yet, Russia business is by no means dead. And while the Russian economy isn't in anything like healthy shape, the finger could be variously pointed at mismanagement, a decline in the price of oil, or the countermeasures that the Russian government has introduced in response to western sanctions before, or at least alongside, that attributing credit to sanctions.

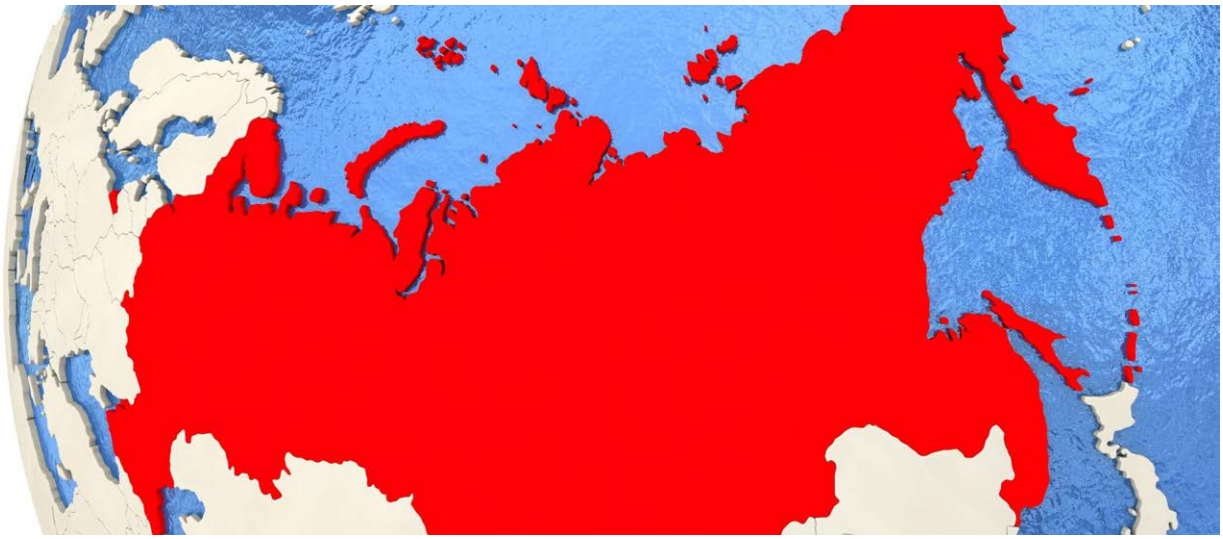
But the sanctions are generating a great deal of work – especially as the secondary sanctions enshrined in CAATSA start to bite – as most of the firms with strong sanctions teams testify.

'It's fair to say that the bulk of our work relates to compliance questions around financing, acquisitions, and corporate activity, generally,' says Les Carnegie, partner at the DC office of Latham & Watkins.

Other recent instructions include helping a bank review its sanctions compliance policies and procedures, advice in respect of the potential removal of an entity currently on the US Treasury Department's SDN list, and a challenge to a listing before the European Court of Justice.

Latham acted for Intesa, Italy's largest bank, on a major transaction involving Rosneft and other Russian entities. It's also been active on another major acquisition, 'making sure that the deal can go through without violating or triggering sanctions,' says London-based partner Charles Claypoole.

CAATSA, says Claypoole, adds a whole new layer of uncertainty because, 'it's such a complicated framework. Trying to understand who is and who isn't off limits is more difficult than merely not doing business with SDNs. In light of the risks associated with dealing with



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companies with SDNs on their boards, dealing with non-sanctioned Russian parties can be very difficult to handle. Clients are very cautious.'

Indeed, this is a very complex and challenging matter. As at writing time, ExxonMobil is challenging an OFAC penalty imposed in July. OFAC levied the fine because the energy company had signed heads of terms with (sanctioned) Igor Sechin, head of the state-run oil company Rosneft, an act which OFAC described as a 'reckless disregard for sanctions'. Exxon argued that Sechin was sanctioned only in his personal capacity.

'You can't underestimate the extent to which a designation can literally move a market.'

Daniel Martin, HFW

Directive 1 (as amended) under Executive Order 13662 imposes targeted, 'sectoral' sanctions on Russian financial institutions. Directives 2, 3 and 4 target the energy, defence, and oil exploration and production sectors, respectively (while European Union restrictive measures place similar, though not identical, constraints).

CAATSA added a new twist in so much that it created a secondary sanctions liability for non-US persons if they knowingly facilitated 'significant transactions' for or on behalf of persons sanctioned pursuant to Ukraine-/Russia-related sanctions authorities. Given that the CAATSA 'list' includes over 200 oligarchs and senior political figures, risk of non-compliance is heightened, despite the myriad of general licences that OFAC has issued and extended, enabling companies to do some kinds of business with some designated entities (e.g., with Rusal, and EN+, and the GAZ group).

Currently, it is the predicament of aluminium giant Rusal that is being closely watched – because the fortunes of such a behemoth have – however you define it – a significant impact on the wider market. As HFW partner Daniel Martin points out, 'When Oleg Deripaska and RUSAL were designated in April, taking them out of the market caused a huge spike in market prices. I've had clients who simply aren't in a position to exclude RUSAL as a counterparty. It's true that the US Treasury has issued general licences, but it's difficult to enter into long-term supply or shipping contracts when – as at the moment – the licence expires on 7 January. You can't underestimate the extent to which a designation can literally move a market.'

Martin's fellow partner, Anthony Woolich notes how Russian countermeasures are having a genuine impact upon the European companies impacted by them. The first retaliatory sanctions were imposed in 2014 and there have been subsequent amendments. Measures introduced in June 2018 included import restrictions on products and materials from 'unamicable states' and bans and restrictions on exports made by entities 'subject to the jurisdiction of [or controlled by] unamicable states.'

Worst hit are the agricultural and dairy sectors. For some European countries, Russia is a major market for products, and despite apparent resistance to 'home-grown' substitutes for foreign foods (such as 'French-style' cheeses), the restrictions remain in place.

'An increased number of sectors are impacted and being forced to take compliance seriously – for example, in the M&A arena. No one wants to buy a problem!'

Mike Zolandz, Dentons

'Finnish dairy companies are having to actively look for new markets because, in effect, their customer base has been taken away from them. And companies that have Russian subsidiaries under an obligation to obey Russian law face real tensions,' says Woolich.

The conflict highlights the extent to which Russia is neither a market nor economy that can be easily ignored.

Generally speaking, says Dentons' partner Mike Zolandz, sanctions policy is one area where both sides of the US political divide are broadly in agreement: 'CAATSA was a bipartisan effort, driven by concern that Obama era programmes against Russia would be removed. What you'll see is the trend line continuing. The pace of change with respect to US sanctions programmes is accelerating and an increased number of sectors are impacted and being forced to take compliance seriously – for example, in the M&A arena. No one wants to buy a problem!'

Corporate planning, investment planning, supply chain structuring, these and other business investment issues, he notes, 'don't all happen of a sudden. Sanctions changes can make a business decision become untenable very quickly.'

Zolandz says that whereas sanctions were always traditionally associated with cross-border trade, the breadth of the measures imposed by OFAC – and the scope of designated parties' interests – put them firmly on the due diligence radar of those involved in purely domestic M&A transactions. 'When, in April, OFAC sanctioned Viktor Vekselberg and the Renova Group conglomerate [which reportedly possesses assets in the region of $1.5 to $2bn], in effect it meant an additional 200 designations cropping up overnight, a number of which were even in the United States.'

There is, of course, always the vexed question as to the extent to which the regime will be enforced, and how deeply compliance needs to penetrate into business practices to satisfy OFAC and other agencies.

In that regard, says Zolandz, a 2017 settlement against a major insurer is instructive. The penalty wasn't earth-shattering (being a shade under $200,000), but the message was clear.

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OFAC highlighted that the company's compliance programme at the time of the apparent violations 'included recommendations for when to use exclusion clauses in the policies it issued regarding coverage or claims that implicated US economic sanctions,' says Zolandz. 'While a majority of the policies were issued with exclusionary clauses, most were too narrow in their scope and application to be effective.

'It wasn't enough that the company was complying or that it had a compliance programme. OFAC focused its enforcement on the fact that the programme wasn't being used consistently. This really calls attention to the need to conduct ongoing risk assessments and screening.'

'We may yet see sanctions targeted at the Chinese hi-tech sector, or the Chinese military.'

Alexandra Baj, Steptoe & Johnson

Interesting times

Alexandra Baj, of counsel in the Washington, DC office of Steptoe & Johnson, says that companies should be looking ahead as to how the lay of the land may change: 'There are industries that have not yet been made subject to sectoral sanctions, but are on the periphery of those that have. And there are companies in the targeted sectors that have yet to be designated. In addition, we have to see what might come out of the Mueller investigation.'

Beyond Russia, China is clearly very much the focus of the US government's current analysis of long-term economic threats. The ZTE case has yet to be matched since making waves in 2016, but concerns about China's appetite for US technology is clearly behind the Foreign Investment Risk Review Modernization Act ('FIRRMA'), and there are undisguised concerns amongst law makers about the risk posed to US national security by specific Chinese companies, both state-owned and private.

'We may yet see sanctions targeted at the Chinese hi-tech sector, or the Chinese military,' says Baj. 'And I wouldn't be surprised to see a case similar to the action against ZTE.'

Scanning the horizon, where are the the London lawyer's colouring pens likely to land next?

Executive Order 13851, issued on 27 November, creates a new sanctions authority targeting Nicaragua, and sanctions vice-president and first lady of Nicaragua, Rosario Maria Murillo De Ortega, whom the US government believes has influence over a youth group responsible for killing, torture and kidnapping.

'The past year,' says Ryan Fayhee of Hughes Hubbard, 'the government's use of sanctions to address any foreign policy concern, including corruption and human rights, has been really marked. We've seen sanctions used in ways and in parts of the world that we haven't seen before – and that's shown by the recent designation of the Nicaraguan president's wife. It's pretty provocative.'

If the underlying message is that if lawmakers are increasingly willing to impose restrictions on trade with countries whose human rights and governance credentials fall short of the acceptable, international business has its due diligence cut out for it. ■

'We've seen sanctions used in ways and in parts of the world that we haven't seen before...It's pretty provocative.'

Ryan Fayhee, Hughes Hubbard

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Economic sanctions: foreign policy tool or signal?

A popular foreign policy tool – and increasingly used against friends and allies – the true value of sanctions is debatable, write Sue Millar and Stephen Ashley.

We have in recent years lived through a period of unprecedented growth in the use of economic sanctions as a foreign policy tool. Since the early 1990s, the US, Europe and other developed economies have employed economic sanctions on other nation states more than 500 times.

The orthodox explanation for their use is that they are intended to effect behavioural change without the necessity for boots on the ground, i.e., military intervention. Perhaps more frequently, however, they are used to signal disapproval with a country's stance or actions.

The efficacy of sanctions regimes is much debated – at least in relation to those regimes which are intended to effect behavioural change. There is a strong argument to suggest that the longer that sanctions regimes are in place, the less likely they are to be effective as the targeted state learns to adapt to its new economic circumstances instead of changing its behaviour. There has also been increasing criticism of the humanitarian costs of sanctions regimes. This was particularly the case in relation to Iraq where the stringent and comprehensive sanctions imposed during the 1990s led to childhood malnutrition and a widespread humanitarian crisis compounded by a lack of medical supplies and a shortage of clean water.

True cost of sanctions

There is also credible evidence to suggest that sanction regimes carry economic costs not only to the target but also to the countries that initiate the sanctions through the reduction in trade. There may also be retaliatory measures such as happened in relation to Russia, where Russia responded to the imposition of EU sanctions by banning the importation of certain agricultural products in Russia emanating from the EU. According to EU Commission data, the sanctions targeting Russia are likely to have reduced the EU's economic growth in 2014 by 0.3% and by 0.4% in 2015.

Politically, sanctions are often most effective against friends and allies in discouraging them from trading with the targeted country; in the case of adversaries, they can stiffen their resolve – at least in the short term.

According to EU Commission data, the sanctions targeting Russia are likely to have reduced the EU's economic growth in 2014 by 0.3% and by 0.4% in 2015.

All that said, sanctions probably have the greatest prospect of success where they are agreed upon and imposed at either the supranational level, e.g., by the UN or are the result of co-ordinated action – as was the case in relation to the UN, US and EU sanctions regimes targeting Iran in relation to nuclear proliferation. The main objective of the international sanctions was to block Iran's access to nuclear-related materials and put pressure on the Iranian government to compel it to end its nuclear enrichment programme and other nuclear proliferation-related activities.

To all intents and purposes, that international effort was successful. The Iranian government signalled an intention to change its behaviour, it entered into the JCPOA with the P5+1 and according to the International Atomic Energy Agency has been complying with all of its obligations to date. That did not stop President Trump from announcing that the US was withdrawing from the JCPOA on 8 May 2018. If you are from Iran, you might well be justified in taking the position that the JCPOA did not deliver the benefits that were promised to the Iranian people in return for the government actually changing its behaviour in the first place. But on any view, it is difficult not to see the cognitive dissonance in walking away from the JCPOA where the foreign policy objective of the international sanctions was actually achieved and being independently verified on an ongoing basis.

Since President Trump's decision, we have seen the roll-back of secondary sanctions and a major partner and ally, the EU, attempt to neutralise the effect of those sanctions by amending the 'Blocking Statute' and deciding to establish a special purpose vehicle to facilitate payments with Iran.

The transatlantic alignment on Iran has clearly ended but it remains to be seen whether that will also be the case with Russia, where Congress has enacted the Countering America's Adversaries through Sanctions Act ('CAATSA') which introduces potentially wide-ranging secondary sanctions on non-US persons doing business with the Russian government and Russian businesses. Many of these provisions have not yet been fully brought into effect but it is very much a question of wait and see for the future.

This raises serious questions about the future use of economic sanctions as an effective foreign policy tool – at least in relation to those matters requiring international co-ordination. That is not to say that we will not see continuing growth in their use but their utility may be limited to signalling displeasure or disapproval only. ■

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Time to get to know the UK's Sanctions and Anti-Money Laundering Act 2018

By Guy Martin

As the UK struggles to prepare for Brexit, one key piece of legislation is already in place. Plugging a gap previously filled by EU law, the Sanctions and Anti-Money Laundering Act 2018 ('the Act') received royal assent on 23 May. Many of its provisions are now in force.

At present all sanctions derived from the EU, and indeed from the UN, are implemented throughout the EU through EU regulations – these either have direct effect in the UK or are then brought into UK law through a statutory instrument issued under powers derived from the European Communities Act 1972. These statutory instruments will often impose penalties in the event of any breach, including criminal penalties.

However, the UK is currently on a course towards leaving the EU in March 2019. At that point, the 1972 Act will be repealed. A wholly different legal basis will then be required to empower the UK government to issue instruments giving effect to sanctions. Hence we have the 2018 Act. What does it say?

First, the Act empowers UK government ministers to create six different types of sanctions. These are set out at section 1(5) and include financial sanctions (the most important of these being asset freezing, but also including prohibitions on the provision of financial services and on asset transfers), immigration (i.e., UK travel bans), trade (including real property as well as goods and services) and transportation including by sea and by air. Provision is also made to empower ministers to take other steps necessary to comply with UN obligations.

The Act also lists at s.1(2) some 11 purposes for which sanctions may be introduced. These include prevention of terrorism within and outside the UK, national security, in the interests of international peace and security, to further a UK foreign policy objective, to promote the resolution of armed conflicts, to promote compliance with international humanitarian law, to contribute to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction and – most broadly – to promote 'respect for democracy, the rule of law and good governance'.

There is also a purpose which comes into the statute via the so-called 'Magnitsky amendments' – named after the Russian lawyer who died in prison in 2009 and which were passed by the UK parliament on 1 May. This introduces an additional purpose of accountability for, or to be a deterrent to, 'gross violations of human rights' or otherwise to promote respect for human rights and compliance with international human rights law.

The subject of these sanctions is referred to in the Act as a 'designated person'. Section 11(2) of the Act specifies the basis for designation, prohibiting the minister from designating a person except where they 'have reasonable grounds to suspect' that that person is an 'involved person' and that designation is appropriate with regard to sanctions compliance and the likely effects of designation on that person. An 'involved person' means, we are told in s.11(3), someone who has been involved in an activity specified in the regulations or on their behalf or direction.

It will also be possible, under the provisions of s.12 of the Act, to designate not just individual persons but categories of persons. This is the first time UK law has allowed for unnamed persons to be designated by description or category.

Further, and in a radical shift from the current EU sanctions regime, the Act provides for a form of automatic listing. It states at s.13 that UK regulations implementing listings by the UN Security Council are obliged to designate persons listed by the UN even if the UK minister regards those designations as being, for example, based on mistaken identity. This effectively requires the UK to 'rubber stamp' the listings of the UNSC.

As far as licences are concerned, s.15 establishes a rather broad power to create exceptions to prohibitions and to grant licences, including general licences to categories of people (in a manner similar to s.12 above). Section 16 says sanctions regulations may make provision to require persons to deliver information to a minister or a specified other person, including to inform them of prescribed matters, to create and maintain records, and to authorise inspection and copying of prescribed documentation.

In another significant change, the Act extends the international reach of the UK sanctions regime by explicitly establishing extra-territorial application. Section 21 sets this out explicitly, stating that prohibitions or requirements may be imposed in relation to conduct in the UK or its territorial sea, or to conduct elsewhere if the conduct is by 'a United Kingdom person', which it defines as a UK national or a body incorporated or constituted 'under the law of any part of the United Kingdom'.

It is therefore clear that the new regime will depart from the current EU system in certain significant respects. While the purposes for which sanctions can be imposed are broadly similar, the introduction of designation by category, automatic listing and extraterritoriality are significant changes which businesses, individuals and their advisers would do well to keep under close review.

But perhaps the biggest change comes with the review mechanisms in the Act. Whereas currently a listing in an EU instrument can be challenged only in the EU courts, in future requests to ministers to exercise their powers to reconsider or alter decisions will be subject to review in the UK courts. The courts will in turn apply the administrative law standards that they would otherwise use in a judicial review.

As periodic reviews of all designations will take place only every three years (as opposed to every year under the current EU regime), and as sections 23 and 25 expressly provide that a person who is designated or listed may request that a minister revoke their designation or use best endeavours to remove them from a UN list, it is reasonable to anticipate a certain increase in activity in the London courts consequent on these changes. ■

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The EU Blocking Regulation: compliance programmes for US and EU companies

By Satish M. Kini, Jane Shvets, Konstantin Bureiko and Tom Cornell

In light of the US withdrawal from the Joint Comprehensive Plan of Action ('JCPOA') and the EU's subsequent amendment of the so-called 'Blocking Regulation', companies subject to US and EU jurisdiction may find themselves between a rock and a hard place when designing sanctions compliance programmes. If they implement a global policy requiring all operations to follow US sanctions requirements, their EU subsidiaries could be at risk of breaching the Blocking Regulation by arguably taking actions to comply with relevant US sanctions restrictions. Yet, if their EU subsidiaries or operations do not take into account US sanctions, they may become a target of US secondary sanctions or, if there is sufficient US nexus, direct penalties for breaching US sanctions laws.

US sanctions against Iran

The 4 November US sanctions against Iran include so-called 'secondary sanctions' designed to discourage non-US persons from doing certain business with Iran, such as purchasing oil. Secondary sanctions allow (but do not require) US authorities to impose sanctions on non-US persons that engage in targeted commercial activities involving Iran. These secondary sanctions create a particular risk for EU companies doing business with Iran under the JCPOA.

In addition, the United States maintains a trade embargo against Iran as well as extensive 'primary' sanctions, which must also be followed by non-US subsidiaries of US companies. Together, these generally prohibit any person from engaging in Iran-related transactions involving US-origin goods or through the US financial system (e.g., undertaking a funds transfer denominated in US dollars).

EU Blocking Regulation

The EU has remained committed to the JCPOA and has taken steps to persuade Iran that the JCPOA continues to be viable. In particular, the EU has amended the Blocking Regulation.[1] The Blocking Regulation, as amended, prohibits EU persons from taking actions to comply with most US sanctions against Iran.

Prior to the Iran-related amendment, enforcement of the Blocking Regulation had not been rigorous. There is a risk that this might change, given the renewed attention paid to the Regulation and opposition in the EU to the US withdrawal. In particular, EU guidance published in August 2018 (the 'EU Guidance') has clarified that article 6 of the Regulation creates a free-standing right for a private person to sue for damages caused by a company's compliance with US sanctions at issue in the Blocking Regulation. Although article 6 was not the subject of the recent amendment, its scope was previously interpreted in a much more limited way.[2] The new interpretation implies that a company can sue another company in the EU for actions taken to comply with certain US sanctions.

Compliance

The differing directives of US sanctions law and the Blocking Regulation may seem incompatible to companies subject to both. However, the Blocking Regulation does not force companies to do business in Iran, in any other jurisdiction, or with any counterparty. Per the EU Guidance, the purpose of the Blocking Regulation is 'to ensure that such business decisions remain free, i.e. are not forced upon EU operators by the listed extra-territorial legislation'. The EU Guidance expressly states that EU companies 'are free to choose whether to start working, continue, or cease business operations in Iran or Cuba'. Consequently, if a company decides to prohibit business in Iran or in any other jurisdiction for its own risk or policy reasons, the Blocking Regulation would not stand in the way of that decision. The reasons for such a prohibition might relate, for example, to Iran's inclusion on the FATF 'grey list', or the country's low Transparency International score. The risk-based rationale for declining to do business in Iran should be reflected in the company's policies, guidelines and other documentation, as appropriate. The company should also ensure that relevant employees and, if necessary, counterparties understand the company's risk-based foundation for such decisions.

Companies should also assess sanctions compliance clauses in their contracts. Among other considerations, they should carefully review whether their EU affiliates can provide blanket undertakings or representations about compliance with US sanctions, or whether appropriate carve-outs and references to internal polices should be included. When reviewing contractual relationships, the recent decision of the English High Court in *Mamancochet Mining Limited v. Aegis Managing Agency Ltd and Others* [2018] EWHC 2643 (Comm) may be instructive, as it suggests (albeit *obiter*) that the Blocking Regulation does not apply to certain contractual obligations.[3]

The reinstatement of US sanctions on Iran has created compliance headaches for companies doing business in the US and EU. Whilst the risks of conflict between US and EU laws can be mitigated, they are unlikely to be eliminated entirely. Companies should ensure that their compliance policies and sanctions clauses reflect the full scope of their risk-based decision-making without unnecessarily falling afoul of the Blocking Regulation. ■

The authors would like to thank Robert Dura (associate, Debevoise & Plimpton) for his contributions to this article.

Links and notes

1 Council Regulation (EC) No 2271/96, as amended.
2 See: EU Guidance Note on Blocking Statute, 7 August 2018.
3 See: www.debevoise.com/insights/publications/2018/10/us-sanctions-v-eu-blocking-regulation




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Coping with evolving US sanctions on Russia

By Alexandra Baj and Brian Egan

While the US economic sanctions on North Korea and Iran have dominated US headlines in recent months, US sanctions involving Russia are the most complex current US sanctions programme. These sanctions began in 2014 as a 'surgical' programme, limited and targeted and closely coordinated with US allies in Europe, in response to Russia's incursion into Ukraine. Since that time, unique and complicated elements have been added to the sanctions – sometimes in coordination with, and at other times at odds with, US allies – that pose difficult implementation challenges for companies inside and outside the United States.

What are the key features of this sanctions programme that makes compliance such a challenge?

The SSI List

The US Russia sanctions programme has its own list of sanctioned entities – the Sectoral Sanctions Identification List ('SSI List') entities – in addition to the list of Specially Designated Nationals ('SDN') List that is common to other US sanctions programmes. The differences between the SSI List and SDN List are meaningful and they create compliance challenges. The SSI List consists of Russian entities that operate in the energy, military, and financial services sectors of Russia, and that have been identified by the Office of 'Foreign Assets Control ('OFAC) pursuant to four 'Directives'. Transactions with SSI List entities are restricted, but not outright prohibited. These restrictions primarily limit the extension of 'new debt' (broadly defined) to these entities, of varying tenure based on the Directive that applies to the specific SSI List entity. In addition, the SSI List sanctions restrict the provision of goods and services in support of certain 'special' (deep water, Arctic offshore, or shale) Russian oil projects. These restrictions have been amended and expanded over time.

Russia also creates unique challenges involving due diligence associated with OFAC's '50% rule'. This rule provides that any property or business entity owned 50% or more by an SDN or a combination of SDNs is itself automatically an SDN. OFAC has applied the same rule to SSI List entities and the SSI List restrictions. The 50% rule creates particular difficulties in Russia because many SDNs and SSI List entities have vast ownership interests, held in complicated and semi-transparent arrangements (for example, through offshore entities, various levels of holding companies, and other structures). For US companies intending to do business with Russia while staying on the 'safe side' of US sanctions, more due diligence is frequently required for transactions involving Russia than in other jurisdictions.

CAATSA

The Countering America's Adversaries through Sanctions Act of 2017 ('CAATSA') represented a major expansion of the US 'secondary' sanctions on Russia. While it is widely known that US persons must comply with US sanctions, secondary sanctions affect non-US persons. They do not prohibit activity by a non-US person, but can result in a denial of the privilege of doing business in the United States if a non-US person engages in certain transactions. In the case of Russia, CAATSA implemented secondary sanctions for 'significant' transactions – determined through a discretionary six-factor test – with Russian SDNs and SSI List entities, as well as entities 50% or more owned by SDN or SSI List entities. This is the only sanctions programme in which the '50% rule' has been extended explicitly as a trigger for secondary sanctions.

OFAC has issued an important clarification with respect to secondary sanctions on transactions with SSI List entities that should provide some comfort to companies outside the United States. Under OFAC's guidance, transactions that only involve SSI List entities (and not SDN List entities) must include 'deceptive practices', which OFAC describes as 'attempts to obscure or conceal the actual parties or true nature of the transaction(s), or to evade sanctions' to potentially be considered 'significant'.

CAATSA took on special significance in 2018 following the 6 April SDN List designations of several Russian oligarchs, government officials, and major Russian companies involved in industries from metals to cars, energy, weapons trading, and finance. These designations increased substantially the compliance risk and need for due diligence when operating in and with Russia.

CAATSA is also unique for requiring congressional notification for certain changes in US sanctions involving Russia, such as removing an individual or entity from OFAC's SDN List, or for the issuance of particular licences, which could add time to these processes.

Crimea sanctions

Historically part of Ukraine and now controlled by Russia, the Crimea region is subject to a broad trade embargo under US sanctions – prohibiting exports, imports, investments, and facilitation of trade by US persons. Individuals and entities operating in Crimea can be subject to inclusion on the SDN List. Some Ukraine-related business may have ties to Crimea in a manner that is not evident from contracts and other documentation.

A unilateral US approach

Initially, the US and the European Union were closely aligned with almost identical Russia-related sanctions. As time has gone on, divergence between the two approaches has become more stark, particularly after the US Congress mandated additional sanctions under CAATSA, and there is no sign that the US and EU are coordinating their approaches to these issues going forward.

We didn't even mention the targeted US export controls on Russian special oil projects, the use of human rights sanctions against Russian parties, and other aspects of the US controls. In short, compliance with these 'surgical' sanctions sometimes seems more complicated than surgery itself to those attempting to steer clear of infractions and other problems. Companies doing business that could implicate the Russia sanctions are well advised to exercise care in understanding the rules of the road that are embedded in the US sanctions. ■

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The future of Iran sanctions: looking to the past

By Barbara Linney

As the new year approaches – and with it, a new US Congress – sanctions practitioners frequently are asked to predict how US sanctions policy will unfold in the coming months. In the case of Iran, the future looks very much like the past. After a tumultuous year that saw the United States withdraw from the Joint Comprehensive Plan of Action ('JCPOA'), US sanctions against Iran that were waived pursuant to the JCPOA have been reimposed, and the momentum for increased sanctions and enforcement of existing sanctions gained over the past year likely will continue to build, impacting both US and non-US persons.

US Iran sanctions currently are comprised of two distinct parts – primary sanctions and secondary sanctions.

The *primary* sanctions programme targets behaviour of US persons, who are prohibited from engaging in most trade and transactions with Iran, and are subject to fines, penalties and imprisonment for violations of the prohibitions.

Non-US persons are not immune from primary sanctions enforcement actions. Non-US parties who receive US origin goods are subject to the relevant export controls – i.e., the ITAR and, EAR, under which re-exports to embargoed jurisdictions such as Iran are prohibited. Furthermore, under the Iranian Transactions and Sanctions Regulations, non-US persons are prohibited from re-exporting controlled goods, technology or services with knowledge or reason to know that the re-exportation is intended specifically for Iran or the government of Iran.

In addition to specific prohibitions related to re-exports, all of these laws provide for jurisdiction over those who cause, aid or abet, or engage in conspiracies regarding such violations, and these provisions have been used frequently in the past as the basis for charging non-US persons with violations of the primary sanctions. In this regard, the United States has not shied from using extradition treaties with third countries to bring alleged sanctions violators before US courts – as in the recent case of the Huawei executive detained in Canada in connection with the US investigation of allegations that Huawei breached US sanctions against Iran. Attempts to violate the sanctions and transactions for the purpose of evading or avoiding sanctions by US as well as non-US persons likewise are prohibited. Violators also may become ineligible to receive exports from the United States.

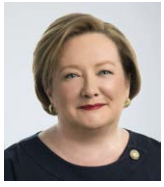
Finally, since 2012 – except for a brief period under the JCPOA – the primary sanctions also have applied in their entirety to foreign entities owned or controlled by US persons. In a nod to objections to extraterritorial reach of US sanctions, however, fines and penalties imposed by OFAC for violations of this prohibition by a foreign entity will be assessed against the US parent entity.

The *secondary* sanctions programme targets behaviour of non-US persons, who are faced with significant economic consequences if they engage in certain trade or transactions with Iran or with individuals, entities, vessels or aircraft listed on the US Specially Designated Nationals and Blocked Persons List ('SDN List'). In general, there are three types of consequences that can result from the imposition of secondary sanctions. In most cases, foreign persons who engage in sanctionable behaviour risk asset blocking (or freezing) and, in the case of individuals, exclusion from entry into the United States. In other cases, blocking and/or a range of other consequences will be imposed. Such consequences include exclusion from transactions involving the US Export-Import Bank; ineligibility for specific export licences; restrictions on loans from US financial institutions; ineligibility for US government contracts; ineligibility to engage in transactions in foreign exchange subject to US jurisdiction; ineligibility to engage in banking transactions subject to US jurisdiction; ban on investment in equity or debt of sanctioned entity by US persons; travel ban on corporate officers and controlling shareholders of sanctioned entities; imposition of any of the above sanctions on executive officers of the sanctioned entity; and imposition of import sanctions under the International Emergency Economic Powers Act ('IEEPA'). Finally, in the case of financial institutions which support sanctionable transactions with Iran, correspondent account sanctions may be imposed.

Numerous sectors of the Iranian economy now are targeted by US secondary sanctions, including financial, financial messaging (e.g., SWIFT) and banking; sovereign debt and currency transactions; gold & precious metals; graphite, raw or semi-finished metals such as aluminium and steel, coal; software for integrating industrial processes; automotive; port operators; shipping and shipbuilding; petroleum, petrochemical and energy; and underwriting, insurance and reinsurance.

Currently, the Trump Administration is waging a comprehensive interagency approach to Iran sanctions led by a Special Representative on Iran and core staff at the US Department of State. This effort is focused on the full range of threats posed by Iran, including nuclear, missile and cyber threats, and maritime aggression. Traditionally, Congress also has played an active role in Iran sanctions, particularly in the context of secondary sanctions, but in the context of primary sanctions as well – for example, by extending the primary sanctions to non-US entities owned or controlled by US persons, and, more recently, under Title I of the Countering America's Adversaries Through Sanctions Act ('CAATSA'), limiting OFAC's discretion in determining whether to impose sanctions on the Islamic Revolutionary Guard Corps, persons involved in human rights abuses in Iran or Iran's ballistic missile programme and conventional arms trade. These initiatives traditionally have had bipartisan support, and both sides of the aisle have been quick to propose and support legislative measures whenever they perceive that the administration is not being hard enough on sanctions targets.

Given the Trump Administration's tough stance on Iran, congressional intervention in Iran sanctions may not materialise early in 2019, but Congress undoubtedly will be watching the Administration's progress closely, and will not hesitate to step in if warranted. ■



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Iran: sanctions issues facing the international shipping and insurance industries

By Michelle Linderman and Cari Stinebower

The international shipping industry carries around 90% of world trade. Goods shipped around the world on a daily basis include raw materials in bulk and manufactured goods. Over 50,000 vessels – each of which is insured against various maritime perils – move these goods daily. While the world economy relies on this commerce, many of us give little thought to how ship owners and their insurers mitigate the risks arising from the complex and often conflicting world of international sanctions.

Here we discuss some of the risks facing the shipping and insurance industries, US government expectations to address those risks, and possible compliance solutions.

The Iran problem

The re-introduction of US secondary sanctions relating to Iran, together with the revised EU Blocking Statute, has left the shipping and insurance industries facing a conundrum. On the one hand, EU insurers cannot take the risk of breaching US secondary sanctions by providing cover for restricted activities. On the other hand, refusing to pay a claim because of the threat of looming secondary sanctions leaves EU-based insurers at risk of breaching the EU Blocking Statute. Breach of the Blocking Statute could give rise to Member State-issued penalties and potentially claims for compensation from the party who has suffered losses as a result of the breach. Neither scenario is attractive and for the International Group of P&I clubs, which insure around 90% of the world's ocean-going tonnage, it is a quandary.

Insurers who re-entered the Iranian market in 2016 have spent the last six months reacting to these changes from a legal, practical, and policy perspective. It is one thing to assert compliance with laws but it is an entirely separate matter in the global shipping world to prescribe a cohesive plan for addressing new Iran sanctions, identifying Iranian touch points, addressing conflicting legal structures, meeting fiduciary obligations, and navigating contractual requirements. For some insurers, this means exiting the Iran market completely by refusing to provide cover for anything that has an Iranian nexus. Even for trade that is permissible (i.e., carriage of grain or humanitarian cargoes to Iran), there are practical issues as fewer banks will handle Iran-related transactions. As such, even if insurers are liable to pay claims for incidents with an Iranian nexus, in practical terms, they may be unable to do so – resulting in exposure for shipowners.

Further, where an EU-based insurer seeks to avoid liability for a claim due to risks from US secondary sanctions, the shipowner could seek compensation for losses from the insurer under the EU Blocking Statute. While the insurers could seek permission from the European Commission to comply with the US secondary sanctions, there is no precedent for how the Commission will address such a request. Moreover, if the shipowner is also an EU entity, it is not clear how the Commission will rule, given the foreign policy considerations and the EU's commitment to the JCPOA.

These implications have broad consequences for global commerce. If all of the International Group of P&I clubs exit the Iran market, a chain of unintended and devastating consequences is inevitable. What happens if there is an oil spill from, for example, an NITC tanker? Who pays for the clean-up? Do the relevant parties have to wait for a licence from the US Department of the Treasury allowing US Person participation (which negates the risk of secondary sanctions)? Further, outside of the International Group of P&I clubs, insurers may not have the capacity to provide the levels of cover necessary for the environmental clean-up.

Dealing with 'deceptive practices'

On 20 November 2018, The US Department of the Treasury issued an 'OFAC Advisory to the Maritime Petroleum Shipping Community' alerting the maritime industry to the sanctions risks involved in petroleum shipments to Syria and naming specific ships that had been involved in this practice. This followed a 'North Korea Sanctions Advisory' issued on 23 February 2018. Both notices warned of deceptive practices certain parties in the shipping industry utilise to evade sanctions. These include falsification of cargo and vessel documents, ship-to-ship transfers to conceal the origin or destination of cargo, and disabling of automatic identification systems ('AIS') to mask the movements of ships engaged in illicit activity.

OFAC has suggested some mitigating steps to help identify and prevent illicit activity, including strengthening AML and CFT compliance, monitoring for AIS manipulation, reviewing all applicable shipping documentation, establishing clear communication with partners, and leveraging resources such as organisations that provide commercial ship data.

While the insurance industry is keen to play its part, monitoring the AIS data for every voyage made by every vessel is simply not feasible. That said, marine insurers must be part of the solution. Risk-based solutions could include, for example, identifying those vessels trading to or near high-risk areas and identifying cargoes and/or assureds that might present higher risks. Carrying out spot checks and/or requiring assureds to provide data could also be options. Finally, and perhaps ideally, a private sector-government partnership (including OFAC) to collaborate on addressing viable solutions for the different stakeholders is imperative. The United States Financial Crimes Enforcement Network (OFAC's sister agency) recently called for more pilot programmes between the private and bank regulatory sectors – a similar call for cooperation here is ideal.

It is, however, clear that OFAC will be looking at what steps the industry is taking, and having issued guidance on suggested mitigating steps, taking no action is surely not an option. ■

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Global Magnitsky sanctions and expanding anti-corruption and human rights enforcement authority

By Peter G. Feldman, Paul M. Lalonde, Nadiya Nychay and Jason M. Silverman*

On 20 December 2017, US President Donald J. Trump signed Executive Order 13818 (the 'Executive Order'), implementing sanctions under the 2016 Global Magnitsky Human Rights Accountability Act ('Global Magnitsky Act').[1] The Executive Order established a new sanctions programme targeting corruption and human rights abusers, and imposed sanctions against an initial set of 13 human rights abusers and 39 affiliated individuals and entities from 13 different countries – some of which are strong US allies.

The Global Magnitsky Act provides the United States with a tool to punish human rights violators and corrupt conduct outside of the traditional criminal enforcement process, and on a worldwide scale. With over 100 designations under this programme in the past 12 months,[2] Global Magnitsky (or, 'Glomag' as it has become known) signals an alternative approach to addressing these issues, one that also expands well beyond traditional jurisdictional lines and national borders.

Under the Global Magnitsky Act, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, can target foreign individuals and entities for sanctions, blocking (freezing) their property and interests in property within US jurisdiction and prohibiting any US person (including US companies) from transacting with them. Glomag sanctions have been imposed on foreign persons determined to be responsible for or complicit in serious human rights abuse, and current or former government officials, or persons acting on behalf of such officials, responsible for and complicit in corruption or the transfer of the proceeds of corruption. Also targeted under the programme are leaders or officials of entities that engage in or attempt to engage in such activities, persons who provide goods or services in support of these activities, and persons who have materially assisted, sponsored or provided financial, material, or technological support for these activities.

Both US and non-US persons may face liability for evading or avoiding, causing a violation of sanctions imposed, or conspiring to violate them.

The Global Magnitsky Sanctions broaden the categories of individuals and entities that may be added to the Specially Designated Nationals and Blocked Persons ('SDN') List, and have the potential to diversify the geographic distribution of SDNs. In addition to China, Russia, and South Sudan, the list of countries associated with persons and entities designated under the Executive Order has included Burma, Canada, The Gambia, Israel, the Netherlands, Saudi Arabia, Turkey, and the British Virgin Islands. Several of these are not typically considered a significant sanctions risk.

In the year since its implementation, the United States has shown a willingness to use Global Magnitsky as an agile tool to address pressing foreign policy issues. For instance, OFAC designated – and a few months later, undesignated – two senior Turkish government officials in connection with the detention of an American pastor. Shortly after the disappearance of journalist Jamal Khashoggi, OFAC sanctioned 17 Saudi Arabian individuals for their alleged role in his murder. It is reasonable to expect that, as such events continue to occur in the future, sanctions designations will follow from them – in some cases, in remarkably short order.

The Global Magnitsky Act has also inspired the enactment of similar legislation in countries including Canada, the United Kingdom, Latvia, Lithuania and Estonia. Prohibitions outlined in each country's legislation largely parallel those in the Global Magnitsky Act, though there are differences in each country's approach (notably, the United States has the most diverse list of sanctioned individuals and entities). This trend presents the global community with an opportunity to act in concert to address human rights abuses and corruption but creates pressure on governments to consider requests to add more individuals to their respective sanctions lists. It also places increasing demands on global and national companies. US and non-US companies should consider whether their sanctions compliance programmes cover the legislation enacted in each of these countries, as applicable, and any other countries that follow suit and impose their own form of the Global Magnitsky Act.

Close attention to future sanctions implemented under the Global Magnitsky Act may offer insight into the United States' emerging new strategy for addressing human rights and alleged corruption, potentially utilising the Global Magnitsky Sanctions as a 'smart sanctions' approach. Use of similar legislation by other countries may also offer deeper insight into any development of a global strategy. Accordingly, as more countries implement Global Magnitsky-style sanctions, human rights abuses and corrupt conduct that may previously have been outside the reach of national authorities may no longer go unaddressed – and businesses around the world will need to incorporate this new risk into their plans and compliance programmes. ■

Links and notes

[1] Available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag_eo.pdf.

[2] See: https://home.treasury.gov/news/press-releases/sm547.

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The firm's representations cover the gamut from private individuals to major international financial institutions, and representative matters range from routine advisory matters to litigating sanctions issues in US courts. In short, our practice has nearly seen and done it all when it comes to OFAC and US sanctions.

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- Defended clients in both Department of Justice prosecutions and investigations of sanctions violations
- Advised and counselled multinational corporations across industry sectors with respect to compliance with OFAC-administered sanctions programmes
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THE FUTURE WILL BE EXPORT-CONTROLED

Technology is driving export controls and keeping up with new developments is perhaps the greatest challenge practitioners will face in the coming years.

Little more than a year away, 2020 sounds space age – and it is. Hypersonics, brain-computer interfaces, Artificial Intelligence and quantum computing may all be at a nascent stage (or at least being kept under wraps) but it's probably only a matter of time before our children are demanding mind-reading, superfast robots in their Christmas stockings (which they'll casually jettison as soon as a version made of 'smart sand' is released via social media).

Beyond the immediate havoc inflicted on domestic harmony and finances, who knows what these and other innovations have in store for us? And as Mankind has known since s/he first learnt to sharpen a twig, technology can be used for both good and ill. A knapped flint is equally effective in scraping a hide as it is for stabbing an annoying neighbour, or vice-versa. With the judicious use of an anvil, a sword becomes a ploughshare.

Clear-sighted vision would be appropriate as we approach 2020, but it is singularly in short supply – and with so much that's happening in the world shrouded in figurative fog, the US government's attempt to assess its and industries' requirements of a future export control regime, are, say those in the game, very much to be welcomed.

Export control, arguably, is the quieter of the pair of conjoined twins that it makes up with the use of economic sanctions.

Sanctions make headline news, following hot (or at least warm) on the heels of each new international outrage. Sanctions are as likely discussed by the educated chattering classes at large. The man on the Clapham Omnibus may well have an opinion about sanctions. President Trump's pulling out of 'the Iran deal'

made the front pages of newspapers not particularly focused on business.

Export controls by contrast are the product of careful deliberation across both international and domestic fora, of technology, the use to which it might be put, its capacity for transformation, and what it might do in the wrong hands – today and tomorrow.

Right up until the end of Barack Obama's administration, the overhaul that was Export Control Reform kept lawyers and many companies (especially in the defence sector) in the United States busy, as items were moved from the United States Military List ('USML') to the Commerce Control List ('CCL') with huge ramifications for product classification.

The upheaval wasn't restricted to the United States: partner companies of US contractors had to factor export control reform into their own landscape, and effectively learn new sets of rules, and in effect, supply chain ecosystems had to adapt or fail.

Now, a new era of change is on the horizon. ECA (the Export Control Act) and FIRRMA (Foreign Investment Risk Review Modernization Act) though not admittedly on everyone's lips, share the title for strategic trade community acronym of the year. And they prepare the ground, say export control lawyers, for the shape of export control compliance to come.

Future shocks

Amongst other things, the ECA codifies – for the first time – Department of Commerce export control practice which had previously been under the authority of the Export Administration Act, which lapsed in 1994 and has subsequently been continued by the International Emergency Economic Powers Act ('IEEPA'). For the forward-looking practitioner, the ECA's arguably more interesting characteristic is that it requires the Department of Commerce to establish

> 'Appropriate controls under the Export Administration Regulations (EAR) on the export, reexport, or in-country transfer' of technologies deemed by a new interagency group to be 'emerging and foundational technologies' that
> 1. are essential to the national security of the United States; and
> 2. do not fall within any of the other categories of "critical technologies" specifically enumerated in FIRRMA (including technologies currently captured on the US Munitions List under the International Traffic in Arms Regulations (ITAR) or the Commerce Control List (CCL) under the EAR).'

In November 2018, the US Department of Commerce published a list of technologies that are not currently controlled 'but should be because they are essential to the national security of the United States', seeking public comment on how they might be identified and defined.

In the same month, FIRRMA introduced a pilot programme expanding the jurisdiction of CFIUS to include 27 'critical technology industries', and a mandatory reporting notification for investments into those sectors.

Tommorow's world

The list of emerging technologies on which the US Department of Commerce seeks comments include

- biotechnology
- artificial intelligence
- Position, Navigation, and Timing (PNT) technology
- microprocessor technology
- advanced computing technology,
- data analytics technology
- quantum information and sensing technology
- logistics technology
- additive manufacturing
- robotics
- brain-computer interfaces
- hypersonics
- advanced materials
- advanced surveillance technologies

In essence, the US government is striving to ensure that the regulations anticipate technological change. At the same time, export control practice and investment review are converging ever more closely, not only on the same abstract goal of ensuring 'national security' but in the sense that they are concerned with the loss of the same technologies (even if, for the moment, some of those remain locked in the imagination of a Millennial).

'Making classification decisions when you're combining different strands and creating new permutations is hugely complex...There's been a new awakening as to the need for it.'

David Ring, Wiggin and Dana

The foreign power in the sights of this package of regulation is quite specific. It all 'fits into a broader framework in Washington of looking at our trade relations with China and China-related national security controls that is still coming into focus,' says Tamer Soliman of Mayer Brown. 'Given the categories of technologies that are included on the Commerce Department's proposed list of emerging and foundational technologies, this is a development that's being very closely watched across a range of industries. There are also inter-agency discussions about leveraging some of the provisions in the act and trying to understand what they mean for the companies [developing relevant technology] and for striking the right balance from a trade and national security perspective. There's a great deal of interest from a variety of perspectives.'

This is a realm generally in which there are some interesting distinctions to be made.

'When you look at sanctions regulation,' says Michael Zolandz of Dentons, 'that's primarily a tool of foreign policy – although some of it has a national security component – for example, the sanctions against persons engaged in malicious cyber-enabled activities. CFIUS, by contrast, pertains purely to national security. And with the FIRRMA modifications coming on line, our team has noticed a real uptick in the number of enquiries from colleagues and clients because of the

Worldwide experience. Practical, workable solutions.

"Our company had a first-in-its-history significant export compliance enforcement event, which began with the unannounced arrival of multiple agents from various federal agencies and a search warrant. This was the most important case in the world to our company and I was looking for a firm that would invest the personnel, time and attention to work like it was their most important case. Wiggin and Dana did that for us. Their attorneys' reassuring and patient demeanor and guidance made a very difficult situation not only bearable, but a constructive opportunity for a deep-dive into our entire export compliance effort and for crafting improvements to work toward a best-in-class program. In the end, the matter resolved with only the issuance of a Warning Letter." — *General Counsel, Global Electronics Manufacturing Co.*

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mandatory filing obligations. There's a lot of concern about it in the technology space. There are real economic costs and consequences.'

'This legislation is certainly laying the ground for a new generation of export control. And there will definitely be new controls arising out of it.'

Barbara Linney, Miller & Chevalier

How far will the ripples spread?

'This legislation is certainly laying the ground for a new generation of export control,' says Barbara Linney of Miller & Chevalier. 'And there will definitely be new controls arising out of it. The process is designed to address concerns about the fact that there are no controls on some outbound transactions involving contribution of emerging technology to offshore joint ventures. Many in Washington believe that responsibility for control of such transactions lies within the purview of exports controls and hence we've seen the bifurcation of CFIUS reform [manifest in] FIRRMA and the ECA.'

The ECA, says Giovanna Cinelli of Morgan Lewis, 'has been, for the most part, hugely welcomed. Twenty-four years is a long time to have an emergency! During that time, everything relating to the administration of export controls was left to the agencies, but with limited congressional oversight, because there was no statute!

'Now we do have a substantive statute, which establishes a new approach, acknowledges changing geopolitical circumstances, and also the need to address emerging and foundational technology.'

The question is, she says, 'How is the Commerce Department going to address the new issues? It's moving on multiple fronts, and concomitant with that is sharing information with CFIUS. The law also calls for technologies to be identified for purposes *other* than for export controls, e.g., [for use by] CFIUS, which is an interesting distinction. Of course, other agencies involved in the consultation process [including the Department of Energy, State and Defense] also have their equities and concerns.'

The prospect of needing to file CFIUS notices or to manage export countries has presented something of a surprise, Cinelli says, to some small companies (and their investors). Yes, some see regulation as 'squelching innovation. But others are less negative – although many are not adequately resourced to understand the requirements.'

In response to this, Cinelli notes, the Defense Innovation Unit, a Silicon Valley-based part of the Department of Defense, and founded to assist the US

military in making 'faster use of emerging commercial technologies', has been conducting outreach to those parts of the tech community who might not otherwise hear the compliance 'word'.

But, says export control lawyer and Wiggin & Dana partner David Ring – who has a long track record of advising companies (including FLIR, UTC and Esterline) under consent agreements – the direction of travel indicated by ECA is already underway. Ring says that the growth in the number of CFIUS reviews has 'injected a new dimension in so much as that trade compliance teams are increasingly getting involved in foreign transactions, and people are just getting smarter about the export control angle on deals.'

Increasing also is the technical complexity: 'We do a lot of work with start-ups who are creating software, says Ring. 'There are very few law firms that really understand how to classify software. Other areas where we're asked to advise include universities and institutes working in biomedicine where there are analogies with software. Making classification decisions when you're combining different strands and creating new permutations is hugely complex. There's been a new awakening as to the need for it.'

And of course, in the sense that almost every aspect of modern business is attended by technical (e.g., intangible, but all too real) challenges, it isn't only companies at the cutting edge that struggle to get to grips with them.

'One "mega" headache for companies' export control functions on a day-to-day basis [lies] in the difficulty they have in controlling electronic transfers of technology, through the cloud or otherwise.'

William McGlone, Latham & Watkins

'If I was pinpointing one "mega" headache for companies' export control functions on a day-to-day basis, beyond that of classifying products and technology,' says William McGlone, co-chair of the Export Controls, Economic Sanctions & Customs practice at Latham & Watkins in DC, 'it would lie in the difficulty they have in controlling electronic transfers of technology, through the cloud or otherwise,'

'That holds true whether you're a US or an EU company operating in either of those jurisdictions. Because the processes and documentation – commercial invoices, import and export documentation, the role of freight forwarder and customs brokers, etc. – do not apply to technology transfers that can occur with the stroke of a key, without the checks and balances that come with the shipment of widgets.'

McGlone's London-based colleague Charles Claypoole adds that the 'intangible' space is one of many where sanctions and export controls overlay: 'We've seen companies struggle, for example, where they've discovered that software has been downloaded from

their websites by parties in sanctioned countries.' Both such situations, the Latham lawyers say, could result in agency enforcement actions if not properly addressed.

In an area necessarily attended by uncertainty (i.e., the future) even regulators are finding their way. Brian Egan of Steptoe & Johnson says that, 'informally, we've heard that the agencies are still struggling to work out what some of these concepts really mean. What constitutes "foundational" is very difficult to define with any certainty. So, they're focusing on the "emerging" element of that.'

The Commerce Department, Egan says, has indicated that it wants to maintain a positive list approach to make life easier for businesses but it will be a challenge, he believes, to apply that guidance to emerging technology.

Other elements in the pipeline, says Barbara Linney, may include introducing a licensing requirement on technology being exported to any country for which there's an arms embargo in place – China of course, being one such country. Which is not a surprise, given that China is the unspoken object of both FIRRMA and the ECA's 'affections'.

A refocus on deemed exports can also be expected, thinks Linney. 'Traditionally there's been a lot of research [on emerging technology] done in collaboration with foreign PhD students from countries not currently subject to export controls.

'Furthermore, under the current immigration rules, a Green Card holder is a US person for the purpose of export control, but is not under CFIUS's requirements... It'll be interesting to see how things play out.'

Meanwhile on the other side of the Atlantic...

...(where EU export control reform rumbles on slowly, and not necessarily surely), export control issues continue to give rise to practical issues attendant and impacting upon every element of a company's organisation.

'A lot of the work I do,' says John Grayston, name partner at Brussels-based Grayston & Company, is what I'd call "regular EU export control work". This might mean: looking at exports of special products or one-off transactions or the implications of a group reorganisation, for example, where responsibilities are changed within a group, and what the export control-related consequences of that might be. Or providing support to clients setting up a new business activity in a new Member State and working with them to develop export compliance for that new business – which might be quite different to the requirements of the core business.'

Equally complex, he says, is where companies are looking to move between military and dual-use applications and vice-versa. 'What are the differences in practical implementation? Which licences are available? And what is the actual procedure?'

'[Within the EU] there are important national differences in approach and outcomes. There's no single answer when dealing with infringement issues across the EU.'

John Grayston, Grayston & Company

'Things take a whole other turn,' says Grayston, 'when there are concerns about things that may have gone wrong. When that happens, there are very important questions around corrections to systems and understanding where liability arises.'

In both scenarios, he says, 'it becomes so necessary to recognise that the EU system for export control and sanctions is implemented nationally and this means that there are important national differences in approach and outcomes. The legal and cultural differences are very significant. There's no single answer when dealing with infringement issues across the EU. We use our multi-national team of lawyers and consultants, together with a network of specialist lawyers, to provide the necessary advice on such differences and how best to respond to issues in a given Member State.'

Arguably, export control regulation remains a US-centric area of compliance: US agencies deliver the most punishing penalties, their legal 'arm' is longer than that of any other. The United States has the largest budget for outreach, spreading the export control message to developing countries – even those which have yet to develop dual-use or military industries to any significant extent.

But in Europe, while export controls are enforced with varying degrees of stringency, not only is compliance very high on the agenda, especially of globally-facing companies but the (albeit delayed) 'recast' dual-use export control regulation asks, implicitly, important questions about technology, society, and the meaning of security.

Asian countries including China, Japan, India and others are also looking at the appropriateness of various kinds of control – balancing national security with economic imperatives, and companies with global footprints now understand that compliance is a multijurisdictional exercise.

Those that possess the ability to process the legal and technical demands of export controls are (and will likely increasingly become) rare and highly prized.

'When I began practising over 30 years ago,' recalls Giovanna Cinelli, 'an administrative assistant would most likely be asked to look after the entire export control function. Those days are gone. There's far too much complexity and nuance. Companies are looking for people with real experience in the area, used to handling sensitive material, who have regulatory mindsets and understand technology. None of this is getting any easier.'

The human touch

Will technology work on the compliance officer's side? It is of course, for the export control function to be fully armed with tools for record keeping, list-checking, screening, component tracking and more. But, says one lawyer: 'There's only so much that you can automate. Yes, you need the technology in place to handle all those thinks, but at the end of the day there's limits to what they can do. Export control still requires interpretations of regulations, interaction with regulators, and with employees and colleagues. The human touch – reassuringly – remains very necessary.' ■